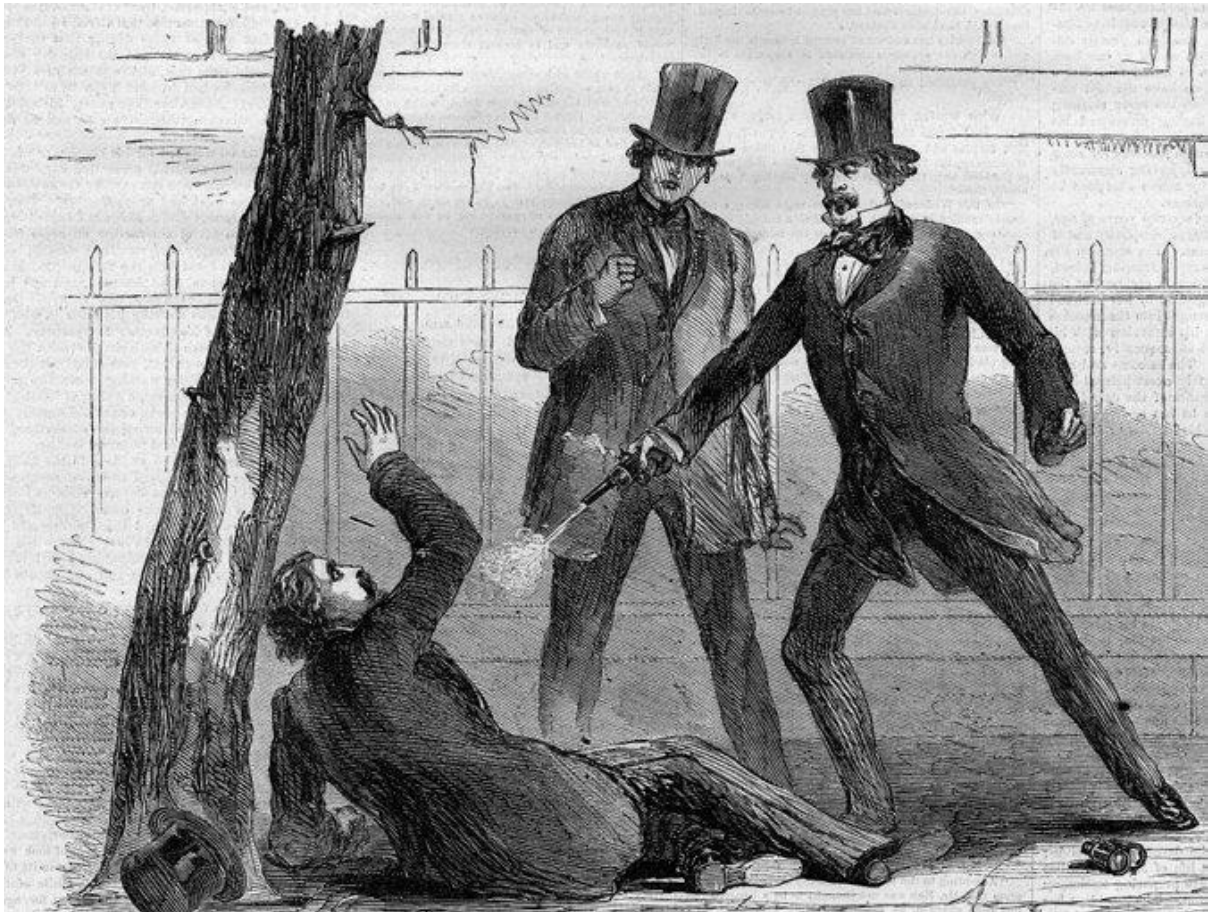


## Report 11

April 2018



**South Australian Law Reform Institute**

## **The Provoking Operation of Provocation: Stage 2**

The **South Australian Law Reform Institute** was established in December 2010 by agreement between the Attorney-General of South Australia, the University of Adelaide and the Law Society of South Australia. It is based at the Adelaide University Law School.

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#### **Publications:**

SALRI publications, including this Report and the LGBTIQ Reports that preceded it, are available to download free of charge from the SALRI webpage under *Publications: Reports and Papers*.

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## **Terms of reference**

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In February 2015, the then Attorney-General of South Australia, the Hon John Rau MP, asked the South Australian Law Reform Institute to review legislative or regulatory discrimination against individuals and families on the grounds of sexual orientation, gender, gender identity, or intersex status. This review identified the contentious ‘gay panic’ or homosexual advance’ aspect of the partial defence of provocation to murder. Further examination of this aspect of provocation gave rise to wider issues including the role and retention of the partial defence of provocation and sentencing, gender and family violence implications. On 4 March 2017, the Attorney-General agreed that the South Australian Law Reform Institute should consider the wider issues.

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This Report draws upon the significant work and initial consultation undertaken by the Institute for its Audit Report, published in September 2015 and its Stage 1 Report, published in April 2017.

The Institute acknowledges and relies upon the extensive previous research on this topic, and, in particular, upon the work of, and submissions to, the NSW Select Committee on the Partial Defence of Provocation of the Parliament of New South Wales and the South Australian Legislative Review Committee.

The Institute is further grateful for the many insightful submissions received in relation to this reference.

## **Disclaimer**

This Report deals with the law as of 31 March 2018 and may not necessarily represent the current law.

Any views expressed in this Report are those of the South Australian Law Reform Institute and no other agency.

## Abbreviations and Glossary

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<i>Audit Report</i>	South Australian Law Reform Institute, <i>Discrimination on the Grounds of Sexual Orientation, Gender, Gender Identity and Intersex Status in South Australian legislation</i> , Audit Paper (September 2015)
<i>CLCA</i>	<i>Criminal Law Consolidation Act 1936</i> (SA)
<i>Law Commission of England (2004)</i>	Law Commission of England and Wales, <i>Partial Defences to Murder</i> , Law Comm No 290 (2004 Cm 6301)
<i>LGBTIQ</i>	Lesbian, Gay, Bisexual, Trans, Intersex and Queer
<i>LRCWA</i>	Law Reform Commission of Western Australia, <i>Review of the Law of Homicide</i> , Final Report No 97 (2007)
<i>MCCOC (Ch 5: DP)</i>	Model Criminal Code Officers Committee, <i>Model Criminal Code: Chapter 5 – Fatal Offences against the Person</i> , Discussion Paper (June 1998)
<i>NSWLRC (R 83, 1997)</i>	New South Wales Law Reform Commission, <i>Partial Defences to Murder: Provocation and Infanticide</i> , Report No 83 (1997)
<i>NSW Select Committee</i>	Select Committee on the Partial Defence of Provocation, Parliament of New South Wales, <i>Partial Defence of Provocation</i> , Final Report (2013)
<i>Sentencing Act 1988</i>	<i>Criminal Law (Sentencing) Act 1988</i> (SA)
<i>Sentencing Act 2017</i>	<i>Sentencing Act 2017</i> (SA)
<i>Stage 1 Report</i>	South Australian Law Reform Institute, <i>The Provoking Operation of Provocation: Stage 1</i> , Report (April 2017)



*SA Legislative Review Committee (2014)* Parliament of South Australia, *Report of the Legislative Review Committee into the Partial Defence of Provocation* (December 2014)

*SA Legislative Review Committee (2017)* Legislative Review Committee, Parliament of South Australia, *Report of the Legislative Review Committee into the Partial Defence of Provocation*, 31 October 2017

*VLRC (2004)* Victorian Law Reform Commission, *Defences to Homicide: Final Report*, Report No 83 (2004)

## Executive Summary

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The background to this reference arose from the Governor's address to the South Australian Parliament on 10 February 2015. His Excellency stated: 'My Government will invite the South Australian Law Reform Institute to review legislative or regulatory discrimination against individuals and families on the grounds of sexual orientation, gender, gender identity, or intersex status.'<sup>1</sup>

### **Audit Report**

The first stage of this reference led to the Audit Report, *Discrimination on the Grounds of Sexual Orientation, Gender, Gender Identity and Intersex Status in South Australian Legislation* ('Audit Report'), published by the South Australian Law Reform Institute ('SALRI') in September 2015.<sup>2</sup> In the Audit Report, SALRI identified the strong criticism in the LGBTIQ community and elsewhere<sup>3</sup> of the 'homosexual advance' or 'gay panic'<sup>4</sup> aspect of the provocation defence, that is, the law which allows a defendant in a criminal trial, or through a guilty plea, to reduce the crime of murder to the lesser crime of manslaughter on the basis that the deceased made an unwanted homosexual advance to the defendant that causes the defendant to feel so 'provoked' that they lose control of their behaviour and kill the other person in response. SALRI agrees with the criticism of the 'gay panic' defence that partially exonerates defendants who kill after a gay advance as 'outdated, prejudicial and biased and thus has no place in modern society'.<sup>5</sup> The Audit Report found this aspect of the defence of provocation was objectionable and clearly discriminatory and that the current law needed reform to remove this unsatisfactory aspect.

There has been almost universal support amongst all those consulted by SALRI to remove the discriminatory homosexual advance of the partial defence of provocation. However, SALRI noted in

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<sup>1</sup> His Excellency the Hon Hieu Van Le AO, 'Speech to the 53rd Parliament of South Australia' (Speech delivered at the Opening of the Second Session of the Fifty-Third Parliament of South Australia, 10 February 2015). See South Australia, *Parliamentary Debates*, Legislative Council, 10 February 2015, 9.

<sup>2</sup> South Australian Law Reform Institute (SALRI), *Discrimination on the Grounds of Sexual Orientation, Gender, Gender Identity and Intersex Status in South Australian Legislation*, Audit Report (2015) ('Audit Report'). A copy of the Audit Report is available at <[https://law.adelaide.edu.au/research/law-reform-institute/documents/audit\\_report\\_lgbtiq\\_sept\\_2015.pdf](https://law.adelaide.edu.au/research/law-reform-institute/documents/audit_report_lgbtiq_sept_2015.pdf)>.

<sup>3</sup> See, for example, Kent Blore, 'The Homosexual Advance Defence and the Campaign to Abolish it in Queensland: The Activist's Dilemma and the Politician's Paradox' (2012) 12 *Queensland University of Technology Law and Justice Journal* 36; Kerstin Braun and Anthony Gray, 'Green and Lindsay: Two Steps Forward – Five Steps Back: Homosexual Advance Defence – Quo Vadis?' (2016) 41(1) *University of Western Australia Law Review* 91; Santo De Pasquale, 'Provocation and the Homosexual Advance Defence: The Deployment of Culture as a Defence Strategy' (2002) 26 *Melbourne University Law Review* 110; Andrew Hemming, 'Provocation: A Totally Flawed Defence that has no Place in Australian Criminal Law Irrespective of Sentencing Regime' (2010) 14 *University of Western Sydney Law Review* 1, 42; Adrian Howe, 'More Folk Provoke their Own Demise (Homophobic Violence and Sexed Excuses – Rejoining the Provocation Law Debate, Courtesy of the Homosexual Advance Defence)' (1997) 19 *Sydney Law Review* 336; Rebecca McGeary and Kate Fitz-Gibbon, 'The Homosexual Advance Defence in Australia: an Examination of Sentencing Practices and Provocation Law Reform' [2018] *Australian and New Zealand Journal of Criminology* 1, 2–4 (2018, doi: 10.1177/0004865817749261).

<sup>4</sup> Various terms have been used to describe this aspect of the partial defence of provocation including the 'Guardsmen's defence' though the terms 'gay panic' and 'homosexual advance' are the most common. SALRI accepts that neither the term 'gay panic' or 'homosexual advance' is an ideal description as both can be seen to perpetuate the myth that there is something inherently threatening about the homosexual nature of the advance that generates 'panic' in the mind of the receiver. However, as both of these terms are now often associated with this aspect of provocation and are widely used to describe its application, this Report (as did the Stage 1 Report) uses these two terms interchangeably where necessary to refer to this aspect of the defence.

<sup>5</sup> Braun and Gray, above n 3, 91.

the Audit Report that the gay panic aspect of provocation was only part of a wider complex picture. The role, scope, and even the existence, of provocation as a partial defence to murder is controversial and has been the subject of extensive study and criticism. The whole issue of provocation is complex, including its interaction in South Australia with the mandatory sentence of life imprisonment and the mandatory minimum non-parole period of 20 years imprisonment for murder. The problems of provocation extend beyond its impact on LGBTIQ communities and involve gender implications, especially in its application to victims of family violence.<sup>6</sup>

In the Audit Report SALRI indicated its intention to conduct further research into a number of complex areas, including the scope and the operation of the law of provocation, to determine what changes were necessary to ensure that the law does not discriminate against individuals and families on the grounds of sexual orientation, gender, gender identity, or intersex status.<sup>7</sup> SALRI indicated that it would pay particular regard to the work in this area of the South Australian Legislative Review Committee (the Committee released its first Report<sup>8</sup> in December 2014 and its second Report<sup>9</sup> in October 2017).

### **Provocation: Stage 1 Report**

SALRI's Stage 1 Report contained the first stage of findings of SALRI's consideration of the operation of the law of provocation and related issues.<sup>10</sup> The Stage 1 Report confirmed that the unwanted homosexual advance aspect of provocation is objectionable and is discriminatory on the grounds of sexual orientation. Its continued existence,<sup>11</sup> in light of the High Court's decision in *R v Lindsay*,<sup>12</sup> tends to indirectly legitimise and sanction lethal violence towards people demonstrating homosexual behaviour. With the passage of an Act by the Queensland Parliament on 21 March 2017 that provides that a non-violent sexual advance generally cannot amount to provocation,<sup>13</sup> South Australia is now the only Australian jurisdiction to retain the outdated gay panic aspect of provocation. SALRI reiterated in its Stage 1 Report that it is fundamental that the law should operate in a fair and non-discriminatory manner and recommended that there is a need for legislative reform of the current South Australian law of provocation to ensure that it does not discriminate on the grounds of sexual orientation or gender (or indeed on any other grounds).

However, the Stage 1 Report described that reform to the law of provocation was necessary beyond simply discarding the gay panic aspect and that more radical reform of the present law is necessary. In

<sup>6</sup> SALRI notes that the terms 'domestic violence', 'family violence' and 'domestic abuse' are all used. SALRI uses the term 'family violence' in this Report.

<sup>7</sup> Audit Report, above n 2, 13 [2.7].

<sup>8</sup> Legislative Review Committee, Parliament of South Australia, *Report of the Legislative Review Committee into the Partial Defence of Provocation*, 2 December 2014 ('SA Legislative Review Committee (2014)').

<sup>9</sup> Legislative Review Committee, Parliament of South Australia, *Report of the Legislative Review Committee into the Partial Defence of Provocation*, 31 October 2017 ('SA Legislative Review Committee (2017)').

<sup>10</sup> South Australian Law Reform Institute, *The Provoking Operation of Provocation: Stage 1* (April 2017) ('Stage 1 Report').

<sup>11</sup> SALRI respectfully differs from the view of the SA Legislative Review Committee that the gay panic aspect effectively no longer exists. See below [4.4.5]–[4.4.7].

<sup>12</sup> (2015) 255 CLR 272.

<sup>13</sup> *Criminal Law Amendment Act 2017* (Qld) s 10. See also Queensland, *Parliamentary Debates*, Legislative Assembly, 11 May 2016, 1654 (Hon YM D'Ath, Attorney-General); Queensland, *Parliamentary Debates*, Legislative Assembly, 21 July 2016, 26; Joshua Robertson, "'Gay Panic' Murder Defence Thrown out in Queensland", *The Guardian* (online), 22 March 2017, <<https://www.theguardian.com/world/2017/mar/22/gay-panic-defence-thrown-out-in-queensland>>.

particular, a strong criticism of the present law expressed in the Stage 1 Report was that the defence of provocation is gender biased and unjust, namely that it unfairly favours male defendants (especially those who have killed a female partner) while applying unfairly to women accused of murder (especially those who have been subjected to prolonged family violence).<sup>14</sup> SALRI noted that the current law in this area in South Australia needs reform to remove any aspect of the law that discriminates on the basis of sexual orientation and/or gender.

The Stage 1 Report outlines the many criticisms of the present law. It is widely asserted that ‘the operation of the [partial] defence [of provocation] is gender biased, anachronistic and archaic and promotes a culture of “victim blaming”; that the legal test is conceptually confusing, inappropriately privileges a loss of self-control and is difficult for juries to understand and apply; and that provocation can be adequately dealt with at the sentencing stage, as it is in all other criminal offences’.<sup>15</sup> The New Zealand Law Commission concluded that ‘both conceptually and in practice, we consider the partial defence of provocation to be irretrievably flawed’.<sup>16</sup> SALRI accepts these criticisms of the present law are well-founded. The criticisms of provocation are such that all Australian jurisdictions bar South Australia have now either abolished it entirely or at least narrowed its scope.<sup>17</sup>

SALRI, in its Stage 1 Report, explained that the current law in South Australia fails to adequately reflect the situation of women who experience family violence and who may be driven to kill their abusive domestic partner, or who may be at risk of being killed by their abusive partner. Any reforms should also address the situation of those who may kill their abusive partners in the context of family violence. It is crucial that any reform should also address the gender bias of the current law and ensure that victims of family violence who may kill their abusive partners are not unfairly prejudiced. SALRI noted that it would look not only at the gay panic aspect of provocation, but also address the gender implications of the current law and its application to victims of family violence (a theme with particular significance at both a state and national level). This accords with SALRI’s wider remit to examine the law to ensure that it operates in a fair and non-discriminatory manner, regardless of gender, gender identity or sexual orientation.

In its Stage 1 Report, SALRI was clear that the current law of provocation in South Australia needs reform to make sure that, at the least, any non-violent sexual advance (not confined to a gay sexual advance) should not be capable of amounting to provocation. However, SALRI explained in the Stage 1 Report that, although such a provision will serve as an important legislative statement of non-discriminatory intention, its practical value will be strictly limited, if not illusory. SALRI therefore recommended that any reform needed to go further than simply seeking to provide that a gay sexual advance cannot amount to provocation. In light of this fact, the wider problems with provocation (notably its inherent gender bias) and the flaws of other potential models of provocation (such as ‘extreme provocation’ in NSW or ‘loss of control’ in England and Wales) that had emerged in its study

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<sup>14</sup> Stanley Yeo, ‘Resolving Gender Bias in Criminal Defences’ (1993) 19 *Monash University Law Review* 104.

<sup>15</sup> Select Committee on the Partial Defence of Provocation (‘NSW Select Committee’), Parliament of New South Wales, *Partial Defence of Provocation Final Report* (2013), 4 [1.19]. See also Victorian Law Reform Commission (VLRC), *Defences to Homicide: Final Report* (2004), 26 [2.14] (‘VLRC (2004)’).

<sup>16</sup> New Zealand Law Commission (NZLC), *The Partial Defence of Provocation*, Report No 98 (2007) 42 [78].

<sup>17</sup> The other jurisdictions to have abolished provocation are Tasmania, Victoria and Western Australia. All other Australian jurisdictions, but for South Australia have now made reforms to restrict the application of the defence. See Kate Fitz-Gibbon, ‘Dr Kate Fitz-Gibbon responds to High Court’s judgement in *R v Lindsay*’ in *Criminology@Deakin Crime, Surveillance, Security and Justice* (7 May 2015) <<https://blogs.deakin.edu.au/criminology/dr-kate-fitz-gibbon-responds-to-high-courts-judgment-in-r-v-lindsay/>>.

to date, SALRI suggested in its Stage 1 Report that further review should be undertaken of the general law of provocation and related issues (especially the sentencing implications), to identify an effective and non-discriminatory wider solution.

SALRI therefore adopted a two-stage approach to reform: to make certain recommendations in Stage 1 (largely relating to self-defence and family violence) with certain questions to be the subject of further review in the second stage of this project. The Attorney-General, on 4 March 2017, agreed to this two stage approach. SALRI recommended in its Stage 1 Report that South Australia should adopt an approach based on the Victorian model of self-defence (and for consistency the Victorian approaches of duress and necessity), which explicitly takes into account both evidence of family violence and the context of family violence in clarifying the scope and operation of self-defence (and, for consistency, duress and necessity). These changes would better reflect the reality and dynamics of family violence.

The Stage 1 Report also included SALRI's position that the complete defence of self-defence (in combination with the existing partial defence in South Australia of excessive self-defence), rather than provocation, is the preferable vehicle to reflect the particular situation of victims of family violence. SALRI suggested that its recommended reforms to self-defence, duress and necessity could, and should, be undertaken regardless of whether provocation is ultimately retained, reformed or abolished.<sup>18</sup>

### ***This Report***

The Stage 2 Report includes the following issues:

1. The option and implications of abolishing the partial defence of provocation in South Australia.
2. The need to ensure that the applicable law is as clear and comprehensible as possible to judges and juries.
3. An examination of the appropriateness, or otherwise, of the existing evidentiary provisions in the *Evidence Act 1929* (SA) as they enable or encourage evidence to be adduced which impugns the deceased victim in homicide trials, with a view to improving the protection for victims and their families, while also ensuring that legitimate social framework evidence is able to be admitted.

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<sup>18</sup> In this context, the Hon Mark Parnell MLC introduced the Criminal Law Consolidation (Defences – Domestic Abuse Context) Amendment Bill 2017 in the Legislative Council on 17 October 2017. See further South Australia, *Parliamentary Debates*, Legislative Council, 17 October 2017, 7953-7962; South Australia, *Parliamentary Debates*, Legislative Council, 29 November 2017, 8738-8740). Mr Parnell explained that the Bill, in accordance with SALRI's Stage 1 recommendations, refrained from any change to the law of provocation until SALRI's Stage 2 Report was complete. Mr Parnell explained that the Bill implemented SALRI's Stage 1 Recommendations 4, 5, 6, 7, 8, 10 and 11 and sought to 'adopt an approach based on the Victorian model of self-defence (and for consistency the Victorian approaches of duress and necessity), which explicitly takes into account both evidence of family violence and the context of family violence in clarifying the scope and operation of self-defence (and for consistency duress and necessity)': at South Australia, *Parliamentary Debates*, Legislative Council, 17 October 2017, 7958-7959 (Hon Mark Parnell) quoting SALRI, Stage 1, above n 10, x-xi. The Bill lapsed with the end of the last parliamentary session. SALRI commends the laudable intention and effect of the Bill but notes that it may be preferable to wait until SALRI's Stage 2 Report is completed and considered as its Stage 2 recommendations include topics such as duress and necessity covered within Mr Parnell's Bill.

4. The consideration of the defence of marital coercion in s 328A of the *Criminal Law Consolidation Act 1935* (SA) (the ‘CLCA’) (which is confined to a wife in a marriage) with a view to its retention, reform or repeal.
5. The consideration of the operation of the Queensland defence of killing for preservation in an abusive domestic relationship and the extent to which its initial operation has achieved its aim of improving legal responses for persons who kill in response to prolonged family violence.
6. The further consideration of such alternative models to abolishing provocation as the NSW model of ‘extreme provocation’ as set out in s 23 of the *Crimes Act 1900* (NSW) and ‘loss of control’ in England and Wales as set out in s 54 of the *Coroners and Justice Act 2009* (UK).
7. In the context of abolishing the partial defence of provocation, an examination of the need to ensure that a court possesses (whether under the current law or under any revised model) sufficient flexibility in sentencing to properly reflect an offender’s culpability and any genuine mitigating factors in sentence.
8. The consideration of the scope of the existing common law defences of necessity and duress (beyond those contained in the Stage 1 Report).
9. The consideration of the merits of the partial defence of diminished responsibility in South Australia, in the context of recent or ongoing changes to the linked defence of mental impairment and its intersection with sentencing for the offence of murder.

SALRI emphasises that any effort at meaningful reform must include the wider issues in this area beyond the gay panic aspect, including the option of the full repeal of provocation and, in light of the strictness of the present South Australian law (especially the mandatory sentence of life imprisonment and the mandatory minimum non-parole period of 20 years for murder), greater flexibility in sentencing for murder than is provided under the present law. SALRI notes that the SA Legislative Review Committee stated that any future reform of the provocation defence should only take place in the context of a wholesale review of the mandatory sentencing provisions that may also apply in South Australia in respect of murder.<sup>19</sup> SALRI concurs with this view.

SALRI has considered five options to date in its consultation and research. First, retaining the partial defence of provocation but removing the objectionable gay panic aspect<sup>20</sup> (or any non-violent sexual advance). Secondly, making major changes to provocation based on the New South Wales (NSW) model of ‘extreme provocation’ or the English model of ‘loss of control’. Thirdly, abolition of the partial defence of provocation. Fourthly, revising the present law of sentencing for homicide offenders to simplify its operation and provide greater clarity and flexibility in sentencing, notably in the context of extraordinary provocation and/or where an offender’s culpability is substantially mitigated by mental illness, cognitive impairment or intellectual disability. Finally, revising the law of self-defence

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<sup>19</sup> SA Legislative Review Committee (2014), above n 8, Rec 2, 44.

<sup>20</sup> The Hon Tammy Franks MLC introduced the Criminal Law Consolidation (Provocation) Amendment Bill 2013 in the Legislative Council. See South Australia, *Parliamentary Debates*, Legislative Council, 1 May 2013, 3804-3808.

(as largely outlined in the Stage 1 Report), duress and necessity, notably in a family violence context. SALRI considers that any reforms in this complex area should be an issue for Parliament.<sup>21</sup>

Many law reform bodies<sup>22</sup> and academics<sup>23</sup> have suggested that the partial defence of provocation should be abolished. SALRI notes the views in favour of retaining provocation (including the SA Legislative Review Committee), but it respectfully disagrees. SALRI concludes that the various flaws and criticisms of provocation (and the lack of any effective alternative model) are such that the preferable solution is that the partial defence should be abolished in South Australia (subject to a court possessing the necessary flexibility in sentencing for murder). On a policy level, SALRI agrees with the view of the Victorian Law Reform Commission: ‘Both the serious nature of the harm suffered by the victim, and the fact the person intended to kill or seriously injure the victim, in our view justifies a murder conviction.’<sup>24</sup> An intentional killing remains murder.

SALRI’s research and consultation to date has confirmed that alternative models of provocation such as ensuring a non-violent sexual advance cannot amount to provocation as in Queensland or the NSW model of ‘extreme provocation’ or the English model of ‘loss of control’ are complex and highly problematic and may be unlikely to produce a workable and effective model in practice. It is difficult, if not impossible, to identify any viable alternative models. In fact, the various options, whilst well intended, could have perverse or unintended consequences and fail to remedy the discriminatory aspects of the present law in both the LGBTIQ and gendered (especially family violence) contexts.

It is significant that provocation from the victim is a potential mitigating factor for offences other than murder.<sup>25</sup> It is widely (though not universally)<sup>26</sup> accepted that provocation retains significance as a partial defence because of the conviction for manslaughter to allow flexibility in sentencing in a regime such as South Australia where the offence of murder attracts a mandatory sentence.<sup>27</sup> SALRI notes that at the roundtable of interested parties held in May 2017 all parties present (including the

<sup>21</sup> See *Attorney General for Jersey v Holley* [2005] 2 AC 580, 594 [27]; Law Commission (England and Wales), *Partial Defences to Murder*, Law Comm No 290 (2004 Cm 6301) 11 [2.10].

<sup>22</sup> NZLC (2007), above n 16, 13; NZLC, *Some Criminal Defences with Particular Reference to Battered Defendants*, Report No 73, (2001) 41–42 [114]–[120]; Model Criminal Code Officers Committee, *Model Criminal Code: Chapter 5 – Fatal Offences against the Person*, Discussion Paper (June 1998) 103–107 (‘MCCOC (Ch 5: DP)’); Law Reform Commission of Western Australia (LRCWA), *Review of the Law of Homicide*, Final Report No 97 (2007) 218–223; VLRC (2004), above n 15, xx–xxi, xxvii–xxviii, 55–58 [2.92]–[2.107]. The Law Reform Commission of Canada discarded the defence in its proposed revision of the Canadian *Criminal Code*: Canadian Law Reform Commission, *Revodifying Criminal Law*, Report No 31, (1987).

<sup>23</sup> See, for example, Graeme Coss, ‘The Defence of Provocation: An Acrimonious Divorce from Reality’ (2006) 18(1) *Current Issues in Criminal Justice* 51, 71–72; Kate Fitz-Gibbon, ‘Provocation in New South Wales: the Need for Abolition’ (2012) 45 *Australian and New Zealand Journal of Criminology* 194; Matthew Goode, ‘The Abolition of Provocation’ in Stanley Yeo (ed), *Partial Excuses to Murder* (Federation Press, 1992) 37; Hemming, above n 3; Jeremy Horder, *Provocation and Responsibility* (Clarendon Press, 1992) 197; Celia Wells, ‘Provocation: the Case for Abolition’ in Andrew Ashworth and Marry Mitchell (eds), *Rethinking English Homicide Law* (Oxford University Press, 2000) 85.

<sup>24</sup> VLRC (2004), above n 15, xxvii.

<sup>25</sup> Mirko Bagaric and Richard Edney, *Sentencing in Australia* (Thomson Reuters, 2014) 424–425 [9.370].

<sup>26</sup> See, for example, Hemming, above n 3, 2–3, 26, 43–44.

<sup>27</sup> Kate Fitzgibbon, ‘Homicide Law Reform in New South Wales: Examining the Merits of the Partial Defence of “Extreme” Provocation’ (2017) 40 *Melbourne University Law Review* 769, 791–815. See also Law Commission (England and Wales) (2004), above n 21, 83 [5.11]; Queensland Law Reform Commission (QLRC), *A Review of the Excuse of Accident and the Defence of Provocation*, Report No 64 (2008) 474 [21.48]–[21.49], 497 [21.164]–[21.166], 500 Rec 21-1.

representatives of the Director of Public Prosecutions, the Law Society, the Bar Association, the Legal Services Commission, the Aboriginal Legal Rights Movement (ALRM) and the Commissioner for Victims' Rights) expressed support for greater flexibility for sentencing murder than is provided under the current strict South Australian law.<sup>28</sup> SALRI concludes that the preferable solution is to abolish provocation entirely with the vital qualification that a court possesses sufficient flexibility in sentencing (whether under the *Criminal Law (Sentencing) Act 1988* (SA) (the '*Sentencing Act 1988*') or the *Sentencing Act 2017* once it comes into effect) to properly reflect the protection of the community,<sup>29</sup> the offender's culpability and any genuine mitigating factors, especially extraordinary provocation and/or an offender's mental illness, cognitive impairment or intellectual disability.<sup>30</sup>

## **Sentencing**

In relation to sentencing, SALRI makes a number of recommendations. The first is that the mandatory sentence of life imprisonment for murder should be qualified by an exception where the penalty would be clearly unjust and the person is unlikely to be a threat to the safety of the community when released from prison, the alternative being liability to imprisonment for 20 years. In this regard, SALRI favours the Western Australian provision rather than absolute abolition of the mandatory sentence of life imprisonment which applies in New South Wales, Victoria, Tasmania and the ACT. A mandatory sentence of life imprisonment removes all sentencing discretion, apart from the setting of a non-parole period, for a crime which encompasses an enormous range of blameworthiness and personal circumstances, of which provocation is one. It is anomalous that this applies to murder but to no other serious crime. It has been widely criticised and, as the *CLCA* presently recognises, would be quite inappropriate for what is presently provocation manslaughter. The present mandatory minimum non-parole provisions of the *CLCA* would cause further distortion of the sentencing process.

Secondly, SALRI recommends that the present mandatory minimum non-parole periods prescribed for murder and for a serious offence against the person should be abolished. Mandatory minimum non-parole periods for murder only apply in jurisdictions where the mandatory sentence for murder is imprisonment for life without qualification, namely South Australia, Queensland and the Northern Territory. The present provisions in South Australia are harsh, extremely complex, are difficult to administer and heighten the risk of sentencing error. They have been widely criticised by judges, academics and practising lawyers. They effectively exclude any consideration of reduced responsibility on the basis of an offender's physical or mental illness or disability or cognitive impairment. The only justification provided for the present law in the Second Reading

<sup>28</sup> See below Part 11 for discussion of the law in South Australia and elsewhere in relation to sentencing for murder. See further Megan Lawson, *SALRI Homicide Sentencing Background Research Paper* (April 2018) (available at the SALRI website) that sets out a study of sentencing practices for murder and manslaughter in South Australia in the period 2007–2017. This study was based on the publicly available sentencing remarks in South Australia for murder and manslaughter for this period kindly made available by the South Australian DPP. There were about 119 such cases of murder (83) or manslaughter (36) during this period.

<sup>29</sup> Section 9 of the *Sentencing Act 2017* (SA) provides that 'the primary purpose for sentencing a defendant for an offence must be the paramount consideration when a court is determining and imposing the sentence.'

<sup>30</sup> SALRI uses and considers these phrases together in this Report but accepts that the terminology in this area is different and there is no universal term or indeed definition. Different terms may even overlap. See, for example, *Evidence Act 1929* (SA) s 4; cf *CLCA* s 51. 'In some cases, courts have conflated mental illness and intellectual disability and their role in the exercise of the sentencing discretion... In our view, such matters are different and operate on the sentencing discretion and should be considered distinctly as particular categories although in the course of how they affect the exercise of sentencing discretion... will be similar?': Bagaric and Edney, above n 25, 331 n 182.



Speech was to fulfil a pre-election pledge under the heading ‘Justice for Victims’ and ‘to continue the Government’s custom of bringing victims to the forefront of criminal justice policy and combating those who would threaten society and individual members of the public’, being ‘measures (that) are necessary to protect the South Australian public, whether as individuals or as a whole, from dangerous criminals’.<sup>31</sup> No statistical or factual information was provided during the parliamentary debate to further justify the Bill. Little justification was provided for the fixing of mandatory minimum non-parole periods or the length. As far as SALRI is aware, no such information was relied on in subsequent debates on the Bill

SALRI considers that the present provisions in relation to mandatory sentences and non-parole periods for murder are inappropriate in a fair sentencing regime and will substantially increase the sentences presently imposed on those who are presently guilty of provocation manslaughter if provocation were to be abolished as a partial defence.

If, contrary to SALRI’s strong recommendation, the mandatory minimum non-parole period for murder is to be retained at all, it should be framed in such a way as to apply only to the most serious crimes rather than, as the present sentencing legislation requires, to offences ‘at the lower end of the range of objective seriousness’. A possible formulation for this is noted.

By way of further alternative, if the present mandatory minimum non-parole periods remain, s 32A(1) of the *Criminal Law (Sentencing) Act 1988* (or the equivalent provision in the *Sentencing Act 2017* once it comes into effect) should be repealed and courts should be able to exercise a discretion to set lower non-parole periods in ‘exceptional circumstances’ (such a term not to be defined). This is a familiar concept in South Australian legislation, including sentencing.

SALRI emphasises that the recommended flexibility in sentence is not simply transferring cases that might fall within the current partial defence of provocation to a new sentencing flexibility. An important normative statement is that a provoked and intentional killing remains murder.

SALRI also notes that the current law in South Australia in relation to sentencing for murder is overly complicated for lawyers and judges. This is undesirable. The changes which SALRI proposes would not only enhance sentencing flexibility but should make the law more straightforward in application.

SALRI accepts there may well be residual cases where defences such as self-defence, duress or necessity (even the revised versions of these defences as recommended in the Stage 1 and Stage 2 Reports) will be unavailable and it might appear harsh that such individuals face conviction for murder. Such cases reinforce the need for greater flexibility in South Australia for sentencing for murder than is afforded under the present law.

## **Parole**

Finally, the important issue of parole is often overlooked. Offenders convicted of murder are currently subject to life on parole.<sup>32</sup> SALRI recommends that the Parole Board should have the discretion (having regard to the existing primary consideration of the safety of the community) to direct that a fixed term of parole is appropriate rather than the usual period of life on parole upon the release of an

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<sup>31</sup> South Australia, *Parliamentary Debates*, House of Assembly, 8 February 2007, 1744. See also South Australia, *Parliamentary Debates*, Legislative Council, 3 May 2007, 89 (Hon P Holloway).

<sup>32</sup> *Correctional Services Act 1982* s 69(2). This is a significant burden and important consequences follow from any breach of the conditions of release on parole.

offender on parole convicted of murder but sentenced to less than 20 years imprisonment. The post-release burden imposed is significant and becomes greater the younger the offender and the shorter his or her non-parole period.

### **Diminished Responsibility**

The partial defence of diminished responsibility for murder as exists in NSW and the United Kingdom has been considered as a possible alternative to provocation.<sup>33</sup> SALRI is aware, notably in the context of Aboriginal offenders, of the unsatisfactory situation of sentencing homicide offenders with a mental illness, cognitive impairment or intellectual disability under the current law. It appears harsh that an offender who may just fall short of establishing either unfitness to plead or a defence of mental impairment but who may have a mental illness, cognitive impairment or intellectual disability that, on any view, substantially impedes their reasoning and comprehension and therefore their culpability in other circumstances<sup>34</sup> will receive, under the current law, the same sentence as an offender without such a condition or impairment.

SALRI, after much consideration, is not convinced of the benefits of a new partial defence of diminished responsibility in South Australia. SALRI accepts that the suggestion of diminished responsibility is tenable, but such a partial defence raises its own issues and complications and also risks reintroducing many of the problems of provocation, notably its gender bias, into the criminal law. Cases where an offender's culpability is substantially mitigated through mental illness, cognitive impairment or intellectual disability reinforce the need for greater flexibility in South Australia for sentencing for murder than is afforded under the present law to allow proper flexibility to have regard to all relevant factors. It is illogical that, whilst mental illness<sup>35</sup> or cognitive impairment or intellectual disability<sup>36</sup> are recognised as potential (though not automatic) valid mitigating factors for all other offences,<sup>37</sup> they are not recognised as such for murder.

### **Victim Blaming**

SALRI accepts that victim blaming is a major criticism of provocation and this supports the case for abolishing the partial defence. Having regard to the views relayed in consultation, SALRI is unconvinced of the need for additional specific reform in South Australia. SALRI recommends that any law based on Victoria<sup>38</sup> to limit gratuitous 'victim blaming' evidence in a homicide trial is unnecessary and should not be adopted at this stage in South Australia.

<sup>33</sup> See generally NSW Law Reform Commission (NSWLRC), *Partial Defences to Murder: Diminished Responsibility*, Report No 82 (1997) ('R 82, 1997'); NSWLRC, *People with Cognitive and Mental Health Impairments in the Criminal Justice System: Criminal Responsibility and Consequences*, Report No 138 (May 2013) 83–108 ('R 138, 2013').

<sup>34</sup> See Bagaric and Edney, above n 25, 318–331 [9.155]–[9.170] (psychiatric and psychological illness) 331–339 [9.175] (intellectual disability). See also *R v Verdins* (2007) 16 VR 269; *R v McIntosh* (2008) 191 A Crim R 370.

<sup>35</sup> Bagaric and Edney, above n 25, 318–331 [9.155]–[9.170]. See also *R v Tsiaras* [1996] 1 VR 398.

<sup>36</sup> See Bagaric and Edney, above n 25, 331–339 [9.175] (intellectual disability); *Muldrock v R* (2011) 244 CLR 120.

<sup>37</sup> See *R v Flentjar* [2013] SASFC 11 (12 March 2013), [42]. 'The mental state of a defendant at the time of his or her offending is a relevant factor in determining sentence. The circumstances in each case will vary and the weight to be given to matters personal to the defendant will depend on a number of circumstances.'

<sup>38</sup> *Evidence Act 2008* (Vic) s 135(d).

### **Marital Coercion**

SALRI has considered the retention of the defence of marital coercion.<sup>39</sup> SALRI is clear that this defence in its current form is outdated and discriminatory (given it is confined to a married wife). A surprising degree of ignorance as to the fact that this defence was still available in South Australia was expressed in consultation. There was broad agreement that the defence in its current form is outdated but a perhaps surprising degree of support was expressed for retaining at least aspects of the defence to protect victims of family violence. SALRI agrees with the need to provide clearer protection to victims of family violence but considers this is best achieved by changes to the law of duress and necessity (to follow its Stage 1 recommendations) and not by retaining the outdated defence of marital coercion.

### **Duress and Necessity**

Consistent with its Stage 1 Report, SALRI recommends that certain limited changes are made to the defences of duress and necessity to provide clearer protection to victims of family violence. SALRI recommends that the *Model Criminal Code* model of duress be adopted in South Australia. This model, consistent with SALRI's Stage 1 recommendations,<sup>40</sup> better reflects the reality and dynamics of family violence but without unduly extending the law or unduly excusing criminal behaviour. This model has been adopted in the ACT, the Commonwealth, Western Australia and Victoria and partly in the Northern Territory. It appears to work effectively in those jurisdictions. SALRI also recommends that the *Model Criminal Code* model of necessity (or 'sudden or extraordinary emergency') that has been adopted in the ACT, Victoria, the Northern Territory and the Commonwealth should be adopted in South Australia. SALRI recommends that, for clarity, the common law defences of necessity and duress should be placed on a statutory footing.

SALRI accepts that although valid arguments can be presented to extend duress and necessity to murder and attempted murder (especially in a family violence context), such an extension raises complex and intractable issues of morality and policy. SALRI notes the fear that, were duress or necessity to extend to murder, 'it might be made the legal cloak for unbridled passion and atrocious crime.'<sup>41</sup> SALRI recommends that duress and necessity should not extend to murder or attempted murder.

SALRI considers that a new partial defence that reduces murder to manslaughter owing to duress or necessity, especially in the context of family violence, is inappropriate. SALRI further considers that the partial defence in Queensland of killing for preservation in an abusive domestic relationship in s 304B of the *Criminal Code 1899* (Qld) is unnecessary and should not be adopted in South Australia.

### **Timing**

SALRI notes that it has not proved possible to complete this Report until now. There are several reasons for this. First, SALRI undertook at the request of the lawyers in the case of *Lindsay* not to progress or publicise this reference, especially its views on the contentious gay panic aspect of provocation, until that prolonged case was concluded. *Lindsay* ultimately gave rise to three trials, two appeals to the Court of Criminal Appeal and one successful appeal and one unsuccessful appeal to the

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<sup>39</sup> *CLCA* s 328A.

<sup>40</sup> See SALRI, Stage 1, above n 10, Recs 4, 5, 6, 7, 8, 10 and 11.

<sup>41</sup> *R v Dudley and Stephen* (1888) 14 QBD 273, 288 (Lord Coleridge).

High Court. Lindsay’s final trial concluded on 30 March 2016, and his second appeal against conviction for murder was dismissed by the South Australian Court of Criminal Appeal on 8 December 2016.<sup>42</sup> A further effort to appeal to the High Court was refused leave on 16 June 2017. Secondly, SALRI wished to have regard to the second Report into provocation of the SA Legislative Review Committee.<sup>43</sup> This was only released on 31 October 2017. Thirdly, and certainly not least, are the complexity of the issues. SALRI in this Report has had regard to such involved issues as mandatory sentencing for murder in South Australia, the merits or otherwise of a new partial defence of diminished responsibility and family violence implications. SALRI notes that these issues were raised but were ultimately not progressed in the Legislative Review Committee’s 2017 Report.<sup>44</sup>

### **Consultation**

This Report has been prepared following an extensive community consultation process. This included requests for traditional written submissions, the use of social media communications and in person consultation in the preparation of the Audit Report. There has been traditional, online and in person consultation on the law of provocation and related issues. SALRI’s work also attracted local and national media interest. SALRI has engaged with a wide range of groups and individuals as part of its consultation. Of particular relevance were a number of community roundtables hosted by SALRI and involving community members with expertise and experiences related to LGBTIQ rights, family violence specialist and related services, victims’ rights services, legal and other practitioners and academics. SALRI is grateful for the generous and insightful community participation in the consultation process.

These views have been carefully considered by SALRI in formulating this Report, as has the extensive comparative research undertaken to determine how other Australian and overseas jurisdictions tackle these complex issues. SALRI has been assisted by the many law reform reports and other reviews and academic works to have considered provocation and related issues, in particular the submissions and reports of the NSW Select Committee<sup>45</sup> and the Legislative Review Committee of the South Australian Parliament.<sup>46</sup>

### **Acknowledgements**

This Report concludes SALRI’s reference into its examination of LGBTIQ and gender discrimination in South Australian law. This has proved a major Report and an important and involved reference. SALRI is grateful for all the parties who kindly contributed to the research and writing of this Report, including the input of the Law Reform class at Adelaide University. SALRI is particularly grateful for the valuable input of the Honourable David Bleby QC to the important but complex part of this Report on Sentencing.

SALRI wishes to thank the South Australian community for engaging so thoughtfully and generously with this entire reference, and for sharing personal stories of how these laws impact their lives and families.

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<sup>42</sup> *R v Lindsay* [2016] SASCF 129 (8 December 2016).

<sup>43</sup> SA Legislative Review Committee (2017), above n 9.

<sup>44</sup> *Ibid* 31–32.

<sup>45</sup> NSW Select Committee, above n 15.

<sup>46</sup> SA Legislative Review Committee (2014), above n 8; SA Legislative Review Committee (2017), above n 9.

## Summary of Recommendations

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### Recommendation 1:

SALRI recommends, consistent with its Stage 1 Report, that legislative amendment to provide that a non-violent sexual advance (not confined to a gay sexual advance) is not capable of amounting to provocation, should not be adopted in South Australia as the practical value of such a provision, although serving as an important legislative statement of non-discriminatory intention, will be strictly limited, if not illusory.

### Recommendation 2:

SALRI recommends that any law based on Victoria to limit gratuitous ‘victim blaming’ evidence in a homicide trial is unnecessary and should not be adopted in South Australia.

### Recommendation 3:

SALRI recommends that the alternative models of provocation of ‘extreme provocation’ in NSW or ‘loss of control’ in England are unsuitable and should not be adopted in South Australia.

### Recommendation 4:

SALRI recommends that, subject to the crucial changes in sentencing flexibility recommended below (see Recommendations 5 to 9), the current partial defence of provocation in South Australia should be abolished.

### Recommendation 5:

SALRI recommends that the *Criminal Law Consolidation Act 1935* be amended to provide that a person found guilty of murder must be sentenced to imprisonment for life unless –

- (a) that sentence would be clearly unjust given the circumstances of the offence and the person; and
- (b) the person is unlikely to be a threat to the safety of the community when released from imprisonment;

in which case the person is liable to imprisonment for 20 years.

### Recommendation 6:

SALRI recommends that current mandatory minimum non-parole periods (including both murder and a serious offence against the person) should be abolished and that the setting of a non-parole period should be in the discretion of the court in accordance with the other provisions of the relevant sentencing law.

### Recommendation 7:

SALRI recommends that, if the mandatory minimum non-parole period for the offence of murder is to be retained, the *Criminal Law (Sentencing) Act 1988* (or the *Sentencing Act 2017* once it comes into effect) should be amended to provide that –

- (a) if Recommendation 5 is adopted and Recommendation 6 is not adopted, the mandatory minimum non-parole period for a person convicted of murder should apply only to a person who is sentenced to imprisonment for life; and
- (b) if neither Recommendation 5 nor Recommendation 6 is adopted, the mandatory minimum non-parole period for a person convicted of murder should apply only to a person convicted of an offence determined by the sentencing court to be one of ‘aggravated murder’, such expression being defined to include recognised categories of serious offences such as, for example, the murder of a police officer, the murder of a child, the murder of more than one person and the murder of a person in the course of, or as a result of, committing another offence, other than manslaughter, for which the person would be liable to imprisonment for life.

**Recommendation 8:**

SALRI recommends that if neither Recommendation 6 nor Recommendation 7 is adopted and current mandatory minimum non-parole periods are to be retained –

- (a) section 32A(1) of the *Criminal Law (Sentencing) Act 1988* (or s 48(3) of the *Sentencing Act 2017* once it comes into effect) should be repealed; and
- (b) without being restricted by any qualifications such as those contained in s 32A(3) of the *Criminal Law (Sentencing) Act 1988* (or s 48(3) of the *Sentencing Act 2017* once it comes into effect), a court should be able to reduce the mandatory minimum non-parole period in ‘exceptional circumstances’ (undefined).

**Recommendation 9:**

SALRI recommends that, in any event, s 69(2) of the *Correctional Services Act 1982* should be amended to allow the Parole Board a discretion to determine and fix a term of parole in respect of an offender who has been sentenced to imprisonment for life and whose non-parole period is less than 20 years.

**Recommendation 10:**

SALRI recommends that any new partial defence of diminished responsibility is inappropriate and should not be adopted in South Australia.

**Recommendation 11:**

SALRI recommends that the current defence of marital coercion in s 328A of the *Criminal Law Consolidation Act 1935* (SA) which is confined to a wife should be repealed.

**Recommendation 12:**

SALRI recommends that certain elements of the current defence of marital coercion be included within a new revised statutory defence of duress (see below Recommendations 13 and 15).

**Recommendation 13:**

SALRI recommends that the defence of duress (and necessity) should be amended to provide greater recognition of the situation of victims of family violence, consistent with its recommendations in its Stage 1 Report.<sup>47</sup>

**Recommendation 14:**

SALRI recommends that the common law defences of duress and necessity should, for clarity, be abolished and replaced with statutory versions.

**Recommendation 15:**

SALRI recommends that the statutory defence of duress to be introduced in South Australia should be based on the *Model Criminal Code* defence of duress<sup>48</sup> that has been adopted in Victoria, the Australian Capital Territory, Western Australia, the Commonwealth and partly in the Northern Territory. This model incorporates an objective test and does not limit duress to only threats of death or grievous bodily harm. This model provides that the defence only applies if the accused reasonably believes that a threat has been made that will be carried out unless an offence is committed; there is no reasonable way that the threat can be rendered ineffective and the conduct is a reasonable response to the threat.

<sup>47</sup> SALRI, Stage 1, above n 10:

**Recommendation 8:** SALRI recommends that, consistent with the changes it recommended in its Stage 1 Report, the statutory defences of duress and necessity should provide that in cases involving family violence, the actual or perceived threat need not be immediate or imminent.

**Recommendation 9:** SALRI recommends that, consistent with the changes it recommended in its Stage 1 Report, the statutory defences of duress and necessity should provide that in cases involving family violence, the definition of ‘family violence’ should be given a wide definition and not be confined to direct physical violence and ‘family violence’ should also be given a wide definition in relation to the relationships caught within it (especially to include Indigenous kinship) and not be confined to spouses or ‘domestic partners’. The model provided in Part IC of the *Crimes Act 1958* (Vic) is helpful but it is additionally suggested that, for consistency, the existing model of ‘family violence’ in s 8 of the *Intervention Orders (Prevention of Abuse) Act 2009* (SA) should be adopted.

**Recommendation 10:** SALRI reiterates that, consistent with its Stage 1 Report, either Division 2 of the *Criminal Law Consolidation Act 1935* (SA) or the *Evidence Act 1929* (SA) should be amended in terms similar to Part IC of the *Crimes Act 1958* (Vic) to explicitly provide that evidence of family violence and related evidence (including ‘social framework’ evidence as to the nature and effect of family violence) is admissible and may be adduced in any case involving family violence (with the exception of murder or attempted murder) that gives rise to the potential statutory defences duress or necessity.

**Recommendation 11:** SALRI reiterates that, for consistency with its Stage 1 Report, the statutory defences of duress and necessity should provide that in cases involving family violence, the actual or perceived threat need not be immediate and to provide that the fact of family violence should be taken into account in considering the reasonableness or proportionality of the response employed. The model in Part IC of the *Crimes Act 1958* (Vic) provides a suitable model.

<sup>48</sup> The *Model Criminal Code* provision provides:

- (1) A person is not criminally responsible for an offence if he or she carries out the conduct constituting the offence under duress.
- (2) A person carries out conduct under duress if and only if he or she reasonably believes that:
  - (a) a threat has been made that will be carried out unless an offence is committed; and
  - (b) there is no reasonable way that the threat can be rendered ineffective; and
  - (c) the conduct is a reasonable response to the threat.

This section does not apply if the threat is made by or on behalf of a person with whom the person under duress is voluntarily associating for the purpose of carrying out conduct of the kind actually carried out.

**Recommendation 16:**

SALRI recommends that the statutory defence of necessity to be introduced in South Australia should be based on the *Model Criminal Code* defence of ‘sudden or extraordinary emergency’<sup>49</sup> that has been adopted in Victoria, the Australian Capital Territory, the Northern Territory and the Commonwealth. This model incorporates an objective test and does not limit the nature of the emergency to only those involving a risk of death or grievous bodily harm. This model provides that the defence only applies if the accused reasonably believes that circumstances of sudden or extraordinary emergency exist; committing the offence is the only reasonable way of dealing with the emergency and the conduct is a reasonable response to the emergency.

**Recommendation 17:**

SALRI recommends that the defences of duress and necessity (or sudden or extraordinary emergency) should not extend to murder or attempted murder.

**Recommendation 18:**

SALRI recommends that the Queensland partial defence of killing for preservation in an abusive domestic relationship set out in s 304B of the *Criminal Code 1899* (Qld) is inappropriate and should not be adopted in South Australia.

**Recommendation 19:**

SALRI recommends that, consistent with its Stage 1 Report, the South Australian Government develop and implement an education package targeting the legal sector and the community more broadly on the nature and dynamics of family violence.

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<sup>49</sup> The *Model Criminal Code* provision provides:

- (1) A person is not criminally responsible for an offence if he or she carries out the conduct constituting the offence in response to circumstances of sudden or extraordinary emergency.
- (2) This section applies if and only if the person carrying out the conduct reasonably believes that:
  - (a) circumstances of sudden or extraordinary emergency exist; and
  - (b) committing the offence is the only reasonable way to deal with the emergency; and
  - (c) the conduct is a reasonable response to the emergency.



# Part 1 – Introduction

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## 1.1 Background

1.1.1 The South Australian Law Reform Institute (‘SALRI’) was established in December 2010 and was formed by an agreement between the Attorney-General of South Australia, the University of Adelaide and the Law Society of South Australia. SALRI is based at the University of Adelaide Law School.

1.1.2 When conducting reviews and research on any proposals for law reform, SALRI focuses on the modernisation of the law; the elimination of defects in the law; the consolidation of any laws; the repeal of laws that are obsolete or unnecessary; and uniformity, where desirable, between laws of other States and the Commonwealth.<sup>50</sup> SALRI then provides reports to the Attorney-General or other authorities on the outcomes of its reviews and/or research and makes recommendations based on those outcomes and its consultation with the community and interested parties. It is ultimately up to the State Government and the South Australian Parliament to implement any recommended changes to South Australian law.

1.1.3 SALRI is based on the Alberta law reform model that is also used in Tasmania<sup>51</sup> and is linked to the Law Reform class at the Adelaide University Law School. The valuable work of the Law Reform class, especially the 2016 and 2017 classes, has actively informed and assisted SALRI’s work and especially this Report.

1.1.4 SALRI’s current Stage 2 Report into the law of provocation and related issues is the final part of SALRI’s reference to identify and examine South Australian laws that discriminate against individuals and families on the basis of their sexual orientation, gender, gender identity or intersex status.<sup>52</sup> This includes laws that discriminate against lesbian, gay, bisexual, trans, intersex and queer (‘LGBTIQ’) people.

1.1.5 On 7 September 2015, SALRI completed the first part of its work with respect to this reference by publishing its Audit Report, *Discrimination on the Grounds of Sexual Orientation, Gender, Gender Identity and Intersex Status in South Australian Legislation* (‘the Audit Report’).

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<sup>50</sup> The issue of national uniform, or at least consistent, Australian criminal law is often overlooked. The *Model Criminal Code* project through the Standing Council of Attorneys-General in the 1990s sought to promote uniform, or at least consistent, criminal laws, especially for the general principles of criminal responsibility. A suggested *Model Criminal Code* was the result. This forms the basis of Chapter 2 of the *Criminal Code* (Cth). The then Secretary of the Commonwealth Attorney-General’s Department expressed his ‘hope the new *Criminal Code* will bring about greater certainty, and in the end, consistency throughout Australia. It is based on the model for national consistency — the *Model Criminal Code* — which was created for that purpose by the nation’s Attorneys-General’: Robert Cornall in Commonwealth Attorney-General’s Department and Australian Institute of Judicial Administration, *The Commonwealth Criminal Code: A Guide for Practitioners* (Australasian Institute of Judicial Administration, 2002) i. Though national consistent criminal laws across Australia remain a distant prospect, SALRI supports the *Model Criminal Code*’s duress (see further at 222–225) and necessity or ‘sudden or extraordinary emergency’ (see further at 226–227) provisions that are now in force in the Commonwealth, the ACT, the Northern Territory and Victoria and recommends these are introduced in South Australia. See further below Part 14.

<sup>51</sup> See Kate Warner, ‘Institutional Architecture’ in Brian Opeskin and David Weisbrot (eds), *The Promise of Law Reform* (Federation Press, 2005) 55, 62–64, 68.

<sup>52</sup> For the full text of the Reference see His Excellency, the Hon Hieu Van Le AO at South Australia, *Parliamentary Debates*, Legislative Council, 10 February 2015, 9.

## 1.2 The Audit Report

1.2.1 The 2015 Audit Report was prepared following a review of all South Australian laws, followed by extensive consultation undertaken by SALRI with LGBTIQ individuals and community organisations and other interested parties. This included a public submission process facilitated by the State Government’s YourSAy website.<sup>53</sup> The desktop Review identified over 140 Acts and Regulations that, on their face, discriminated against individuals on the basis of sex or gender diversity.<sup>54</sup> However, a smaller number of laws were identified in the Audit Report as having a more acute discriminatory impact on the lives of LGBTIQ South Australians and their families.

1.2.2 The Audit Report contained various recommendations for immediate reform, as well as recommendations relating to five complex areas of law that gave rise to apparent discrimination, but which required further review and reporting.<sup>55</sup> In the Audit Report, SALRI noted its intention to conduct further research and make further detailed recommendations in these areas, including ‘the aspect of the existing common law partial defence of provocation that permits homosexual advances to constitute circumstances of provocation, having regard to any relevant recommendations of the South Australian Legislative Review Committee<sup>56</sup> and relevant interstate reforms, including the *Crimes Amendment (Provocation) Act 2014* (NSW).’<sup>57</sup>

1.2.3 The Stage 1 Report paid particular regard to the LGBTIQ and gender implications of the current law in relation to the partial defence of provocation. SALRI explained in its Stage 1 Report that the complex issues surrounding the law of provocation, notably sentencing, required further examination to enable it to fully consider the retention, reform or repeal of provocation. SALRI has therefore adopted a two-stage approach; the Stage 1 Report made certain recommendations (largely relating to self-defence and family violence) with certain questions to be the subject of the current Stage 2 Report.

1.2.4 SALRI has considered five main options in its further consultation and research. First, retaining the partial defence of provocation but removing its homosexual advance aspect (or any non-violent sexual advance). Secondly, making major changes to provocation based on the NSW model of ‘extreme provocation’ or the English model of ‘loss of control’ having regard to how those models have operated to date in those jurisdictions. Thirdly, abolition of the partial defence of provocation. Fourthly, changes to the current law of sentencing in South Australia for homicide offenders to provide greater clarity and flexibility in sentencing, notably in the context of extraordinary provocation (including for situations of family violence) and where an offender’s culpability is impaired through a mental illness, cognitive impairment or an intellectual disability. Finally, revising the law of self-defence (as set out in its Stage 1 Report), duress and necessity to provide greater clarity and protection for victims of family violence.

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<sup>53</sup> Government of South Australia, *YourSAy: LGBTIQ – Removing Discrimination from SA laws* (2015) <<http://yoursay.sa.gov.au/yoursay/lgbtiq-removing-discrimination-from-sa-laws>>.

<sup>54</sup> Audit Report, above n 2, 7, 34 [62], Appendix 1. See further *Statutes Amendment (Gender Identity and Equity) Act 2016* which commenced operation on 7 September 2016.

<sup>55</sup> Audit Report, above n 2, 9–10, 44 [102].

<sup>56</sup> See SA Legislative Review Committee (2014), above n 8; SA Legislative Review Committee (2017), above n 9.

<sup>57</sup> Audit Report, above n 2, 13 [2.7], 144.

1.2.5 This Report sets out the further research conducted by SALRI on the scope and operation of the law of provocation and related issues, notably sentencing for homicide offenders, and sets out a number of recommendations having regard to its research and its consultation (discussed below).

1.2.6 SALRI notes that it has not proved possible to complete this Report until now. There are several reasons for this. First, SALRI undertook at the request of the lawyers in the case of *Lindsay* not to progress or publicise this reference, especially its views on the contentious gay panic aspect of provocation, until that prolonged case was concluded in order to avoid prejudicing any retrial. *Lindsay* was a case that involved the gay panic defence.<sup>58</sup> *Lindsay* ultimately gave rise to three trials, two appeals to the Court of Criminal Appeal and one successful appeal and one unsuccessful appeal to the High Court. *Lindsay*'s final trial concluded on 30 March 2016, and his second appeal against conviction for murder was dismissed by the South Australian Court of Criminal Appeal on 8 December 2016.<sup>59</sup> A further effort to appeal to the High Court was refused leave on 16 June 2017. Secondly, SALRI wished to have regard to the second Report into provocation of the SA Legislative Review Committee.<sup>60</sup> This was only released on 31 October 2017. Thirdly, and certainly not least, are the complexity of the issues. SALRI in this Report has examined such involved issues as mandatory sentencing for murder in South Australia, the merits or otherwise of a new partial defence of diminished responsibility and family violence implications. SALRI notes that these issues were raised but were not progressed in the SA Legislative Review Committee's 2017 Report.<sup>61</sup>

### 1.3 Consultation Process

1.3.1 SALRI is committed to inclusive and accessible consultation with the South Australian community and all interested parties, including but not confined to the legal profession and experts. Such genuine and inclusive consultation is integral to modern law reform. As Neil Rees has observed:

Effective community consultation is one of the most important, difficult and time consuming activities of law reform agencies ... community participation has two major purposes: to gain responses and feedback and to promote a sense of public 'ownership' over the process of law reform ... consultation often brings an issue to the attention of the public and creates an expectation that the government will do something about the matter ...<sup>62</sup>

1.3.2 This Report draws on broad community consultation, in person in Adelaide and via a range of online methods, undertaken as part of its LGBTIQ reference. SALRI was also assisted by the submissions to the NSW Select Committee and the Legislative Review Committee of the South Australian Parliament and the Law Society's submission to SALRI of 22 March 2018.<sup>63</sup>

<sup>58</sup> See SALRI, Stage 1, above n 10, 31–34 [5.3.1]–[5.3.15].

<sup>59</sup> *R v Lindsay* [2016] SASFC 129 (8 December 2016).

<sup>60</sup> SA Legislative Review Committee (2017), above n 9.

<sup>61</sup> *Ibid* 31–32.

<sup>62</sup> Neil Rees, 'The Birth and Rebirth of Law Reform Agencies', Australasian Law Reform Agencies Conference 2008, Vanuatu, 10–12 September 2008, <[http://www.lawreform.vic.gov.au/sites/default/files/ALRAC%2BPaper%2B\\_NeilRees.pdf](http://www.lawreform.vic.gov.au/sites/default/files/ALRAC%2BPaper%2B_NeilRees.pdf)>. See also Michael Kirby, 'Changing Fashions and Enduring Values in Law Reform' (Speech delivered at the Conference on Law Reform on Hong Kong: Does it Need Reform?, University of Hong Kong, Department of Law, 17 September 2011) <<http://www.alrc.gov.au/news-media/2011/changing-fashions-and-enduring-values-law-reform>>.

<sup>63</sup> Law Society of South Australia, Submission to SALRI, *Provocation Stage 2 Report*, 22 March 2018, <<https://www.lawsocietysa.asn.au/pdf/Submissions/SALRI2.pdf>>.

1.3.3 The preparation of the various Reports as part of its LGBTIQ reference has involved several stages. First, following a detailed review of all South Australian legislation, and the provision of plain English ‘Fact Sheets’ on key issues,<sup>64</sup> SALRI undertook consultation with the LGBTIQ community to identify those laws that discriminated on the grounds of sexual orientation, gender identity and intersex status. SALRI then utilised the Government’s YourSAy website<sup>65</sup> and invited members of the public to provide submissions or request meetings with SALRI to discuss its work. Secondly, following the completion of the Audit Report, SALRI conducted specific consultation and comparative research into the partial defence of provocation (and related issues) and has hosted five community roundtables, as well as inviting further written submissions from any interested parties. The five community roundtables involved community members with expertise and experiences related to LGBTIQ rights, family violence and related services, victims’ rights services, legal and other practitioners and academics. Thirdly, SALRI has spoken to various interested parties and experts. Finally, SALRI has considered submissions, the laws in other jurisdictions, relevant law reform and government reports and academic research and commentary.

1.3.4 The recommendations for law reform set out in both the Stage 1 and Stage 2 Reports are made having regard to the consultation which SALRI has undertaken. An initial consultation roundtable event (which included representatives of the family violence sector) was held at the Adelaide Law School on 25 February 2016.

1.3.5 On 11 and 12 May 2016, SALRI hosted two roundtable meetings at the Adelaide Law School attended by representatives of the legal, academic, and LGBTIQ sectors, as well as by family violence agencies and other interested parties.<sup>66</sup> These meetings focused on the implications of the law of provocation for victims of family violence as well as the gay panic defence. On 12 May 2017, SALRI in relation to Stage 2 held a further roundtable attended by representatives of the legal, academic, and LGBTIQ sectors as well as the family violence agencies and other interested parties who had attended the May 2016 roundtable meetings.<sup>67</sup> SALRI held a further roundtable meeting on 9 August 2017 with Ms Heather Stokes and representatives of the Victim Support Service. SALRI attended a meeting with the Law Society’s Criminal Law Committee on 14 November 2017 (followed by the Law Society’s submission of 22 March 2018). SALRI has also spoken with various experts and interested parties. All these meetings, except where an individual participant agreed otherwise, have been conducted under the Chatham House rule.

1.3.6 In the preparation of this Report, SALRI has had careful regard to all the various views expressed to it. SALRI has also had regard to the views expressed by interested parties and individuals to similar reviews, notably those of the NSW Select Committee and both reports of the SA Legislative Review Committee. SALRI has also liaised with the South Australian Equal Opportunity Commission and the Human Rights Law Centre and with legal practitioners and relevant experts from South Australia and interstate in preparing this Report.

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<sup>64</sup> See, for example, *SALRI Fact Sheet 2: Legal Protections against Discrimination* <<https://law.adelaide.edu.au/research/law-reform-institute/documents/factsheet-2-legal-protections-100615.pdf>>.

<sup>65</sup> Government of South Australia, above n 53.

<sup>66</sup> SALRI, Stage 1, above n 10, Appendix 1, 100–106, Appendix 2, 107–113.

<sup>67</sup> See below Appendix 1, 179–186.

## 1.4 Some Notes on Terminology

1.4.1 This Report adopts the same approach to terminology as used in the Audit Report and the Stage 1 Report. Underlying this approach is SALRI’s strong support for the use of inclusive terminology and the right of people to identify their sexual orientation, gender identity or intersex status as they choose, and recognition of the complexity and power of language. SALRI is aware of the important distinction between the terms ‘gender identity’ and ‘intersex status’.

1.4.2 Some of the terminology used in this Report is set out below. These uses were developed as part of the consultation process undertaken by SALRI earlier in 2015.<sup>68</sup>

**Battered Woman Syndrome (‘BWS’):**<sup>69</sup> This term refers to a physical and psychological condition of a person who has suffered (usually persistent) emotional, physical and/or sexual abuse, typically from a spouse. It explains why an abused spouse may stay in a violent and destructive relationship.

**Gender:** The term ‘gender’ refers to the way in which a person identifies or expresses their masculine or feminine characteristics. A person’s gender identity or gender expression is not always exclusively male or female and may or may not correspond to their sex.

**Gender expression:** The term ‘gender expression’ refers to the way in which a person externally expresses their gender or how they are perceived by others.

**Gender identity:** The term ‘gender identity’ refers to a person’s deeply held internal and individual sense of gender.

**Intersex:** The term ‘intersex’ refers to people who are born with genetic, hormonal or physical sex characteristics that are not typically ‘male’ or ‘female’. Intersex people have a diversity of bodies and identities.

**LGBTIQ:** An acronym used to describe lesbian, gay, bisexual, trans, intersex and queer people collectively. Many sub-groups form part of the broader LGBTIQ movement.

**Sex:** The term ‘sex’ refers to a person’s biological characteristics. A person’s sex is usually described as being male or female. Some people may not be exclusively male or female (the term ‘intersex’ is explained above). Some people identify as neither male nor female.

**Sexual orientation:** The term ‘sexual orientation’ refers to a person’s emotional or sexual attraction to another person, including, amongst others, the following identities: heterosexual, gay, lesbian, bisexual, pansexual, asexual or same-sex attracted.

<sup>68</sup> Audit Report, above n 2, 25–26. See also South Australia, *Parliamentary Debates*, Legislative Council, 26 July 2016, 4593–94 (Hon RI Lucas).

<sup>69</sup> This proposition denotes that there is a three-part cycle to abusive relationships where first there is a tension-building phase with express hostility towards the woman characterised by verbal and psychological abuse. Secondly, there is an ‘acute battering phase’ where the abuser physically assaults the victim. The third phase involves the abuser displaying contrition for his actions and promising reform, before the first phase restarts. This cycle produces a ‘psychological paralysis’ called ‘learned helplessness’ in the victim who believes that she has no control or agency and is unable to leave the abusive relationship. See Laurie Dore, ‘Downward Adjustment and the Slippery Slope: The Use of Duress in Defense of Battered Offenders’ (1995) 56 *Ohio State Law Journal* 665, 679–680.

**Trans:** The term ‘trans’ is a general term for a person whose gender identity is different to their sex at birth. A trans person may take steps to live permanently in their nominated sex with or without medical treatment.

## Part 2 – Balancing Rights and SALRI’s Terms of Reference

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### 2.1 Scope and Considerations

2.1.1 SALRI’s reference derives from the Governor’s speech at the Opening of the Second Session of the 53rd Parliament of South Australia on 10 February 2015. His Excellency stated:

Some individuals and families are not able to participate fully in our democracy because of who they are, whether it be lesbian, gay, bisexual and transgender. The strength of our society will be shaped by the extent to which we can guarantee access to these pillars of our democracy, education, health and justice, to all South Australians.

My Government will invite the South Australian Law Reform Institute to review legislative or regulatory discrimination against individuals and families on the grounds of sexual orientation, gender, gender identity, or intersex status. Their recommendations will then be considered in the South Australian Parliament.<sup>70</sup>

2.1.2 This statement provides the context for both the Stage 1 and Stage 2 Reports.<sup>71</sup> The need to acknowledge and address discrimination has been repeated in a South Australian context.<sup>72</sup> The former Premier, the Hon Jay Weatherill MP, stated:

When our laws discriminate against a particular group of people, it sends a message that this prejudice written into law justifies treating people differently in our day-to-day lives. Such laws do not affect only the LGBTIQ community, they diminish our society as a whole. They diminish us by saying effectively that there are certain people who deserve to be treated differently, whose relationships are worth less, whose families should not exist, who are not entitled to the same fundamental rights as their neighbour ...

We should be building a safer, fairer future for the next generation of children so they never have to experience the kind of fear and harm that was a reality for people who grew up when homosexuality was a crime, and we should be ensuring that our laws apply equally, regardless of who you fall in love with, who your family is or the gender you live as. Our state has a long and admirable history of progressive social thinking and legislative reform and some of those advancements have occurred in relation to LGBTIQ South Australians.<sup>73</sup>

2.1.3 The present Premier, when Opposition Leader, the Hon Steven Marshall MP, similarly said:

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<sup>70</sup> South Australia, *Parliamentary Debates*, Legislative Council, 10 February 2015, 9.

<sup>71</sup> See also Government of South Australia, *LGBTIQ State of Play: Equality for Lesbian, Gay, Transgender, Intersex and Queer (LGBTIQ) People* (2015) <<http://yoursay.sa.gov.au/documents/lgbtiq-state-of-play.pdf>>; Government of South Australia, Department for Communities and Social Inclusion, *South Australian Strategy for the Inclusion of Lesbian, Gay, Bisexual, Transgender, Intersex and Queer People 2014-2016* (May 2014), <<http://publicsector.sa.gov.au/wp-content/uploads/20140501-DCSI-LGBTIQ-Strategy.pdf>>; South Australia, *Parliamentary Debates*, House of Assembly, 10 September 2015, 2457–2466; South Australia, *Parliamentary Debates*, House of Assembly, 1 December 2016, 8316–8317.

<sup>72</sup> South Australia, *Parliamentary Debates*, House of Assembly, 10 September 2015, 2457–2466; South Australia, *Parliamentary Debates*, House of Assembly, 10 September 2015, 2503–2504; South Australia, *Parliamentary Debates*, House of Assembly, 1 December 2015, 3805; South Australia, *Parliamentary Debates*, House of Assembly, 10 February 2016, 4182–4183. See also the formal apology by the South Australian Parliament expressed with bipartisan support to the LGBTIQ community for past discrimination and injustice: South Australia, *Parliamentary Debates*, House of Assembly, 1 December 2016, 8312–8317.

<sup>73</sup> South Australia, *Parliamentary Debates*, House of Assembly, 1 December 2016, 8315.

Whilst South Australia has a proud history of reform, we still live in a society where people are at risk of bullying due to their sexuality and where a person’s sexuality is often the first thing used to describe them. Our state retains ‘gay panic’ as a defence to murder. Queensland is the only other state where this defence remains, but just this week the Queensland government announced that it will introduce legislation to abolish it. Other South Australia legislation also retains discriminatory aspects. Last year, the government asked the South Australian Law Reform Institute to review legislative or regulatory discrimination against individuals and families on the grounds of sexual orientation, gender, gender identity or intersex status. I look forward to further reforms being implemented in the same cooperative way as the original homosexual law reform was able to pass this Parliament ... Today, I have reflected on many of South Australia’s achievements and the work that still needs to be done. Our LGBTIQ community was let down by previous Parliaments ... I conclude by calling on all South Australians to do their part to help right the wrongs of the past. Promoting tolerance and respect does not stop here on North Terrace. We all have a role to play in ensuring that members of the LGBTIQ community in South Australia and beyond feel safe, valued and equal in society. Whilst the world has come a long way in calling out discrimination against this community, we still live in a society where it occurs ... Let us in South Australia continue to set an example of tolerance and inclusion so that we can all experience life and love to the full. Challenge hate when you hear it. Call out your friends for discrimination and promote tolerance and inclusiveness in your workplace. Discrimination has no place in our society.<sup>74</sup>

2.1.4 These are important considerations to bear in mind when examining the current law and illustrate the broad support within both the South Australian community and Parliament for the removal of potentially discriminatory laws, such as the gay panic aspect of provocation.

2.1.5 However, SALRI is aware that the criticisms of the law of provocation extend beyond the gay panic aspect. Any examination of provocation and potential reforms must also have regard to its wider implications (especially gender and its intersection with family violence and sentencing). As SALRI’s current remit includes the need to identify areas of law reform where the law discriminates against people on the basis of gender, and that most (though not all) family violence<sup>75</sup> is directed against women,<sup>76</sup> it is crucial that SALRI does not confine its examination to the gay panic aspect of

<sup>74</sup> South Australia, *Parliamentary Debates*, House of Assembly, 1 December 2016, 8316–8137.

<sup>75</sup> Parliament of South Australia, *Report of the Social Development Committee into Domestic and Family Violence* (April 2016) 33 [4.2] (‘SA Social Development Committee’). SALRI notes that various terms are used such as ‘domestic violence’ (see Government of South Australia, *Domestic Violence: Discussion Paper* (July 2016) 12) or ‘family violence’. Under the *Intervention Orders (Prevention of Abuse) Act 2009* (SA), the term ‘domestic abuse’ is used. SALRI prefers, and uses, the term ‘family violence’ in this Report. ‘Family violence’ extends beyond direct physical violence. ‘It is now well recognised that family violence can take many forms, not just physical violence but also psychological and emotional abuse which may include intimidation, harassment, stalking, economic abuse, social isolation, and threats of damage to property and pets’: Thomas Crofts and Danielle Tyson, ‘Homicide Law Reform in Australia: Improving Access to Defences for Women Who Kill their Abusers’ (2013) 39 *Monash University Law Review* 864, 872–873. It is also significant that ‘family violence is a broader term that refers to violence between family members, as well as violence between intimate partners. It involves the same sorts of behaviours as described for domestic violence. As with domestic violence, the National Plan recognises that although only some aspects of family violence are criminal offences, any behaviour that causes the victim to live in fear is unacceptable. The term, ‘family violence’ is the most widely used term to identify the experiences of Indigenous people, because it includes the broad range of marital and kinship relationships in which violence may occur.’ See Council of Australian Governments (COAG), *National Plan to Reduce Violence against Women and their Children 2010–2022* <<https://www.dss.gov.au/women/programs-services/reducing-violence/the-national-plan-to-reduce-violence-against-women-and-their-children-2010-2022>>.

<sup>76</sup> Intimate partner violence is also a very real problem within LGBTIQ communities as in heterosexual relationships. See Australian Institute of Family Studies, *Intimate Partner Violence in Lesbian, Gay, Bisexual, Trans, Intersex and Queer*



provocation but that it also addresses the gender implications and criticisms of the current law and its application to victims of family violence.<sup>77</sup> An initial consultation roundtable event (which included representatives of the family violence sector) on 25 February 2016 at the Adelaide University Law School strongly supported this broader approach. This theme was also expressed at the further provocation roundtable consultation sessions held at the Adelaide Law School on 11 and 12 May 2016.<sup>78</sup>

2.1.6 SALRI has adopted a two-stage approach to its review of the law of provocation and related issues. Whilst the Stage 1 Report focussed on the gay panic aspect of provocation, the gender bias of the current law, family violence implications and self-defence, the Stage 2 Report has focussed on wider issues, including the sentencing implications in South Australia if provocation is abolished. The Attorney-General agreed to this two stage approach in a letter to SALRI on 4 March 2017. SALRI’s Stage 1 Report made 11 recommendations, largely relating to the use of provocation in the gay panic context, self-defence and family violence. SALRI considered that it was premature to make or consider any changes to the present law of provocation until its further review in Stage 2 had been concluded.

2.1.7 SALRI recommended in its Stage 1 Report that South Australia adopt a model similar to the Victorian model of self-defence and also duress and necessity<sup>79</sup> which makes it clear in cases of family violence that the threat need not be imminent. The Victorian model further takes into account family violence evidence and makes clear the admissibility and use of such evidence (including social framework evidence as to the nature and effect of family violence). SALRI in its Stage Report 1 stated that these recommendations can, and should, be implemented independently of whether provocation is ultimately revised, retained or repealed in South Australia.

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*Communities: Key Issues* (December 2015), <<https://aifs.gov.au/cfca/publications/intimate-partner-violence-lgbtqi-communities>>. LGBTIQ intimate partner violence is often unacknowledged in legal, governmental, policy and service responses to family violence. See Matthew Ball and Sharon Hayes, ‘Same-Sex Intimate Partner Violence: Exploring the Parameters’ in Burkhard Scherer (ed), *Queering Paradigms* (Peter Lang Publishing, 2009), 161–177. It was also noted to SALRI in consultation that the implications of family violence for LGBTIQ communities are significant but are all too often overlooked. This accords with the findings of the Victorian Royal Commission: ‘The family violence experiences of lesbian, gay, bisexual, transgender and intersex people and the barriers they face in obtaining services are distinct from those of other victims of family violence. They also differ within these various communities. LGBTI people may also experience distinct forms of family violence, including threats to “out” them. Although there has been little research into family violence in LGBTI relationships, the existing research suggests that intimate partner violence may be as prevalent in LGBTI communities as it is in the general population. The level of violence against transgender and intersex people, including from parents and other family members, appears to be particularly high. There are a variety of barriers to LGBTI people reporting and seeking help, including homophobia, transphobia and a fear of discrimination. The level of awareness of LGBTI experiences and needs is limited among police, in the courts, among service providers and in the community generally. As a result, LGBTI people can feel invisible in the family violence system.’ State of Victoria, *Royal Commission into Family Violence: Summary and Recommendations*, Parl Paper No 132 (2016) 35 (‘Victorian Royal Commission’).

<sup>77</sup> Family violence extends beyond direct physical violence. SALRI’s Stage 1 Recommendation 7 noted ‘that, in light of modern understanding, the definition of “family violence” should be given a wide definition and not be confined to direct physical violence and “family violence” should also be given a wide definition in relation to the relationships caught within it (especially to include Indigenous kinship) and not be confined to spouses or “domestic partners”. The model provided in Part IC of the *Crimes Act 1958* (Vic) is helpful but it is additionally suggested that, for consistency, the existing model of “family violence” in s 8 of the *Intervention Orders (Prevention of Abuse) Act 2009* (SA) should be adopted.’

<sup>78</sup> The Report of the 11 May 2016 roundtable is at SALRI, Stage 1, above n 10, Appendix 1, 100–106. The Report of the 12 May 2016 roundtable is at SALRI, Stage 1, above n 10, Appendix 2, 107–113.

<sup>79</sup> See further below Part 14.

2.1.8 In this context, SALRI notes the Criminal Law Consolidation (Defences – Domestic Abuse Context) Amendment Bill 2017 introduced by the Hon Mark Parnell MLC in the Legislative Council on 17 October 2017.<sup>80</sup> Mr Parnell explained that the Bill, in accordance with SALRI’s Stage 1 recommendations, refrained from any change to the law of provocation until SALRI’s Stage 2 Report was complete. Mr Parnell explained that the Bill implemented SALRI’s Stage 1 Recommendations 4, 5, 6, 7, 8, 10 and 11 and sought to ‘adopt an approach based on the Victorian model of self-defence (and for consistency the Victorian approaches of duress and necessity), which explicitly takes into account both evidence of family violence and the context of family violence in clarifying the scope and operation of self-defence (and for consistency duress and necessity).’<sup>81</sup> The Bill lapsed with the end of the last parliamentary session. SALRI commends the laudable intention and effect of the Bill but notes that it may be preferable to wait until SALRI’s Stage 2 Report is completed and considered as its Stage 2 recommendations include topics such as duress and necessity covered within the Bill.

2.1.9 SALRI considers that the existing partial defence of excessive self-defence in South Australia,<sup>82</sup> as well as a revised version of the complete defence of self-defence as recommended in the Stage 1 Report, are better suited to fairly and effectively cater to the particular context of homicides committed in the situation of family violence rather than seeking to manipulate and retain the flawed partial defence of provocation for this purpose.<sup>83</sup> SALRI notes that its recommended changes in both its Stage 1 and Stage 2 Reports as to the defences of self-defence, duress and necessity will provide greater clarity and protection to victims of family violence in relation to murder and indeed other offences committed in that context.<sup>84</sup>

2.1.10 This Report, where helpful, provides an overview of, or draws upon, SALRI’s Stage 1 Report.

<sup>80</sup> See South Australia, *Parliamentary Debates*, Legislative Council, 17 October 2017, 7953–7962; South Australia, *Parliamentary Debates*, Legislative Council, 29 November 2017, 8738–8740.

<sup>81</sup> South Australia, *Parliamentary Debates*, Legislative Council, 17 October 2017, 7958–7959 (Hon Mark Parnell) quoting SALRI, Stage 1, above n 10, x-xi.

<sup>82</sup> In South Australia, s 15(2) of the *CLCA* provides as a partial defence to a charge of murder (reducing the offence to manslaughter) if a defendant ‘genuinely believed that the conduct to which the charge relates to be necessary and reasonable for a defensive purpose; but the conduct was not, in the circumstances as the defendant genuinely believed them to be, reasonably proportionate to the threat that the defendant genuinely believed to exist.’ The partial defence of excessive self-defence in South Australia allows a person who has an honest or genuine belief in the need to use defensive force, but who is unable to establish the reasonableness or proportionality of his or her actions in the circumstances, to be convicted of manslaughter rather than murder. The partial defence of excessive self-defence recognises a difference between the moral culpability of someone who commits murder, and someone who kills for a defensive purpose, but misjudges the level of force necessary in the circumstances. Excessive self-defence is likely to have particular application for victims of family violence and can operate in combination with the complete defence of self-defence. See VLRC (2004), above n 15, 102 [3.106]–[3.107]. SALRI supports the retention of the partial defence of excessive self-defence. SALRI concurs with the view of the VLRC ‘that a person who has an honest belief in the need to use force in self-protection, or to protect others, is in a different position from those who kill intentionally in other situations and this should be recognised in the crime that person is convicted of: at 60 [3.4]. This may especially arise in the context of family violence: at 102 [3.106]–[3.107].’

<sup>83</sup> See also VLRC (2004), above n 15, xxviii.

<sup>84</sup> SALRI does not recommend that necessity or duress should extend to murder. See below Part 15.

2.1.11 The acute problems raised by family violence are obvious<sup>85</sup> and family violence is a current issue of both national<sup>86</sup> and state<sup>87</sup> concern. This Report looks at the implications of family violence in various contexts but this Report (as with Stage 1) does not examine family violence in general.<sup>88</sup>

2.1.12 The Stage 2 Report has considered further questions, notably the question of provocation in general and related matters such as sentencing law and practices for homicide offences. Stage 2 includes a series of recommendations as to how the law of provocation should be amended, both generally and with particular reference to some of the wider topics raised in the Stage 1 Report. In the Stage 2 Report, SALRI has sought to identify an effective and non-discriminatory wider solution that most appropriately addresses any aspect of the current law that discriminates on the basis of sexual orientation or gender.

2.1.13 The Stage 2 Report especially considers issues of sentencing and the application of the usual mandatory minimum non-parole period of 20 years for murder.<sup>89</sup> The *Sentencing Act 2017* (SA)<sup>90</sup> will replace the current *Sentencing Act 1988*. The *Sentencing Act 2017* restates the current law in South Australia relating to mandatory sentencing, notably the general minimum non-parole term of 20 years for the offence of murder.<sup>91</sup>

2.1.14 This Report, as foreshadowed in the Stage 1 Report, includes the following:

- (a) The option and implications of abolishing the partial defence of provocation in South Australia.
- (b) The need to ensure that the applicable law is as clear and comprehensible as possible to judges and juries.
- (c) An examination of the appropriateness, or otherwise, of the existing evidentiary provisions in the *Evidence Act 1929* (SA) as they enable or encourage evidence to be adduced which impugns the deceased victim in homicide trials, with a view to improving the protection for victims and

<sup>85</sup> See Government of South Australia, above n 75, 4–5. ‘Family violence can cause terrible physical and psychological harm, particularly to women and children. It destroys families and undermines communities. Sometimes children who have directly experienced family violence or have been exposed to it go on to become victims or perpetrators of violence later in life, so that the effect of family violence is passed to the next generation’: Victorian Royal Commission, above n 76, 1. See also SA Social Development Committee, above n 75, 12. For some of the profound effects of family violence, see SA Social Development Committee, above n 75, 47–64; Victorian Royal Commission, above n 76, 34–41, 65–72.

<sup>86</sup> SALRI, Stage 1, above n 10, 7 [2.1.10].

<sup>87</sup> See, for example, Government of South Australia, above n 75; SA Social Development Committee, above n 75, 47–64; Victorian Royal Commission, above n 76, 34–41, 65–72. The then Attorney-General recently announced that the State Government will work to classify a wider range of domestic violence related offences as ‘aggravated’ to ensure harsher penalties are imposed. See Tom Fedorowytch, ‘Domestic Violence: Video Evidence and Tougher Penalties among SA Government Initiatives’, *ABC News* (online), 7 October 2017, <<http://www.abc.net.au/news/2017-10-07/new-sa-anti-domestic-violence-measures/9025574>>.

<sup>88</sup> See generally, SA Social Development Committee, above n 75; Victorian Royal Commission, above n 76.

<sup>89</sup> The SA Sentencing Advisory Council was reportedly also examining the issue of mandatory sentencing (see Miles Kemp, ‘Minimum non-parole period for murder under review’, *The Advertiser* (online), 16 February 2016, <<http://www.adelaidenow.com.au/news/south-australia/minimum-nonparole-period-for-murder-under-review/news-story/f0107087aa9cd1a4bc92e14fb39fbb54>>). However, no public report has been released to date.

<sup>90</sup> South Australia, *Parliamentary Debates*, House of Assembly, 16 November 2016, 7882–7900.

<sup>91</sup> *Sentencing Act 2017*, s 47. See also SALRI, Stage 1, above n 10, 67–69 [8.2.1]–[8.2.5].

their families, while also ensuring that legitimate social framework evidence (see Recommendation 8 of the Stage 1 Report) is able to be admitted.

- (d) The consideration of the problematic defence of marital coercion in s 328A of the *Criminal Law Consolidation Act 1935* (SA) (which is confined to a wife in a marriage) with a view to its retention, reform or repeal.
- (e) The consideration of the operation of the Queensland defence of killing for preservation in an abusive domestic relationship and the extent to which its initial operation has achieved its aim of improving legal responses for persons who kill in response to prolonged family violence.
- (f) The further consideration of such alternative models to abolishing provocation as the NSW model of ‘extreme provocation’ as set out in s 23 of the *Crimes Act 1900* (NSW) and ‘loss of control’ in England and Wales as set out in s 54 of the *Coroners and Justice Act 2009* (UK).
- (g) In the context of abolishing the partial defence of provocation, an examination of the need to ensure that a court possesses (whether under the current law or under any revised model) sufficient flexibility in sentencing to properly reflect an offender’s culpability and any genuine mitigating factors in sentence.
- (h) The consideration of the scope of the existing common law defences of necessity and duress (beyond that contained in Recommendation 10 of the Stage 1 Report).
- (i) The consideration of the merits of the partial defence of diminished responsibility in South Australia, in the context of recent or ongoing changes to the linked defence of mental impairment and its intersection with sentencing for the offence of murder.

2.1.15 Although there are many criticisms of the present law of provocation,<sup>92</sup> three aspects attract particular criticism. These are the gay panic aspect of provocation,<sup>93</sup> the gender bias of the current law, especially in its application in cases involving victims of family violence<sup>94</sup> and that provocation invites victim blaming.<sup>95</sup> SALRI accepts these criticisms of provocation are justified. SALRI reiterates that it is crucial that, as the problems of provocation extend beyond the gay panic aspect, any reforms must also address the gender implications of the present law and the situation of victims of family violence. SALRI notes that care must be taken to avoid establishing a new well-intentioned model which may have undesirable and unintended consequential impacts in practice. The Victorian experience of its problematic and ill-fated defensive homicide law is an example of this.<sup>96</sup> SALRI also notes that should the partial defence of provocation be abolished in South Australia, the sentencing implications need to be considered. The present law in South Australia that provides for a mandatory sentence of life imprisonment and a general mandatory minimum non-parole of 20 years for murder (and a four-fifths

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<sup>92</sup> See below [5.1.1]–[5.3.13]. See further SALRI, Stage 1, above n 10, 19–23 [4.1.1]–[4.1.24].

<sup>93</sup> See below [6.1.1]–[6.1.10]. See further SALRI, Stage 1, above n 10, 37–40 [5.5.1]–[5.5.14].

<sup>94</sup> See below [7.1.1]–[7.1.10]. See further SALRI, Stage 1, above n 10, 44–49 [6.1.1]–[6.1.22].

<sup>95</sup> See below [8.1.1]–[8.1.19]. See further SALRI, Stage 1, above n 10, 24–25 [4.2.1]–[4.2.8].

<sup>96</sup> See, for example, Kate Fitz-Gibbon, *Homicide Law Reform, Gender and the Provocation Defence: A Comparative Analysis* (Palgrave Macmillan, 2014) 108–126; Kate Fitz-Gibbon, ‘The Offence of Defensive Homicide: Lessons learnt from failed Law Reform’ in Kate Fitz-Gibbon and Arie Freiberg (eds), *Homicide Law Reform in Victoria: Retrospect and Prospects* (Federation Press, 2015) 128, 128–143; Kellie Toole, ‘Defensive Homicide on Trial in Victoria’ (2013) 39 *Monash University Law Review* 473. Cf Charlotte King et al, ‘Did Defensive Homicide in Victoria Provide a Safety Net for Battered Women Who Kill? A Case Study Analysis’ (2016) 42(1) *Monash University Law Review* 138. See also below n 141, n 406; SALRI, Stage 1, above n 10, 15 n 92, 78–79 n 571.

non-parole period for any sentence of imprisonment imposed for a serious offence against the person) is strict and raises major issues.<sup>97</sup>

2.1.16 The UK Supreme Court has accepted that, in light of the many criticisms of the partial defence of provocation, ‘the law relating to provocation is flawed to an extent beyond reform by the courts’.<sup>98</sup> SALRI notes this view and reiterates that it is clear that any reforms in this area must be an issue for Parliament.

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<sup>97</sup> There is strong opposition to mandatory life imprisonment by law reform bodies, academics and other commentators. See, for example, New Zealand Criminal Law Reform Committee, *Report on Culpable Homicide* (1976) [6]; Law Reform Commission of Tasmania, *Insanity, Intoxication and Automatism*, Report No 61 (1988) 3; Law Reform Commission of Victoria, *Homicide*, Report No 40 (1991) 128 Recs 38, 39; Queensland Criminal Code Review Committee, *Final Report to the Attorney General* (1992) 55, 194; MCCOC (Ch 5: DP), above n 22, 65; NZLC (2001), above n 22, 51 [147]; Elizabeth Sheehy, ‘Battered Women and Mandatory Minimum Sentences’ (2001) 39 *Osgoode Hall Law Journal* 529; Graeme Coss, ‘Provocative Reforms: A Comparative Critique’ (2006) 30 *Criminal Law Journal* 138, 144; Sean McAnally, ‘The Penalty for Murder’ [1998] *New Zealand Law Journal* 420; Isabel Grant, ‘Rethinking the Sentencing Regime for Murder’ (2001) 39 *Osgoode Hall Law Journal* 655, 700–701, Nicholas Cowdery, ‘Mandatory Sentencing’ (Paper presented at Distinguished Speakers Program, Sydney Law School, 15 May 2014) <<https://www.ruleoflaw.org.au/wp-content/uploads/2014/05/Dist.-speakers-15-May-2014-Mandatory-Sentencing-paper.pdf>>. See further below n 700. See below Part 11 for discussion of the sentencing law and its implications.

<sup>98</sup> *Attorney General for Jersey v Holley* [2005] 2 AC 580, 594 [27]. See also Law Commission (England and Wales) (2004), above n 21, 11 [2.10].

## Part 3 – The History and Law Relating to Provocation

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### 3.1 Brief History and Purpose

3.1.1 The history and purpose of the partial defence of provocation is outlined in the Stage 1 Report.<sup>99</sup>

3.1.2 The historical rationale for provocation was that a man was justified in killing in four situations: to free a person who was unlawfully deprived of their liberty; in response to a grossly indecent assault; in defence of another; or when killing a man who has committed adultery with one's wife.<sup>100</sup> A product of a hetero-normative and patriarchal society, the defence operated in practice to alleviate the criminal responsibility of men when their sense of male dignity or honour was deeply compromised.<sup>101</sup> Provocation was often invoked in cases where a jealous husband killed his wife in response to actual or suspected sexual infidelity.<sup>102</sup> The original (and even 19<sup>th</sup> century) context of the partial defence of provocation is notable. Provocation stems from an era, as the New Zealand Law Commission (NZLC) observed in 2007, 'when it was culturally acceptable to exercise physical violence in defence of one's honour — an era of "pistols at dawn". It was also an era in which the law tended to perpetuate white, male, heterosexual, middle class, Christian values.'<sup>103</sup>

3.1.3 By the 20<sup>th</sup> century, the rationale for the partial defence shifted from a retaliatory killing being justified in those discrete circumstances, to partially excusing an otherwise unacceptable killing in a broader set of situations.<sup>104</sup> The modern rationale is that provocative conduct can be so serious as to partially excuse an illegal killing, reducing the killer's culpability from the most serious charge of murder to a charge of less gravity, namely manslaughter. 'The modern day justification for having a partial defence of provocation is that it recognises human frailties by acknowledging that the accused could not properly control his or her behaviour in the circumstances, and an ordinary person might react similarly.'<sup>105</sup>

3.1.4 There are three scenarios in which the successful use of provocation as a partial defence has attracted much concern and prompted extensive modern law reform debate: First, where men kill a female intimate partner in response to actual or suspected sexual infidelity and/or relationship separation; secondly, where men kill as a result of a non-violent homosexual advance; and thirdly, when women kill their abusive male spouse following a pattern of abuse.<sup>106</sup> In each of these scenarios the gendered operation of the partial defence has given rise to concern and criticism that the requirements of provocation are tailored to the circumstances within which men commit lethal violence as opposed

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<sup>99</sup> SALRI, Stage 1, above n 10, 10–12 [3.1.1]–[3.1.11].

<sup>100</sup> *R v Mangridge* (1706) Kel 119. See also Fitz-Gibbon, *Homicide Law Reform, Gender and the Provocation Defence*, above n 96, 25; VLRC (2004), above n 15, 21–23 [2.1]–[2.7].

<sup>101</sup> See Blore, above n 3; *R v Smith (Morgan)* [2001] 1 AC 146, 159–161 (Lord Hoffman).

<sup>102</sup> Susan Edwards, 'Anger and Fear as Justifiable Preludes for Loss of Self-Control' (2010) 74 *Journal of Criminal Law* 223, 230.

<sup>103</sup> NZLC (2007), above n 16, 46 [91].

<sup>104</sup> NSW Select Committee, above n 15, 7 [2.1]–[2.3], 10–12 [2.20]–[2.28].

<sup>105</sup> QLRC, *Discussion Paper Audit on Defences to Homicide: Accident and Provocation* (September 2007) 18. See also VLRC (2004), above n 15, 23.

<sup>106</sup> Fitz-Gibbon, *Homicide Law Reform, Gender and the Provocation Defence*, above n 96, 25–84; McGeary and Fitz-Gibbon, 'The Homosexual Advance Defence in Australia', above n 3, 3–4.

to women.<sup>107</sup> Both Australian and international research has noted the acute difficulties that women defendants often face in raising a partial defence of provocation, particularly where they have killed in response to cumulative family violence.<sup>108</sup>

3.1.5 The common law rationale for the provocation defence is that where a victim’s provocative conduct causes a defendant to lose control and kill the victim while they have lost control (being a subjective question), and where the provocative conduct would have been capable of causing an ordinary person to lose self-control and kill (an objective question),<sup>109</sup> the criminal law considers the killer to be less culpable than if the circumstance of the provocation were absent. It has been stated that the moral basis of the defence lies in the defendant’s justifiable sense of being seriously wronged.<sup>110</sup>

3.1.6 The partial defence is based on the premise that people who kill as a result of provocation, who otherwise would not have killed, should not be convicted of the same charge as someone who, for example, commits premeditated murder with malice.<sup>111</sup> Indeed, the High Court in *Lindsay* held:

Although it is common to describe the doctrine as a “partial defence”, the true position is that the unlawful intentional killing of another under provocation is not murder. The malice that is implicit in the intention to kill or to do grievous bodily harm is denied in the case of a killing done under provocation.<sup>112</sup>

3.1.7 The partial defence of provocation is said to provide a concession for the frailties of humanity — accepting as it does that people when sorely tested may lose control of their faculties, ‘go berserk’ and act violently, when normally they are not of violent temperament.<sup>113</sup> It is asserted that the partial defence of provocation is necessary (though this is disputed) to make proper allowance for a person who has been placed in the invidious position of being seriously provoked and who while experiencing a sense of loss of control commits lethal violence, in circumstances where an ordinary person would likewise succumb (this is why provocation is often referred to as a ‘concession to human frailty’).<sup>114</sup>

3.1.8 This is why when the partial defence of provocation is successfully argued, a defendant will not be convicted of murder but rather of the lesser charge of manslaughter. Although the distinction

<sup>107</sup> See SALRI, Stage 1, above n 10, 44–49, [6.1.1]–[6.1.22].

<sup>108</sup> See, for example, Kate Fitz-Gibbon and Julie Stubbs, ‘Divergent Directions in Reforming Legal Responses to Lethal Violence’ (2012) 45 *Australian and New Zealand Journal of Criminology* 318; Elizabeth Sheehy, Julie Stubbs and Julia Tolmie, ‘Defences to Homicide for Battered Women: A Comparative Analysis of Laws in Australia, Canada and New Zealand’ (2012) 34 *Sydney Law Review* 467. See also SALRI, Stage 1, above n 10, 44–49 [6.1.1]–[6.1.22].

<sup>109</sup> *Lindsay v The Queen* (2015) 255 CLR 272, 278–279 [15]. See also *R v McCarthy* [2015] SASCFC 177 (30 November 2015), [92].

<sup>110</sup> NSW Select Committee, above n 15, 194 [9.24].

<sup>111</sup> See, for example, NSWLRC, *Partial Defences to Murder: Provocation and Infanticide*, Report No 83 (1997) 27 [2.38] (‘NSWLRC (R 83, 1997)’). This view was also previously relayed to SALRI in its consultation by Mr Caldicott, an experienced defence lawyer.

<sup>112</sup> *Lindsay v The Queen* (2015) 255 CLR 272, 278 [15]. See also *R v McCarthy* [2015] SASCFC 177 (30 November 2015), [92].

<sup>113</sup> VLRC (2004), above n 15, 23 [2.7].

<sup>114</sup> See *R v Kirkham* (1837) 8 Car & P 115, 119; 173 ER 422, 424: ‘[T]he law condescends to human frailty’ (Coleridge J). See also *R v Hayward* (1833) 6 C & P 157, 159 (Tindal CJ), ‘the law’s compassion to human infirmity.’ However, a strong concern is that provocation typically looks at male ‘frailty’ as opposed to female ‘frailty’ and that the law has developed to fit and excuse certain types of violent conduct more likely to be engaged in by men than women. See further SALRI, Stage 1, above n 10, 44–49 [6.1.1]–[6.1.22].

between murder and manslaughter originated as a means to afford mercy to an offender facing the death sentence, the modern distinction is:

seen to reflect degrees of seriousness of unlawful killings, based on the everyday understanding that some killings are more blameworthy than others. Liability for murder is reserved for the most serious or reprehensible killings, whereas manslaughter applies to unlawful killings which are recognised by the law as less blameworthy, whether because the offender's mental state was affected by some mitigating influence, or because the offender did not intend to kill or otherwise lacked the requisite guilty mind for murder.<sup>115</sup>

3.1.9 SALRI questions whether this distinction remains valid. As the Victorian Law Reform Commission (VLRC) in 2002 commented:

it can be argued that those who rely on provocation as a defence have generally formed an intention to kill. Why should the emotion of anger reduce moral culpability more than other emotions such as envy, lust or greed? ... Why should it make a difference to the level of criminal responsibility that a person who intends to kill does so as a result of a loss of self-control?<sup>116</sup>

## 3.2 Law in South Australia

3.2.1 The offence of murder in South Australia is contained in s 11 of the *CLCA*, which states that any person who is guilty of having committed murder 'shall be imprisoned for life'. In practice, only a handful of the most heinous murderers (such as sadistic serial killers) spend life in prison and the great majority are eventually released on parole by the Parole Board.<sup>117</sup> This is supplemented by the *Sentencing Act 1988*, which requires for murder in the absence of limited 'special reasons', a mandatory non-parole term of at least 20 years.<sup>118</sup>

3.2.2 In contrast, the offence of manslaughter is contained in s 13 of the *CLCA* and provides only for the possibility that a person convicted of manslaughter be imprisoned for life. There is more scope for judicial discretion in sentencing for manslaughter than murder in South Australia and, in practice, the sentences for manslaughter on the basis of provocation will be far less than those imposed for murder. This emerges from SALRI's review of the sentencing statistics available for South Australia (and is supported by the more comprehensive statistics available elsewhere).<sup>119</sup> Indeed, it is not unheard

<sup>115</sup> NSWLRC (R 82, 1997), above n 33, 6 [2.1].

<sup>116</sup> VLRC, *Defences to Homicide*, Issues Paper (2002) 67 [6.17]. See also Tasmania, *Parliamentary Debates*, House of Assembly, 20 March 2003, 59–60 (Judy Jackson).

<sup>117</sup> The *Correctional Services Act 1982* (SA) requires any decision to release an offender on parole to be subject to the primary consideration of community protection. An offender convicted of murder is on parole for the term of his or her life when released. See further below [11.2.11]–[11.2.12], [11.5.7], [11.7.7]–[11.7.9] and [11.12.1]–[11.12.2].

<sup>118</sup> *Sentencing Act 1988* s 32A. This is restated in s 47 of the *Sentencing Act 2017* when it comes into effect. Mr Caldicott, noting the tight constraints of the present law, previously noted to SALRI that the present law does not provide adequate flexibility to recognise genuine provocative conduct by the deceased as a mitigating factor in sentence. See also Law Society of South Australia, Submission to the *Inquiry into the Partial Defence of Provocation* (28 October 2014) 3–4, <[https://www.lawsocietyysa.asn.au/pdf/Submissions/L281014\\_Inquiry\\_into\\_the\\_Partial\\_Defence\\_of\\_Provocation.pdf](https://www.lawsocietyysa.asn.au/pdf/Submissions/L281014_Inquiry_into_the_Partial_Defence_of_Provocation.pdf)>; Law Society of South Australia (2018), above n 63. Mr Caldicott also noted that even if the limited discretion in s 32A applies, the likely sentence for murder is still likely to exceed what would now be imposed for manslaughter on the basis of provocation. See also NSW Select Committee, above n 15, 87 [5.98]. See further below [11.5.1]–[11.5.7].

<sup>119</sup> The sentences imposed in the only four clear cases of provocation in South Australia in the period 2007 to 2017 identified in SALRI's research ranged from six years with three years non-parole (wholly suspended) to 13 years



of for offenders convicted of manslaughter on the apparent basis of provocation to avoid an immediate prison sentence.<sup>120</sup> The relevant law and sentencing practices for murder and manslaughter in South Australia will be considered below in Part 11 in further detail.

3.2.3 To raise provocation and have it considered by the jury as a partial defence, a defendant has only an evidentiary onus and not a persuasive onus.<sup>121</sup> That is a relatively undemanding test.<sup>122</sup> It can be raised if there is evidence of a factual foundation for the defence.<sup>123</sup> It is enough that there is a reasonable possibility on the facts most favourable to the defendant that provocation may arise.<sup>124</sup> Once the issue of provocation is raised (whether by the defendant or otherwise),<sup>125</sup> it is incumbent upon the prosecution to rebut the defence beyond reasonable doubt for a defendant to be found guilty of murder. Even if provocation is expressly not raised by a defendant, if there is material upon which a reasonable jury could enter a verdict of manslaughter on the basis of provocation, a trial judge must put this to the jury<sup>126</sup> (indeed, this is what occurred in the first trial in *Lindsay*).

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with nine years non-parole. See further below [11.5.1]–[11.5.7]. See also SALRI, *Homicide Sentencing Background Research Paper*, above n 28. Though as manslaughter is a ‘serious offence against the person’, offenders in South Australia are required to serve four-fifths of any term of imprisonment before being eligible for parole in the absence of one of the limited ‘special reasons’. The Victorian experience is also illustrative. In Victoria, where provocation was abolished as a partial defence to murder in November 2005, between July 1998 to June 2007 the average term imposed for manslaughter on the basis of provocation was just under eight years’ imprisonment — a term higher than that imposed for other forms of manslaughter but much lower than the average term of 18 years imposed for murder. See Arie Freiberg, Karen Gelb and Felicity Stewart, ‘Homicide Law Reform, Provocation and Sentencing’ in Kate Fitz-Gibbon and Arie Freiberg (eds), *Homicide Law Reform in Victoria: Retrospect and Prospects* (Federation Press, 2015) 57–75. See also Felicity Stewart and Arie Freiberg, *Provocation in Sentencing: Research Report* (2<sup>nd</sup> ed) (Sentencing Advisory Council, July 2009).

<sup>120</sup> See, for example, *R v Narayan* [2011] SASCFC 61 (1 July 2011). For Victorian examples prior to the abolition of provocation, see *R v Gazdovic* [2002] VSC 588 (20 December 2002); *R v Stavreski* [2004] VSC 16 (6 February 2004); *R v Tran* [2005] VSC 220 (24 June 2005).

<sup>121</sup> *R v Hajistassi* [2010] SASC 111 (27 April 2010), [93].

<sup>122</sup> Hemming, above n 3, 33–34.

<sup>123</sup> *R v Stingel* (1990) 171 CLR 312, 334.

<sup>124</sup> See, for example, *Van Den Hoek v The Queen* (1986) 161 CLR 158, 162; *R v Rogers* [2016] SASCFC 38 (14 April 2016), [6] (Gray J).

<sup>125</sup> Provocation should be left to the jury if there is a reasonable possibility it may arise, even if the defence explicitly does not ask for it to be left. See, for example, *R v McCarthy* [2015] SASCFC 177 (30 November 2015). This is consistent with the wider principle of the role of the trial judge to ensure that any matter favourable to the defendant’s case is left to the jury (see, for example, *R v Pemble* (1971) 124 CLR 107, 117–118; *RPS v The Queen* (2000) 199 CLR 620, 637–638 [41]–[43]). As was expressed by Barwick CJ in *R v Pemble* (1971) 124 CLR 107, 117–118: ‘Whatever course counsel may see fit to take, no doubt bona fide but for tactical reasons in what he considers the best interest of his client, the trial judge must be astute to secure for the accused a fair trial according to law. This involves, in my opinion, an adequate direction both as to the law and the possible use of the relevant facts upon any matter upon which the jury could in the circumstances of the case upon the material before them find or base a verdict in whole or in part... Here, counsel for the defence did not merely not rely on the matters now sought to be raised; he abandoned them and expressly confined the defence to the matters he did raise. However, in my opinion, this course did not relieve the trial judge of the duty to put to the jury with adequate assistance any matters on which the jury, upon the evidence, could find for the accused.’ This principle has been repeatedly followed. See Law Society of South Australia, Submission on ‘Jury Directions on Defences’ (20 July 2017) 2 [8], <[https://www.lawsocietysa.asn.au/pdf/Submissions/L%20200717\\_Jury\\_decisions\\_on\\_defences.pdf](https://www.lawsocietysa.asn.au/pdf/Submissions/L%20200717_Jury_decisions_on_defences.pdf)>. The Government circulated a draft Bill, the Criminal Procedures (Jury Directions) Amendment Bill 2017, that proposed to modify the rule in *Pemble* to provide that a judge need not leave a defence to a jury in certain situations and ‘a party should be bound by tactical decision made at trial by his or her lawyer’: at 3 [8]. The Bill has not been introduced to date.

<sup>126</sup> *Van Den Hoek v The Queen* (1986) 161 CLR 158, 161; *R v McCarthy* [2015] SASCFC 177 (30 November 2015).

3.2.4 South Australian courts have dealt with provocation in various situations, notably where one man has unlawfully killed another man.<sup>127</sup> There are no publicly available statistics in South Australia regarding the varying incidences of provocation (the court’s sentencing remarks are only available online for four weeks). However, SALRI’s study reveals that of the four clear cases of provocation identified for the period 2007 (after the present law came into effect) to 2017, one (*Narayan*) concerned the killing of an abusive husband by his wife, one (*Li*) concerned the killing of an overbearing mother by her son, one (*Kelleher*) concerned one man killing another following taunts and goading and one (*Simpson*) concerned the killing of a man (who was a convicted sexual offender) who had groped the defendant’s vulnerable domestic partner.<sup>128</sup>

3.2.5 The current law of provocation is often criticised for its gender bias<sup>129</sup> and its unfair application to women accused of murder (especially those who have been subjected to prolonged family violence) and for unfairly favouring men accused of murder (especially those who have killed a female partner).<sup>130</sup>

3.2.6 The case law demonstrates that provocation has been raised in circumstances partially excusing the murder of a woman by a male (as in the controversial NSW case of *R v Singh*<sup>131</sup> and the equally controversial Victorian case of *R v Ramage*<sup>132</sup>). In Victoria, in the five years prior to the abolition of

<sup>127</sup> See, for example, *R v Simpson* in 2008 (Supreme Court of South Australia, 23 September 2008 (Kelly J) No SCCRM-08-72) and *R v Kelleher* in 2010 (Supreme Court of South Australia, 29 October 2010 (Vanstone J) No SCCRM-10-208). See further below n 598, [11.5.1]–[11.5.7]; SALRI, *Homicide Sentencing Background Research Paper*, above n 28. Indeed, this is the most common use of provocation, typically after violent physical confrontations. See Sam Indyk, Hugh Donnelly and Jason Keane, *Partial Defences to Murder in New South Wales 1990–2004* (Judicial Commission of New South Wales, 2006) 39–40. The NSW experience is illustrative. The NSW cases involving when one man had unlawfully killed another man accounted for 10 of the 20 convictions for manslaughter by reason of provocation finalised in the 10 years prior to the 2014 NSW legislative reforms (January 2005 to December 2014). See Kate Fitz-Gibbon, ‘Homicide Law Reform in NSW’, above n 27, 782–785.

<sup>128</sup> See also above n 28, below n 598, [11.5.1]–[11.5.7]. See further SALRI, *Homicide Sentencing Background Research Paper*, above n 28.

<sup>129</sup> LRCWA, above n 22, 212–216. See also SALRI, Stage 1, above n 10, 44–49, [6.1.1]–[6.1.22]. The gender bias of self-defence is also often criticised in its application to female defendants, especially in the context of family violence. See Heather Douglas, ‘A Consideration of the Merits of Specialised Homicide Offences and Defences for Battered Women’ (2012) 45(3) *Australian and New Zealand Journal of Criminology* 367, 373, 376; Angela Guz and Marilyn McMahon, ‘Is Imminence Still Necessary? Current Approaches to Imminence in the Laws Governing Self-Defence in Australia’ (2011) 13 *Flinders Law Journal* 79; Kellie Toole, ‘Self-Defence and the Reasonable Woman: Equality Before the New Victorian Law’ (2012) 36 *Melbourne University Law Review* 250, 256. See further SALRI, Stage 1, above n 10, 70–76 [9.1.1]–[9.2.12], 81–84 [9.5.1]–[9.5.16].

<sup>130</sup> See, for example, Rebecca Bradfield, ‘Domestic Homicide and the Defence of Provocation: A Tasmanian Perspective on the Jealous Husband and the Battered Wife’ (2000) 19 *University of Tasmania Law Review* 5, 5–6, 33–37; Helen Brown, ‘Provocation as a Defence to Murder: To Abolish or To Reform?’ (1999) 12 *Australian Feminist Law Journal* 137; Graeme Coss, ‘Provocation, Law Reform and the Medea Syndrome’ (2004) 28 *Criminal Law Journal* 133, 136; Coss, ‘An Acrimonious Divorce from Reality’, above n 23, 51–71; Ben Golder, ‘The Homosexual Advance Defence and the Law/Body Nexus: Towards a Poetics of Law Reform’ (2004) 11(1) *Murdoch University Electronic Journal of Law* [50]–[51]; Hemming, above n 3; Adrian Howe, ‘Reforming Provocation (More or Less)’ (1999) 12 *Australian Feminist Law Journal* 127, 130–131; Jenny Morgan, ‘Provocation Law and Facts: Dead Women Tell No Tales, Tales Are Told about Them’ (1997) 21 *Melbourne University Law Review* 237, 255; Stella Tarrant, ‘The “Specific Triggering Incident” in Provocation: Is the Law Gender Biased?’ (1996) 26 *University of Western Australia Law Review* 190, 206; Yeo, ‘Resolving Gender Bias in Criminal Defences’, above n 14; NZLC (2007), above n 16, 48–49 [96]–[97], 58 [121]; VLRC (2004), above n 15, 27–30 [2.18]–[2.25]; QLRC, above n 27, 331–332 [16.1]–[16.9].

<sup>131</sup> [2012] NSWSC 637 (7 June 2012).

<sup>132</sup> [2004] VSC 508 (9 December 2004). Provocation became especially controversial in Victoria after the 2004 trial of James Ramage, who successfully relied on ‘provocation’ (which was tenuous, if not non-existent) after killing his estranged wife, Julie, after she had left him. See *R v Ramage* [2004] VSC 391 (8 October 2004), *R v Ramage* [2004]

provocation as a partial defence to murder, such cases comprised six of the 14 cases where an offender was sentenced for manslaughter on the basis of provocation.<sup>133</sup> While this period includes the notorious *Ramage* case, research has documented that the *Ramage* case was not unique to the operation of provocation in either Victoria or other Australian jurisdictions. Research reveals that provocation cases of male perpetrated intimate homicide permeate Australian and comparable international jurisdictions.<sup>134</sup> In such cases men are most likely to kill a current or former female intimate partner in response to an actual or threatened separation or an allegation of sexual infidelity.<sup>135</sup> The successful use of provocation in reducing what would otherwise be murder to manslaughter in such cases has attracted extensive criticism as legitimating the killing of women who are exercising their right to leave a relationship and/or begin a new relationship while simultaneously providing an avenue for blaming of the female victim.<sup>136</sup>

3.2.7 SALRI agrees with Dr Rebecca Bradfield that the successful use of provocation in this context:

endorses outdated attitudes that women are the property of their husbands, attitudes that continue to permit men who kill their partners following sexual provocation such as rejection, a partner's unfaithfulness or jealousy to be accommodated within the defence of provocation. The defence of provocation operates as a "licence" for men to kill their female partners who dare to assert their own autonomy by leaving or choosing a new partner.<sup>137</sup>

### 3.3 Other Jurisdictions

3.3.1 The common law model of provocation as still exists in South Australia is now the exception rather than the rule.<sup>138</sup> The criticisms of provocation are such that all Australian jurisdictions except South Australia have now either abolished the partial defence entirely or at least narrowed its scope.<sup>139</sup>

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VSC 508 (9 December 2004). See also Graeme Coss, 'Prosecution's Victorian Nadir: The Obscenity of *Ramage*' (2005) 29 *Criminal Law Journal* 133; SALRI Stage 1, above n 10, 78 n 565.

<sup>133</sup> Kate Fitz-Gibbon and Sharon Pickering, 'Homicide Law Reform in Victoria, Australia: From Provocation to Defensive Homicide and Beyond' (2011) 52(1) *British Journal of Criminology* 159.

<sup>134</sup> Fitz-Gibbon, *Homicide Law Reform, Gender and the Provocation Defence*, above n 96, 43–56.

<sup>135</sup> This has been consistently documented in research. See, for example, Bradfield, above n 130; Jeremy Horder and Kate Fitz-Gibbon, 'When Sexual Infidelity Triggers Murder: Examining the Impact of Homicide Law Reform on Judicial Attitudes in Sentencing' (2015) 74 *Cambridge Law Journal* 307; Adrian Howe, "'Red Mist' Homicide – Sexual Infidelity and the English Law of Murder (Glossing Titus Andronicus)" (2013) 3 *Legal Studies* 407. The study of the 75 cases in which provocation was successfully raised as a defence in NSW between 1990 and 2004 (58 by men, 17 by women) found that 11 cases involved a male defendant who killed a female intimate partner. 'In all 11 cases the use of lethal violence occurred in response to the alleged infidelity or the breakdown of an intimate relationship': Fitz-Gibbon, *Homicide Law Reform, Gender and the Provocation Defence*, above n 96, 154. See also Indyk, Donnelly and Keane, above n 127, 42. It is also significant that of the 15 men in Victoria between 1980 and 2000 who successfully raised provocation, eight were able to do so on the basis of their partner's infidelity or separation. See Fitz-Gibbon, *Homicide Law Reform, Gender and the Provocation Defence*, above n 96, 109–112.

<sup>136</sup> See for example, Fitz-Gibbon, *Homicide Law Reform, Gender and the Provocation Defence*, above n 96, 65–69; Adrian Howe, 'Provoking Comment: The Question of Gender Bias in the Provocation Defence – A Victorian Case Study' in Norma Grieve and Alisa Burns (eds), *Australian Women: New Feminist Perspectives* (Oxford University Press, 1986) 225–235; Danielle Tyson, *Sex Culpability and the Defence of Provocation* (Routledge, 2013); Morgan, above n 130.

<sup>137</sup> Bradfield, above n 130, 35.

<sup>138</sup> Kellie Toole, 'Law Reform, South Australia and the Defence of Provocation' (2013) 38 *Alternative Law Journal* 270, 270.

<sup>139</sup> See Fitz-Gibbon, above n 17.

3.3.2 Tasmania was the first Australian jurisdiction to abolish provocation in the *Criminal Code Amendment (Abolition of Defence of Provocation) Act 2003* (Tas). Victoria abolished the common law defence of provocation in 2005 after the controversial case of *Ramage*<sup>140</sup> on the basis that provocation was outdated and condoned male aggression towards women.<sup>141</sup> The partial defence of provocation was then abolished in Western Australia in 2008 in the *Criminal Law Amendment (Homicide) Act 2008* (WA).

3.3.3 Provocation has also proved contentious and unpopular outside Australia.

3.3.4 In 2007, the New Zealand Law Commission concluded that the partial defence of provocation, both conceptually and in practice, was ‘irretrievably flawed’.<sup>142</sup> The NZLC recommended that the partial defence should be abolished and the issue of provocation should be dealt with as a matter of sentencing.<sup>143</sup> In response to these recommendations and public concern about misuse of the law, the partial defence of provocation was abolished in New Zealand in 2009.<sup>144</sup>

3.3.5 The law of homicide in New Zealand was most recently reviewed in 2016, when the NZLC after detailed consideration concluded that the partial defence of provocation should not be reintroduced.<sup>145</sup> The NZLC ‘found no empirical evidence from our case review to conclude that repeal of provocation in New Zealand [in 2009] has in practice adversely affected the position of victims of family violence who kill their abusers.’<sup>146</sup>

3.3.6 The common law defence of provocation ‘was abolished and consigned to the legal history books’<sup>147</sup> in England and Wales in the *Coroners and Justice Act 2009* (UK) in 2009 ‘against a background of controversy and widespread dissatisfaction’.<sup>148</sup> The common law version of provocation was also

<sup>140</sup> [2004] VSC 508 (9 December 2004). See also above n 132; SALRI, Stage 1, above n 10, 78 n 565.

<sup>141</sup> Victoria, *Parliamentary Debates*, Legislative Assembly, 6 October 2005, 1349 (Rob Hulls, Attorney-General). Provocation was initially abolished in Victoria (see *Crimes Act 1958* (Vic) s 3B) and replaced with a new model of ‘defensive homicide’ but that model proved problematic. See above n 96. In 2014, after extensive criticism, the offence of defensive homicide was abolished by the *Crimes Amendment (Abolition of Defensive Homicide) Act* in Victoria. In announcing the repeal of defensive homicide, the Government conceded that the law ‘had failed to work as intended’ (Matt Johnson, ‘Killer Blow: Defensive Homicide Laws Hijacked by Thugs will be Scrapped’, *Herald Sun* (Melbourne) 21 June 2014, 1) and instead had allowed full responsibility to be avoided in situations where a conviction for murder would have been deserved. Indeed, it was noted that defensive homicide had proved to be ‘provocation by new name’: Fitz-Gibbon and Pickering, above n 133, 169. Cf Madeleine Ulbrick, Asher Flynn and Danielle Tyson, ‘The Abolition of Defensive Homicide: A Step towards Populist Punitivism at the Expense of Mentally Impaired Offenders’ (2016) 40 *Melbourne University Law Review* 324. See also above n 96, below n 406.

<sup>142</sup> NZLC (2007), above n 16, 41 [77].

<sup>143</sup> *Ibid* 13 Rec 1, 2.

<sup>144</sup> *Crimes (Provocation Repeal) Amendment Act 2009* (NZ). The Bill to abolish provocation passed the New Zealand Parliament with 116 votes in favour and only five votes against. There are now no other legislative partial defences to murder and as a result, self-defence set out in s 48 of the *Crimes Act 1961* (NZ) is now the primary defence in New Zealand available to women who may kill their abusers. See further SALRI, Stage 1, above n 10, 75–76 [9.2.7]–[9.2.12].

<sup>145</sup> Law Commission of New Zealand, *Understanding Family Violence: Reforming the Criminal Law Relating to Homicide*, Report 139 (2016) 11 Rec 9.

<sup>146</sup> *Ibid* 10 [35]. The Commission was troubled by the insistence for a threat be imminent for self-defence to arise (see *R v Wang* [1990] 2 NZLR 529, 539 (Bisson J); Sheehy, Stubbs and Tolmie, above n 108, 471). The NZLC recommended that the law be amended to make it clear that in cases involving family violence, the threat need not be imminent. See NZLC (2016), above n 145, 8 [24]–[28], 9 Rec 5.

<sup>147</sup> *R v Clinton* [2012] 3 WLR 515, 518 [1].

<sup>148</sup> *R v Rejmanski* [2017] EWCA Crim 2061, [4]. See further Law Commission (England and Wales) (2004), above n 21; Law Commission (England and Wales), *Murder, Manslaughter and Infanticide*, Law Com No 304 (2006).

abolished in NSW in 2014 in the *Crimes Amendment (Provocation) Act 2014* (NSW).<sup>149</sup> However, the common law model of provocation has been replaced to a large extent by the similar legislative partial defences of ‘extreme provocation’ in NSW and ‘loss of control’ in England and Wales which may also reduce liability for murder to manslaughter. The merits of the English and NSW models will be considered further below.<sup>150</sup>

3.3.7 The gay panic aspect of provocation has been abolished in the ACT. The *Sexual Discrimination Amendment Act 2003* (ACT) amended s 13 of the *Crimes Act 1900* (ACT) to exclude any non-violent sexual advance, by itself, from amounting to provocation. The position in the Northern Territory is similar.<sup>151</sup> The *Criminal Law Amendment Act 2017* passed the Queensland Parliament on 21 March 2017 and provides that an ‘unwanted sexual advance’ cannot amount to provocation other than in ‘exceptional circumstances’.<sup>152</sup> This Act came into force on 30 March 2017. South Australia is now the only Australian jurisdiction to still permit a provocation defence on the basis of a homosexual advance.

### 3.4 Queensland

3.4.1 The recent Queensland developments regarding provocation and the rationale for these changes are highly significant to this Report. However, the Queensland changes in relation to the gay panic aspect of provocation also demonstrate that well intended reforms may not always achieve their intended ends.

3.4.2 Section 304 (killing on provocation) of the *Criminal Code* (Qld) provides for the partial defence of provocation which, if successfully raised, reduces the criminal responsibility of an offender from murder to manslaughter. The offence of murder in Queensland carries mandatory life imprisonment, whereas the offence of manslaughter carries a maximum discretionary penalty of life imprisonment.

3.4.3 In April 2011, s 304 was amended to address perceived bias and flaws in the law following the recommendations of the Queensland Law Reform Commission (QLRC) contained in its 2008 report.<sup>153</sup> The revised section provided that provocation was not available ‘if the sudden provocation is based on words alone, other than in circumstances of a most extreme and exceptional character’.<sup>154</sup> Further, the 2011 amendments reversed the onus of proof to a defendant. While not specifically dealing

<sup>149</sup> See further New South Wales, *Parliamentary Debates*, Legislative Council, 5 March 2014, 27033 (Hon Fred Nile).

<sup>150</sup> See below Part 10. See also SALRI, Stage 1, above n 10, 56–58 [7.1.1]–[7.1.8] (England) and 58–61 [7.2.1]–[7.2.15] (NSW). The English model is set out below at Appendix 2, 187. The NSW model is set out below at Appendix 3, 188–189.

<sup>151</sup> *Criminal Code* s 158. The Northern Territory provision also allows conduct to be considered, regardless of whether it occurs immediately before any loss of self-control.

<sup>152</sup> This Act was prompted by the contentious use of the gay panic defence at the trial in Queensland in 2010 of two men, Jason Pearce and Richard Meerdink. See also SALRI, Stage 1, above n 10, 17–18 [3.4.6]–[3.4.9] for discussion of the new Queensland Act.

<sup>153</sup> QLRC, above n 27.

<sup>154</sup> The section further provides that provocation is unavailable ‘other than in circumstances of a most extreme and exceptional character, if a domestic relationship exists between two persons; and one person unlawfully kills the other person (the deceased); and the sudden provocation is based on anything done by the deceased or anything the person believes the deceased has done to end the relationship; or to change the nature of the relationship; or 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.’

with the issue of an unwanted sexual advance, the 2011 amendment to exclude ‘words alone’ applied to a sexual proposition, unaccompanied by any physical contact.

3.4.4 However, the partial defence of provocation in Queensland proved controversial and continued to be criticised on the basis that it could be relied upon by a man who had killed in response to an unwanted homosexual advance from the deceased.<sup>155</sup> There was considerable public pressure in Queensland to revise the law of provocation in the aftermath of a contentious case of gay panic<sup>156</sup> from Maryborough arising from the violent death of Wayne Ruks (the two offenders, Richard Meerdink and Jason Pearce, in 2009 were convicted of manslaughter by apparent reason of provocation).<sup>157</sup>

3.4.5 In November 2011, an expert committee was asked by the Queensland Government to review s 304 regarding its application to an unwanted homosexual advance. The Committee was chaired by a retired judge, the Hon John Jerrard QC. The Committee was equally divided about amending s 304 in relation to the gay panic issue. However, the Chairman ultimately recommended that s 304 should be amended to exclude an unwanted sexual advance from the ambit of the partial defence, other than in circumstances of an ‘exceptional character’.<sup>158</sup> The report notes the Chairman’s reasoning of ‘the goal of having a *Criminal Code* which does not condone or encourage violence against the Lesbian, Gay, Bisexual, Trans, Intersex (LGBTI) community’ as being persuasive in supporting the amendment.

3.4.6 The Queensland Attorney-General announced on 11 May 2016 that the gay panic aspect of provocation would be abolished in Queensland.<sup>159</sup> The Attorney-General explained:

Today I commenced targeted consultation with key legal stakeholders by circulating a draft amendment to s 304 of the *Criminal Code* for comment on whether the amendments achieve the policy intention. I want to thank in advance those stakeholders for their consideration of these amendments. I consider it absolutely essential to obtain their feedback in this matter. Their comments will be considered in developing the final amendments. I would welcome comments from the Opposition as I know it had previously indicated support for such a proposal.

<sup>155</sup> See, for example, Blore, above n 3; Patrick Caruana, ‘Qld Scraps “Gay Panic” Defence Changes’, *The Australian* (online), 2 August 2012, <<http://www.theaustralian.com.au/news/latest-news/qld-scraps-gay-panic-defence-changes/story-fn3dxiwe-1226427364778>>; Robert Sims, ‘Licence to kill? Time to abolish the “gay panic” defence’, *ABC News* (online), 22 August 2012, <<http://www.abc.net.au/news/2012-08-22/simms-licence-to-kill/4204460>>.

<sup>156</sup> To add to the controversy of the case, Mr Ruks was not even gay. As his mother commented in her understandable criticism of the law: ‘My son was not gay, and that was the hardest part. It shows the defence can be used against ... Even the CCTV footage showed no sign of a homosexual advance. It was just used as an excuse.’ See Clementine Norton, ‘“Gay Panic” Killer walks Free’, *Fraser Coast Chronicle* (online), 20 July 2012, <<http://www.frasercoastchronicle.com.au/news/killer-walks-free-after-just-4-years/1460306/>>.

<sup>157</sup> See, for example, Blore, above n 3. Father Paul Kelly, a Catholic priest, was especially active in campaigning for law reform as a result of Mr Ruks’s death. Mr Ruks was killed in the churchyard of the church of which Father Kelly was the priest. See Annie Guest, ‘Priest Fights for End to Gay Panic Defence’, *ABC News* (online), 11 January 2012, <<http://www.abc.net.au/news/2012-01-11/petition-calls-for-end-to-gay-panic-defence/3767446>>; Karen Skinner, ‘The Catholic Priest Fighting to Repeal the Homophobic Law that Shames Australia’, *Sydney Morning Herald* (online), 17 May 2016, <<http://www.smh.com.au/comment/the-catholic-bishop-fighting-to-repeal-the-homophobic-law-that-shames-australia-20160516-gowhg5.html>>; Joshua Robertson, ‘How “gay panic” defence reform was brought about by a straight man’s death’, *The Guardian* (online), 1 December 2016, <<https://www.theguardian.com/australia-news/2016/dec/01/how-gay-panic-defence-reform-was-brought-about-by-a-straight-mans-death>>; Queensland, *Parliamentary Debates*, Legislative Assembly, 30 November 2016, 4699 (Hon YM D’Ath, Attorney-General).

<sup>158</sup> John Jerrard, ‘Special Committee Report on Non-Violent Sexual Advances’ (Special Committee Report to the Queensland Attorney-General, Parliament of Queensland, 2012).

<sup>159</sup> Queensland, *Parliamentary Debates*, Legislative Assembly, 11 May 2016, 1654 (Hon YM D’Ath, Attorney-General).

Amendments that touch on criminal defences are always highly complex and technical and must strike the right balance between protecting the community while also protecting the rights of the individual accused. The Palaszczuk government considers it imperative to ensure that the amendments responsibly and meaningfully deliver on this important shift in the criminal law, reflecting the changes in community expectations demanded by a modern, progressive society. Queensland's *Criminal Code* must not be seen to condone violence against the gay community or indeed any community. I anticipate introducing the proposed amendments to s 304 of the *Criminal Code* in the House later this year.<sup>160</sup>

3.4.7 The subsequent Bill, introduced to the Queensland Parliament on 30 November 2016, amended s 304 of the *Criminal Code* (Qld) to exclude an 'unwanted sexual advance',<sup>161</sup> other than in circumstances of an 'exceptional character', from the ambit of the partial defence. The Attorney-General stressed 'the importance attached to this reform recognising as it does the modern and progressive society Queensland is in 2016'.<sup>162</sup> The Attorney-General noted the importance to the LGBTIQ community of the change. She explained that the proposed amendment reflected changes in community values and expectations that such conduct should not be able to establish a partial defence of provocation where a defendant has killed with murderous intent. However, the proposed amendment also included the proviso 'other than in circumstances of an exceptional character' to guard against unjust outcomes as it is impossible to predict the factually dynamic circumstances that may arise in homicide cases.<sup>163</sup>

3.4.8 The Attorney-General shed some light on what is an 'exceptional circumstance':

Let me be perfectly clear and remove any doubt: an unwanted homosexual advance is not of itself to be considered an exceptional circumstance. Consistent with the other subsections of s 304, which limit the operation of the defence, a proviso is included to allow for circumstances of an exceptional character. Such a proviso is included to act as a safeguard in case of any unjust outcomes as it is impossible to foresee the myriad circumstances that may arise in homicide matters. As to what circumstances fall within the exception, no examples are provided. This will be a matter for the trial judge to assess on a case-by-case basis. ... This in no way is intended to limit the circumstances of an exceptional character to which consideration may be had.<sup>164</sup>

3.4.9 The Queensland Act passed Parliament with broad all party support<sup>165</sup> and came into effect on 30 March 2017. The Queensland model, whilst a significant legislative statement of non-discrimination, raises problems and is not suggested by SALRI as a suitable model for South Australia.<sup>166</sup>

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<sup>160</sup> Ibid.

<sup>161</sup> As to the term 'unwanted sexual advance', this is defined in new sub-s (9) as meaning a sexual advance that 'is unwanted by the person' and 'if the sexual advance involves touching the person—involves only minor touching'. The term sexual advance is not defined and carries its everyday meaning and the conduct can transpire in infinite ways. It refers to conduct of a sexual nature towards the person, including conduct made up of no words or touching, such as a gesture: Queensland, *Parliamentary Debates*, Legislative Assembly, 30 November 2016, 4698.

<sup>162</sup> Queensland, *Parliamentary Debates*, Legislative Assembly, 30 November 2016, 4697.

<sup>163</sup> Ibid 4698.

<sup>164</sup> Ibid. See also See further Queensland, *Parliamentary Debates*, Legislative Assembly, 21 March 2017, 602–603.

<sup>165</sup> See Queensland, *Parliamentary Debates*, Legislative Assembly, 21 March 2017, 601–631.

<sup>166</sup> See below [6.2.1]–[6.2.12]. See also SALRI, Stage 1, above n 10, 64 [7.4.1]–[7.4.3].

## Part 4 – *Lindsay* and the SA Legislative Review Committee

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### 4.1 Overview

4.1.1 *Lindsay* is a significant decision and is pivotal to SALRI's reference and this Report.<sup>167</sup> The work of the SA Legislative Review Council arising from *Lindsay* in relation to the whole provocation defence (not confined to the gay panic defence) is also important. In this Part, SALRI's discusses both *Lindsay* and the work of the SA Legislative Review Committee and their implications for this Report.

### 4.2 *R v Lindsay*

4.2.1 The background to *Lindsay* is described in SALRI's Stage 1 Report.<sup>168</sup> In brief, *Lindsay* was said to have murdered the deceased after an unwanted homosexual advance. The first trial judge, Sulan J, left provocation to the jury as a possible partial defence to murder (though the case was not run by the defence at this trial on this basis).<sup>169</sup> *Lindsay* was convicted of murder at first instance and was given a life sentence with a non-parole period of 23 years.

4.2.2 The conviction and sentence were appealed. The three judges of the South Australian Court of Criminal Appeal dismissed the appeal.<sup>170</sup> The majority, Peek J (Kourakis CJ agreeing), found that the trial judge's directions to the jury were flawed in relation to provocation but that the inadequate directions did not result in a substantial miscarriage of justice and did not deprive *Lindsay* of the chance of a verdict of manslaughter that was fairly open to him. The majority held that no reasonable jury could find that an ordinary person could have lost control and attacked the deceased in the way that *Lindsay* did due to the deceased's conduct and provocation was unavailable as a defence and should not have been left to the jury.<sup>171</sup>

4.2.3 Peek J accepted there 'is no doubt that in former times, when acts of homosexuality constituted serious crime, and men were accustomed to resort to weapons and violence to defend their honour'<sup>172</sup> a killing under the provocation present in *Lindsay* would have been viewed as giving rise to a verdict of manslaughter rather than murder, '[h]owever, times have very much changed.'<sup>173</sup> Peek J noted that the question of whether provocation was available as a defence had to be decided in the light of contemporary conditions and attitudes.<sup>174</sup>

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<sup>167</sup> The High Court's controversial decision in *Green v R* (1997) 191 CLR 334 and its gay panic implications are also significant. See further SALRI, Stage 1, above n 10, 30–31 [5.2.1]–[5.2.3].

<sup>168</sup> SALRI, Stage 1, above n 10, 31–34 [5.3.1]–[5.3.115].

<sup>169</sup> If there is evidence of provocation the judge has a duty 'to leave the question of provocation to the jury notwithstanding that it has not been raised by the defence and is inconsistent with the defence which is raised': *Stingel v R* (1990) 171 CLR 312, 333, 334.

<sup>170</sup> *R v Lindsay* (2014) 119 SASR 320.

<sup>171</sup> Gray J also dismissed the appeal, but for different reasons. He held that the trial judge's directions were adequate and accorded with settled authority. Gray J noted that the evidence to support any defence of provocation was 'weak' ((2014) 119 SASR 320, 338 [60]) and that it would have been open to the trial judge not to have left provocation to the jury: at 338 [62].

<sup>172</sup> *Ibid* 380 [235].

<sup>173</sup> *Ibid*.

<sup>174</sup> *Ibid* 380 [235]. See also *R v Moffa* (1977) 138 CLR 601, 616–617 (Gibbs J).



#### 4.2.4 Peek J concluded:

After careful consideration of the authorities, and of some of the extensive academic literature, I have come to the firm view that in twenty-first century Australia, the evidence taken at its highest in favour of the appellant in the present case was such that no reasonable jury could fail to find that an ordinary man could not have so far lost his self-control as to attack the deceased in the manner that the appellant did. Accordingly, the Judge was incorrect in his decision to leave the partial defence of provocation to the jury in this case.<sup>175</sup>

4.2.5 Lindsay then appealed to the High Court, arguing that the trial judge had been correct to leave provocation to the jury but those directions were flawed. All five judges of the High Court allowed the appeal.<sup>176</sup> The High Court held that the trial judge did not err by leaving the verdict of manslaughter based on provocation to the jury. The High Court quashed the conviction and ordered a retrial and found that there had been a substantial miscarriage of justice due to the inadequate directions given by the trial judge regarding provocation.

4.2.6 The High Court emphasised the need for caution before declining to leave a claim of provocation to the jury.<sup>177</sup> The majority of the court explained:

There is an evident need for caution before a court determines as a matter of law that contemporary attitudes to sexual relations are such that conduct is incapable of constituting provocation. The partial defence recognises human frailty and requires that the gravity of the provocation be assessed from the standpoint of the accused, taking into account his or her history and attributes.<sup>178</sup>

4.2.7 After an unsuccessful effort,<sup>179</sup> Lindsay's retrial was heard in March 2016. Provocation was raised as a partial defence. Lindsay was again convicted of murder. This conviction was also appealed and leave to appeal was granted.<sup>180</sup> On 2 September 2016, Lindsay was resentenced for murder. In line with the second jury's verdict, the sentencing judge, Bampton J, described the killing as an 'unprovoked killing of a man in your home' and noted that the victim's actions 'did not make you [Lindsay, the defendant] lose control'.<sup>181</sup> Lindsay was sentenced to life imprisonment with a non-parole period of 23

<sup>175</sup> *R v Lindsay* (2014) 119 SASR 320, 380 [236]. See also the similar view of Kourakis CJ in *R v Hajistassi* [2010] SASFC 111 (27 April 2010), [104] where he noted that some of the grounds which traditionally had been thought to have the potential to cause a person with ordinary self-restraint to lose control 'reflect a view of manhood which is no longer generally accepted' and 'there do not appear to be any sound policy reasons to treat the sudden discovery of infidelity, the shock of a homosexual advance or other similar personal affronts as a sufficient basis to partially excuse what would otherwise be murder.'

<sup>176</sup> (2015) 255 CLR 272. French CJ, Kiefel, Bell, and Keane JJ delivered a joint judgment allowing the appeal. Nettle J delivered a separate judgment, agreeing that the appeal should be allowed.

<sup>177</sup> *Ibid* 284 [27]–[28] (French CJ, Kiefel, Bell and Keane JJ). See also *Stingel v The Queen* (1990) 171 CLR 312, 334.

<sup>178</sup> (2015) 255 CLR 272, 284 [28] (French CJ, Kiefel, Bell, and Keane JJ).

<sup>179</sup> A second trial before Nicholson J resulted in a mistrial. See *R v Lindsay* [2016] SASFC 129 (8 December 2016), [9].

<sup>180</sup> Andrew Hough, 'Man Found Guilty of "Gay Panic" Murder Wins Right to Appeal Fresh Conviction', *The Advertiser* (online), 5 August 2016, <<http://www.adelaidenow.com.au/news/south-australia/man-found-guilty-twice-of-gay-panic-murder-wins-right-to-appeal-fresh-conviction/news-story/c5cadc77b71b1a06eba6bbbf2bbb4b66>>. The grounds of appeal include concerns about Bampton J's direction of the jury including whether the prosecution had 'excluded the possibility that Mr Lindsay had killed Mr Neagre as a consequence of a sudden and temporary loss of self-control brought about by Mr Neagre's conduct'.

<sup>181</sup> *R v Lindsay*, 2 September 2016 (Bampton J) No. SCCRM-12-16, Supreme Court Criminal Jurisdiction: Adelaide.

years. Bampton J offered no comments in her sentencing remarks in *Lindsay* relating to the law of provocation in South Australia though she did not accept that the conduct of the deceased amounted to a mitigating factor or a ‘special reason’ to depart from the usual 20-year mandatory minimum sentence for murder.<sup>182</sup>

4.2.8 *Lindsay*’s second appeal against conviction based on inadequate directions to the jury regarding the issue of provocation and other grounds was heard by the Court of Criminal Appeal.<sup>183</sup> On 8 December 2016, the court dismissed the appeal and found that the trial judge’s directions regarding provocation were satisfactory.<sup>184</sup> Vanstone J delivered the court’s judgment. She quoted the trial judge’s detailed observations regarding the issue of provocation,<sup>185</sup> remarking: ‘It is hard to see what more could have been done.’<sup>186</sup> A further effort to appeal to the High Court was refused leave on 16 June 2017.<sup>187</sup>

4.2.9 *Lindsay* is a significant decision and is pivotal to SALRI’s reference. The High Court was clear that, noting the need for caution to not allow a claim of provocation to go the jury, a non-violent sexual advance could still amount to provocation. The majority observed that Peek J did not purport to decide that a non-violent sexual advance might never amount to provocation in law and ‘such a conclusion would be inconsistent with the holding in *Green*’.<sup>188</sup> Nettle J cautioned that whatever may ‘have very much changed’<sup>189</sup> since *Green* was decided in 1997, ‘the law remains now as it was then, that the application of the objective test depends on the jury’s evaluation of the degree of outrage which the accused might have experienced. ... “it [is] not for the Court to determine questions of that kind, especially when reaction to sexual advances are critical to the evaluation”’.<sup>190</sup>

4.2.10 The High Court’s decision is widely perceived<sup>191</sup> to have confirmed that the gay panic aspect of provocation remains part of the present law (though there is a view that *Lindsay*, as with *Green*, is

<sup>182</sup> *Sentencing Act 1988* s 32A. See also below SALRI, Stage 1, above n 10, 67–69 [8.2.1]–[8.2.5]. See also below [11.4.12]–[11.4.15].

<sup>183</sup> SALRI, at the request of the lawyers involved in the case, undertook not to publicly publish any finding or report into the issue of gay panic and provocation until the appeal process arising from the retrial had been completed.

<sup>184</sup> *R v Lindsay* [2016] SASCFC 129 (8 December 2016).

<sup>185</sup> See *Ibid* [46]: ‘Just turning now to provocation. I will remind you that you must take into account all of the evidence that you have heard from each of the witnesses in evaluating the gravity of the conduct that was perceived by Mr Lindsay, including the matters that I have referred to earlier when I spoke about provocation. You need also to take into account those matters that you heard Brigette Mildwaters give evidence about where she said that Andrew Negre was talking down to Michael Lindsay and that he was a bragger. She also referred to him persisting in asking Mr Lindsay to sleep with him and when his persistence was rejected Mr Negre then said “I’ll pay you for it then” and he also made reference to having \$600 in his wallet. So, you must also take that into account in determining the gravity of the provocation that you may find. You also take into account the responses of Mr Lindsay’s partner Mel and Mr Lindsay’s responses that you heard evidence about.’

<sup>186</sup> *Ibid* [46].

<sup>187</sup> *R v Lindsay* [2017] HCA Trans 137 (16 June 2017).

<sup>188</sup> (2015) 255 CLR 272, 287, [39] (French CJ, Kiefel, Bell and Keane JJ).

<sup>189</sup> (2014) 119 SASR 320, 380 [235].

<sup>190</sup> (2015) 255 CLR 272, 301 [84] (Nettle J) quoting *Green v R* (1997) 191 CLR 334, 346 (Brennan J).

<sup>191</sup> See, for example, Braun and Gray, above n 3; McCreary and Fitzgibbon, ‘The Homosexual Advance Defence in Australia’, above n 3, 2; Kellie Toole, ‘SA should abolish provocation’, *The Advertiser* (online), 2 June 2015 <<http://www.adelaidenow.com.au/news/opinion/kellie-toole-sa-should-abolish-provocation/news-story/8cfdaf87a3ccba0f56bee0961c3a7f15>>.

explicable by its wider and particular facts and actually has little to do with homophobia and/or gay panic).<sup>192</sup>

### 4.3 First Legislative Committee Review

4.3.1 The partial defence of provocation as a result of *Lindsay* has been the subject of much recent consideration by the Legislative Review Committee of the South Australian Parliament. The SA Legislative Review Council opted to consider the whole provocation defence and not confine its deliberations to the gay panic aspect of the defence. The Committee was ultimately unable to identify any options for meaningful reform and supported retention of the present law and did not support either abolition of provocation or any change to the present law. The Committee highlighted that its terms of reference did not extend to considering the general mandatory sentence for murder in South Australia. Given the importance of the Committee’s work and the fact that SALRI has reached a different conclusion on certain issues, notably the abolition of the partial defence of provocation, this Report sets out the work of the Committee and its reasoning.

4.3.2 On 2 December 2014, the SA Legislative Review Committee presented its first Report into the partial defence of provocation.

4.3.3 This Report was commissioned as a result of the Criminal Law Consolidation (Provocation) Amendment Bill 2013 (‘the Bill’) introduced by the Hon Tammy Franks MLC in the Legislative Council on 1 May 2013.<sup>193</sup> The Bill was intended to limit the defence of provocation so that conduct of a sexual nature by a person does not constitute provocation ‘merely’ because the person was the same sex as a defendant. The Hon Tammy Franks was highly critical of the current law: ‘It is a law that fails to reflect community attitudes that both homophobia and murder cannot and should not be tolerated and that homophobic violence should never be rewarded.’<sup>194</sup>

4.3.4 The Bill proposed to amend the *CLCA* by way of the insertion of a new s 11A. The proposed new section provided:

11A– Limitation on defence of provocation

For the purposes of proceedings in which the defence of provocation may be raised, conduct of a sexual nature by a person does not constitute provocation merely because the person was the same sex as the defendant.

4.3.5 The Bill effectively sought to abolish the gay panic aspect of provocation. After debate, the Legislative Council on 30 October 2013 resolved that the Bill would be withdrawn and the issue

<sup>192</sup> This view has been raised to SALRI in its consultation by some parties, notably Mr Caldicott. As Gray J explained in *R v Lindsay* (2014) 119 SASR 320, 331–332 [29]: ‘The Judge drew the jury’s attention to the fact that Lindsay was an Aboriginal man, that he was not homosexual, that he was in his own home in the presence of his wife and in the presence of his younger sisters, and that he was confronted with an unwanted sexual advance.’ The fact that Lindsay was an Aboriginal man was also regarded as significant by the High Court. ‘It was open to a reasonable jury to consider that an offer of money for sex made by a Caucasian man to an Aboriginal man in the Aboriginal man’s home and in the presence of his wife and family may have had a pungency that an uninvited invitation to have sex for money made by one man to another in other circumstances might not possess’: at (2015) 255 CLR 272, 287 [37] (French CJ, Kiefel, Bell and Keane JJ). See also at 300 [81] (Nettle J).

<sup>193</sup> South Australia, *Parliamentary Debates*, Legislative Council, 1 May 2013, 3804–3808 (Hon Tammy Franks).

<sup>194</sup> *Ibid* 3804. See further below [6.1.1]–[6.1.10].

referred to the Legislative Review Committee for an inquiry and report.<sup>195</sup> Due to the range of issues covered in submissions to the Committee during its inquiry, the Committee decided to broaden its original terms of reference and conduct a broad examination of the provocation defence, not limited to the Bill.<sup>196</sup>

4.3.6 The Committee received 12 submissions to its First Inquiry. Four public hearings were held. Although the majority of submissions supported the Bill’s intent (to preclude a claim of gay panic from amounting to provocation), the submissions were divided into three distinct groups, being those which:

- did not support the Bill in its current form without addressing further reform;<sup>197</sup>
- supported the Bill in the context of recommending a broader review or abolition of the provocation defence;<sup>198</sup> and
- did not support the Bill on the basis that the common law has previously addressed the issue contemplated by the Bill, and that the issue the Bill seeks to address no longer exists.<sup>199</sup>

4.3.7 The Committee noted the various criticisms of provocation including the gay panic aspect,<sup>200</sup> its gender bias<sup>201</sup> and victim blaming.<sup>202</sup> It strongly agreed that homophobic violence should not be tolerated. But the Committee was unable to agree with the submissions suggesting the abolition of the partial defence of provocation. The majority of the Committee<sup>203</sup> thought that provocation may serve an important function in circumstances such as those involving ‘a high degree of provocation’.<sup>204</sup> The Committee noted that the Court of Criminal Appeal in *Lindsay*<sup>205</sup> thought that provocation should not have been left to the jury in that case. The Committee noted that the court in that case contemplated that homosexuality is now largely accepted as part of contemporary Australian society.

4.3.8 The Committee unanimously supported the position that a non-violent sexual advance should not of itself give rise to any potential defence of provocation. However, the majority of the Committee concluded that the Bill would ‘not achieve meaningful legal reform of the provocation defence’.<sup>206</sup> The Committee, after reviewing the views of the legal profession and the case law as it stood at the time,

<sup>195</sup> South Australia, *Parliamentary Debates*, Legislative Council, 30 October 2013, 5428–5432.

<sup>196</sup> SA Legislative Review Committee (2014), above n 8, 9.

<sup>197</sup> South Australian Police and Youth Affairs Council of South Australia.

<sup>198</sup> Ian Leader-Elliott, Kellie Toole, Professor Ngaire Naffine and Associate Professor Alex Reilly (joint submission); South Australian Commissioner for Victims’ Rights; Dr Kate Fitzgibbon and the Victim Support Service.

<sup>199</sup> The Hon John Rau, Attorney-General; South Australian Director of Public Prosecutions; Commissioner for Equal Opportunity [though supporting a wider review of the law]; Legal Services Commission; Law Society of South Australia and SA Bar Association [cf Roundtable, May 2017, Appendix 1, below 179–185].

<sup>200</sup> SA Legislative Review Committee (2014), above n 8, 5. See also below [6.1.1]–[6.1.10]; SALRI, Stage 1, above n 10, 37–40, [5.5.1]–[5.5.14].

<sup>201</sup> SA Legislative Review Committee (2014), above n 8, 27–28 [6.1.1]. See also below [7.1.1]–[7.1.7]; SALRI, Stage 1, above n 10, 44–49 [6.1.1]–[6.1.22].

<sup>202</sup> SA Legislative Review Committee (2014), above n 8, 30–31 [6.1.4]. See also below [8.1.1]–[8.1.9]; SALRI, Stage 1, above n 10, 24–28 [4.2.1]–[4.2.18] for discussion of the victim blaming issue.

<sup>203</sup> The Hon John Darley provided a dissenting opinion. See SA Legislative Review Committee (2014), above n 8, 47.

<sup>204</sup> Ibid 43. See also at 8. The situation in *DPP v Camplin* [1978] AC 780 was presented to the Committee as an example of this. See SA Legislative Review Committee (2014), above 8, 36 [6.2.5].

<sup>205</sup> *R v Lindsay* (2014) 119 SASR 320.

<sup>206</sup> SA Legislative Review Committee (2014), above n 8, 8.

notably the South Australian Court of Appeal decision in *Lindsay* (especially the view of Peek J),<sup>207</sup> accepted the view that in South Australia ‘it is highly unlikely that a non-violent homosexual advance will ever be sufficient, of itself, to establish a provocation defence.’<sup>208</sup> The Report, finalised prior to the hearing and determination of the High Court appeal in *Lindsay*, was based on the view that the common law had already addressed the gay panic issue and the ‘now settled common law position’ had been set out by the South Australian Court of Criminal Appeal.<sup>209</sup>

4.3.9 The Committee, based on the evidence presented to it, considered that the gay panic aspect of provocation no longer remained in light of changing social values. The Committee was satisfied that the law in this regard had already been remedied by the Court of Criminal Appeal and the Bill was therefore unnecessary and should not be supported. SALRI notes in passing that the Committee overlooked the fact the High Court could take a different view from the Court of Criminal Appeal. As it transpired, the High Court in *Lindsay* did take a different view and upheld the possibility of a homosexual advance constituting provocation in itself, its judgment going against the recent judicial trend to limit the application of the defence.<sup>210</sup>

4.3.10 The Committee accepted that it was unlikely that a sexual advance will ever be the only relevant matter to a provocation defence and that a complex evidential matrix will often apply<sup>211</sup> (reflecting evidence provided to the Committee).<sup>212</sup> The Committee found that ‘introducing provisions to limit the conduct which may be considered by a court as relevant to a provocation defence at trial will also provide for ineffective reform’.<sup>213</sup>

4.3.11 The Committee was unable to identify suitable options for reform of the common law of provocation and suggested that the partial defence should be retained in South Australia. It noted that, consistent with the view also reached by SALRI,<sup>214</sup> if any reform of provocation is to be pursued in the future, such reform should only take place in conjunction with a wholesale review of any mandatory sentencing laws that apply to persons convicted of murder.<sup>215</sup>

4.3.12 The High Court’s decision in *Lindsay*<sup>216</sup> (obviously binding on South Australian courts) contradicted a major rationale for the Committee’s recommendations and it became necessary for the Committee to reconsider the issue. On 15 May 2015, the Legislative Council in light of the High Court’s decision in *Lindsay* amid concerns that the High Court, contrary to the earlier view of the Legislative Review Committee, had in fact reopened the door to the gay panic defence, resolved the following: ‘That, as a matter of urgency, the Legislative Review Committee review its Report into the Partial Defence

<sup>207</sup> *R v Lindsay* (2014) 119 SASR 320, 380 [236].

<sup>208</sup> SA Legislative Review Committee (2014), above n 8, 6.

<sup>209</sup> South Australia, *Parliamentary Debates*, House of Assembly, 3 December 2014, 3158 (Ms Digance).

<sup>210</sup> Braun and Gray, above n 3, 92, 115.

<sup>211</sup> SA Legislative Review Committee (2014), above n 8, 7, 8.

<sup>212</sup> This theme was also strongly expressed to SALRI during its consultation. See SALRI Stage 1, above n 10, [5.6.1]–[5.6.10].

<sup>213</sup> SA Legislative Review Committee (2014), above n 8, 8. See also below [8.1.1]–[8.2.9]; SALRI, Stage 1, above n 10, 24–28 [4.2.1]–[4.2.18] for discussion of the victim blaming issue.

<sup>214</sup> SALRI, Stage 1, above, n 10, 67–69 [8.2.1]–[8.2.5]. See further below Parts 9 and 11.

<sup>215</sup> SA Legislative Review Committee (2014), above n 8, 9 Recommendation 2, 35 [6.2.3], 41–42; SA Legislative Review Committee (2017), above n 9, 31. SALRI concurs with this view which is why its Stage 2 Report has examined the current law and practices for sentencing homicide offenders.

<sup>216</sup> (2015) 255 CLR 272.

of Provocation tabled in the Legislative Council on 2 December 2014, in light of the recent High Court decision in *Lindsay v The Queen* [2015] HCA 16.<sup>217</sup>

4.3.13 The Committee subsequently issued an Interim Report on 8 March 2016 and resolved that it would not be prudent in the circumstances to make any findings or recommendations until the completion of Lindsay’s retrial for murder.<sup>218</sup> The Committee formed this view after taking into consideration the views of several witnesses who appeared before the Committee. The Bill had been brought for debate in the Legislative Council on 2 December 2015<sup>219</sup> but was defeated in light of both the pending retrial at that stage and the incomplete further review by the SA Legislative Review Committee.

4.3.14 Lindsay’s retrial concluded on 30 March 2016, and his second appeal against conviction for murder was dismissed by the South Australian Court of Criminal Appeal on 8 December 2016.<sup>220</sup> A further effort to appeal to the High Court was refused leave on 16 June 2017.<sup>221</sup>

## 4.4 Second Legislative Review Report

4.4.1 The second Legislative Review Committee review into provocation resumed after the conclusion of the *Lindsay* appeal process. The Committee received seven further submissions from the Law Society, the Bar Association, the ALRM, the DPP, the Equal Opportunity Commissioner, the Commissioner of Victims’ Rights and the Youth Affairs Council.<sup>222</sup> A number of issues were raised to the Committee.<sup>223</sup>

4.4.2 The Committee stated that the submissions and evidence it received were to the effect that the High Court’s 2015 judgment in relation to Lindsay’s first appeal did not change the basis of the provocation defence. The reason for the allowance of the appeal was considered to be in relation to a difference of opinion between the High Court and the Court of Criminal Appeal with respect to the interpretation of the facts of the case.<sup>224</sup> The Committee was unable to recommend further options for reform of the law, particularly the scope of other available defences to murder and manslaughter, without undertaking a wholesale review of sentencing options available for such offences.<sup>225</sup> The

<sup>217</sup> South Australia, *Parliamentary Debates*, Legislative Council, 13 May 2015, 703–705. See also at 705–706.

<sup>218</sup> South Australia, *Parliamentary Debates*, Legislative Council, 9 March 2016, 3302–3303. SALRI took a similar position.

<sup>219</sup> South Australia, *Parliamentary Debates*, Legislative Council, 2 December 2015, 2461–2466.

<sup>220</sup> *R v Lindsay* [2016] SASFC 129 (8 December 2016).

<sup>221</sup> *R v Lindsay* [2017] HCA Trans 137 (16 June 2017).

<sup>222</sup> The DPP, the Equal Opportunity Commissioner, the Commissioner of Victims’ Rights and the Youth Affairs Council raised that provocation should be abolished. The ALRM, the Bar Association and the Law Society supported retention of the defence. The Law Society of South Australia, above n 63, in its submission to SALRI of 22 March 2018 repeated its preferred position that provocation should be retained but accepted that, should it be abolished, greater sentencing flexibility is necessary.

<sup>223</sup> These issues included mandatory sentencing implications, diminished responsibility and the situation of offenders with an intellectual disability and domestic violence. See SA Legislative Review Committee (2017), above n 9, 31–32.

<sup>224</sup> *Ibid* 7–8. SALRI does not wholly concur with this assessment. It is clear that, whilst the Court of Criminal Appeal doubted that in light of changing social values as a matter of law a gay sexual advance was still capable of amounting to provocation, the High Court held that it could be. See also SALRI, Stage 1, above n 10, 31–34 [5.3.1]–[5.3.115].

<sup>225</sup> SA Legislative Review Committee (2017), above n 9, 8, 10 Recommendation 1.

Committee adhered to its view that the terms of reference for the Initial Inquiry did not provide for the undertaking of such a review.

4.4.3 The Committee was of the view that the High Court’s 2015 judgment in *Lindsay* did not change the basis of the common law in relation to provocation. As a result, the Committee resolved to support the recommendations and findings set out in its first Report of 2 December 2014. The Committee accepted that that the defence remains controversial, with a number of submissions calling for its abolition, and others suggesting options for reform. However, the Committee considered that in the circumstances it was unable to change its position in relation to the defence and Ms Franks’ original Bill. The Committee condemned all forms of unlawful violence, especially homophobic attacks, but recommended that the common law basis of the partial defence of provocation should remain unchanged.<sup>226</sup>

4.4.4 The Committee stated that any reform must result from a wholesale review of the law of murder and manslaughter in South Australia, in conjunction with the mandatory sentencing provisions that apply to murder. The Committee remained of the view that the terms of reference for its initial inquiry into the provocation defence did not extend to reviewing the sentencing options for murder and manslaughter.<sup>227</sup>

4.4.5 The Committee noted SALRI’s view that the availability of the provocation defence in relation to an unwanted gay advance may well be discriminatory on the grounds of sexual orientation (and inconsistent with the *Sex Discrimination Act 1984* (Cth)).<sup>228</sup> The Committee respectfully disagreed with this view.<sup>229</sup> The Committee argued that the requirement for the entire evidential matrix (that is both the unwanted sexual advance and its wider context) ‘to be assessed for the purposes of the relevance of a provocation defence at trial appeared to temper any discriminatory aspect of the defence’.<sup>230</sup> The Committee also noted a submission which considered that it was ‘almost certain’ that a heterosexual advance was capable of providing a basis for a provocation defence (although it was also noted that the defence of provocation has not been applied to a heterosexual advance in Australia). The need to address the issue of discrimination therefore did not influence the Committee’s deliberations.<sup>231</sup>

4.4.6 Though it is not integral to SALRI’s ultimate conclusions (as the problems of provocation extend well beyond the gay panic aspect), SALRI respectfully disagrees with the Committee’s finding on this point. In practice, only a non-violent sexual advance by a man to another man will be capable of amounting to provocation. The simple fact is, as the Committee accepts, no case has ever been identified when a non-violent sexual advance by a man to a woman was held to amount to provocation. The implications of this would be profound. ‘If every woman killed every man who made unwanted physical advances toward them, there would be a lot of dead men around.’<sup>232</sup> In *Green*, Kirby J commented:

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<sup>226</sup> Ibid 10 Recommendation 1.

<sup>227</sup> Ibid 5, 10 Recommendation 1, 31.

<sup>228</sup> Ibid 8–9, 20–21, 26–27, 33.

<sup>229</sup> Ibid 8.

<sup>230</sup> Ibid. See also at 33.

<sup>231</sup> Ibid 8–9. See also at 33.

<sup>232</sup> K Adams quoted in Gary Comstock, ‘Dismantling the Homosexual Panic Defence’ (1992) 2 *Law and Sexuality* 81, 100. SALRI has found no cases in its research of women claiming provocation on the basis of an unwanted sexual advance from a man or vice versa.

If every woman who was the subject of a “gentle”, “non-aggressive” although persistent sexual advance, in a comparable situation to that described in the evidence in this case could respond with brutal violence rising to an intention to kill or inflict grievous bodily harm on the male importuning her, and then claim provocation after a homicide, the law of provocation would be sorely tested and undesirably extended.<sup>233</sup>

4.4.7 SALRI has proceeded on the premise that, as have most parties in its consultation, *Lindsay* provides that a homosexual advance (even though in practice it is likely to be part of a wider factual matrix)<sup>234</sup> can still amount to provocation under the present South Australian law. SALRI respectfully differs from the suggestion of the Legislative Review Committee that the gay panic defence effectively no longer exists.<sup>235</sup> A defendant remains entitled, in light of *Lindsay* (and *Green*), to claim that a non-violent homosexual advance amounts to provocation and for the defence to be left to the jury on that basis. SALRI adheres to its consistent view that it is objectionable and discriminatory that a homosexual advance is still capable of amounting to provocation.

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<sup>233</sup> *Green v R* (1997) 191 CLR 334, 415–416.

<sup>234</sup> See also SALRI, Stage 1, above n 10, 40–43 [5.6.1]–[5.6.10], 64 [7.4.1]–[7.4.3].

<sup>235</sup> See SA Legislative Review Committee (2017), above n 9, 6: ‘in light of the judgment [in *Lindsay*] by the legal community that it is highly unlikely that a non-violent homosexual advance will ever be sufficient, of itself, to establish a provocation defence. This view is accepted by the Committee.’



## Part 5 – Criticisms of the Provocation Defence

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### 5.1 An Overview of the Criticisms of Provocation

5.1.1 There are many criticisms of the law in relation to provocation. These criticisms include the gay panic aspect, its perceived gender bias and its victim blaming aspect (which will be separately discussed further below).<sup>236</sup> Lord Hoffman has noted the ‘serious logical and moral flaws’ of the whole concept of provocation.<sup>237</sup> The Model Criminal Code Officers Committee noted the ‘plethora of serious defects’ about the whole defence.<sup>238</sup> Many academics<sup>239</sup> and law reform agencies<sup>240</sup> (though others disagree)<sup>241</sup> have called for the abolition of the partial defence. Hemming describes provocation as ‘a totally flawed defence that has no place at all in any Australian jurisdiction irrespective of the particular sentencing regime’.<sup>242</sup>

5.1.2 SALRI has previously set out the various criticisms of provocation in its Stage 1 Report. SALRI has carefully considered the various criticisms of the present law and has taken them into account in its examination and in identifying any alternative or preferred models. SALRI notes the compelling nature of the many criticisms of provocation and concludes that these criticisms are such that ultimately no effective alternative model can be identified and it should be abolished as a partial defence.

5.1.3 The underlying rationale of the ordinary person test is viewed as flawed. It is asserted to be at odds with reality as ordinary people, no matter the provocation (especially in the modern climate) do not resort to killing. As one party submitted to the NSW Select Committee, ‘ordinary people, when affronted, do not resort to lethal violence ... it is clear the ordinary person does not kill. Only the most extraordinary person does.’<sup>243</sup> The New Zealand Law Commission expressed a similar view and stated that provocation is ‘conceptually flawed’ in that the rationale of the defence ‘assumes that the ordinary person, faced with a severely grave provocation, will in consequence resort to homicidal violence, when in fact it is arguable that only the most extraordinary person does this.’<sup>244</sup> Andrew Hemming raises how 21<sup>st</sup> century society should respond to lethal violence and argues ‘there is no justification or excuse for an intentional killing being downgraded to manslaughter, as the ordinary person, whatever the gravity

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<sup>236</sup> See further below [6.1.1]–[6.1.10] (gay panic), [7.1.1]–[7.1.7] (gender bias) and [81.11.]–[8.1.9] (victim blaming). See also SALRI, Stage 1, above n 10, 24–28 [4.2.1]–[4.2.18] (victim blaming), 37–40 [5.5.1]–[5.5.14] (gay panic) and 44–49 [6.1.1]–[6.1.22] (gender bias).

<sup>237</sup> *R v Smith (Morgan)* [2001] 1 AC 146, 159. See also *R v Clinton* [2012] 3 WLR 515, 517–518 [1].

<sup>238</sup> MCCOC (Ch 5: DP), above n 22, 105.

<sup>239</sup> See above n 23.

<sup>240</sup> See, for example, New Zealand Crimes Consultative Committee, *Crimes Bill 1989: Report of the Crimes Consultative Committee* (1991); NZLC (2001), above n 22, 41–42 [114]–[120]; NZLC (2007), above n 16, 13; Report of the Crimes Consultative Committee (1991) 45–46; MCCOC (Ch 5: DP), above n 22, 105; VLRC (2004), above n 15, xx–xxi, xxvii–xxviii, 55–58 [2.92]–[2.107]; LRCWA, above n 22, 218–223. See also above n 22.

<sup>241</sup> See, for example, Law Reform Commission of Victoria, above n 97, 71 [160] (though only a majority of the Commissioners recommended retention); Law Reform Commission of Ireland, *Homicide: The Plea of Provocation*, Consultation Paper No 27, (2003) [6.44]; Law Commission (England and Wales), *Murder, Manslaughter and Infanticide*, above n 148, 78–79 [5.11]; NSWLRC (R 83, 1997), above n 111, 20 Rec 1; QLRC, above n 27, 471 [21.36], 474 [21.48]–[21.49], 500 Rec 21-1 (though the QLRC noted had the issue of the mandatory sentence of life imprisonment for murder been open, it may well have reached a different conclusion: at 497 [21.164]–[21.166]).

<sup>242</sup> Hemming, above n 3, 2.

<sup>243</sup> NSW Select Committee, above n 15, 59 [4.133].

<sup>244</sup> NZLC (2007), above n 16, 42 [79].

of the alleged provocation, does not kill in response to provocative conduct. Such a statement is grounded both in moral principle and public policy.<sup>245</sup> In brief, ‘there is nothing reasonable about killing out of anger.’<sup>246</sup>

5.1.4 The whole notion that a person can lose self-control and kill someone is itself medically and scientifically dubious. The NSW Select Committee ‘noted the comments of various participants and academics that there is little or no medical or scientific basis for the “condition” of having lost one’s self-control.’<sup>247</sup> The Committee observed that ‘the phrase “loss of self-control” fails to acknowledge the reality of domestic and family violence.’<sup>248</sup> It is also dubious whether there is, in reality, very much difference in the psychological state of someone who has ‘lost control’ and an extremely angry person, for example.<sup>249</sup>

5.1.5 SALRI finds these views compelling. It shares the view of the VLRC in 2004: ‘Historically, an angry response to a provocation might have been excusable, but in the 21st century, the Victorian community has a right to expect people will control their behaviour, even when angry or emotionally upset.’<sup>250</sup> As a basic principle of policy, society in the 21<sup>st</sup> century should not accept or countenance the idea that even an angry person might be partly excused in killing someone.

## 5.2 Complexity of the Law

5.2.1 A further criticism of provocation is the complexity, if not incoherence, of the current law as set out by SALRI in some detail in its Stage 1 Report.<sup>251</sup> As described by the VLRC, ‘[t]he current test for provocation is criticised as being conceptually confused, complex and difficult for juries to understand and apply.’<sup>252</sup> The twofold objective and subjective limbs of the test for provocation<sup>253</sup> occasion particular difficulty as ‘highly complex and artificial to apply’.<sup>254</sup> The provocation defence is complex and may well be misapplied by judges and juries, a real concern in the context of murder, the most serious crime in the criminal law. One academic told the NSW Select Committee of the current

<sup>245</sup> Hemming above n 3, 18.

<sup>246</sup> Nicole Matlock, ‘Reasonable Rage: The Problem with Stereotypes in Provocation’ (2014) 6 *Washington University Jurisprudence Review* 371.

<sup>247</sup> NSW Select Committee, above n 15, 63, [4.153]. See also NZLC (2007), above n 22, 45 [88].

<sup>248</sup> NSW Select Committee, above n 15, 64 [4.164]. See also at 54 [4.110] quoting Women’s Legal Services NSW, Submission 37, 14–15.

<sup>249</sup> Indeed, the scientific substance of the notion of a killing under a total ‘loss of control’ is widely doubted. See NSW Select Committee, above n 15, 53–54 [4.101]–[4.106], 63 [4.153], 193 [9.16]. ‘Many commentators, noting the psychological literature, have poured scorn on this concept of loss of control, concluding either that there is insufficient evidence for its existence, or else that the evidence in fact supports the notion that there is always choice, an election to act in a certain way. The law has continued to ignore the science, preferring instead to rely on “common sense”’: at 53 [4.106].

<sup>250</sup> VLRC (2004), above n 15, xxi.

<sup>251</sup> SALRI, Stage 1, above n 10, 19–22 [4.1.4]–[4.1.13].

<sup>252</sup> VLRC (2004), above n 15, 34 [2.34]. See also at 34–35 [2.34]–[2.37], 56–57 [2.98]; Fitz-Gibbon, *Homicide Law Reform, Gender and the Provocation Defence*, above n 96, 214–221.

<sup>253</sup> See SALRI, Stage 1, above n 10, 13–14 [3.2.3]–[3.3.5] where the elements of provocation are set out.

<sup>254</sup> Julia Tolmie, ‘Is the Partial Defence an Endangered Defence? Recent Proposals to Abolish Provocation’ [2005] *New Zealand Law Review* 25, 50. See also Michael Detmold, ‘Provocation to Murder: Sovereignty and Multiculture’ (1997) 19 *Sydney Law Review* 5; Bernadette McSherry, ‘Afterword: Options for the Reform of Provocation, Automatism and Mental Impairment’ (2005) 12(1) *Psychiatry, Psychology and Law* 44, 45; NSW Select Committee, above n 15, 57–59 [4.125]–[4.131], 60–61 [4.135]–[4.142].

law, '[i]t is a nightmare. It is an absolute illogical, nonsensical nightmare, and judges have actually admitted it is a nightmare.'<sup>255</sup> The New Zealand Law Commission stated that it is an 'impossible task' to expect juries to properly understand and apply the law in this area.<sup>256</sup>

5.2.2 Indeed, both judges and juries struggle with the current law.<sup>257</sup> One submission to the NSW Select Committee relayed the comments of Thomas J of the New Zealand Court of Appeal regarding:

the glazed look in the jurors' eyes as, immediately after instructing them that it is open to them to have regard to the accused's alleged characteristic in assessing the gravity of the provocation, they are then advised that they must revert to the test of the ordinary person and disregard that characteristic when determining the sufficiency of the accused's loss of self-control.<sup>258</sup>

5.2.3 This view is not universally shared. Mr Caldicott, an experienced criminal lawyer, for example, previously told SALRI that a properly presented and instructed jury can understand and apply the current South Australian law as to provocation and complex criminal trials are far from unknown.<sup>259</sup> The Queensland Bar Association asserted that 'the two-tiered test, as it is applied to the partial defence of provocation, is a sensible, understandable and appropriate test ... It is a narrow and stringent test which has clearly been applied conscientiously by Queensland juries'.<sup>260</sup> A similar view was presented to the NSW Select Committee by Dina Yehia SC, representing the NSW Public Defender's Office, who also disputed the suggestion that juries do not understand the test for provocation and referred to other areas of law in which juries are subjected to complicated directions or complex matters of fact. She argued that 'it is for judges and for practitioners like me to make sure that directions and evidence is presented in a way that is clear and that is simple ... juries do represent community values'.<sup>261</sup> The SA Legislative Review Committee was similarly 'unconvinced of the argument juries lack the ability to deal with the complexities of the provocation defence'.<sup>262</sup> The Committee 'expressed its support for the capacity of juries to be able to comprehend, and to make determinations in relation to, the provocation defence'.<sup>263</sup>

5.2.4 SALRI is unconvinced of this argument. The reference to the glazed eyes of jurors of Thomas J remains telling. SALRI notes that the current law of provocation in South Australia and the application of its objective and subjective limbs is neither simple nor straightforward. The fact that *Lindsay* ultimately gave rise to three trials, two appeals to the Court of Criminal Appeal and one successful appeal and one unsuccessful appeal to the High Court illustrates the fraught and complex

<sup>255</sup> Graeme Coss, Evidence, 28 August 2012, 71, quoted by NSW Select Committee, above n 15, 60 [4.138]. See also Hemming, above n 3, 34–35.

<sup>256</sup> NZLC (2007), above n 16, 41 [75].

<sup>257</sup> *R v Mankotia* (2001) 120 A Crim R 492, 495 [18]–[19].

<sup>258</sup> *R v Rongonui* [2000] 2 NZLR 385, 446, quoted by NSW Select Committee, above n 15, 59 [4.131]. See also *R v Mankotia* (2001) A Crim R 482, 495 [19].

<sup>259</sup> See also Law Society of South Australia, above n 118, 2.

<sup>260</sup> QLRC, above n 27, 410–411 [20.42]. See also Law Society of South Australia, Submission to the Hon Tammy Franks (26 June 2013) 3 <[https://www.lawsocietyysa.asn.au/submissions/130626\\_Abolition\\_of\\_the\\_Defence\\_of\\_Provocation\\_in\\_South\\_Australia.pdf](https://www.lawsocietyysa.asn.au/submissions/130626_Abolition_of_the_Defence_of_Provocation_in_South_Australia.pdf)>.

<sup>261</sup> Dina Yehia SC, Evidence, 28 August 2012 74, quoted by NSW Select Committee, above n 15, 62 [4.146]. The Privy Council in *Attorney General for Jersey v Holley* [2005] 2 AC 580, 594 [26] similarly viewed the difficulty faced by juries in relation to provocation as overstated and more an issue of 'presentation' than substance.

<sup>262</sup> SA Legislative Review Committee (2014), above n 8, 43.

<sup>263</sup> SA Legislative Review Committee (2017), above n 9, 31.

nature of the current law. SALRI considers that it is undesirable that a law such as provocation, especially in a climate where there is already extensive concern over the length and complexity (if not incoherence) of jury directions,<sup>264</sup> should be so convoluted. SALRI reiterates<sup>265</sup> that it is important that the applicable law should be as clear and comprehensible as possible to both judges and juries. The current law is neither.

5.2.5 This theme is integral to any reform of the present law. SALRI notes the recent comments of the Minister, the Hon Kyam Maher, of the need for clarity and accessibility in relation to the law of sentencing<sup>266</sup> (which equally applies to the law of provocation). Any replacement model must ensure that the relevant law is as clear and comprehensible as possible to judges and juries. SALRI is supported in its view to recommend abolition of the partial defence of provocation on the basis that abolition will make the law simpler and clearer.<sup>267</sup>

### 5.3 Fair Label and Jury's Role

5.3.1 An argument that is often presented in support of retaining a partial defence of provocation is the 'fair label' issue. If provocation were to be abolished, those offenders who may have otherwise been partially excused by provocation will likely be convicted and sentenced for the offence of murder instead (although it is acknowledged that they may also have been convicted for manslaughter on another basis). It has been argued that in some contexts of lethal violence it is unfair for such offenders to be 'labelled' as murderers, having killed as a result of provocation, as particular stigma attaches to the offence of murder.<sup>268</sup> Professor Andrew Ashworth, for example, asserts that 'the label "murder"

<sup>264</sup> See, for example, Fitz-Gibbon, *Homicide Law Reform, Gender and the Provocation Defence*, above n 96, 232–234; VLRC, *Jury Directions: Final Report* (2009); Lord Justice Moses, 'Summing Down the Summing-Up' (Speech delivered at the Annual Law Reform Lecture, 23 November 2010); Justice Mark Weinberg, 'The Criminal Law – A "Mildly Vituperative" Critique' (2011) 35 *Melbourne University Law Review* 1177; NSWLRC, *Jury Directions*, Report 136 (November 2012); Criminal Law Review, *Jury Directions: A Jury-Centric Approach* (Department of Justice and Regulation, March 2015).

<sup>265</sup> See also SALRI, Stage 1, above n 10, Rec 2.

<sup>266</sup> 'Principles of legislation can be stated by saying the criminal law and its close relative, sentencing, should be easy to find, easy to understand, cheap to buy and democratically made and amended. Being easy to find means that the basic rules can be published in a book. The public can buy the book and read it. A good and simple commentary will soon become possible. But more than just that is involved. Society expects all of its citizens to know the law. How can we expect the citizen (and the multitude of commentators in the media) to know the law, let alone try to understand it, debate it and contribute to its change or defence if it is scattered all over the statute book and hidden in hundreds of volumes of law reports? The criminal law should be accessible so that it is written in language that is capable of being understood by citizens of reasonable literacy. That means that it must address not only an audience of lawyers, but also an audience of average citizens ... The system of criminal law and sentencing is arguably the most direct expression of the relationship between the State and its citizens. It is right as a matter of constitutional principle that the relationship should be clearly stated in terms of which have been deliberated upon by a democratically elected legislature': South Australia, *Parliamentary Debates*, Legislative Council, 2 March 2017, 6253 (Hon K Maher).

<sup>267</sup> The problem of undue complexity is not confined to provocation. The current law in South Australia for sentencing murder is 'a complicated process': *R v Narayan* [2011] SASCF 61, [48]. Patrick Leader-Elliott has observed that attempting to interpret the law surrounding the mandatory minimum period for murder is 'clarifying the incomprehensible' (Patrick Leader-Elliott, 'Clarifying the Incomprehensible: South Australia's Mandatory Minimum Non-Parole Period Scheme' (2012) 36 *Criminal Law Journal* 216, 216) and that the current law will continue to 'complicate the already difficult task of sentencing to the point of utter incomprehensibility as a matter of logic, law and, most importantly, justice': at 232. See further below [11.6.1]–[11.6.9].

<sup>268</sup> See, for example, Thomas Crofts and Arlie Loughnan, 'Provocation; The Good, The Bad and the Ugly' (2013) 37 *Criminal Law Journal* 23, 27–30, 41; NSWLRC (R 83, 1997), above n 111, 26 [2.36], 27 [2.38]; NSW Select

should be reserved for the most heinous of killings, and most people would accept that provoked killings are not in this group'.<sup>269</sup> Mr Caldicott previously noted to SALRI that offenders should not be labelled as murderers unless their conduct truly deserves that label.<sup>270</sup> The Law Society of South Australia argued to the SA Legislative Review Committee that it may be 'unfair and unjust' to label an offender as guilty of murder where they have acted under provocation and there is an 'infinite' number of situations where the culpability of the offender is viewed as less than murder.<sup>271</sup>

5.3.2 It is argued that to abolish the partial defence in favour of dealing with provocation at sentencing, fails to acknowledge the importance of offence labels in distinguishing between the differing levels of culpability of offenders who commit manslaughter as opposed to murder.<sup>272</sup> It is said that the partial defence allows for suitable recognition of an offender's lesser culpability.<sup>273</sup>

5.3.3 However, the 'fair label' view in favour of provocation is often challenged. Other commentators highlight the presence of an intent to kill in cases where provocation is successfully raised and argue that a conviction for murder more accurately reflects the nature and severity of the lethal violence perpetrated.<sup>274</sup> The importance of recognising the intent present in a killing under provocation has been highlighted by law reform bodies and noted in support of abolition of the partial defence of provocation.<sup>275</sup> A provoked murder remains murder. As Jennifer Yule argues: 'Murder should be labelled murder. If there is an intention to kill someone then it should be named murder. Why should the loss of self-control be the basis of a defence? ... Violence should not be condoned. Self-control should be encouraged.'<sup>276</sup>

5.3.4 It is often argued that the issue of any provocative conduct from a deceased should be left to the court to address in mitigation on sentence. This argument is based on the fact that as provocation is dealt with purely as a sentencing factor in all other crimes and sufficient flexibility in sentencing practices should provide adequate recognition of the differing levels of culpability.<sup>277</sup>

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Committee, above n 15, 69 [5.10]–[5.11], 73 [5.30], 87 [5.97]; SA Legislative Review Committee (2014), above n 8, 7, 35–36 [6.2.4].

<sup>269</sup> Andrew Ashworth, *Principles of Criminal Law* (4<sup>th</sup> ed) (Oxford University Press, 2003) 278.

<sup>270</sup> See also Law Society of South Australia, above n 260, [7]–[9]; Law Society of South Australia, Submission to the *Inquiry into the Partial Defence of Provocation* (2 June 2015) 1–2, <[https://www.lawsocietysa.asn.au/pdf/Submissions/020615\\_Inquiry\\_into\\_the\\_Partial\\_Defence\\_of\\_Provocation.pdf](https://www.lawsocietysa.asn.au/pdf/Submissions/020615_Inquiry_into_the_Partial_Defence_of_Provocation.pdf)>.

<sup>271</sup> SA Legislative Review Committee (2014), above n 8, 37 [6.2.6]. See also SA Legislative Review Committee (2017), above n 9, 31; Law Society of South Australia, Submission to SA Legislative Review Committee (25 June 2014) <[https://www.lawsocietysa.asn.au/submissions/140625\\_Inquiry\\_into\\_the\\_Criminal\\_Law\\_Consolidation\\_%28Provocation%29\\_Amendment\\_Bill\\_2013.pdf](https://www.lawsocietysa.asn.au/submissions/140625_Inquiry_into_the_Criminal_Law_Consolidation_%28Provocation%29_Amendment_Bill_2013.pdf)>.

<sup>272</sup> See, for example, Crofts and Loughnan, above n 268, 27–30, 41; NSW Select Committee, above n 15, 69 [5.10]; SA Legislative Review Committee (2014), above n 8, 35–36 [6.2.4]; Crofts and Tyson, above n 75, 873–874.

<sup>273</sup> See, for example, Crofts and Tyson, above n 75, 873–874; NSWLRC (R 83, 1997), above n 111, 26 [2.36]; NSW Select Committee, above n 15, 68 [5.8], 69 [5.10]–[5.11], [5.12]–[5.13].

<sup>274</sup> Jennifer Yule, 'Current Issues with Regards to the Defences of Provocation and Self-Defence in the Criminal Law Context', *Proceedings: Australasian Law Teachers Association* (September 2007, Perth). See also Fitz-Gibbon, *Homicide Law Reform, Gender and the Provocation Defence*, above n 96, 250–252.

<sup>275</sup> See, for example, Law Reform Commission of Canada, *Homicide*, Working Paper 33 (1984) 74; LRCWA, above n 22, 218–219; QLRC, above n 27, 469–470 [21.26]–[21.31]; VLRC (2004), above n 15, 56 [2.97].

<sup>276</sup> Yule, above n 274, 17–18.

<sup>277</sup> See, for example, Horder, above n 23, 157; Fitzgibbon, 'Homicide Reform in NSW', above n 27, 771, 791–807, 814–815; VLRC (2004), above n 15, 33 [2.31]–[2.35], 55–56 [2.92]–[2.94], 58 Rec 1.

5.3.5 Various law reform agencies have expressed this view.<sup>278</sup> The Model Criminal Code Officers’ Committee argued that in place of the partial defence of provocation, ‘with all its doctrinal defects’, the normal sentencing process offers a flexible means to accommodate the differences in culpability between offenders. ‘Some hot blooded killers are morally as culpable as the worst of murderers. Some are far less culpable. The differences can be reflected as they are at present, in the severity of the punishment.’<sup>279</sup> The Law Reform Commission of Western Australia (LRCWA) reached a similar conclusion.<sup>280</sup>

5.3.6 The VLRC expressed a similar view. It explained its reasoning as follows:

Generally, the label “murder” applies to those who kill intentionally or who intentionally cause serious injury which results in death, while the label “manslaughter” covers unintentional killings. The partial defence of provocation is the main exception to this principle. Our view is that where the accused has an intention to kill or to cause serious injury, the accused should be labelled a murderer. The fact that a person kills because they have lost self-control (as in the case of provocation) or because they are suffering from a mental condition such as depression, which does not amount to a mental impairment,<sup>281</sup> is not sufficient to distinguish them from other intentional killers.<sup>282</sup>

5.3.7 The VLRC concluded that ‘the partial defence of provocation should be abolished [and] relevant circumstances of the offence, including provocation, should be taken into account at sentencing as they currently are for other offences.’<sup>283</sup>

5.3.8 The NSW DPP, Mr Babb QC, stated to the NSW Select Committee that where an offender intentionally kills in circumstances where self-defence is not available, the offence is appropriately dealt with as murder and not manslaughter.<sup>284</sup> Mr Babb explained that provocation is essentially a factor that may impact upon the offender’s culpability, and such factors are properly considered by the sentencing judge (as they are in sentencing for all offences other than murder).<sup>285</sup> The South Australian DPP, Mr Kimber SC, similarly told the SA Legislative Review Committee there were ‘very good arguments for getting rid of provocation’, noting ‘it often gets left in circumstances, in my opinion, where what you’re really talking about is that it’s just a motive for the killing that should be taken into account in sentencing.’<sup>286</sup>

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<sup>278</sup> MCCOC (Ch 5: DP), above n 22, 107; NZLC (2007), above n 16, 13, 77 [183]; VLRC (2004), above n 15, 55–56 [2.92]–[2.94], 57 [2.100], 58 Rec 1.

<sup>279</sup> MCCOC (Ch 5: DP), above n 22, 105.

<sup>280</sup> LRCWA, above n 22, 221–222.

<sup>281</sup> See below Part 12.

<sup>282</sup> VLRC (2004), above n 15, 9 [1.21].

<sup>283</sup> Ibid 58 Rec 1.

<sup>284</sup> NSW Select Committee, above n 15, 69 [5.12].

<sup>285</sup> Ibid 69 [5.13]. See ‘Gay Rights Groups want “Gay Panic” Murder Defence to be Abolished in South Australia’, *The Advertiser* (online), 25 June 2016, <<http://www.adelaidenow.com.au/news/south-australia/gay-rights-groups-want-gay-panic-murder-defence-to-be-abolished-in-south-australia/news-story/f561e86f121d2fc039e79316a2ec56e4>>.

<sup>286</sup> ‘Gay rights groups want “gay panic” murder defence to be abolished in South Australia’, above n 285.

5.3.9 It is sometimes said that to abolish provocation would be to usurp or undermine the role of the jury. Supporters of provocation argue that abolition of the partial defence amounts to a lack of trust in the jury system.<sup>287</sup> The NSW Law Reform Commission (NSWLRC), for example, argued:

While the defence of provocation is no longer necessary for the purpose of providing judges with a discretion in sentencing for unlawful homicide, the defence remains vitally important in terms of gaining community acceptance of reduced sentences for manslaughter rather than murder. The defence of provocation remains necessary as a means of involving the community, as represented by the jury, in the process of determining the degree of an accused's culpability according to his or her loss of self-control in response to provocation.<sup>288</sup>

5.3.10 It is asserted that the partial defence and its application by a jury plays an important role in involving the community in dealing with ordinary people who find themselves in extreme circumstances.<sup>289</sup>

5.3.11 The VLRC was not convinced with this argument. It accepted that the abolition of the partial defence of provocation will require judges to make factual findings about whether the offender was provoked when they are determining the sentence which should be imposed. However, sentencing already requires judges to consider many factual issues other than provocation.<sup>290</sup> As the NZLC commented, 'the task of crafting penalty to blameworthiness has long been the daily diet of judges'.<sup>291</sup> Dealing with provocation as an issue to be taken into account in sentencing would ensure the fact that the killing occurred as the result of the offender's loss of self-control could be weighed against other matters which also affected the offender's culpability.<sup>292</sup>

5.3.12 Courts already consider the issue of provocation in sentencing for all crimes other than murder. As the LRCWA argues: 'In any event, there is no reason why provocation as a mitigating factor for murder should be singled out as one issue requiring community input via the jury.'<sup>293</sup>

5.3.13 SALRI is unpersuaded by the arguments raising fair labelling or recognising the role of the jury. The abolition of the partial defence of provocation does not undermine or usurp the role of the jury as its role remains to determine the defendant's guilt or innocence. It is artificial and unnecessary to require the community's input as to the presence of provocation only for the crime of murder through a jury's verdict. SALRI also notes that a provoked intentional killing remains murder. 'Provocation is an anomaly in the law'<sup>294</sup> in that provocation does not operate as a defence or partial defence to any other crime in South Australia. For all offences other than murder, provocation is dealt with as an issue by the court in sentence. SALRI considers that it is difficult to see why murder should be treated differently.

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<sup>287</sup> Hemming, above n 3, 39.

<sup>288</sup> NSWLRC (R 83, 1997), above n 111, 25 [2.33]. See also Crofts and Loughnan, above n 268, 29.

<sup>289</sup> NSWLRC (R 83, 1997), above n 111, 27 [2.38]. NSW Select Committee, above n 15, 4 [1.21], quoting Submission 14, James Trevallion, 2. See also at 4 [1.22], quoting Submission 33, Winston Terracini QC, 3.

<sup>290</sup> VLRC (2004), above n 15, 11 [1.27].

<sup>291</sup> NZLC (2001), above n 22, 41.

<sup>292</sup> VLRC (2004) above n 15, 11 [1.27].

<sup>293</sup> LRCWA, above n 22, 217.

<sup>294</sup> VLRC (2004), above n 15, 33 [2.31].

5.3.14 SALRI considers that the ‘fair label’ or the level of the offender’s culpability argument is linked with the vital question of mandatory sentencing for murder in South Australia and is better dealt with in the sentencing context. SALRI notes that dealing with provocation at sentence is a transparent and accountable process and not the opaque finding of a jury. The parties can make submissions and the court will have to deliver a written finding on the nature of the provocation and its relevance or otherwise in sentence. There is the right of appeal to both parties. SALRI considers that the partial defence of provocation should be abolished in South Australia and the relevant circumstances of the offence, including provocation and any mental illness, cognitive impairment or intellectual disability falling short of a complete defence, should be taken into account at sentencing as they currently are for other offences.<sup>295</sup>

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<sup>295</sup> See below Parts 11 and 12.



## Part 6 – The Homosexual Advance Defence

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### 6.1 Overview

6.1.1 The existence, rationale and operation of the homosexual advance aspect of provocation is highly controversial.<sup>296</sup> The much-criticised decisions of the High Court in *Green* and *Lindsay* are widely (though not universally)<sup>297</sup> perceived to have held that the gay panic aspect remains part of the present law in those jurisdictions (now only South Australia) that retain the common law model of provocation. The gay panic defence and its retention in the criminal law have been strongly criticised to SALRI by almost all interested parties and individuals during its consultation process (reflecting the wider research) as objectionable and discriminatory. The notion that a person's sexual orientation can constitute a prima facie basis for another person to be provoked to such a degree that they should no longer be legally culpable for murder, was strongly contested by many to SALRI in consultation (consistent with wider research) as contrary to modern standards of morality and human rights.

6.1.2 The existence, rationale and operation of the homosexual advance defence has also been the subject of much academic criticism.<sup>298</sup> In any jurisdiction such as South Australia where the homosexual advance defence lingers, 'the law remains complicit in the argument that the use of fatal violence against gay men is somehow excusable, certainly that it is not so reprehensible as to be labelled as 'murder', and that it should be punished less severely.'<sup>299</sup> Such a law is 'outdated, prejudicial and biased and thus has no place in modern society'.<sup>300</sup> As the Hon Mark Parnell MLC observes, 'South Australia remains the only jurisdiction in Australia to still have this defence available. This is an embarrassment to South Australia.'<sup>301</sup>

6.1.3 The continued existence of this aspect of provocation is also at odds with modern attitudes to homosexuality<sup>302</sup> (especially now that same sex marriage is recognised in Australia). As the Hon Tammy Franks MLC, drawing attention to the tragic death of Dr George Duncan in 1972, observed in 2013:

There is no doubt, however, that four decades on our attitudes as a society have changed, and attitudes in this place have changed. Then why is it that, four decades on and so many years after the act of homosexuality is no longer deemed illegal, the gay panic defence remains an option for a man who murders another man this state?<sup>303</sup>

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<sup>296</sup> See Blore, above n 3; Braun and Gray, above n 3; NSW Select Committee, above n 15, 97–99, [6.47]–[6.58].

<sup>297</sup> There is an argument that both *Green* and *Lindsay* are explicable by their wider facts and have little to do with gay panic or homophobia. See SALRI, Stage 1, above n 10, 31 n 197, 34 n 225, See also above n 185, n 192.

<sup>298</sup> See, for example, Howe, above n 3; De Pasquale, above n 3; Golder, above n 130; David Mack, "But Words Can Never Hurt Me": Untangling and Reforming Queensland's Homosexual Advance Defence' (2013) 35 *Sydney Law Review* 167, 167–168, 178–181, 185–186; Elisabeth McDonald, 'No Straight Answer: Homophobia as Both an Aggravating and Mitigating Factor in New Zealand Homicide Cases' (2006) 37 *Victoria University of Wellington Law Review* 223, 231–238, 247–248; Jeff Sewell, "I just bashed somebody up. Don't worry about it Mum, he's only a Poof": The "Homosexual Advance Defence" and Discursive Constructions of the "Gay" Victim' (2001) 5 *Southern Cross University Law Review* 47.

<sup>299</sup> Blore, above n 3, 38–39.

<sup>300</sup> Braun and Gray, above n 3, 92,

<sup>301</sup> South Australia, *Parliamentary Debates*, Legislative Council, 18 October 2017, 7958.

<sup>302</sup> See, for example, Braun and Gray, above n 3, 93–96, 103–105; *Green v R* (1997) 191 CLR 334, 415–416 (Kirby J).

<sup>303</sup> South Australia, *Parliamentary Debates*, Legislative Council, 1 May 2013, 3807.

6.1.4 SALRI reiterates its consistent view that the gay panic defence of provocation discriminates on the basis of sexual orientation. Implicit in the defence is the notion that being subjected to an unwanted homosexual advance is inherently degrading to the person who is sexually propositioned. This aspect of provocation accepts that being the subject of an unwanted homosexual advance is so degrading or insulting that an ‘ordinary’ person may be capable of losing control and killing in murderous rage.

6.1.5 This reasoning is simplistic and offensive. As stated by the Australian Human Rights Commission, the defence effectively sanctions or legitimises violence towards gay people when they express their homosexuality by propositioning others.<sup>304</sup> These discriminatory features of the defence led the Australian Human Rights Commission to recommend the abolition of the homosexual advance defence in any jurisdiction where it remains.<sup>305</sup> The South Australian Equal Opportunity Commission has expressed similar views to SALRI in its Audit Report and subsequently, noting that the common law gay panic defence ‘is no longer reflective of community attitudes in our society today and has no place in our justice system’ and ‘is a relic of a bygone era where homophobic attitudes were tragically rife and accepted in our community.’<sup>306</sup> The Equal Opportunity Commission has called for the repeal of this law. The Human Rights Law Centre in its submission to SALRI expressed a similar view.

6.1.6 Although manslaughter is still a serious offence, as provocation excuses a defendant’s conduct, that conduct ‘is viewed to some extent as “understandable” in the circumstances.’<sup>307</sup> The gay panic defence is said to function as a licence for men to kill other men who they claim made an unwanted sexual advance toward them.<sup>308</sup> As Mison observes, when men who kill in response to a gay advance are not convicted of murder, ‘courts and juries [further] reinforce the notion ... that gay men do not deserve the respect and protection of the criminal justice system.’<sup>309</sup> Graeme Coss asserts ‘the message is a simple one: unwanted homosexual overtones are an abomination and the perpetrators deserve everything they get.’<sup>310</sup>

6.1.7 SALRI notes the cogent view presented by Dr Justin Koonin, Co-Convenor of the NSW Gay and Lesbian Rights Lobby to the NSW Select Committee:

a non-violent sexual advance should never by itself form the basis for a partial defence against murder, regardless of the sex or gender or sexuality of the people involved. In practice, the defence has only ever applied in the case of a non-violent advance from a male to another male. As we know, it has been applied 11 times [in NSW] between 1990 and 2004.<sup>311</sup> It has never been applied to an advance from a male to a female or from a female to a male, and nor should it be.

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<sup>304</sup> Australian Human Rights Commission, *Resilient Individuals: Sexual Orientation, Gender Identity and Intersex Rights*, National Consultation Report (2015), 64. See also Mack, above n 298. Queensland has now changed its law as a result.

<sup>305</sup> Australian Human Rights Commission, above n 304, 3, Rec 6.

<sup>306</sup> Adit Report, above n 2, Submission No 40, 12.

<sup>307</sup> Graeme Coss, ‘A Reply to Tom Molomby’ (1998) 22 *Criminal Law Journal* 119, 120.

<sup>308</sup> See Howe, above n 130, 130–131; Sewell, above n 298, 79.

<sup>309</sup> Robert Mison, ‘Homophobia in Manslaughter: The Homosexual Advance as Insufficient Provocation’ (1992) 80 *California Law Review* 133, 174.

<sup>310</sup> Graeme Coss, ‘Revisiting Lethal Violence by Men’ (1998) 22 *Criminal Law Journal* 5, 8.

<sup>311</sup> See Indyk, Donnelly and Keane, above n 127, 43–45. See also SALRI, Stage 1, above n 10, 40 n 271.

What we are seeking is an end to the differential treatment to gay males in the legal system which has otherwise delivered inequality.<sup>312</sup>

6.1.8 SALRI finds these views compelling. The continued availability of provocation as a partial defence in response to a non-violent homosexual advance is objectionable and outdated. SALRI reiterates that, as expressed in both its Audit Report<sup>313</sup> and Stage 1 Report,<sup>314</sup> South Australia should not retain this aspect of the present law. SALRI respectfully differs from the view of the SA Legislative Review Committee that the gay panic aspect of provocation effectively no longer exists.<sup>315</sup>

6.1.9 The High Court in both *Green* and *Lindsay* has made it clear that a non-violent sexual advance is capable of amounting to provocation (even if practice it is likely to be part of a wider factual matrix). The use of gay panic as a defence is not just a theoretical possibility. Cases such as *Green*, *Lindsay* and *Pearce and Meerdick*<sup>316</sup> are not unique instances of the contentious use of a homosexual advance as provocation.<sup>317</sup> In the 2009 New Zealand case of *R v Ambach*,<sup>318</sup> Ferdinand Ambach successfully argued that an alleged gay advance by Ronald Brown during a drinking session at Brown’s home provoked him to violently attack and kill Brown. The attack was so violent that part of a banjo was inserted in Brown’s throat.<sup>319</sup> This successful case of the gay panic advance as provocation is far from unique.<sup>320</sup> The NZLC, as recently as 2007, noted that its review of a sample of homicide cases over a five-year period found that half of the cases in which provocation was successful were homosexual advance or gay panic cases.<sup>321</sup> Professor Elisabeth McDonald of the University of Canterbury (and previously of the NZLC) has confirmed to SALRI that one of the strong concerns of the NZLC was the continued use of the gay panic defence.

6.1.10 SALRI considers that the confidence of the SA Legislative Review Committee ‘that it is very unlikely a non-violent homosexual advance would ever, of itself, constitute sufficient grounds to establish a provocation defence’<sup>322</sup> is misplaced. It is clear from the view of the High Court in *Lindsay* that a gay advance remains capable of amounting to provocation.<sup>323</sup> SALRI considers that the case is overwhelming to ensure that a non-violent gay or indeed any sexual advance cannot amount to

<sup>312</sup> Justin Koonin, Evidence, 28 August 2012, 26, cited in NSW Select Committee, above n 15, 41 [4.39].

<sup>313</sup> SALRI, Audit Report, above n 2, 109–113 [342]–[358].

<sup>314</sup> SALRI, Stage 1, above n 10, 40–43, [5.6.1]–[5.6.10].

<sup>315</sup> See above [4.4.5]–[4.4.7].

<sup>316</sup> The offenders responsible for the controversial death of Mr Ruks in Queensland.

<sup>317</sup> A NSW Working Party examined NSW Supreme Court data for the period from 1993 to 1998, finding that there were at least 13 homicide cases in which an allegation of a homosexual advance was made. See NSW Attorney General’s Department, Criminal Law Review Division, *Homosexual Advance Defence: Final Report of the Working Party* (1998) [3.4]. A further study of NSW and Queensland homicide data from 2000 to 2014 found four cases in which the gay panic defence had been successfully used and four others in which it had been raised. See McGeary and Fitz-Gibbon, ‘The Homosexual Advance Defence in Australia’, above n 3, 7–8.

<sup>318</sup> *R v Ambach* (2009) HC AK CRI-2007-004-027374.

<sup>319</sup> NSW Select Committee, above n 15, 29 [3.42].

<sup>320</sup> See, for example, *R v Meerdink and Pearce* [2002] QSC 158; Blore, above n 3, 38, n 10; Howe, above n 135, 467–468; NSW Attorney-General’s Working Party on the Review of the Homosexual Advance Defence, *Review of the Homosexual Advance Defence* (1996); Sewell, above n 298, 51, 80–81. A study of the 75 cases in which provocation was successfully used as a defence in NSW between 1990 and 2004 (58 by men, 17 by women) found that 11 cases relied on an alleged gay advance as the ‘provocation’. See Indyk, Donnelly and Keane, above n 127, 43–45.

<sup>321</sup> NZLC (2007), above n 16, 97 [49]. See also McDonald, ‘No Straight Answer’, above n 298, 239–247.

<sup>322</sup> SA Legislative Review Committee (2017), above n 9, 8.

<sup>323</sup> See also above [4.2.9]–[4.2.10], [4.4.5]–[4.4.7]; SALRI, Stage 1, above n 10, 34 [5.3.14]–[5.3.15].

provocation to reduce murder to manslaughter. However, SALRI accepts (as discussed below) that there are major problems with the operation of any change to the current law to provide that a non-violent sexual advance (whether confined to a gay advance or generally) cannot amount to provocation<sup>324</sup> as in Queensland and proposed in South Australia in the Criminal Law Consolidation (Provocation) Amendment Bill 2013 (SA).

## 6.2 Excluding a Non-Violent Sexual Advance as Provocation

6.2.1 The option of discarding the gay panic aspect of provocation was the model in the Criminal Law Consolidation (Provocation) Amendment Bill 2013 (SA) introduced in May 2013 in the Legislative Council by the Hon Tammy Franks MLC.<sup>325</sup> It has been employed in the ACT, the Northern Territory and NSW and now Queensland (though in these jurisdictions it extends to excluding any non-violent sexual advance). SALRI has previously discussed that such a change, whilst serving as an important legislative statement of non-discrimination, will have little, if any, practical value.<sup>326</sup> SALRI adheres to this view.

6.2.2 SALRI repeats the Queensland Attorney-General's caution that any changes in this area of the law 'that touch on criminal defences are always highly complex and technical and must strike the right balance between protecting the community while also protecting the rights of the individual accused'.<sup>327</sup>

6.2.3 The option of providing that a non-violent sexual advance could not amount to provocation had some initial appeal to SALRI in its Stage 1 Report.<sup>328</sup> It would remove an objectionable aspect of the law. All parties in consultation with SALRI agreed that, if the South Australian Parliament is to abolish the homosexual advance aspect of provocation, it should be abolished in terms that would include all non-violent sexual advances, rather than being confined to homosexual advances. SALRI considers this approach (if this option were to be adopted) is preferable and would make any change consistent and entirely non-discriminatory. However, SALRI considers that such a change (whether confined to excluding a gay sexual advance or any non-violent sexual advance from amounting to provocation) is problematic and its practical effect has been widely doubted.<sup>329</sup>

6.2.4 It was highlighted to the SA Legislative Review Committee that provocation, when argued by an accused, will likely be founded on a variety of factors, of which a gay sexual advance is likely to be just one relevant factor. The South Australian DPP, Adam Kimber SC, explained to the Committee in relation to the first Report that a multitude of factors will always be relevant in considering if provocation is made out in any case.<sup>330</sup> John Wells, a highly experienced criminal lawyer (now a Magistrate), noted 'that it is rare in a murder trial that the issues will be clear and compartmentalised

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<sup>324</sup> NSW Select Committee, above n 15, 97 [6.41], 106–111 [6.87]–[6.105]. See also below SALRI, Stage 1, above n 10, 40–43 [5.6.1]–[5.6.10].

<sup>325</sup> South Australia, *Parliamentary Debates*, Legislative Council, 1 May 2013, 3804–3808 (Tammy Franks).

<sup>326</sup> See SALRI, Stage 1, above n 10, x, 40–43 [5.6.1]–[5.6.10].

<sup>327</sup> Queensland, *Parliamentary Debates*, Legislative Assembly, 11 May 2016, 1654 (Hon YM D'Ath, Attorney-General); Queensland, *Parliamentary Debates*, Legislative Assembly, 21 July 2016, 26 (Hon YM D'Ath, Attorney-General).

<sup>328</sup> SALRI, Stage 1, above n 10, 41, [5.6.2].

<sup>329</sup> See, for example, NSW Select Committee, above n 15, 107–109 [6.88]–[6.100].

<sup>330</sup> SA Legislative Review Committee (2014), above n 8, 34 [6.2.2]. See also SA Legislative Review Committee (2017), above n 9, 23 [8.3].

because things flow into one another frequently.<sup>331</sup> The then South Australian Attorney-General, the Hon John Rau, similarly submitted to the Committee, ‘[i]t is almost impossible to imagine a case involving a homosexual advance by the deceased upon the accused where the respective sexes of the deceased and the accused will be the only matter that is relevant in assessing whether provocation should be a consideration at trial.’<sup>332</sup>

6.2.5 This view was repeated to the SA Legislative Review Committee in relation to its second Report by the Bar Association,<sup>333</sup> the DPP<sup>334</sup> and Mr Charles of the ALRM.<sup>335</sup>

6.2.6 The views expressed to the SA Legislative Review Council on this point accord with those consistently expressed to SALRI who found little support (even amongst LGBTIQ groups) in its consultation for this approach. All parties accepted that to abolish the gay panic aspect of provocation would serve as an important legislative statement of non-discrimination but its practical effect would be strictly limited, if not illusory. It was highlighted to SALRI that discarding the gay panic aspect of provocation will have little practical effect and will not address the victim blaming that provocation tends to encourage in such cases. It was explained in consultation to SALRI that provocation arguments are often not just based on a non-violent sexual advance, but rather a combination of circumstances said to be provocative, of which a sexual advance is likely to be one of several. It was noted that rarely, if ever, will a gay sexual advance exist in isolation and it will be combined with other factors. The context will be crucial. Both *Lindsay*<sup>336</sup> and *Green*<sup>337</sup> were discussed to SALRI as examples where the defence argued that a number of circumstances, not just the unwanted gay advance, needed to be properly considered in combination when assessing the nature of the ‘provocative’ conduct.

6.2.7 In circumstances where the provocative conduct comprises (as it is likely to be in practice) of a combination of offensive things said and done, it was pointed out in consultation to SALRI that juries will have great difficulty ignoring the fact of a gay sexual advance if they were directed to do so and directed only to focus on the other conduct by the deceased said to be provocative. Several interested parties, including Mr Caldicott and Mr Boucaut SC, stated this approach is artificial and unrealistic.

6.2.8 As an example of this risk, reference was made to the recent English experience of reform.<sup>338</sup> The British Parliament abolished the common law defence of provocation and enacted a limited statutory defence of ‘loss of control’, excluding certain conduct from being considered as provocative, such as sexual infidelity. The decision of the English Court of Appeal in *R v Clinton*<sup>339</sup> in 2012 reveals

<sup>331</sup> SA Legislative Review Committee (2014), above n 8, 34 [6.2.2]. Ms Redmond MP, a member of the SA Legislative Review Committee, highlighted she ‘found the evidence given by Mr John Wells to be particularly useful and compelling in my consideration of the committee’s report’: South Australia, *Parliamentary Debates*, House of Assembly, 3 December 2014, 3159.

<sup>332</sup> SA Legislative Review Committee (2014), above n 8, 34 [6.2.2]. Mr Caldicott concurred with this view in consultation with SALRI, noting that in his 37 years of practice, he had never encountered a case where a gay advance would have existed in isolation from other factors.

<sup>333</sup> SA Legislative Review Committee (2017), above n 9, 25 [8.5].

<sup>334</sup> *Ibid* 23 [8.3].

<sup>335</sup> *Ibid* 27 [8.10].

<sup>336</sup> *R v Lindsay* (2015) 255 CLR 272.

<sup>337</sup> *Green v R* (1997) 191 CLR 334.

<sup>338</sup> See also SALRI, Stage 1, above n 10, 42–43 [5.6.5]–[5.6.10].

<sup>339</sup> [2012] 3 WLR 515.

how the intentions of exclusionary approaches to reform can be frustrated in practice. The Court of Appeal in *Clinton* concluded that in circumstances where other words or acts beyond the alleged sexual infidelity were argued to constitute the qualifying trigger for loss of control, the English legislation still permitted, and ought to permit, the judge and jury to consider those words or acts in the context of evidence of sexual infidelity. The Court of Appeal explained that the sexual infidelity could not be isolated or compartmentalised from its wider context. Such an approach was artificial and unrealistic.<sup>340</sup>

6.2.9 SALRI reiterates its view that to abolish the gay panic aspect of provocation would act as an important legislative declaration of non-discrimination and would, in theory at least, remove an objectionable feature of the current law. However, SALRI accepts the major problems of such a change. SALRI acknowledges the force of the strong views outlined to both it and the SA Legislative Review Committee that the practical effect of such a change would be strictly limited, if not illusory.<sup>341</sup> SALRI concurs with the view of the SA Legislative Review Committee that the exclusion of specific factors (whether a non-violent sexual advance or sexual infidelity) within an often complex factual matrix is unlikely to provide an effective legal mechanism.<sup>342</sup> It would be artificial and unrealistic, as outlined to SALRI in its consultation and supported by the English decision in *Clinton*, to expect juries to ‘compartmentalise’ their reasoning and have regard to a permissible factor and to discount an impermissible factor. SALRI reiterates that discarding the gay panic aspect of provocation (or extending to exclude any non-violent sexual advance) would amount to well-intentioned but largely futile legislative tinkering. Despite the laudable aim of this change, it would be unlikely to have any real practical impact.

6.2.10 SALRI notes the new Queensland model which provides that a non-violent sexual advance cannot amount to provocation unless it is of an ‘exceptional’ character. SALRI accepts that, although the new Queensland provision is an important legislative expression of non-discrimination, it still raises major problems. The difficulty in separating a non-violent sexual advance from its likely wider factual matrix remains. The Queensland model does not completely close the door to the problematic gay panic aspect of provocation if the non-violent sexual advance from the deceased is of an ‘exceptional’ character. Just what would separate an ‘exceptional’ non-violent sexual advance from an unexceptionable non-violent sexual advance is unclear. The Queensland Attorney-General explained that no examples are provided of what circumstances might fall within the definition of an ‘exceptional character’. The Attorney-General explained that it ‘will be a matter for the trial judge to assess on a case-by-case basis. ... This in no way is intended to limit the circumstances of an exceptional character to which consideration may be had.’<sup>343</sup>

6.2.11 SALRI considers that the Queensland approach, especially in distinguishing what is an ‘exceptional’ non-violent sexual advance from a ‘non-exceptional’ sexual advance, is likely to lead to confusion and uncertainty. Indeed, a real fear noted in consultation, is that the reference to ‘exceptional’ may allow, even invite, assertions that a gay sexual advance in itself could be regarded as

<sup>340</sup> Ibid 527–528 [39]. See also NSW Select Committee, above n 15, 107–109 [6.88]–[6.100]. For strong criticism of the court’s approach in *Clinton*, see Dennis Baker and Lucy Zhao, ‘Contributory Qualifying and Non-Qualifying Triggers in the Loss of Control Defence: A Wrong Turn on Sexual Infidelity’ (2012) 76 *Journal of Criminal Law* 254.

<sup>341</sup> SALRI also notes the Committee’s additional reason. ‘It is the view of the Committee that it is not the role of Parliament to enact laws of no meaningful effect, aimed solely at conveying a message to the community. There are other mechanisms at the disposal of Parliament to achieve that end’: SA Legislative Review Committee (2014), above n 8, 40. See also SA Legislative Review Committee (2017), above n 9, 16, 21, 30.

<sup>342</sup> SA Legislative Review Committee (2014), above n 8, 41.

<sup>343</sup> Queensland, *Parliamentary Debates*, Legislative Assembly, 30 November 2016, 4698. See also Queensland, *Parliamentary Debates*, Legislative Assembly, 21 March 2017, 602–603.

‘exceptional’ when contrasted with a heterosexual sexual advance and thus perpetrate the offensive gay panic ‘defence’. SALRI does not support the Queensland approach as a model for South Australia.

6.2.12 In light of these problems, SALRI does not support or propose any model confined to excluding a non-violent sexual advance from the ambit of provocation. It is clear that wider reform is necessary.

6.2.13 Recommendation:

**Recommendation 1**

SALRI recommends, consistent with its Stage 1 Report, that legislative amendment to provide that a non-violent sexual advance (not confined to a gay sexual advance) is not capable of amounting to provocation, should not be adopted in South Australia as the practical value of such a provision, although serving as an important legislative statement of non-discriminatory intention, will be strictly limited, if not illusory.

## Part 7 – Provocation: A Man’s Law?

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### 7.1 Overview of Gender Bias

7.1.1 SALRI has previously discussed<sup>344</sup> the strong criticisms of the present law in that the partial defence of provocation is said to be gender biased and unjust, namely that it applies unfairly to women accused of murder (especially those who have been subjected to family violence)<sup>345</sup> and unfairly favours male accused (especially those who have killed a female partner).<sup>346</sup> This theme has been strongly expressed to SALRI in its consultation by various family violence groups; the Women’s Legal Service; Relationships Australia; the Victim Support Service and Ms Heather Stokes; the Equal Opportunity Commission; the Human Rights Law Centre and academics such as Professor Elisabeth McDonald of the University of Canterbury, Associate Professor Terese Henning of the University of Tasmania, Professor Mary Heath and Kris Wilson from Flinders University, Professor Rick Sarre from the University of South Australia, Dr Kate Fitz-Gibbon from Monash University, Dr Mary Iliadis from Deakin University and Professor Ngaire Naffine, Associate Professor Alex Reilly and Kellie Toole from the University of Adelaide. SALRI accepts the cogency of these criticisms of the gender basis of provocation and it is unnecessary to repeat them at length.

7.1.2 The South Australian Commissioner for Victims’ Rights previously described the current law as ‘misogynist’ to SALRI. The English Law Commission noted that the central place occupied by the requirement of a sudden response in any claim of provocation ‘privileg[es] men’s typical reactions to provocation over women’s typical reactions.’<sup>347</sup>

7.1.3 There has been a line of cases<sup>348</sup> where men have successfully argued they were provoked into killing their female partners, to uphold their ‘honour’.<sup>349</sup> The South Australian statistics don’t reveal any such cases but research undertaken by Dr Kate Fitz-Gibbon found that in the 10 year period immediately prior to the 2014 NSW reforms (1 January 2005 to 31 December 2014) of the 20 cases of provocation on the basis of manslaughter, seven involved a male perpetrator who killed a current or

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<sup>344</sup> SALRI, Stage 1, above n 10, 44–49 [6.1.1]–[6.1.22].

<sup>345</sup> Even though males can be and are victims of family violence, the role of the defence of provocation in providing a potential defence under present law to female victims of family violence is notable. Where provocation is raised in the context of family violence nearly all the defendants are women. See James Moshides, *The Provisions of the ‘Loss of Self Control’ Defence in England and New South Wales: Models for Reform of New South Wales Provocation Law* (University of Gloucestershire, 2011) 3.

<sup>346</sup> See, for example, Bradfield, above n 130, 5–6, 33–37; Helen Brown, ‘Provocation as a Defence to Murder: To Abolish or To Reform?’ (1999) 12 *Australian Feminist Law Journal* 137; Coss, ‘Provocation, Law Reform and the Medea Syndrome’, above n 130, 136; Coss, ‘An Acrimonious Divorce from Reality’, above n 23, 51–71; Golder, above n 130, [50]–[51]; Hemming, above n 3; Howe, above n 129, 130–131; Morgan, above n 129, 255; Tarrant, above n 130, 206; Yeo, ‘Resolving Gender Bias in Criminal Defences’, above n 14; LRCWA, above n 22, 212–216; NZLC (2007), above n 16, 48–49 [96], 58 [121]; MCCOC (Ch 5: DP), above n 22, 89–93; VLRC (2004), above n 15, 27–30 [2.18]–[2.25]; QLRC, above n 27, 331–332 [16.1]–[16.9].

<sup>347</sup> Law Commission (England and Wales), *Murder, Manslaughter and Infanticide*, above n 148, 81 [5.18].

<sup>348</sup> See, for example, *R v Keogh* (Unreported, Supreme Court of Victoria, Hampel J 15 February 1989); *R v Butay* [2001] VSC 417 (2 November 2001); *R v Hamoui (No 4)* [2005] NSWSC 279 (19 April 2005); *R v Ramage* [2004] VSC 391 (8 October 2004); *R v Sebo; ex parte Attorney-General (Qld)* (2007) 179 A Crim R 24; *R v Stevens* [2008] NSWSC 1370 (18 December 2008).

<sup>349</sup> Paul Bibby and Josephine Tovey, ‘Six years for killing sparks call for law review’, *Sydney Morning Herald* (online), 8 June 2012 <<http://www.smh.com.au/nsw/six-years-for-killing-sparks-call-for-law-review-20120607-1zz2r.html>>; *Stabbing case questions a provocative defence* (7:30 Report, ABC, 2012) 1:25.



estranged female partner, and three cases involved a male perpetrator who killed a male who was in a sexual relationship with the defendant’s current or former partner.<sup>350</sup> In each of these cases the homicide occurred in the context of relationship separation and/or sexual infidelity (actual or alleged).<sup>351</sup>

7.1.4 The view was presented to the NSW Select Committee that there is ‘nothing in the formulation of the defence [that] involves gender bias’.<sup>352</sup> Chrissa Loukas SC, representing the NSW Bar Association, similarly stated ‘provocation is not a male defence or a female defence—it is a human defence.’<sup>353</sup>

7.1.5 SALRI remains unable to accept this position. The situation of female defendants, especially in a family violence context, demonstrates the entrenched gender bias of the current law and supports the case that any reform of the law of provocation must also address its gender bias. SALRI reiterates its view that provocation is, and remains, predominantly a ‘male’ defence. It has an inherent and inevitable gender bias.

7.1.6 SALRI considers that, noting its terms of reference include gender bias, substantial reform is necessary of the current law to address its gender bias. SALRI concludes that the most effective means to address the gender bias of the present law is to abolish the partial defence of provocation. SALRI notes that in many cases abused women who kill should be primarily protected by a different kind of defence(s), rather than relying on the inappropriate and ill-suited vehicle of provocation.<sup>354</sup> SALRI considers that defences such as self-defence, excessive self-defence and duress (and necessity for the sake of completeness)<sup>355</sup> rather than provocation are the preferable vehicles to reflect the particular circumstances in which victims of prolonged family violence kill their abuser.

7.1.7 SALRI recommended in its Stage 1 Report that South Australia should adopt an approach based on the Victorian model of self-defence (and for consistency the Victorian approaches of duress and necessity), which explicitly takes into account both evidence of family violence and the context of family violence in clarifying the scope and operation of self-defence (and for consistency duress and necessity). These changes would better reflect the reality and dynamics of family violence. SALRI’s Stage 2 Report includes additional recommendations designed to provide greater clarity to the law in relation to duress and necessity and, in particular, provide greater protection to victims of family violence.<sup>356</sup>

<sup>350</sup> Fitz-Gibbon, *Homicide Law Reform, Gender and the Provocation Defence*, above n 96, 151–153.

<sup>351</sup> Ibid 151–153. See also Elisabeth McDonald, ‘Provocation, Sexuality and the Actions of “Thoroughly Decent Men”’ (1993) 9 *Women’s Studies Journal* 126; SALRI, Stage 1, above n 10, 14 n 134, for discussion of the successful use of provocation in male perpetrated intimate partner homicides.

<sup>352</sup> Stephen Odgers SC, Chair of the Criminal Law Committee, NSW Bar Association, Evidence, 29 August 2012, 34, quoted by NSW Select Committee, above n 15, 37 [4.19]. See also at 37–38 [4.18]–[4.25].

<sup>353</sup> Chrissa Loukas SC, Barrister, Public Defender and Member of the Bar Council, Evidence, 29 August 2012, 37, quoted by NSW Select Committee, above n 15, 37 [4.20]. See also NSWLRC (R 83, 1997), above n 111, 77 [2.142].

<sup>354</sup> ‘While provocation has served men well, perhaps too well, one has to question the appropriateness of [this] defence for women, bearing in mind it was never designed for them.’ MCCOC (Ch 5: DP), above n 22, 89.

<sup>355</sup> While duress and necessity conceptually overlap in excusing from criminal liability a person who is ‘forced’ to commit a crime under some overpowering external threat, the defences are generally differentiated in that duress applies to threats from by humans, whilst necessity applies to threats of nature or extraordinary emergency. See David Caruso et al, *South Australian Criminal Law and Procedure* (Lexis Nexis, 2<sup>nd</sup> ed, 2016) 349 [11.1]. See, for example, *R v Kaviti* [2000] 1 NZLR 117 (necessity not available where the threat comes from a human). Necessity will therefore rarely arise as a potential defence in family violence.

<sup>356</sup> See above Recs 11–19. See also below Part 14.

## Part 8 – Victim Blaming

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### 8.1 Overview of Issues

8.1.1 The partial defence of provocation, by its nature, requires an investigation of the evidence relating to the conduct of the deceased victim, including the version of events presented by the defendant. Through that process, the trial is likely to focus on the victim and his or her conduct, as opposed to the conduct of the defendant who is on trial. By its focus at the trial on the conduct of the deceased, provocation allows the focus and ‘blame’ for the offence to be placed on the deceased victim. ‘The continued existence of provocation can be seen as promoting a culture of blaming the victim and sending a message that some victims’ lives are less valuable than others.’<sup>357</sup> This can especially arise in the gay panic scenario<sup>358</sup> or where the defence is used by a man to excuse his killing of his female partner.<sup>359</sup> As Dr Kate Fitz-Gibbon explains of the concern about the courtroom narratives in such provocation cases that may allow the victim to be somehow ‘blamed’ for what happened to them:

When a partial defence of provocation is raised, it is undoubtedly the victim’s behaviour and actions, as opposed to that of the defendant, that are put in focus. This is highly problematic and is further compounded in cases of male-perpetrated intimate homicide and homosexual advance defence where the experiences and actions of the victim are inevitably considered through a gendered lens that all too often privileges the male defendant’s account.<sup>360</sup>

8.1.2 This is a particular concern in the context of family violence. Wells asserts that women killed by their male partners are often unfairly stereotyped according to their alleged ‘infidelity, nagging, or other undesirable characteristics’.<sup>361</sup> It is argued that ‘the defence of provocation allows women to be dragged through the dirt so that men can get away with murder’.<sup>362</sup>

8.1.3 Victim blaming is a main criticism of the law of provocation.<sup>363</sup> It is said that provocation allows, even encourages, a culture of unfair ‘victim blaming’, especially in cases involving family violence or assertions of gay panic.<sup>364</sup> In provocation trials, as Dr Fitz-Gibbon explains, the actions of the victim become the focus at both trial and sentencing, ‘they are simultaneously used to partially legitimise, excuse or justify the perpetration of lethal violence, leaving the perception that it is ultimately the victim, not the defendant, on trial.’<sup>365</sup> Provocation provides defendants with an ‘incentive to

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<sup>357</sup> VLRC (2004), above n 15, 32 [2.29]–[2.30].

<sup>358</sup> Sewell, above n 298; 58–71; Mack, above n 298, 180–181.

<sup>359</sup> Fitzgibbon and Pickering, above n 133, 162. Family violence and victim groups have also raised this concern to SALRI in consultation.

<sup>360</sup> Fitz-Gibbon, *Homicide Law Reform, Gender and the Provocation Defence*, above n 96, 265. See also NSW Select Committee, above n 15, 36 [4.16]. See also SALRI, Stage1, above n 10, 24–28 [4.2.1]–[4.2.18].

<sup>361</sup> Wells, above n 23, 101.

<sup>362</sup> Karen Kissane, ‘Honour Killing in the Suburbs’, *The Age*, ‘Insight’ Section, 6 November 2004, 4–5.

<sup>363</sup> See VLRC (2004), above n 15, 32 [2.29]–[2.30]; NSW Select Committee, above n 15, 49–51 [4.75]–[4.87], 186–188 [8.139]–[8.148]; Fitz-Gibbon, *Homicide Law Reform, Gender and the Provocation Defence*, above n 96, 56–65.

<sup>364</sup> This view was relayed to SALRI by the SA Commissioner for Victims’ Rights. See also SALRI, Stage1, above n 10, 24–28 [4.2.1]–[4.2.18].

<sup>365</sup> Fitz-Gibbon, *Homicide Law Reform, Gender and the Provocation Defence*, above n 96, 56.

completely go to town and blacken the name of the absent victim and say it was all their fault because ... they can't tell their side of the story.<sup>366</sup>

8.1.4 The VLRC in 2004 recognised the problem of victim blaming in relation to the law of provocation:

The continued existence of provocation can be seen as promoting a culture of blaming the victim and sending a message that some victims' lives are less valuable than others. An argument that the victim provoked his or her own death can understandably be the cause of significant distress to the friends and families of victims.<sup>367</sup>

8.1.5 The NSW DPP informed the NSW Select Committee that 'the defence, in my view ... creates a culture of blaming the victim and I think there is a real perception that sometimes the blame is manufactured because there is no-one there to refute it.'<sup>368</sup>

8.1.6 Dr Fitz-Gibbon, the Human Rights Law Centre and the SA Commissioner for Victims' Rights, Mr O'Connell, reiterated this criticism to SALRI. Similar views were also expressed to the SA Legislative Review Committee. Dr Fitz-Gibbon noted that a victim blaming theme had 'plagued' the operation of provocation.<sup>369</sup> She argued that 'victim blaming is unavoidable in provocation cases and provides a central reason for why provocation must be abolished as a partial defence to murder in South Australia.'<sup>370</sup> The Commissioner for Victims' Rights, Mr O'Connell, also expressed this concern to the Committee. He stated that victim blaming is an 'inherent part' of the defence and his office had received complaints from friends and relatives of deceased victims about defence imputations which 'too often remain untested and unsubstantiated'.<sup>371</sup> Mr O'Connell elaborated that provocation is 'an artefact of an archaic legal system which allows the accused person to present almost exclusively his or her version of an incident resulting in the death of a victim, who in death is silent and thus unable to rebut the accused.'<sup>372</sup> The Hon Tammy Franks MLC also noted 'the issue of victims being deceased, yet a person accused of murder is given an opportunity to make assertions in respect of the conduct of the deceased, which the deceased cannot rebut this concern.'<sup>373</sup>

8.1.7 The NSW Select Committee acknowledged and shared the concern that the operation of provocation can result in a perception that the deceased victim is, at least partly, to blame for the defendant's conduct that resulted in the victim's death.<sup>374</sup> The Committee noted the vital concern raised is that, although there will be a need to focus on the conduct of the victim, 'there are times where the evidence raised by the defence at trial arguably goes beyond what is necessary to draw out the facts as to the provocative conduct'.<sup>375</sup> It was argued that in these situations a strategic opportunity arises for

<sup>366</sup> Ibid 64.

<sup>367</sup> VLRC (2004), above n 15, 32 [2.29].

<sup>368</sup> Lloyd Babb SC, Director of Public Prosecutions, Office of the Director of Public Prosecutions, Evidence, 29 August 2012, 46, quoted by NSW Select Committee, above n 15, 49 [4.77].

<sup>369</sup> SA Legislative Review Committee (2014), above n 8, 30 [6.14].

<sup>370</sup> Ibid 31 [6.14].

<sup>371</sup> Ibid 30 [6.14].

<sup>372</sup> SA Legislative Review Committee (2017), above n 9, 25 [8.6].

<sup>373</sup> Ibid 22 [8.1]. The situation of the murder of Mr Negre by Lindsay was noted by Ms Franks as an example of a case where numerous assertions have been made publicly without Mr Negre having any opportunity to respond.

<sup>374</sup> NSW Select Committee, above n 15, 52 [4.94]–[4.95]. See also at 188 [8.147]–[8.148].

<sup>375</sup> Ibid 52 [4.94].

the defence to inappropriately or unfairly portray the victim in a particular way so as to create antipathy toward them and sympathy for the defendant.<sup>376</sup> However, the Select Committee stated that provocation is not unique in this regard and noted the testimony of Dina Yehia SC, that any evidence given by a defendant is tested in court.<sup>377</sup> However, the NSW Select Committee agreed that the use of evidence that defames or denigrates a deceased victim in provocation cases is ‘an issue of significant concern’ and agreed that ‘there may be merit’ in proposals to prohibit or control the use of such evidence.<sup>378</sup> The Committee recommended that the NSW Attorney-General should examine this issue further, with a view to determining whether any such evidentiary provisions are warranted.<sup>379</sup>

8.1.8 The SA Legislative Review Committee argued that ‘abolition of the provocation defence would not reduce incidences of victim blaming... [and] this would merely transfer this problematic issue to the sentencing process.’<sup>380</sup> The Committee accepted that victim blaming was a ‘vexed issue’ with provocation and was sympathetic to victims and their families but stated the defence should be entitled in criminal proceedings to present any relevant evidence at either trial or sentence and did not support any limitation be placed on the material that can be adduced on a defendant’s behalf.<sup>381</sup>

8.1.9 SALRI notes the cogency of the criticism of provocation in leading to victim blaming. The prosecution is rarely in a position to contest or contradict the defendant’s version of events, as often the only other witness has been killed by the defendant.<sup>382</sup> LGBTIQ groups have highlighted to SALRI in consultation their concern that the gay panic aspect of provocation enables unsupported assertions of an unwanted homosexual advance and unfair victim blaming.<sup>383</sup> In brief, SALRI concludes that the problem of victim blaming, especially in a gay panic or family violence situation, provides further support for abolition of the partial defence of provocation. SALRI is unconvinced with respect to the view of the SA Legislative Review Committee that abolition of the partial defence would simply transfer the problem of victim blaming to the sentencing stage. There is a fundamental difference between the jury’s role at a trial (which involves no finding or reasons beyond its bare verdict) and the scrutiny and reasoned accountability of a judge at sentencing (which includes reasons for any finding and potential appeals by both sides).

## 8.2 Victim Blaming Law in Victoria

8.2.1 The issue of unfair victim blaming raises the question of whether other specific changes are necessary. SALRI notes with interest the 2014 legislative reforms introduced in Victoria to address victim blaming in homicide trials that allow a court to exclude evidence that ‘unnecessarily’ demean the deceased in a homicide trial. The Victorian reform, introduced as part of the *Crimes Amendment (Abolition of Defensive Homicide) Act 2014* (Vic):

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<sup>376</sup> Ibid. See also at 188 [8.147].

<sup>377</sup> Ibid 52 [4.95]. See also at 51–52 [4.88]–[4.93].

<sup>378</sup> Ibid 188 [8.148].

<sup>379</sup> Ibid 189.

<sup>380</sup> SA Legislative Review Committee (2017), above n 9, 31.

<sup>381</sup> SA Legislative Review Committee (2014), above n 8, 42.

<sup>382</sup> Hemming, above n 3, 5.

<sup>383</sup> See also Sewell, above n 298, 58–71.

gives the court the discretion under [s 135 of] the *Evidence Act* to exclude evidence if its probative value is substantially outweighed by the danger that the evidence might “unnecessarily demean the deceased in a criminal proceeding for a homicide offence”, while including a note that this “does not limit evidence of family violence that may be adduced” under the new self-defence, duress and sudden emergency provisions.<sup>384</sup>

8.2.2 The role and operation of such evidence was explained by the relevant Minister as follows:

Clause 9 of the Bill will amend s 135 of the *Evidence Act* to empower a court, in criminal proceedings for a homicide offence, to refuse to admit evidence if its probative value is substantially outweighed by the danger that it may unnecessarily demean the deceased. The purpose of clause 9 is to reduce unjustifiable attacks on the character and reputation of the deceased during homicide proceedings. Evidence that demeans a deceased person is not automatically excluded. Rather, clause 9 requires the court to determine whether the desirability of admitting the evidence outweighs the undesirability of admitting evidence that unnecessarily demeans the deceased. Evidence will not be excluded if there are legitimate forensic reasons for admitting that evidence. The judicial discretion to refuse to admit evidence under s 135 operates as a safeguard that protects and balances the rights of accused, the deceased and the witnesses in the proceeding, and the importance of the court hearing all relevant evidence. In my opinion, this is consistent with the right to a fair hearing and rights in criminal proceedings.<sup>385</sup>

8.2.3 These limitations are compared with the rape shield laws that now exist (and are widely accepted) to prevent the unnecessary and often demeaning questioning about the sexual history of a rape victim.<sup>386</sup>

8.2.4 The benefit of such a provision was considered by the NSW Select Committee.<sup>387</sup> The Committee was referred to a number of cases by Inquiry participants who suggested that the character and reputation of the deceased victim was ‘blackened’, and that this was ‘a deliberate strategy designed to portray the victim to the jury in a particular way in order to garner sympathy for the defendant.’<sup>388</sup> The Committee noted these concerns.<sup>389</sup> It concluded:

It has been suggested that evidentiary provisions that would operate to prohibit the adducing of evidence that defames or denigrates the deceased victim in provocation cases are warranted. The Committee is of the view that this is an issue of significant concern and agrees that there may be merit in such proposals. The Committee therefore recommends that the Attorney-General examine this issue further, with a view to determining whether such provisions are warranted.<sup>390</sup>

8.2.5 The Hon Fred Nile MLC in introducing the Crimes Amendment (Provocation) Bill 2014 (NSW) subsequently explained that evidence serving only to denigrate a deceased was generally already

<sup>384</sup> Parliament of Victoria, *Crimes Amendment (Abolition of Defensive Homicide) Bill 2014*, Research Brief (Department of Parliamentary Services, 2014) 7, as cited in Fitz-Gibbon, ‘Homicide Law Reform in NSW’, above n 27, 808–809.

<sup>385</sup> Victoria, *Parliamentary Debates*, Legislative Council, 25 June 2014, 2128 (Edward O’Donohue, MP, Minister for Liquor and Gaming Regulation).

<sup>386</sup> NSW Select Committee, above n 15, 187–188 [8.144].

<sup>387</sup> *Ibid* 186–188 [8.139]–[8.148].

<sup>388</sup> *Ibid* 186 [8.140].

<sup>389</sup> *Ibid* 188 [8.147].

<sup>390</sup> *Ibid* 188 [8.148].

irrelevant and inadmissible under the present law ‘so that an explicit provision is unnecessary and undesirable’.<sup>391</sup>

8.2.6 Victoria remains the only Australian jurisdiction to date to introduce such reforms with the aim of addressing victim blaming in homicide cases. As these changes have only been in operation for three years, their impact in practice is yet to emerge in case law.

8.2.7 The SA Legislative Review Committee accepted that victim blaming was a ‘vexed issue’ with provocation but stated a defendant should be entitled to present any relevant evidence at either trial or sentence and did not support any limitation be placed on the material that can be adduced on a defendant’s behalf.<sup>392</sup> This view was reiterated to SALRI by Mr Caldicott and Mr Boucaut SC.

8.2.8 Little support was expressed to SALRI during consultation for the introduction of a law as in Victoria in South Australia to address gratuitous or unfair homicide victim blaming. Mr Caldicott and the Bar Association noted the importance of a defendant being able to adduce genuinely relevant material at either trial or sentence. The new Victorian provision was viewed as unnecessary in South Australia as a court already possesses ample powers to prevent gratuitous or unfair imputations levelled at the deceased in a homicide case. It was also noted, especially by Mr Boucaut SC, that South Australian trial lawyers adopt a responsible and professional approach and the examples of abusive, gratuitous or unfair imputations directed at homicide victims seen in such Victorian cases as *Ramage* are absent in South Australia. Though representatives of the LGBTIQ sector were not wholly convinced, it is significant that Mr Boucaut’s position received wide support in consultation, notably by the Commissioner for Victims’ Rights<sup>393</sup> and the Hon Geoffrey Muecke, who agreed such laws were not needed at this stage in South Australia.

8.2.9 Given the strong view in consultation that such a law is unnecessary in South Australia, SALRI does not support the introduction at this stage of a Victorian style homicide ‘victim blaming’ law to prevent unfair or gratuitous imputations about the deceased. SALRI accepts a defendant should be entitled to present any genuinely relevant evidence at either trial or sentence and the apparent adequacy of existing law and practice in South Australia and therefore does not at this stage support any limitation be placed on the material that can be adduced on a defendant’s behalf.

8.2.10 Recommendation:

**Recommendation 2**

SALRI recommends that any law based on Victoria to limit gratuitous ‘victim blaming’ evidence in a homicide trial is unnecessary and should not be adopted in South Australia.

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<sup>391</sup> New South Wales, *Parliamentary Debates*, Legislative Council, 5 March 2014, 27037.

<sup>392</sup> SA Legislative Review Committee (2014), above n 8, 42.

<sup>393</sup> The 2017 roundtable held by SALRI (which included a representative of the DPP) agreed with this view. See below Appendix 1, 184–185.

## Part 9 – The Case for Residual Provocation?

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### 9.1 Residual Provocation in Family Violence and Elsewhere

9.1.1 There are conflicting views about retaining a residual category of provocation to cater for those ‘truly deserving’ cases in which self-defence, duress or necessity cannot be raised. One view is that the problems of provocation are such that it is futile to seek to formulate a residual category of provocation and the mitigating features of such cases are better left for sentence. The other view is that such truly deserving or extreme cases illustrate the need for retention of, at least, a restricted form of provocation and it is unfair to label such cases as ‘murder’ and to leave the mitigation of such cases to the sentencing stage.

9.1.2 Concern was expressed to SALRI in consultation by Mr Caldicott, the ALRM and the Law Society that if provocation is abolished, then there will be no defence available in extreme circumstances, where provocation may legitimately assist a deserving defendant, including victims of family violence. This view has been expressed elsewhere.<sup>394</sup> It is said that at least some form of provocation should be retained as it ‘recognises that not all actions are done with the same intention or a rational mind’.<sup>395</sup> There will be circumstances where a battered woman does not necessarily kill their abuser in self-defence<sup>396</sup> (or duress or necessity) and provocation is said to provide a potential window of flexibility for victims of family violence.<sup>397</sup> A concern is that the abolition of provocation and the availability of manslaughter will lead to higher sentences than would have been previously imposed (even if there is greater flexibility in sentence for murder),<sup>398</sup> especially for deserving defendants, notably those who are victims of prolonged family violence.

9.1.3 Further, it has been consistently put forward to SALRI in its consultation that there will be truly deserving, even extreme, cases where self-defence, duress or necessity (even with the changes SALRI proposes in its Stage 1 and Stage 2 Reports) will not be available and provocation (albeit in a revised form) serves a vital role as it would be unfair for an accused to be convicted of murder.<sup>399</sup> In such cases, a conviction for murder may appear unjust. This argument was accepted by both the NSW Select Committee<sup>400</sup> and the SA Legislative Review Committee<sup>401</sup> as supporting the retention of at least a revised form of provocation. This was the preferred position of the Law Society in its submission of 22 March 2018.

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<sup>394</sup> See, for example, Crofts and Loughnan, above n 268, 34–36; NSW Select Committee, above n 15, 87 [5.97]–[5.98]; QLRC, above n 27, 469, [21.24], 471 [21.36], 490 [21.129], 491 [21.137], 500 [21.176]–[21.177]; SA Legislative Review Committee (2014), above n 8, 36–37 [6.2.5]–[6.2.6]; SA Legislative Review Committee (2017), above n 9, 31.

<sup>395</sup> James Trevallion, Submission No 14 to *Select Committee on the Partial Defence of Provocation*, 9 August 2012, 1; Winston Terracini, Submission No 33 to *Select Committee on the Partial Defence of Provocation*, 8 August 2012, 3.

<sup>396</sup> Tolmie, (2005) above n 254, 45.

<sup>397</sup> See, for example, Elizabeth Sheehy, Julie Stubbs and Julia Tolmie, ‘Battered Women Charged with Homicide in Australia, Canada and New Zealand: How Do They Fare’ (2012) 45 *Australian and New Zealand Journal of Criminology* 383; Crofts and Tyson, above n 75, 865.

<sup>398</sup> SA Legislative Review Committee (2017), above n 9, 24 [8.4].

<sup>399</sup> The ALRM raised the situation of Aboriginal defendants in this context to SALRI. See also SALRI, Stage 1, above 10, Appendix 1, 101–102 and Appendix 2, 109.

<sup>400</sup> NSW Select Committee, above n 15, 87 [5.97]–[5.98].

<sup>401</sup> SA Legislative Review Committee (2014), above n 8, 43; SA Legislative Review Committee (2017), above n 9, 31.

9.1.4 The English case of *DPP v Camplin*<sup>402</sup> was raised to the SA Legislative Review Committee by one submission as an example of where some form of provocation as a partial defence is necessary.<sup>403</sup> The extreme case of *R v Butler*<sup>404</sup> was presented to SALRI (and also the SA Legislative Review Committee)<sup>405</sup> during consultation as supporting the case for retention of at least a revised form of provocation as the type of case where provocation served a valid role in reducing murder to manslaughter.

9.1.5 However, it is difficult to formulate a fair and effective replacement model of provocation to specifically cater for these very rare situations that would not be open to the same problems and type of misuse as seen in Victoria’s much criticised example of defensive homicide.<sup>406</sup> SALRI in light of its research and the strong views in consultation, is unconvinced of the benefit of such alternative models as the NSW model of ‘extreme provocation’ or the English model of ‘loss of control’.<sup>407</sup> The preferable solution to such cases such as *Camplin* and *Butler* is not to retain a revised form of provocation but to ensure that a court in sentencing possesses the flexibility to properly reflect the protection of the community,<sup>408</sup> the culpability of the offender and any genuine mitigating features (whether grave provocative conduct from the deceased and/or an offender’s mental illness, cognitive impairment or intellectual disability). The Law Society in its submission of 22 March 2018 agreed that, should the partial defence of provocation be abolished, it is necessary that a court possess the flexibility in sentencing to reflect such provocation conduct from a deceased as in *Camplin* or *Butler*.

9.1.6 SALRI notes that s 32A of the *Sentencing Act 1988* (or s 48 of the *Sentencing Act 2017* once it comes into effect) its successor version) provides little and uncertain flexibility to recognise such

<sup>402</sup> [1978] AC 705. *Camplin*, a 15 year old boy, killed a middle aged man by hitting him over the head with a heavy kitchen pan. At his murder trial, *Camplin* raised the defence of provocation stating that the deceased had raped him and then laughed at him at which point he lost his control and hit him. The trial judge directed the jury on provocation that they should consider whether a reasonable adult would have done as the defendant did and told them that they should not take account of *Camplin*’s actual age. The jury convicted *Camplin* of murder and he appealed contending the trial judge was wrong to direct the jury that age was irrelevant. The House of Lords allowed the appeal and held that the age of the defendant was relevant to the objective limb of provocation. Lord Diplock noted ‘the reasonable man ... is a person having the power of self-control to be expected of an ordinary person of the sex and age of the accused’ [1978] AC 705, 718.

<sup>403</sup> SA Legislative Review Committee (2014), above n 8, 36 [6.2.5]. See also NSW Select Committee, above n 15, 91–92 [6.16]–[6.18].

<sup>404</sup> [2012] NSWSC 1227 (11 October 2012). The defendant was a female prostitute who had been sexually abused as a child. During a sexual encounter with a client she had never met before, the defendant was spoken to about child sex and was shown a video depicting child sexual abuse by her client. It was found that the defendant had lost self-control as a result of her past experiences and she ultimately killed the victim, once he expressed his fetishes. The NSW DPP accepted a plea to manslaughter on the basis of provocation. *Butler*’s solicitor noted that ‘in this case there could not have been any other defence, and yet any fair minded member of the community, hearing the facts of the case would not want her [the defendant] convicted of murder’: Harriet Alexander, ‘Kill Case Relied on Provocation’, *Sydney Morning Herald* (online), 19 October 2012, <<http://www.smh.com.au/nsw/kill-case-relied-on-provocation-20121018-27txl.html>>.

<sup>405</sup> SA Legislative Review Committee (2017), above n 9, 28.

<sup>406</sup> See above n 96, n 141. See also SALRI, Stage 1, above n 10, 15 n 92, 78–79 n 571.

<sup>407</sup> See further below Part 10.

<sup>408</sup> Section 9 of the *Sentencing Act 2017* (SA) provides that ‘the primary purpose for sentencing a defendant for an offence must be the paramount consideration when a court is determining and imposing the sentence’.



extreme provocation from the deceased as in *Camplin* and *Butler*.<sup>409</sup> Whether this provision should be amended is examined below.<sup>410</sup>

9.1.7 SALRI is aware that the position of victims of family violence needs to be carefully considered. SALRI has considered if changes to the law are necessary, whether to the law of provocation, duress, necessity, sentencing or some other law (such as a partial defence of diminished responsibility) to provide for a residual category of case with egregious provocation, especially in a context of family violence, where the defences of excessive self-defence and self-defence may be unavailable. SALRI concludes that the problems of provocation and alternative models are such that it is impracticable to provide for a residual category of ‘extreme’ case and the preferable solution is that provocation should be abolished with the necessary changes to provide for greater sentencing flexibility as discussed below in Part 11. SALRI considers that its recommendations in both its Stage 1 and Stage 2 Reports, notably to sentencing discretion, self-defence, duress and necessity, bring greater clarity to the law and will provide enhanced protection in the context of family violence.

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<sup>409</sup> The Government during the 2007 parliamentary debate explained that the present s 32A was intended to cover in a suitable case provocative conduct from the deceased. See South Australia, *Parliamentary Debates*, Legislative Council, 21 June 2007, 406 (Hon P Holloway); South Australia, *Parliamentary Debates*, Legislative Council, 24 July 2004, 448 (Hon P Holloway). See also *R v Narayan* [2011] SASCFC 61 (1 July 2011), [46]–[48]; *R v Li* [2016] SASCFC 152 (22 December 2016), [28], [37]–[38] (Stanley J), [50]–[54], [61]–[74], [123]–[126] (Lovell J).

<sup>410</sup> See below Part 11.

## Part 10 – Other Provocation Models

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### 10.1 Overview

10.1.1 SALRI has previously considered the NSW model of ‘extreme provocation’ set out in s 23 of the *Crimes Act 1900* (NSW)<sup>411</sup> and ‘loss of control’ in England and Wales set out in s 54 of the *Coroners and Justice Act 2009* (UK)<sup>412</sup> as possible alternatives to the problematic common law model of provocation. SALRI from its initial consultation and research had previously identified various concerns with both of these models but stated it would further consider these alternative models to the abolition of provocation.

### 10.2 NSW Model of ‘Extreme Provocation’

10.2.1 On 13 June 2014, the *Crimes Amendment (Provocation) Act 2014* (NSW) came into effect. This Act abolished the common law model of provocation and introduced the concept of ‘extreme provocation’ in s 23 of the *Crimes Act 1900* (NSW).<sup>413</sup> Under extreme provocation, for a charge of murder to be reduced to manslaughter, the provocative conduct must constitute a serious indictable offence.<sup>414</sup> Given the relatively recent nature of the NSW reforms, their impact in practice is yet to emerge in case law.<sup>415</sup>

10.2.2 The basis for the NSW reform was the Report of the NSW Select Committee on the Partial Defence of Provocation<sup>416</sup> which was prompted by the successful use of provocation in the controversial case of *Singh*.<sup>417</sup> Another consideration for the changes was the need for the defence to be accessible to women who may be provoked into killing their male abusers in a family violence context.<sup>418</sup>

10.2.3 The terms of reference of the NSW Select Committee required ‘the Committee to consider whether the partial-defence should be retained, abolished, or whether the elements of the partial

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<sup>411</sup> SALRI, Stage 1, above n 10, 56–58 [7.1.1]–[7.11.8]. See below Appendix 3, 188–189 for the NSW provisions.

<sup>412</sup> SALRI, Stage 1, above n 10, 58–64 [7.2.1]–[7.3.11]. See below Appendix 2, 187 for the English provisions.

<sup>413</sup> See Thomas Crofts and Arlie Loughnan, ‘Provocation, NSW Style: Reform of the Defence of Provocation in NSW’ [2014] *Criminal Law Review* 109, for discussion of the differences between the Committee’s model and that in s 23.

<sup>414</sup> *Crimes Act 1900* (NSW) s 23(2)(b).

<sup>415</sup> The main case so far to consider the new model is *Turnbull*; see *R v Turnbull (No 5)* [2016] NSWSC 439 (15 April 2016); *Turnbull v R* [2016] NSWCCA 109 (10 June 2016), *R v Turnbull (No 25)* [2016] NSWSC 831 (23 June 2016).

<sup>416</sup> The Committee members were the Hon Reverend Frederick Nile (Christian Democratic Party, Chair), the Hon Trevor Khan (National Party), the Hon David Clarke (Liberal Party), Scot McDonald (Liberal Party), the Hon Adam Searle (Australian Labor Party), David Shoebridge (the Greens) and Helen Westwood (Australian Labor Party). The Committee delivered its final unanimous report on 23 April 2013, and had regard to 52 written submissions.

<sup>417</sup> *R v Singh* [2012] NSWSC 937 (7 June 2012). In *Singh*, the defendant successfully relied on provocation, after he killed his wife by slashing her throat with a box cutter. The defendant successfully argued at trial he was ‘provoked’ into killing his wife, after she told him that she never loved him, was in love with another man and would have him deported. See NSW Select Committee, above n 15, x; Fitz-Gibbon, ‘Homicide Law Reform in NSW’, above n 27, 771–773.

<sup>418</sup> NSW Select Committee, above n 15, 191 [9.5]; Women’s Electoral Lobby, Submission No 10 to *Select Committee on the Partial Defence of Provocation*, 7 August 2012, 1; Justice Action, Submission No 24 to *Select Committee on the Partial Defence of Provocation*, 10 August 2012, 2.

defence should be amended in light of proposals in other jurisdictions'.<sup>419</sup> The Committee recognised the various criticisms of provocation but recommended that it should be retained as a partial defence to 'allow for cases that have defensive elements but fall short of self-defence or excessive-self-defence'.<sup>420</sup> The Committee recommended that provocation be retained in a revised form of 'gross provocation'.<sup>421</sup>

10.2.4 The NSW Attorney-General formed the view that 'extreme provocation' was the best model to achieve the Committee's intent.<sup>422</sup> This model of extreme provocation is now confirmed in s 23 of the *Crimes Act 1900* (NSW).<sup>423</sup> The Attorney-General explained that the new model was 'intended to deliver a limited and targeted partial defence'.<sup>424</sup> The new model is intended to be 'significantly narrowed' than under the previous common law model.<sup>425</sup>

10.2.5 The NSW changes restrict the scope of the provocation defence by only making it applicable in circumstances where the provocative conduct of the deceased was itself a 'serious indictable offence' (an offence carrying more than five years' imprisonment).<sup>426</sup> Further, the new NSW model specifically excludes the homosexual advance defence with the provision, '[c]onduct of the deceased does not constitute extreme provocation if the conduct was only a non-violent sexual advance to the accused or the accused incited the conduct in order to provide an excuse to use violence against the deceased'.<sup>427</sup>

10.2.6 The NSW Parliament in relation to the question of persons who kill those who abuse them, intended that the new model of extreme provocation would also help to remedy the gender bias of the common law model, which requires that the loss of control and killing occur immediately or very soon after the provocative conduct.<sup>428</sup> Section 23(4) of the *Crimes Act 1900* (NSW) provides that 'conduct of the deceased may constitute extreme provocation even if the conduct did not occur immediately before the act causing death'.

10.2.7 SALRI notes the aspect of the NSW model that prevents any non-violent sexual advance from amounting to extreme provocation — the NSW model avoids characterising the exclusion as being limited to non-violent homosexual advances. SALRI agrees (as did all its consultees) that it is preferable that in this regard, the law applies equally to all types of non-violent sexual advances. The NSW model also avoids assuming, in contrast to the traditional law of provocation, the sexuality of the person making the advance and the person subject to the advance, just because of the biological sex of both parties. This development is appropriate because the law ought to recognise that human sexuality is

<sup>419</sup> NSW Select Committee, above n 15, 2 [1.6].

<sup>420</sup> *Ibid* 195 [9.30].

<sup>421</sup> *Ibid*.

<sup>422</sup> NSW Department of Attorney General and Justice, *Reform of the Partial Defence of Provocation* (Discussion Paper, 2013) 2–3.

<sup>423</sup> See Crofts and Loughnan, above n 413, for discussion of the differences between the Committee's model and that in s 23.

<sup>424</sup> *R v Turnbull (No 5)* [2016] NSWSC 439 (15 April 2016), [65].

<sup>425</sup> *Ibid* [86].

<sup>426</sup> *Crimes Act 1900* (NSW) s 23(2)(d). A 'serious indictable offence' in NSW is an offence carrying more than five years' imprisonment (*Crimes Act 1900* (NSW) s 4). In South Australia, it is termed as a 'major indictable offence'.

<sup>427</sup> *Crimes Act 1900* (NSW) s 23(3).

<sup>428</sup> Fitz-Gibbon, *Homicide Law Reform, Gender and the Provocation Defence*, above n 96, 80–81.

broader than the simple duality of homosexual or heterosexual, but encompasses bisexual, queer, intersex, and transgender sexuality.<sup>429</sup>

10.2.8 SALRI was initially attracted to the NSW model. It is an improvement over the current common law model. It has three benefits. First, ‘extreme provocation’ cannot be constituted by conduct that is only a non-violent sexual advance.<sup>430</sup> This removes (or at least seeks to remove) the offensive gay panic aspect of provocation. Secondly, the NSW model also purports to provide for victims of family violence in removing the need for immediacy of the act done in response to the provocation.<sup>431</sup> Thirdly, by confining ‘extreme provocation’ to a serious indictable offence (that is a major indictable offence in South Australia), slights as in controversial cases such as *Singh* and *Ramage* would be unable to amount to provocation.

10.2.9 However, the NSW model has consistently received little support in SALRI’s consultation. All attendees at the two 2016 roundtable consultation sessions viewed the NSW model as too restrictive and/or overly complex.<sup>432</sup> This view was repeated at the 2017 roundtable session.<sup>433</sup>

10.2.10 SALRI considers that the NSW reform, whilst an improvement on the common law, is open to criticism in several significant respects.

10.2.11 First, the NSW model may not entirely close the door to the problematic gay panic defence. This is because rarely will the allegedly provocative conduct consist only of a sexual advance. It is likely to be linked with other conduct that may undermine the effectiveness of the exclusionary provision. The NSW model which prevents a non-violent sexual advance from amounting to extreme provocation may not apply in a factual scenario where the non-violent sexual advance is accompanied by provocative conduct that amounts to a serious indictable offence such as certain threats or assaults (although an indecent assault in itself does not amount to a serious indictable offence). It would seem that, in such circumstances under the NSW model, extreme provocation can still be raised as a defence and the non-violent sexual advance would be likely to be considered as part of the wider factual matrix that forms the alleged provocative conduct.<sup>434</sup> It is therefore unclear if a non-violent sexual advance would be excluded from consideration in such circumstances.

10.2.12 Where such an exclusionary model exists, the jury may still need to determine what act constituted the provocative conduct — the excluded conduct or some other conduct. This issue is illustrated by the English case of *R v Clinton*.<sup>435</sup> This approach was said in *Clinton* to be artificial and unreal in that it is impossible to ‘compartmentalise’ the excluded factor from the wider factual matrix.

<sup>429</sup> This theme was noted to SALRI in its consultation by LGBTIQ groups.

<sup>430</sup> *Crimes Act 1900* (NSW) s 23(3)(a).

<sup>431</sup> *Ibid* s 23(4). See also Fitz-Gibbon, *Homicide Law Reform, Gender and the Provocation Defence*, above n 96, 80–81.

<sup>432</sup> See SALRI, Stage 1, above n 10, Appendix 1, 105–105 and Appendix 2, 111–112.

<sup>433</sup> See below Appendix 1, 185.

<sup>434</sup> See also SALRI, Stage 1, above n 10, 40–43 [5.6.1]–[5.6.10], 64 [7.4.1]–[7.4.3].

<sup>435</sup> [2012] 3 WLR 515. In *Clinton*, a husband killed his wife after she had confessed to infidelity and taunted him about suicide. At the time, England had enacted the ‘partial defence of loss of self-control’ to replace provocation. This was likewise an exclusionary model, which explicitly excluded infidelity from being a ‘trigger’ to murder. However, on appeal, the court determined that the infidelity trigger could not be considered in isolation, where there are other potential triggers. It would be artificial and unrealistic to consider the excluded factor in isolation from its wider factual matrix. See also NSW Select Committee, above n 15, 107–109 [6.88]–[6.100].

10.2.13 Secondly, the NSW model of ‘extreme provocation’ is complex. The common law position is already confusing<sup>436</sup> and the NSW requirement that a defendant may need to prove that they themselves were the direct victim of a serious indictable offence and not some other less serious act brings only further complication to the law.<sup>437</sup> If a new, potentially more complex statutory model is implemented in South Australia, there is a real risk of uncertainty in its application. Problems may arise such as inadequate judicial directions to juries regarding the resolution of the serious indictable offence, the partial defence not being correctly applied by juries and consequential appeals and retrials.

10.2.14 The prospect under the NSW model of two effective trials within the one trial, one to resolve the commission of a ‘serious indictable offence’ and one to resolve whether murder or manslaughter is made out emerged as a particular concern. This concern was raised in NSW in relation to the NSW model.<sup>438</sup> This prospect also raised real concerns to Mr Caldicott and other experienced South Australian lawyers in SALRI’s consultation. This is likely, as was pointed out to SALRI, to prove neither simple nor straightforward and to result in even further confusion, complexity and uncertainty than under the present law. SALRI was informed that the prospect under the NSW model of two effective trials is likely to complicate and prolong proceedings.<sup>439</sup> One experienced lawyer said the likely judicial directions will prove a ‘minefield’.<sup>440</sup> It was pointed out to SALRI that, when a criticism of the current law of provocation is its complexity and difficulty in application,<sup>441</sup> it makes little sense to

<sup>436</sup> James Moshides, Submission No 50 to *Select Committee on the Partial Defence of Provocation*, 8 August 2012, 3; *R v Mankotia* (2001) 120 A Crim R 492, 495 [18]–[19].

<sup>437</sup> University of New South Wales, Submission to the NSW Department of Attorney General and Justice, *Response to Exposure Draft Bill to the Crimes Amendment (Provocation) Bill 2013*, 20 November 2013, 3, <[https://view.officeapps.live.com/op/view.aspx?src=http%3A%2F%2Fwww.justice.nsw.gov.au%2Fjusticepolicy%2FDocuments%2Fsubmission\\_on\\_edb\\_julie\\_stubbs\\_nov\\_2013.doc](https://view.officeapps.live.com/op/view.aspx?src=http%3A%2F%2Fwww.justice.nsw.gov.au%2Fjusticepolicy%2FDocuments%2Fsubmission_on_edb_julie_stubbs_nov_2013.doc)>.

<sup>438</sup> *Ibid*; Kate Fitz-Gibbon, Submission to the NSW Department of Attorney General and Justice, *Response to Exposure Draft Bill to the Crimes Amendment (Provocation) Bill 2013*, 15 November 2013, 3; Graeme Coss, Submission to the NSW Department of Attorney General and Justice, *Response to Exposure Draft Bill to the Crimes Amendment (Provocation) Bill 2013*, 15 November 2013, 5.

<sup>439</sup> See also SALRI, Stage 1, above n 10, Appendix 1, 105 and Appendix 2, 111.

<sup>440</sup> This seems a valid concern. The draft NSW judicial direction on this issue reads as follows:

‘The conduct of [*the deceased*] must have amounted to a serious offence. [*The accused*] says that [*the deceased*]’s conduct constituted the offence of [*specify offence*]. I direct you as a matter of law that the offence of [*specify offence*] is a “serious offence”.

The issue for you to decide is whether the Crown has proved beyond reasonable doubt that the conduct of [*the deceased*] did not amount to an offence of [*description of crime*]. In deciding this issue you must have careful regard to the ingredients of the offence of [*description of crime*].

The crime of [*description of crime*] comprises the following ingredients:

[*Set out the ingredients of the serious indictable offence.*

*If this issue is in dispute it will be necessary for the judge to explain each ingredient and the competing submissions of the parties about the evidence for or against each ingredient of the serious indictable offence.*

If the Crown proves to you beyond reasonable doubt that any or all of the ingredients of [*description of crime*] did not occur on the evidence then the Crown will have proved the conduct of [*the deceased*] did not constitute a serious offence.

If you are satisfied that the Crown has proved beyond reasonable doubt that the conduct of [*the deceased*] did not constitute the serious offence of [*description of crime*] then the Crown will have disproved extreme provocation and providing you are satisfied beyond reasonable doubt as to all the elements of murder to which I have earlier referred, the appropriate verdict is “guilty of murder”. But if you take the view that the Crown has not done so then you must consider the next element of extreme provocation.’ See <<https://www.judcom.nsw.gov.au/publications/benchbks/criminal/provocation.html>>.

<sup>441</sup> See also SALRI, Stage 1, above n 10, 19–22 [4.1.4]–[4.1.13].

introduce a potentially even more confusing and complex model of provocation such as the NSW model.

10.2.15 SALRI agrees with the perceptive views of Helen Gibbon, Alex Steel, Julie Stubbs and Courtney Young of the University of New South Wales on this aspect of the NSW model:

[it] has the potential to extend the length of the trial, and will undoubtedly shift the focus of the murder trial away from the accused and squarely onto the deceased. The deceased is not available to give evidence as to intent, etc. and no inferences can be drawn from the failure to give such evidence. What inferences can a jury fairly make in such circumstances? How is the Crown to go about discharging their burden of proof to negative beyond reasonable doubt that a serious indictable offence was committed? Is it in the public interest for the Crown to both be prosecuting an offence against the accused, and constructing a defence for the deceased? If so, are there ethical limits on the ways in which it is appropriate for the Crown to argue its defence? In terms of jury directions, it is difficult to see how the current amendments will do other than to further complicate the enterprise, notwithstanding the removal of the subjective limb of the test ... A trial judge will now, in addition to being required to direct the jury with respect to the elements of murder, and the operation of the defence of provocation, as a precursor need to explain the elements of the relevant serious indictable offence which itself could be very complex.<sup>442</sup>

10.2.16 Thirdly, the NSW model arguably does not fully address the gender bias of the common law model of provocation and sufficiently cater for victims of family violence who kill.<sup>443</sup> While it moves away from the traditional need for the provocative conduct and the lethal response to be proximate in time, it has no explicit focus in its language on typical family violence scenarios. Further, removing the need for immediacy of retaliation to provocative conduct substantially changes the nature of provocation from the common law model, which requires a near immediate loss of control.

10.2.17 To establish extreme provocation, the provocative conduct must have both caused the defendant<sup>444</sup> and an ordinary person<sup>445</sup> to lose self-control. This deviation from the previous test, which necessitated an assessment from the perspective of an ordinary person in the position of the defendant, has been criticised for focusing too much on objective considerations.<sup>446</sup> The subjective experiences of family violence are seldom understood by ordinary people,<sup>447</sup> and hence this test may omit important considerations from the trial.<sup>448</sup> The retention of the need for a loss of self-control has also been criticised, especially as it may fail to accommodate victims of family violence who experience a slow-burn effect and/or who kill in circumstances where their abuser does not present an immediate threat.<sup>449</sup>

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<sup>442</sup> UNSW, above n 437, 5.

<sup>443</sup> See further SALRI, Stage 1, above n 10, 44–49 [6.1.1]–[6.1.22].

<sup>444</sup> *Crimes Act 1900* (NSW) s 2(c).

<sup>445</sup> *Ibid* s 2(d).

<sup>446</sup> Letter from the Law Society of New South Wales to the NSW Department of Attorney General and Justice, 18 November 2013, 2; Legal Aid NSW, Submission to the NSW Department of Attorney General and Justice, *Response to Exposure Draft Bill to the Crimes Amendment (Provocation) Bill 2013*, November 2013, 2–3; Coss, above n 438, 3.

<sup>447</sup> Women's Legal Services NSW, Submission to NSW Department of Attorney General and Justice, *Response to Exposure Draft Bill to the Crimes Amendment (Provocation) Bill 2013*, 14 November 2013, 6.

<sup>448</sup> UNSW, above n 437, 8.

<sup>449</sup> Coss, above n 438, 3. See Tarrant, above n 129, 194, for discussion on the 'slow burn effect'.

10.2.18 The fact that the NSW model is confined to where it can be established that the deceased committed a serious indictable offence also raises problematic implications in a family violence context. The NSW Attorney-General said that the aim of this restriction was to achieve the policy intent of restricting the availability of the provocation defence, while retaining it for victims of domestic violence as ‘ongoing domestic violence will generally involve serious indictable offences’ both physical and psychological.<sup>450</sup> The Attorney-General explained:

Despite this restriction [confining the defence to where the provocation conduct is a serious indictable offence], victims of domestic violence will be able to rely upon the partial defence in appropriate cases. Domestic violence, particularly long-term abuse, will generally involve conduct involving serious indictable offences, such as the range of assaults in the *Crimes Act 1900*. Even where abuse is not physical, but psychological, it may amount to the serious indictable offence of stalking or intimidation set out in s 13 of the *Crimes (Domestic and Personal Violence) Act 2007*. These offences are committed where the perpetrator's conduct is intended to cause the victim to fear physical or mental harm to themselves or another person with whom they have a domestic relationship. These offences are further defined in sections 7 and 8 of that Act to encompass a broad range of behaviours. As sections 7 and 8 make clear, they also envisage the introduction of evidence of past violent conduct, particularly where it involves a domestic violence offence. The concerns of stakeholders that victims of domestic violence may be prejudiced is also addressed by the continued recognition in proposed s 23(4) that the conduct relied upon need not necessarily have occurred immediately before the act causing death.<sup>451</sup>

10.2.19 However, other parties in NSW did not share this confidence. The Women’s Legal Services NSW, for example, noted:

We fear the requirement that “the conduct of the deceased was a serious indictable offence” will exclude women who have experienced serious domestic violence and ultimately kill their violent partner from raising the partial defence of extreme provocation. This because in the experiences of WLS NSW many women do not report violence to the police and hence those women may not be able to establish [that] the deceased’s conduct constituted a “serious indictable offence”.<sup>452</sup>

10.2.20 Family violence often takes the form of a cumulative series of offences that have often previously failed to be effectively investigated, prosecuted or punished under the criminal justice system.<sup>453</sup>

10.2.21 The need for a defendant under the NSW model to prove that the victim’s conduct did indeed constitute a ‘serious indictable offence’ raises its own difficulties.<sup>454</sup> Victims of family violence who kill their abusers may be unable to establish or point to the commission of a serious indictable (as opposed to some lesser) offence by their abuser.<sup>455</sup> A strong concern with this threshold is that it has ‘restricted

<sup>450</sup> NSW Department of Attorney General and Justice, above n 422, 3.

<sup>451</sup> *R v Turnbull (No 5)* [2016] NSWSC 439 (15 April 2016), [60].

<sup>452</sup> Letter from Women’s Legal Service NSW to Barry O’Farrell, 14 March 2014, [6]–[7] <[www.wlsnsw.org.au/wpcontent/uploads/Ltr-Premier-Provocation-Bill-2014-140314-f.pdf](http://www.wlsnsw.org.au/wpcontent/uploads/Ltr-Premier-Provocation-Bill-2014-140314-f.pdf)>, cited in New South Wales, *Parliamentary Debates*, Legislative Assembly, 14 May 2014, 28774 (Paul Lynch).

<sup>453</sup> Women’s Legal Services NSW, above n 447, 3; Legal Aid NSW, above n 446, 2.

<sup>454</sup> There are often no witnesses to the family violence bar the victim. Victims of family violence are also often too fearful to report an act of their abuser. See Women’s Legal Services NSW, above n 447, 4; New South Wales, *Parliamentary Debates*, Legislative Council, 25 March 2014, 27690 (David Shoebridge).

<sup>455</sup> Fitz-Gibbon, ‘Homicide Law Reform in NSW’, above n 27, 779–780.

[provocation] to the point of redundancy'.<sup>456</sup> Many victims of family violence who are subjected to multiple and persistent acts of abuse, which may not necessarily constitute serious indictable offences, would be unlikely to meet the NSW threshold.<sup>457</sup> For example, typical family violence offences such as contravention of an intervention order,<sup>458</sup> affray,<sup>459</sup> stalking,<sup>460</sup> various types of assault<sup>461</sup> and even assault causing harm<sup>462</sup> would not amount to a major indictable offence in South Australia. The modern concept of family or domestic violence also extends to financial or emotional abuse and the NSW model fails to have regard to such forms of indirect family violence that ordinarily will not amount to an indictable offence.<sup>463</sup>

10.2.22 SALRI notes that to eliminate such a wide range of significant criminality from satisfying the threshold for extreme provocation to apply restricts, if not undermines, the purpose and utility of such a partial defence, crucially in family violence context. This theme was highlighted to SALRI by family violence groups.<sup>464</sup> It was noted in consultation that if one of the main justifications for retaining a partial defence of provocation is to offer an accessible avenue away from murder for persons who kill in response to prolonged family violence, then the NSW model is likely to present major barriers for such defendants.

10.2.23 Critics of extreme provocation have argued that provocation ought to have been abolished altogether, as even revised models will retain provocation's inherent flaws.<sup>465</sup> It has also been noted that victims of family violence who kill their abuser are likely to be better assisted by the complete and partial defences of self-defence and excessive self-defence rather than any revised model of provocation.<sup>466</sup>

10.2.24 SALRI considers that, although the NSW model has some benefits at face value, it raises major problems of both policy and practice. SALRI's further research has found little support for the NSW model. Mr Boucaut SC and Mr Caldicott note that the NSW model is too complex and will make the

<sup>456</sup> A study completed by Dr Kate Fitz-Gibbon reveals that the majority of cases in the period January 2005 to June 2013 where the defendant successfully relied on provocation, would not be able to suffice this threshold and would be excluded from the remit of the new NSW model of 'extreme provocation': Kate Fitz-Gibbon, Submission to Criminal Law Review, NSW Department of Attorney-General and Justice, 15 November 2013, 2. See also Fitz-Gibbon, 'Homicide Law Reform in NSW', above n 27, 781–787.

<sup>457</sup> Coss, above n 438, 3; Fitz-Gibbon, above n 438, 3; Letter from the Law Society of New South Wales to the NSW Department of Attorney General and Justice, 18 November 2013, 1. The NSW Select Committee also did not advocate for a serious indictable offence threshold test on the grounds that it 'did not recognise the true nature of abusive relationships'. See NSW Select Committee, above n 15, 89 [6.4]. See further at 92–96 [6.21]–[6.35].

<sup>458</sup> *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 31.

<sup>459</sup> *CLCA* s 83C.

<sup>460</sup> *Ibid* s 19AA.

<sup>461</sup> *Ibid* s 20.

<sup>462</sup> *Ibid* s 20(4).

<sup>463</sup> NSW Select Committee, above n 15, 92 [6.21]. See, for example, the expansive definition of 'family violence' in s 8 of the *Intervention Orders (Prevention of Abuse) Act 2009* (SA).

<sup>464</sup> Another concern is that the need for a serious or major indictable offence may encourage unfair victim blaming, when that is already a concern of provocation. 'The requirement for the conduct of the deceased to amount to a serious indictable offence has the potential to create a situation where the deceased is on trial to a much greater extent than is currently the case': UNSW, above n 437, 4.

<sup>465</sup> Fitzgibbon, 'Homicide Law Reform in NSW', above n 27, 814; Fitz-Gibbon, above n 438, 7.

<sup>466</sup> Moshides, above n 345, iii; Redfern Legal Centre, Submission No 42 to Select Committee on the Partial Defence of Provocation, 24 August 2012, 4. See also SALRI, Stage 1, above n 10, Appendix 1, 105 and Appendix 2, 112.



law even more complicated than it already is. The NSW model does not close the door to the use of a gay advance as amounting to provocation and may well restrict deserving claims of provocation in the context of family violence. SALRI does not propose the NSW model for South Australia.

### 10.3 English Model: Loss of control

10.3.1 The British Parliament ‘against a background of controversy and widespread dissatisfaction’<sup>467</sup> abolished the common law defence of provocation in England and Wales and replaced it with a new partial defence of ‘loss of self-control’.<sup>468</sup> The English model is of significance for South Australia as a potential model. The Law Society of South Australia has suggested on more than one occasion that if it is ‘inevitable’ that its preferred option for the retention of the present law of provocation is not acceptable, then the English model of loss of control should be considered as an alternative.<sup>469</sup>

10.3.2 The recent British legislative reforms were particularly designed to enhance the legal protection available in England and Wales to victims of family violence. Whilst the partial defence of provocation had long been available under the English common law, the requirement of suddenness made it extremely difficult in practice for abused women to successfully raise provocation.<sup>470</sup> In *R v Ahluwalia*,<sup>471</sup> for example, a defendant who set her abusive husband alight failed to raise provocation at trial as she was unable to point to any sudden and temporary loss of self-control. Instead, the defendant had to rely on diminished responsibility: a partial defence that has been criticised for its ‘mental-illness stigma’<sup>472</sup> (and is unavailable in South Australia).<sup>473</sup> In *R v Thornton*,<sup>474</sup> the court reached a similar result, affirming that, even if a defendant can establish that she was suffering from Battered Woman Syndrome (BWS) at the time of the killing, an element of suddenness had to be present to establish provocation.

10.3.3 The new loss of control model sought to address the gender bias inherent in the traditional law of provocation. When the Bill was first announced, Harriet Harman, then the Minister for Women stated: ‘For centuries the law has allowed men to escape a murder charge in domestic homicide cases by blaming the victim. Ending the provocation defence in cases of “infidelity” is an important law change and will end the culture of excuses.’<sup>475</sup>

<sup>467</sup> *R v Rejmanski* [2017] EWCA Crim 2061, [4]. See further Law Commission (England and Wales) (2004), above n 21; Law Commission (England and Wales), *Murder, Manslaughter and Infanticide*, above n 148.

<sup>468</sup> *Coroners and Justice Act 2009* (Eng).

<sup>469</sup> SA Legislative Review Committee (2014), above n 8, 39; SA Legislative Review Committee (2017), above n 9, 24 [8.4]. See further Law Society of South Australia, Submission to *Inquiry into the Partial Defence of Provocation*, 2 June 2015

<[https://www.lawsocietyasa.asn.au/pdf/Submissions/020615\\_Inquiry\\_into\\_the\\_Partial\\_Defence\\_of\\_Provocation.pdf](https://www.lawsocietyasa.asn.au/pdf/Submissions/020615_Inquiry_into_the_Partial_Defence_of_Provocation.pdf)>.

<sup>470</sup> Kesar Zaman, ‘Is the Defence of Loss of Control a “Better” Defence for Female Victims of Domestic Abuse Than Provocation?’ (2015) 1(1) *University of Bradford Student Law Journal* 1, 5.

<sup>471</sup> [1992] 4 All ER 889.

<sup>472</sup> Zaman, above n 470, 7. See further below n 816.

<sup>473</sup> See below Part 12. See further SALRI, Stage 1, above n 10, 95–96 [11.1.1]–[11.1.7].

<sup>474</sup> [1992] 1 All ER 306.

<sup>475</sup> David Pallister and Rachel Stevenson, ‘Plans to Reform Murder Laws Unveiled’, *The Guardian* (online), 29 July 2008, <<https://www.theguardian.com/politics/2008/jul/29/justice.ukcrime>>.

10.3.4 The new partial defence seeks to better accommodate cases involving battered women, by removing the requirement of suddenness, and extending the defence to individuals who kill in response to a ‘fear of serious violence’.<sup>476</sup> The defence does not apply where a defendant kills in response to sexual infidelity<sup>477</sup> or in a ‘considered desire for revenge’.<sup>478</sup>

10.3.5 The new model, whilst an improvement on the much criticised common law model, is not without major concern. The exclusionary clauses seeking to excise certain conduct, especially infidelity, from amounting to ‘loss of control’ have ‘effectively become a dead letter’<sup>479</sup> as a court is likely to still need to determine what act constituted the provocative conduct, the excluded conduct or some other conduct. This issue is highlighted by the English case of *Clinton*<sup>480</sup> where the Court of Appeal held that the deceased’s infidelity could not be considered in isolation, where there are other potential facts giving rise to loss of control. The court said that to exclude infidelity from the likely wider factual matrix is artificial and unreal and that it is impossible to ‘compartmentalise’ from the jury the excluded factor from the wider factual matrix.<sup>481</sup> Wake suggests that *Clinton* ‘effectively rendered the controversial sexual infidelity prohibition nugatory where the defendant alleges that the victim’s infidelity combined with other factors caused him to lose his self-control and kill’<sup>482</sup> and that the case serves as a ‘salutary warning’<sup>483</sup> against the use of an exclusionary conduct law reform model.

10.3.6 There are additional concerns with the English model, notably in relation to its application in the context of gender and family violence and its complexity.

10.3.7 The need for a loss of self-control remains integral to the new defence.<sup>484</sup> The retention of loss of self-control (contrary to the view of the English Law Commission) arguably excludes a significant proportion of victims of family violence from recourse to the defence.<sup>485</sup> It is established that when a battered woman kills, she is more likely to use a weapon, or to strike when her abuser is unconscious.<sup>486</sup> Whilst the killing might be preceded by an act of abuse, the risk to the defendant may not necessarily be fatal.<sup>487</sup> When a woman kills in these circumstances, it is unlikely that she will be able to demonstrate the requisite ‘physical signs of outburst’ typically associated with a loss of control.<sup>488</sup> Kewley explains that the English ‘defence of loss of control in relation to battered wives fails because it maintains the

<sup>476</sup> *Coroners and Justice Act 2009* (Eng) s 55(3).

<sup>477</sup> *Ibid* s 55(6)(c).

<sup>478</sup> *Ibid* s 54(4).

<sup>479</sup> Nicola Wake, ‘Political rhetoric or principled reform of loss of control? Anglo-Australian perspectives on the exclusionary conduct model’ (2013) 77 *Journal of Criminal Law* 512, 514.

<sup>480</sup> *R v Clinton* [2012] 3 WLR 515. See also Wake above n 479; SALRI, Stage 1, above n 10, 40–43 [5.6.1]–[5.6.10], 64 [7.4.1]–[7.4.3].

<sup>481</sup> See also above [6.2.1]–[6.2.12], [10.2.11]–[10.2.12], [10.3.5].

<sup>482</sup> Wake, above n 479, 514.

<sup>483</sup> *Ibid* 540.

<sup>484</sup> *Coroners and Justice Act 2009* (UK) c 1, s 54(1)(a).

<sup>485</sup> Kate Fitz-Gibbon, ‘Replacing Provocation in England and Wales: Examining the Partial Defence of Loss of Control’ (2013) 40 *Journal of Law and Society* 280, 291; Nicola Wake, ‘Battered Women, Startled Householders and Psychological Self-Defence: Anglo-Australian Perspectives’ (2013) 77 *Journal of Criminal Law* 433, 437, 456.

<sup>486</sup> See, for example, VLRC (2004), above n 15, 62 [3.11]; Wake, above n 485, 456; Julia Tolmie, ‘Battered Defendants and the Criminal Defences to Murder – Lessons from Overseas’ (2002) 10 *Waikato Law Review* 91, 94; Bruce Robertson, ‘Battered Woman Syndrome: Expert Evidence in Action’ (1998) 9(2) *Otago Law Review* 277, 279.

<sup>487</sup> Edwards, above n 102, 233, 240.

<sup>488</sup> *Ibid* 224.

requirement that there must be a loss of control ... The requirement to lose control ignores the fact that battered women will kill out of desperation and fear.<sup>489</sup> Simester et al similarly note that ‘it is not obvious that a battered woman who kills her abusive partner is any more likely to have a successful partial defence of loss of control than she would a defence of provocation at common law.’<sup>490</sup>

10.3.8 Such criticisms have led to concern in England that the loss of self-control model reflects a mere ‘rebranding’ under a new guise of provocation with all its previous problems (notably gender bias), rather than any substantial change in the operation of the law.<sup>491</sup>

10.3.9 Other commentators, in contrast, have suggested that the English changes went too far in addressing the gender bias of the common law model of provocation.<sup>492</sup> McDonagh, for example, suggests that the English legislative reforms have the potential to create a double standard, whereby female perpetrators of violence receive more lenient treatment than male offenders.<sup>493</sup>

10.3.10 The Court of Appeal has declared that the new statutory defence is wholly self-contained and ‘its common law heritage is irrelevant’<sup>494</sup> and it is now unhelpful to have recourse to the common law.<sup>495</sup> The Court of Appeal has highlighted that the new law is ‘clear [and] the development of the criminal law is ... not assisted by continued reference to the old cases or further judicial exegesis on the clear statutory words.’<sup>496</sup> A more rigorous approach to claims of loss of control should prevail than claims of provocation under the previous common law model.<sup>497</sup>

10.3.11 Given that loss of control is a relatively new defence, it is too soon to firmly determine if the gender bias criticisms of the new loss of control model are valid. The overall effect of the English reforms will only become clear as a significant body of case law evolves.<sup>498</sup> Initial case law relating to the loss of control remains of interest. The defence is still used by men, specifically the jealous and jilted responding to sexual infidelity as in *Clinton*<sup>499</sup> and *Daves*.<sup>500</sup> Zaman in 2015 was only able to identify

<sup>489</sup> Ellis Kewley, ‘Should the Loss of Control Defence be Maintained?’ (2015) 3 *North East Review* 55, 56.

<sup>490</sup> Andrew Simester et al, *Simester and Sullivan’s Criminal Law: Theory and Doctrine* (Bloomsbury, 6<sup>th</sup> ed, 2016) 406.

<sup>491</sup> See, for example, Kewley, above n 489, 55; Fitz-Gibbon, *Homicide Law Reform, Gender and the Provocation Defence*, above n 96, 183–187; Fitz-Gibbon, ‘Replacing Provocation in England’, above n 485, 296–298.

<sup>492</sup> Zaman, above n 470, 10. See also Melanie McDonagh, ‘Women should not be allowed to get away with Murder’, *The Telegraph* (online), 4 March 2003, <<https://www.telegraph.co.uk/comment/personal-view/3588370/Women-should-not-be-allowed-to-get-away-with-murder.html>>.

<sup>493</sup> Melanie McDonagh, ‘An Unjust, Feminist View of Murder’, *The Times* (online), 30 July 2008, <<http://www.thetimes.co.uk/to/law/columnists/article2047464.ece>>; Fitz-Gibbon, ‘Replacing Provocation in England’, above n 485, 288.

<sup>494</sup> *R v Clinton* [2012] 3 WLR 515, 518 [1].

<sup>495</sup> *R v Gurnipar* [2015] EWCA Crim 179, [4].

<sup>496</sup> *Ibid* [17].

<sup>497</sup> *Ibid* [14].

<sup>498</sup> *Ibid* [12]. See also Horder and Fitz-Gibbon, above n 135.

<sup>499</sup> *R v Clinton* [2012] 3 WLR 515. In this case, the defendant and the wife (his wife) were on a trial separation. However, two weeks into the separation she told the defendant that she was having an affair. Ultimately, the defendant killed his wife, by repeatedly beating her on the head with a wooden baton and strangling her with his belt. Clinton ultimately pleaded guilty to murder on the day of his retrial.

<sup>500</sup> *R v Daves* [2013] WLR 130. In this case, the defendant went to his estranged wife’s house and found her asleep on the sofa with the victim. The defendant woke the victim up and a fight ensued. The fight escalated and the defendant fatally stabbed the victim in the neck. At trial he raised the defence of self-defence which was not accepted by the jury. See also Dennis Baker and Lucy Zhao, ‘Contributory Qualifying and Non-Qualifying Triggers

one case where a battered woman pleaded guilty to manslaughter on the basis of loss of control.<sup>501</sup> Simester et al were unable to identify any such case.<sup>502</sup> SALRI's far from complete research has only identified several cases such as Mirosława Dowidowicz,<sup>503</sup> Lesley Culley<sup>504</sup> and Karen Otmani,<sup>505</sup> where potential victims of family violence have pleaded guilty to manslaughter on the basis of loss of control.

10.3.12 The English model has attracted particular criticism as a result of its drafting and complexity.<sup>506</sup> Lawyers and judges have described the new law as 'an incredibly complicated piece of legislation', even 'a dog's breakfast'.<sup>507</sup> Lord Judge said scrapping provocation as a defence in murder trials and replacing it with the defence of loss of self-control was not 'sensible'. He told a House of Lords committee that the new model was overly complex and could cause confusion. The fact that the new law required 'five typed pages' of directions for the judge to give to juries made it 'unworkable'.<sup>508</sup> Simester et al note that the defence is 'complicated' and the resulting judicial directions would 'likely be excessively complicated'.<sup>509</sup> Quick and Wells explain that the English model is 'highly problematic' and 'may prove even worse' than the previous common law model of provocation.<sup>510</sup>

10.3.13 SALRI does not support the English model. It is significant that the new law has proved problematic. SALRI, in particular, highlights the need for any new model of provocation to be simpler

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in the Loss of Control Defence: A Wrong Turn on Sexual Infidelity' (2012) 76 *Journal of Criminal Law* 254. Mr Polnay, an experienced criminal barrister in London, has confirmed to SALRI that loss of control is still used in this context (though he does not necessarily oppose its use in a suitable case).

<sup>501</sup> Zaman, above n 470.

<sup>502</sup> Simester et al, *Simester and Sullivan's Criminal Law: Theory and Doctrine*, above n 490, 406. See also, Zaman, above n 470; Kewley, above n 489; Amanda Clough, 'Battered Women: Loss of Control and Loss of Opportunity' (2016) 3 *Journal of International and Comparative Law* 279.

<sup>503</sup> In this 2014 case, Dawidowicz, killed her abusive partner with a knife from behind and successfully pleaded loss of control. See Elaine Wilson, 'Woman who stabbed partner to death had suffered years of abuse, court told', *The Telegraph and Argus* (online), 25 October 2014 <[http://www.thetelegraphandargus.co.uk/news/11558904.Woman\\_who\\_stabbed\\_partner\\_to\\_death\\_had\\_suffered\\_years\\_of\\_abuse\\_\\_court\\_told/](http://www.thetelegraphandargus.co.uk/news/11558904.Woman_who_stabbed_partner_to_death_had_suffered_years_of_abuse__court_told/)>.

<sup>504</sup> Lesley Culley pleaded guilty to manslaughter on the grounds of loss of control and was jailed for six years. The circumstances leading up to the husband's death was that an argument escalated after Mr Culley called the defendant a 'lazy bitch' for not making a bed. The police stated that the claim of loss of control was 'supported by a number of psychiatric assessment'. The judge in sentencing commented: 'I'm anxious not to make a judgement about Anthony and whether he was violent towards you throughout your marriage.' It is unclear whether there was actual family violence. See Charlotte Cox, 'Woman who stabbed husband to death after he called her a "lazy b\*\*\*\*" for not making the bed is jailed', *Manchester Evening News* (online), 27 June 2017 <<http://www.manchestereveningnews.co.uk/news/greater-manchester-news/woman-who-stabbed-husband-death-13248351>>.

<sup>505</sup> See, The Telegraph Reporters, 'Woman who killed her lover and hid his body in a bin jailed', *The Telegraph* (online), 12 November 2012 <<http://www.telegraph.co.uk/news/uknews/crime/9671796/Woman-who-killed-her-lover-and-hid-his-body-in-a-bin-jailed.html>>.

<sup>506</sup> Fitz-Gibbon, *Homicide Law Reform, Gender and the Provocation Defence*, above n 96, 137–139, 145–148, 226–228.

<sup>507</sup> *Ibid* 227.

<sup>508</sup> *BBC News* (online), 'Axing Provocation Defence "not sensible" – Lord Judge', 16 December 2010, <<http://www.bbc.com/news/uk-politics-12007501>>.

<sup>509</sup> Simester et al, above n 490, 406–407. See also David Ormerod, *Smith and Hogan's Criminal Law* (Oxford University Press, 13<sup>th</sup> ed, 2011) 506; Jonathan Herring, *Criminal Law Text Cases and Materials* (Oxford University Press, 5<sup>th</sup> ed, 2012) 305.

<sup>510</sup> Oliver Quick and Celia Wells, 'Partial Reform of Partial Defences: Developments in England and Wales' (2012) 45(3) *Australian and New Zealand Journal of Criminology* 337, 345–346. See also Fitz-Gibbon, 'Replacing Provocation in England' above n 485, 299–302.

for judges, jurors and lawyers (and one might add law students) than the current overly complex law.<sup>511</sup> SALRI considers that the English model of loss of control, despite the Law Society’s qualified support, is unsuitable and should not be adopted in South Australia. SALRI reiterates its view that the problems of provocation and the alternative models such as ‘extreme provocation’ in NSW and ‘loss of control’ in England are such that the preferable solution is that the partial defence of provocation should be abolished with the necessary changes to provide for greater sentencing flexibility as discussed below in Part 11.

#### 10.3.14 Recommendations:

**Recommendation 3**

SALRI recommends that the alternative models of provocation of ‘extreme provocation’ in NSW or ‘loss of control’ in England are unsuitable and should not be adopted in South Australia.

**Recommendation 4**

SALRI recommends that, subject to the crucial changes in sentencing flexibility recommended below (see Recommendations 5 to 9), the current partial defence of provocation in South Australia should be abolished.

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<sup>511</sup> See further SALRI, Stage 1, above n 10, 19–22 [4.1.4]–[4.1.13].

## Part 11 – Sentencing

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### 11.1 Introduction

11.1.1 The present partial defence of provocation to a charge of murder is a common law defence. If successful, it will result in a conviction of manslaughter (‘provocation manslaughter’). As pointed out in the Stage 1 Report,<sup>512</sup> there are three types of event in which the successful use of the provocation defence has attracted attention and concern in law reform debates:

- (a) A person (usually male) kills an intimate partner in response to actual or suspected sexual infidelity or relationship separation;
- (b) A man kills in response to non-violent homosexual advances, otherwise known as ‘gay panic’;
- (c) A person kills an abusive partner or close relative following a pattern of family violence.

11.1.2 These are by no means exclusive types of offending where the defence has been successfully engaged. The principles discussed in this section are relevant to all types of provocation manslaughter.

11.1.3 There is one other common law offence of manslaughter applicable in South Australia, namely causing death by unlawful and dangerous act. In addition to that, however, there are a number of statutory offences of manslaughter:

- (a) Partial defence to murder of killing in pursuance of a suicide pact;<sup>513</sup>
- (b) Partial defence to murder of excessive self-defence;<sup>514</sup>
- (c) Partial defence to murder that the killing was unintentional and that the conduct was necessary and reasonable to prevent loss or damage to property, criminal trespass to land or premises or to make or assist in the lawful arrest of an offender;<sup>515</sup>
- (d) Causing death while under certain conditions of intoxication.<sup>516</sup>

11.1.4 If the partial defence of provocation to murder is no longer available, as recommended elsewhere in this Report, the same facts will then result in a conviction of murder. One of the reasons supporting the abolition of the partial defence of provocation is that a provoked killing still requires proof of all the elements of the crime of murder, and in particular, of an intention to kill or inflict grievous bodily harm. If it contains all the elements of murder it should be classified as murder.<sup>517</sup> In South Australia the mandatory sentence for murder is imprisonment for life.

11.1.5 As will be seen later in this Part of the Report, the only jurisdictions besides South Australia which require a mandatory sentence of imprisonment for life for murder are the Northern Territory and Queensland. All others except Western Australia provide that imprisonment for life is the

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<sup>512</sup> SALRI, Stage 1, above n 10, 10 [3.1.5]. See also above n 106.

<sup>513</sup> *CLCA* s 13A (3).

<sup>514</sup> *Ibid* s 15(2).

<sup>515</sup> *Ibid* s 15A(2).

<sup>516</sup> *Ibid* s 268(4).

<sup>517</sup> The arguments for and against this view are set out above at [5.3.1]–[5.314]. See also SALRI, Stage 1, above n 10, 65–67 [8.1.1]–[8.1.10].

maximum sentence. Western Australia, although retaining mandatory life imprisonment, provides for certain relevant exceptions which clearly could include provocative conduct of the victim. It is significant that the other jurisdictions which retain mandatory life imprisonment besides South Australia are also the only jurisdictions to retain provocation as a partial defence to murder. In all other jurisdictions, the conduct of the victim can be taken into account in sentencing.

11.1.6 Mandatory life imprisonment has been a reason for rejecting abolition of the partial defence of provocation by some Law Reform Commissions and review bodies, including the South Australian Legislative Review Committee.<sup>518</sup> While that view may be understandable it suggests that the existence of an offence should depend on the penalty rather than the penalty depend on the offence or, in the case of murder, the multitude of different circumstances surrounding the offence. The abolition of provocation in South Australia therefore raises squarely the question whether the penalty for murder in South Australia should remain mandatory life imprisonment.

11.1.7 As was pointed out in the Stage 1 Report,<sup>519</sup> the partial defence of provocation to murder had its origin as a means to avoid the harshness of the death penalty for murder. In other words, the common law recognised that some classes of intentional homicide warranted a lesser penalty than the mandatory maximum. That principle is given effect in South Australia by the statutory sentencing regime for manslaughter as opposed to murder. On a conviction of manslaughter of any type the maximum sentence is imprisonment for life or a fine or both.<sup>520</sup> Because of the wide variety of circumstances attending convictions of manslaughter there is no ‘tariff’ for manslaughter<sup>521</sup> and a wide variety of custodial sentences (whether actual or even suspended) are imposed.<sup>522</sup> Imprisonment for life, being for the worst possible case of manslaughter, is seldom imposed.

11.1.8 As can be seen from these sentencing regimes, the crime of provocation manslaughter, along with all other types of manslaughter, has always been regarded, both by the common law and by Parliaments in their statutory enactments, as a less blameworthy form of intentional killing than the crime of murder.

11.1.9 The question emerges as to whether this be maintained for what is presently provocation manslaughter if that crime is abolished in a jurisdiction where the only sentence for murder is imprisonment for life. The experience of other jurisdictions in Australia suggests that it cannot. It was noted in the Stage 1 Report,<sup>523</sup> that the role and operation of the mandatory sentence for murder was beyond the remit of SALRI’s then current review and that SALRI offered no comment ‘at this stage’ on the role and operation of mandatory sentencing. However, it noted for further review in this Report

<sup>518</sup> See SA Legislative Review Committee (2014), above n 8, 35 [6.2.3], SA Legislative Review Committee (2017), above n 9, 31; LRCWA, above n 22, 222, Recommendation 29; Law Commission (England and Wales) (2004), above n 21, 6–7 [1.6] 37 [3.33], 83 [5.11]; QLRC (2008), above n 28, 474 [21.48]–[21.49], 497 [21.164]–[21.166], 500 Rec 21-1; Coss, ‘Provocative Reform: A Comparative Critique’, above n 97, 138, 144.

<sup>519</sup> SALRI, Stage 1, above n 10, 10 [3.1.1].

<sup>520</sup> *CLCA* s 13(1).

<sup>521</sup> See, for example, *R v Weinman* (1987) 49 SASR 248; *R v Lyons* (1993) 69 A Crim R 307, 311, 313, 316; *R v Hoerler* [2004] NSWCCA 184 (11 June 2004); *R v Wheeler* [2015] SASCFC 83 (11 June 2015), [30]–[35].

<sup>522</sup> ‘For more than 100 years, judges in all Australian jurisdictions, and in England, have observed that, of all serious offences, manslaughter attracts the widest range of possible sentences. The culpability of a person convicted of manslaughter may fall just short of that of a person guilty of murder or ... it may be such that a nominal penalty would suffice’: *R v Lavender* (2005) 222 CLR 67, 77 (Gleeson CJ, McHugh, Gummow and Hayne JJ).

<sup>523</sup> SALRI, Stage 1, above n 10, 68 [8.2.3]–[8.2.4].

an examination of the need to ensure that a court possesses (whether under the current law or under any revised model) sufficient flexibility in sentencing to properly reflect an offender's culpability and any genuine mitigating factors in sentencing.<sup>524</sup> This Report will therefore need to include a review of the head sentence for murder in South Australia as well as reviewing the present position relating to parole for those convicted of murder.

11.1.10 It is not only the differences in the head sentence between murder and manslaughter that would cause sentencing distortions. Whether or not those differences remain, because of existing mandatory minimum non-parole periods, a conviction of murder which would previously have been a conviction of provocation manslaughter will substantially increase the length of non-parole periods for the offence to an unacceptable level and, in the process –

- (a) if mandatory life sentences are abolished, force the imposition of unacceptably high head sentences, and
- (b) if mandatory life sentences are not abolished, ensure that a period on parole will not finish on the expiry of a fixed head sentence but will be for life, regardless of the non-parole period determined.

11.1.11 Crucial to the removal of the discriminatory aspects of the partial defence of provocation is therefore a resolution of the consequential issues of fixing both head sentences and non-parole periods. This is so not only in relation to the repeal of the partial defence in its entirety but is critical to the repeal of the discriminatory aspects of provocation discussed in both this and the Stage 1 Report. As has already been pointed out, repeal of the discriminatory aspects of the provocation defence without more will achieve very little. In fact, it would replace one form of discrimination with another, and would have the effect of substantially increasing sentences and non-parole periods for convicted persons who would otherwise have been able to avail themselves of the partial defence.

11.1.12 This section of the Report examines those differences and the effect of applying sentencing standards for murder to those presently applied for manslaughter. It concludes that if the partial defence is to be abolished there must be an inevitable and significant amendment to the sentencing regime for murder to give greater recognition to the acknowledged less blameworthy form of murder. Failure to make such amendment would not only be discriminatory against one class of criminal offender but would be tantamount to Parliament creating a new and very serious offence for one class of criminal behaviour without giving any consideration to the appropriate sentence for the new offence.

11.1.13 Without such a review, one of the most significant contributors to the discriminatory effect of failing to amend the sentencing regime is the application of the present mandatory minimum non-parole provisions of the *Sentencing Act 1988*. SALRI recommends that they should be abolished. However, notwithstanding their inherent weaknesses, it is accepted that the total removal of mandatory minima may be contentious, and possible alternative but less satisfactory approaches will be suggested.

## **11.2 The mandatory sentence of life imprisonment for murder**

11.2.1 South Australia is one of only three jurisdictions in Australia where the mandatory sentence for murder is imprisonment for life. If the partial defence of provocation to murder were to be

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<sup>524</sup> See SALRI, Stage 1, above n 10, Recommendation 7, 69.



abolished, persons who have taken advantage of the defence would be convicted of murder and would be required to be sentenced to imprisonment for life rather than the almost certain likelihood of being sentenced to a fixed term of imprisonment.

11.2.2 The amendment to the *CLCA* which abolished capital punishment as the sentence for murder was introduced in the Legislative Council by the Statutes Amendment (Capital Punishment Abolition) Bill on 24 November 1976. Debate on the Bill was confined to the contentious question of abolition of capital punishment and its replacement by the present terms of s 11 of the *CLCA*, namely that: ‘Any person who commits murder shall be guilty of an offence and shall be imprisoned for life.’ There was no debate at all as to any alternative wording which would merely provide that a person guilty of the offence would be liable to imprisonment for life.<sup>525</sup> Accordingly, it is not an issue which was or has since been considered by the South Australian Parliament.

11.2.3 On a theoretical level, mandatory penalties are underscored by the assumption that all offences, within a particular category, are equally serious and, as a consequence, all offences within that category should attract the same penalty. However, it is apparent that the circumstances of offences vary significantly in both nature and severity.<sup>526</sup> There is a broad spectrum of offending that can constitute murder, such that murder offences differ widely in both severity and character ‘probably more so than any other crime’. For instance, murder can encompass a single ‘mercy’ killing, or extremely violent, cruel, pre-meditated, multiple and contract killings.<sup>527</sup> Additionally, there is a large spectrum of subjective blameworthiness and moral culpability of the person or persons responsible for the killing(s), which ranges from recklessness and intentional motives of compassion to intentional killings for financial gain or callous and calculating offenders.<sup>528</sup>

In relation to manslaughter, the Supreme Court of Tasmania has stated:

It encompasses a wide range of situations, varying in their degree of heinousness, to the extent that it has been said that “there is no offence in which the permissible degrees of punishment cover so wide a range, and none perhaps in which the exercise of so large a discretion is called for in determining the appropriate penalty”.<sup>529</sup>

<sup>525</sup> South Australia, *Parliamentary Debate*, Legislative Council, 24 November 1976 2435–2438; South Australia, *Parliamentary Debates*, Legislative Council, 1 December 1976, 2677–2681; South Australia, *Parliamentary Debates*, Legislative Council, 8 December 1976, 2879–2892.

<sup>526</sup> John Anderson, ‘The Label of Life Imprisonment in Australia: A Principled or Populist Approach to an Ultimate Sentence’ (2012) 35(3) *University of New South Wales Law Journal* 747, 748, 750.

<sup>527</sup> Alex Bailin, ‘The Inhumanity of Mandatory Sentences’ (2002) *Criminal Law Review* 641, 641 citing *Reyes v The Queen* [2002] 2 AC 235, 241–242 [11] (Lord Bingham). See also *R v Howe* [1987] 1 AC 417, 433. ‘No two murders will be alike and that the range of circumstances is such that it is almost impossible to put into one bucket the offences that constitute what can be classified as murder. Murder can be everything from the most awful torture of an innocent child to someone who lovingly assists a longstanding partner who is terminally ill to die’: South Australia, *Parliamentary Debates*, House of Assembly, 6 March 2007, 1936 (Mrs Redmond).

<sup>528</sup> Anderson, above n 526, 764; *R v Howe* [1987] AC 417, 433 (Lord Hailsham).

<sup>529</sup> *Attorney-General (Tas) v Wells* [2003] TASSC 78 (28 August 2003), [26], citing *R v Withers* (1925) 25 SR (NSW) 382, 394–395.

11.2.4 General sentencing principles require that the penalty must be proportionate to the seriousness of an offence<sup>530</sup> and accordingly any mitigating or aggravating factors must be taken into account.<sup>531</sup> However, the restrictive nature of a mandatory sentence of life imprisonment makes it difficult for sentencing judges to properly reflect the differing circumstances of the offence and levels of culpability of an offender. This is arguably of increased importance in the context of homicide offences, as they are subject to the most severe sanctions.<sup>532</sup> A mandatory life sentence for murder provides no scope for accounting for the ‘differing degrees of moral seriousness’ in murder offences,<sup>533</sup> and hence the reason why the opposition to mandatory life imprisonment by law reform bodies, academics and other commentators is overwhelming.<sup>534</sup>

11.2.5 The position concerning sentencing for murder in all Australian jurisdictions is set out in tabular form in Table 1 below.

**Table 1 – Sentencing and Partial Defences for Murder in all Australian Jurisdictions**

Jurisdiction	Sentence	Partial Defences Available to Murder Charge
Western Australia	Life imprisonment <sup>535</sup> (mandatory, but with qualifications)	None
Northern Territory	Life imprisonment <sup>536</sup> (mandatory)	Diminished Responsibility <sup>537</sup> Provocation <sup>538</sup>
Queensland	Life imprisonment <sup>539</sup> (mandatory)	Provocation <sup>540</sup> Diminished Responsibility <sup>541</sup> Killing in an abusive domestic relationship <sup>542</sup>

<sup>530</sup> *Veen v The Queen (No 1)* (1979) 143 CLR 458; *Leeth v The Commonwealth* (1992) 174 CLR 455; *Kruger v The Commonwealth* (1997) 190 CLR 1, 63–68 (Dawson J), 141–142 (McHugh J); *Siganto v The Queen* (1998) 194 CLR 656, 670–672 (Gaudron J); *Muir v The Queen* (2004) 206 ALR 189, 194 (McHugh and Hayne JJ); *Hili v The Queen* (2010) 242 CLR 520, 527 [18], 535 [49] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

<sup>531</sup> LRCWA, above n 22, 299.

<sup>532</sup> Dirk van Zyl Smit, *Taking Life Imprisonment Seriously in National and International Law* (Kluwer Law International, 2002) 1.

<sup>533</sup> David Wood, ‘The Abolition of Mandatory Life Imprisonment for Murder: Some Jurisprudential Issues’ in Heather Strang and Sally-Ann Gerull (eds), *Homicide: Patterns, Prevention and Control, Conference Proceedings No 17* (Australian Institute of Criminology, 1993) 237, 249; Anderson, above n 526, 764.

<sup>534</sup> See, for example, New Zealand Criminal Law Reform Committee, above n 97, [6]; Law Reform Commission of Tasmania, above n 97, 3; Law Reform Commission of Victoria, above n 97, 128 Recs 38, 39; Queensland Criminal Code Review Committee, above n 97, 55, 194; Law Reform Commission of Ireland, *Report on Sentencing*, Report No 53 (1996) [5.12]; MCCOC (Ch 5: DP), above n 22, 65; McAnally, above n 97; NZLC (2001), above n 22, 51–52 [147]–[151]; Sheehy, above n 97; Grant, above n 97, 700–701; Coss, above n 97, 144; Kate Fitz-Gibbon, ‘The Mandatory Life Sentence for Murder: An Argument for Judicial Discretion’ (2012) 13 *Criminology and Criminal Justice* 506; Anderson, above n 526; LRCWA, above n 22, 310; Fitz-Gibbon, ‘Homicide Law Reform in NSW’, above n 27, 769, 791–815.

<sup>535</sup> *Criminal Code* (WA) s 279(4).

<sup>536</sup> *Criminal Code* (NT) s 157(1).

<sup>537</sup> *Ibid* s 159.

<sup>538</sup> *Ibid* s 158.

<sup>539</sup> *Criminal Code 1899* (Qld) s 305(1).

<sup>540</sup> *Ibid* s 304.

<sup>541</sup> *Ibid* s 304A.

<sup>542</sup> *Ibid* s 304B.

South Australia	Life imprisonment <sup>543</sup> (mandatory)	Provocation <sup>544</sup> Excessive Self-Defence <sup>545</sup> Suicide Pact <sup>546</sup> Unintentional killing in defence of property etc <sup>547</sup>
Victoria	Life imprisonment <sup>548</sup> (maximum)	None
New South Wales	Life imprisonment <sup>549</sup> (maximum)	Diminished Responsibility <sup>550</sup> Excessive Self-Defence <sup>551</sup> Extreme Provocation <sup>552</sup>
Tasmania	Life imprisonment <sup>553</sup> (maximum)	None
Australian Capital Territory	Life imprisonment <sup>554</sup> (maximum)	Diminished Responsibility <sup>555</sup> Provocation <sup>556</sup>

11.2.6 As shown in Table 1, there are only three jurisdictions which have absolute mandatory life imprisonment. They are also the only three of the jurisdictions which retain the partial defence of provocation to murder. The three Australian jurisdictions that retain absolute mandatory life imprisonment are a minority of jurisdictions and represent a relatively small proportion of the national population.

11.2.7 The position in Western Australia is that the *Criminal Code* provides that a person who is guilty of murder must be sentenced to life imprisonment, unless the sentence would clearly be unjust given the circumstances of the offence and the offender and the person is unlikely to be a threat to the safety of the community when released,<sup>557</sup> in which case the offender is only liable to imprisonment for 20 years. In practice, this ‘mandatory’ sentencing scheme rather operates as a ‘presumption’ of a life sentence, and was introduced following the Western Australia Law Reform Commission’s *Review of the Law of Homicide*.<sup>558</sup> The Commission noted that provoked killings are not uniform in either intent or degree of moral culpability.<sup>559</sup>

11.2.8 The Commission recommended that provocation as a partial defence to homicide should be abolished and any issue of provocation considered only as a sentencing factor. The Commission’s

<sup>543</sup> *CLCA* s 11.

<sup>544</sup> This is under the common law.

<sup>545</sup> *CLCA* s 15(2).

<sup>546</sup> *Ibid* s 13A.

<sup>547</sup> *Ibid* s 15A.

<sup>548</sup> *Crimes Act 1958* (Vic) s 3.

<sup>549</sup> *Crimes Act 1900* (NSW) s 19A.

<sup>550</sup> *Ibid* s 23A.

<sup>551</sup> *Ibid* s 421.

<sup>552</sup> *Ibid* s 23.

<sup>553</sup> *Criminal Code* (Tas) s 158.

<sup>554</sup> *Crimes Act 1900* (ACT) s 12.

<sup>555</sup> *Ibid* s 14.

<sup>556</sup> *Ibid* s 13.

<sup>557</sup> *Criminal Code 1913* (WA) s 279(4). See *Western Australia v Silich* [2011] WASCA 135 (28 June 2011), [86]; Hemming, above n 3, 43.

<sup>558</sup> See LRCWA, above n 22.

<sup>559</sup> *Ibid* 219.

recommendations included that the partial defence to murder of provocation be repealed, but only if the mandatory penalty of life imprisonment for murder was replaced with a presumptive sentence of life imprisonment.<sup>560</sup> Further, the Commission found that the previous sentencing regime — under which the most lenient penalty available for ‘wilful murder’ was life imprisonment with a minimum non-parole period of 15 years — had insufficient flexibility to fairly take into account differences in culpability.<sup>561</sup> For example, the Commission observed that in the absence of discretion, an intentional killing committed in a state of extreme anger following the discovery that the deceased had sexually abused a close relative would attract life imprisonment with a minimum term of at least 15 years.<sup>562</sup>

11.2.9 Commentators have since expressed support for this presumptive sentence of life imprisonment model,<sup>563</sup> as it ‘recognise[s] the unique seriousness of murder on the one hand, and yet allow[s] for flexibility on the other’.<sup>564</sup> For example, Rathus argued that majority of murders ordinarily attract life imprisonment, but this model is able to fairly respond to exceptional circumstances, such as instances where a woman kills a systemically abusive partner, that call for the imposition of a lesser sentence.<sup>565</sup>

11.2.10 Notably, this ‘presumptive’ model is similar to the scheme in New Zealand. In this jurisdiction, there is a ‘strong presumption in favour of life imprisonment for murder’ unless,<sup>566</sup> given the circumstances of the offence and the offender, such a sentence would be ‘manifestly unjust’ in which case the court may depart from a life sentence.<sup>567</sup> However, the New Zealand Parliament has made it clear that this presumption will only be displaced in the case of mercy killings and cases ‘where there is evidence of prolonged and severe abuse’.<sup>568</sup> It has, however, been observed by the New Zealand Court of Appeal that there may be cases where ‘mental or intellectual impairment of the offender may be so mitigating of moral culpability that, absent issues of future risk to public safety, it would be manifestly unjust to impose a sentence of life imprisonment’.<sup>569</sup> However, there is yet to be any case law recognising an intellectual disability or cognitive impairment as sufficient to make a life sentence ‘manifestly unjust’ and displace the presumption.

11.2.11 In South Australia, one must look beyond the provision of the penalty of mandatory life imprisonment in the *CLCA* for its full effect. Prior to the recent amendments to the *Correctional Services Act 1982* (SA) by the *Correctional Services (Parole) Amendment Act 2015*, if the non-parole period of a person sentenced to imprisonment for life had expired and it was otherwise appropriate to do so, the Parole Board would recommend to the Governor that the prisoner should be released on parole for a stated period at the end of which, if all the conditions of parole had been observed, the prisoner would be free. If the Governor accepted the recommendation, it would be given effect. By the 2015 amendments to the *Correctional Services Act*, the decision to release on parole became that of the Parole

<sup>560</sup> Ibid 222 (Recommendation 29).

<sup>561</sup> LRCWA, above n 22, 217–223. See also the discussion in NSW Select Committee, above 15, 26–27 [3.24]–[3.26].

<sup>562</sup> LRCWA, above n 22, 310.

<sup>563</sup> See, for example, Grant, above n 97, 697.

<sup>564</sup> Ibid.

<sup>565</sup> Z Rathus, ‘There Was Something Different About Him That Day: The Criminal Justice System’s Response to Women Who Kill Their Partners’ (Brisbane: Women’s Legal Service, 2002) 26.

<sup>566</sup> New Zealand, *Parliamentary Debates*, 14 August 2001, 594, 10910 (P Goff, Minister of Justice).

<sup>567</sup> *Crimes Act 1961* (NZ) s 172; *Sentencing Act 2002* (NZ) s 102. See also Anderson, above n 526, 764.

<sup>568</sup> New Zealand, *Parliamentary Debates*, 14 August 2001, 594, 10910 (P Goff).

<sup>569</sup> *R v O’Brien* (Unreported, Court of Appeal, CA 107/03, 16 October 2003) [36].

Board, subject to possible review. However, the 2015 amendments inserted s 69(2) into the main Act which now provides:

A prisoner serving a sentence of life imprisonment who is released on parole after the commencement of this subsection will, unless the release is cancelled or suspended, or the sentence is extinguished, remain on parole for the remainder of the sentence.

11.2.12 This now applies without exception to every person sentenced to life imprisonment regardless of the length of the non-parole period set by a court. Release on parole is subject to many conditions required by the *Correctional Services Act* and by the Parole Board. Parole is liable to cancellation by the Parole Board for breach of any condition of parole.<sup>570</sup> The shorter the duration of a non-parole period the greater this burden becomes. Other prisoners are unconditionally released when the period of the head sentence has expired.<sup>571</sup> Therefore, without amelioration of the requirement of mandatory life imprisonment, a young person convicted of murder who would otherwise have been convicted of provocation manslaughter, even if subject to a modest non-parole period, would be on parole for the rest of his or her life.

11.2.13 Abolition of the partial defence, even in a jurisdiction which does not have mandatory life imprisonment as the head sentence for murder, could well see a rise in the level of head sentences for what would have been manslaughter. The partial defence of provocation was abolished in Tasmania in 2003.<sup>572</sup> The ‘provocative conduct’ of the deceased is now considered in the sentencing process, alongside other sentencing factors that the court must take into account to arrive at an appropriate and proportionate sentence.

11.2.14 In *Tyne v Tasmania*,<sup>573</sup> Blow J (as he then was) noted that the previous disparity between sentences for intentional killings (murder and provocation manslaughter) would be reduced with the abolition of the partial defence:

Between the abolition of mandatory sentences of life imprisonment for murder in 1994 and ... [the abolition of substantive provocation] in 2003, sentences for manslaughter in provocation cases were substantially less than those for murder. The only reason for the great disparity between murder sentences and manslaughter sentences in provocation cases was the existence of [the partial defence of provocation] ... Now ... there is no reason for such a great disparity. When a murder has been brought about, or contributed to by provocation, that is now simply a mitigating factor whose weight will depend on the circumstances.<sup>574</sup>

11.2.15 Further, his Honour outlined the approach to be taken in sentencing an offender for murder where provocation is raised as a mitigating factor, stating:

The circumstances that a sentencing judge should take into account in relation to provocation in a murder case include the nature of the provocation, its severity, its duration, its timing in relation to the killing, any relevant personal characteristics of the offender (eg in cases of racial abuse) and the extent of the impact of the provocative conduct on the offender ... I see no reason why

<sup>570</sup> *Correctional Services Act 1982* (SA) s 74.

<sup>571</sup> *Ibid* s 69(1).

<sup>572</sup> *Criminal Code Amendment (Abolition of Defence of Provocation) Act 2003* (Tas).

<sup>573</sup> [2005] TASSC 119 (1 December 2005).

<sup>574</sup> *Ibid* [26]. Notably, this case was the first post-abolition case in Tasmania, and the defendant’s contention that he should have been sentenced for murder as if provocation had reduced his crime to manslaughter, despite the repeal of the partial defence, was rejected: at [18], [27].

provocation should be dealt with as a mitigating factor any differently in murder cases from the way it is dealt with in other cases.<sup>575</sup>

11.2.16 As will be seen by a review of recent sentences for provocation manslaughter, the head sentence is imposed where the maximum possible penalty is imprisonment for life have been substantially less than that. If mandatory life imprisonment for murder is abolished there may well be a tendency for such sentences to be increased if Blow J's reasoning is applied. If it is it will be consistent with the best outcome of sentencing, namely that sentences for all crimes of murder are to be assessed on a similar scale, taking into account the requirements of ss 10, 10A and 10C of the *Sentencing Act 1988*, thereby bringing a greater degree of consistency the sentencing for intentional homicide.

11.2.17 However, achievement of this goal need not necessarily require the absolute abandonment of mandatory life imprisonment for murder. SALRI is attracted to the solution adopted in Western Australia for the reasons given by the Western Australia Law Reform Commission and approved by other commentators and recommends accordingly.

11.2.18 Recommendation:

#### **Recommendation 5**

SALRI recommends that the *Criminal Law Consolidation Act 1935* be amended to provide that a person found guilty of murder must be sentenced to imprisonment for life unless –

- (a) that sentence would be clearly unjust given the circumstances of the offence and the person; and
- (b) the person is unlikely to be a threat to the safety of the community when released from imprisonment;

in which case the person is liable to imprisonment for 20 years.

### **11.3 Mandatory Minimum Non-parole Periods for Murder and Manslaughter in South Australia**

11.3.1 Before discussing whether there should be reform of mandatory minimum non-parole period provisions in South Australia it is necessary to understand what they are and how they work.

11.3.2 Section 32(5)(ab) of the *Sentencing Act 1988* prescribes that in respect of a person sentenced to life imprisonment for an offence of murder, the mandatory minimum non-parole period for the offence is 20 years.

11.3.3 In respect of a serious offence against the person, s 32(5)(ba) of the Act prescribes that the mandatory minimum non-parole period is four-fifths the length of the head sentence. A 'serious offence against the person' is defined as meaning:

- (i) a major indictable offence (other than an offence of murder) that results in the death of the victim or the victim suffering total incapacity; or
- (ii) a conspiracy to commit an offence referred to in subparagraph (i); or

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<sup>575</sup> Ibid [28].

- (iii) aiding, abetting, counselling or procuring the commission of an offence referred to in subparagraph (i).<sup>576</sup>

11.3.4 It therefore includes the offence of manslaughter. The application of both minimum mandatory non-parole periods is governed by s 32A of the Act. It is necessary to set out those provisions in full:

32A—Mandatory minimum non-parole periods and proportionality

- (1) If a mandatory minimum non-parole period is prescribed in respect of an offence, the period prescribed represents the non-parole period for an offence at the lower end of the range of objective seriousness for offences to which the mandatory minimum non-parole period applies.
- (2) In fixing a non-parole period in respect of an offence for which a mandatory minimum non-parole period is prescribed, the court may—
  - (a) if satisfied that a non-parole period that is longer than the prescribed period is warranted because of any objective or subjective factors affecting the relative seriousness of the offence, fix such longer non-parole period as it thinks fit; or
  - (b) if satisfied that special reasons exist for fixing a non-parole period that is shorter than the prescribed period, fix such shorter non-parole period as it thinks fit.
- (3) In deciding whether special reasons exist for the purposes of subsection (2)(b), the court must have regard to the following matters and only those matters:
  - (a) the offence was committed in circumstances in which the victim's conduct or condition substantially mitigated the offender's conduct;
  - (b) if the offender pleaded guilty to the charge of the offence—that fact and the circumstances surrounding the plea;
  - (c) the degree to which the offender has cooperated in the investigation or prosecution of that or any other offence and the circumstances surrounding, and likely consequences of, any such co-operation.
- (4) This section applies whether a mandatory minimum non-parole period is prescribed under this Act or some other Act.

11.3.5 These minimum non-parole period provisions were enacted in 2007<sup>577</sup> and commenced operation on 1 November 2007.

11.3.6 The Act does not define the expressions ‘objective seriousness’ in sub-s (1) or ‘objective and subjective factors’ in sub-s (2). In relation to paragraphs (b) and (c) of sub-s (3) it must be pointed out that there also exists in s 10A of the *Sentencing Act 1988* a detailed scheme for reduction of sentences (including non-parole periods)<sup>578</sup> for various types of cooperation with a law enforcement agency, and in s 10C, provision for reduction of sentences for pleas of guilty at various stages of the proceedings.

<sup>576</sup> *Sentencing Act 1988* s 32(10)(d).

<sup>577</sup> *Criminal Law (Sentencing) (Dangerous Offenders) Amendment Act 2007* (SA).

<sup>578</sup> See the definition of ‘sentence’ in s 3 of the *Sentencing Act 1988*.

These provisions were inserted in the Act by later amendment<sup>579</sup> which commenced operation on 11 March 2013.

11.3.7 Section 32A of the *Sentencing Act 1988* is an extremely difficult provision to apply and has been the subject of much judicial comment. In *R v A, D*,<sup>580</sup> the Court of Criminal Appeal said:

If considering whether a non-parole period longer than the mandatory period should be fixed, the court must consider all “objective or subjective factors affecting the relative seriousness of the offence”. This must mean all factors that are relevant according to established principles. It is well established practice to treat all relevant factors in sentencing as either objective or subjective. That must be what Parliament had in mind. Accordingly, the court will ask itself whether the factors that are relevant to the fixation of a non-parole period according to established principles support or warrant a longer non-parole period than 20 years.

But the mandatory period is not just a number. It identifies a non-parole period appropriate “for an offence at the lower end of the range of objective seriousness”. So the court must ask itself whether, bearing in mind that a 20 year non-parole period is an appropriate non-parole period for an offence of murder at the lower end of the range of objective seriousness, this particular offence (considering all relevant factors according to established principles) warrants a longer non-parole period.

By characterising the mandatory period as appropriate for “an offence at the lower end of the range of objective seriousness”, s 32A will increase non-parole periods. Experience indicates that 20 years is a high non-parole period for an offence of murder “at the lower end of the range of objective seriousness”. Parliament must have intended to encourage longer non-parole periods for the offence of murder.

In this way the mandatory or prescribed period operates as a yardstick or benchmark. Parliament has chosen to identify 20 years as an appropriate non-parole period for an offence of murder “at the lower end of the range of objective seriousness”. It is a strange benchmark. The benchmark is identified by reference only to objective seriousness. The court has to compare a particular case, taking account of objective and subjective factors, with a benchmark that is affected by objective factors only. The court is not able to compare like with like. The process is not easy to explain. But this is the statutory task.<sup>581</sup>

## 11.4 *R v Hallcroft*

11.4.1 The most recent and most comprehensive analysis of the provisions is to be found in the reasons for judgment of Kourakis CJ with which Peek, Stanley, Lovell and Doyle JJ agreed in *R v Hallcroft*.<sup>582</sup> This was a prosecution appeal against the fixing by the trial judge of the non-parole period for the defendant on his conviction of murder. The circumstances of the offending were that the defendant stabbed the deceased in the chest and head and then later severed the deceased’s legs at the knees and placed the body in a wheelie bin in the street. The sentencing judge considered that the objective circumstances of the offending were very serious and not at the lower end of the range of objective seriousness. The offender’s mild intellectual disability, his difficult and troubled childhood and his years of alcohol and drug abuse placed his behaviour in context but there was nothing unusual

<sup>579</sup> *Criminal Law (Sentencing) (Guilty Pleas) Amendment Act 2012* (SA).

<sup>580</sup> (2011) 109 SASR 197.

<sup>581</sup> *Ibid* 205 [35]–[38] (Doyle CJ, Duggan, Anderson, White and David JJ).

<sup>582</sup> (2016) 126 SASR 415.



about the defendant’s deficits. The defendant had pleaded guilty to murder on his first arraignment in circumstances where the provisions of s 10C of the *Sentencing Act 1988* were capable of attracting the maximum discount of 30 per cent. The sentencing judge applied a starting point of 22 years in fixing the non-parole period and stated that it was being reduced by 30 per cent on account of mitigating factors, including a discount for the plea. In fact, there was a miscalculation and it was reduced by 31.8 per cent to 15 years.

11.4.2 The DPP appealed on the grounds that the period of 15 years was manifestly inadequate and that the judge erred in failing to make a finding as to whether special reasons existed in accordance with s 32A(3) of the *Sentencing Act 1988*. The appeal was dismissed.

11.4.3 The Chief Justice began by considering the interaction of s 10C of the *Sentencing Act 1988* with s 32(5)(ba). There was no implied repeal of s 32(5)(ba) as both sections can be read together because they both confer discretions. The mandatory minimum was subject to the discretion conferred by s 32A(2)(b), which is activated by the court’s satisfaction of the existence of special reasons.

11.4.4 The Chief Justice then conducted a detailed analysis of s 32A, of which the following is but a brief summary. Subsection (1) ‘sets a benchmark for non-parole periods for murder by reference only to the objective seriousness of the offence’. The stipulation is that the stated minimum period is at ‘the lower end of the range of objective seriousness.’<sup>583</sup> His Honour reviewed the case law which had discussed this difficult concept. He gave some examples, some of which might also be regarded as being subjective, such as the mental element of the accused. He also identified factors which could be characterised as subjective as including ‘the offender’s personal circumstances [including] such things as his or her developmental history, education, socio-economic position, health, previous character, insight, prospects for rehabilitation and contrition’ and ‘the making, timing and circumstances of a guilty plea’.<sup>584</sup>

11.4.5 In relation to s 32A(2)(a), the Chief Justice said:

The dichotomy between “objective” and “subjective” factors established by s 32A(2) must be construed consistently with the expression “objective seriousness” in s 32A(1). ... Objective factors are therefore generally the circumstances attending the commission of the offence and subjective factors are those personal to the offender.<sup>585</sup>

11.4.6 Kourakis CJ then considered which of the factors referred to in s 10(1) of the Act would be considered as subjective factors and which as objective factors. He pointed out that subjective factors will not always be mitigatory, such as the need for personal deterrence and/or poor prospects of rehabilitation.<sup>586</sup> Kourakis CJ rejected a suggestion that the ability to increase the sentence above the mandatory minimum under s 32A(2)(a) was available on purely subjective factors. He said that in fixing the non-parole period all of the objective and subjective factors in the case will be weighed against the benchmark of 20 years which is set by reference to objective factors alone. ‘If an offender’s subjective personal circumstances, on balance, give little or no reason to mitigate penalty, condign punishment reflecting the objective seriousness of the offence will be imposed.’<sup>587</sup>

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<sup>583</sup> Ibid 424 [40].

<sup>584</sup> Ibid 425–426 [42]–[43].

<sup>585</sup> Ibid 426 [47].

<sup>586</sup> Ibid 427 [48].

<sup>587</sup> Ibid.

#### 11.4.7 His Honour continued:

The benchmark, fixed, as it is, by reference only to objective seriousness makes no allowance for subjective factors which are mitigatory. Accordingly the non-parole period fixed for an offence which is relatively more serious might nonetheless be no more than the minimum because the subjective factors in mitigation counterbalance the offence's more serious objective factors. Moreover, even though an application of the 20 year benchmark to an offence at the lower end of the scale of objective seriousness, committed by an offender with strongly mitigating subjective factors, would ordinarily result in a non-parole period of less than 20 years, a non-parole period of 20 years must still be fixed because, subject to the special reasons discretion, the benchmark is also the statutory minimum.

In short, and leaving aside a reduction in the non-parole period for special reasons, the effect of s 32(5)(ab) of the CLSA is that there is no scope to give a defendant who commits an offence at the lower end of the range of objective seriousness and has mitigating personal circumstances, any lesser non-parole period than another defendant who commits an offence at the lower end of objective seriousness but has few, or no, mitigating personal circumstances. Nor is there any scope to give a defendant who commits an offence which is objectively more serious but has strong personal circumstances in mitigation, including for example a plea of guilty at the earliest opportunity a non-parole period of less than 20 years, when the circumstances would have so demanded when measured against the 20 year statutory benchmark, as a result of the statutory minimum.<sup>588</sup>

11.4.8 It would follow from what the Chief Justice has said that the first stage of fixing a non-parole period, before any consideration is given to special reasons, is to fix a notional base or benchmark non-parole period for the offence. In the case of murder it will be 20 years or more. One then turns one's attention, as did the Chief Justice, to sub-ss (2) and (3) of s 32A.

11.4.9 From the discussion which follows in the Chief Justice's reasons a number of propositions emerge.<sup>589</sup>

11.4.10 The expression 'special reasons' in s 32A(2)(b) is not defined. The expression should not be conflated with the prescribed matters to which the court's consideration is confined by s 32A(3). Special reasons cannot exist in the abstract, unconnected to the consideration of whether they support a reduction in the minimum non-parole period. They only exist if they are reasons to fix a non-parole period shorter than the prescribed period. They are therefore more likely to be found, for example in the case of murder, if the notional base or benchmark non-parole period is close to 20 years and where, by reason of the prescribed matters in sub-s (3), the imposition of the mandatory minimum would appear to be disproportionate and oppressive. Even after special reasons are found to exist the mandatory minimum non-parole period remains relevant and affects the extent of the reduction to be made. If the non-parole period so fixed is less than 20 years, the court must then consider whether the factors prescribed in s 32A(3) of the Act support a finding of special reasons to give effect to that result. These factors do not themselves constitute special reasons. They are only factors that may support a finding of special reasons.

11.4.11 The Chief Justice gave an example of the practical operation of the special reasons discretion in considerations arising under sub-s (3)(b). He said:

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<sup>588</sup> Ibid 427 [49]–[50].

<sup>589</sup> Ibid 429–432 [54]–[66].

Special reasons to reduce the statutory minimum will not be made out by the mere making of a guilty plea. It is a necessary condition for the reduction of a non-parole period below the statutory minimum, that the statutory minimum prevents the Court from giving full effect to the reduction it would otherwise have made on account of the offender's plea of guilty. However, the inability to give effect to that reduction will only amount to a special reason to depart from the statutory minimum if the failure to do so would result in a sentence so manifestly disproportionate to all of the circumstances of the case that the case should be treated as an exception to the rule.

The disproportion to which I refer is largely to be measured by the difference between the minimum non-parole period and the non-parole period which would be fixed in accordance with s 32A and s 10C of the CLSA if the benchmark of 20 years were not also the minimum non-parole period ...

Even though the primary indication of injustice and disproportion is the extent of the reduction which is denied by the application of the statutory minimum, it will also be necessary to consider:

- the seriousness of the offence;
- the degree of contrition;
- the reasons for and circumstances surrounding the entry of the guilty plea.

If those qualitative factors operate adversely to a defendant the primary quantitative measure of disproportion may not constitute special reason to reduce the non-parole period.<sup>590</sup>

11.4.12 Other than to note that it was a matter of objective seriousness, the Chief Justice did not have to consider the operation of s 32A(3)(a) in *Hallcroft*. That paragraph specifies one of the matters to which the court may have regard in deciding whether special reasons exist as being 'the offence was committed in circumstances in which the victim's conduct or condition substantially mitigated the offender's conduct'. It will not always be easy to determine whether conduct giving rise to the common law partial defence of provocation will be encompassed by that paragraph. The egregious provocative conduct from the deceased in *Narayan*<sup>591</sup> was held to fall within s 32A. By way of contrast, in *Lindsay* it was held by the Court of Appeal that the deceased's conduct did not fall within s 32A.<sup>592</sup> Bampton J reached the same conclusion in resentencing Lindsay.

11.4.13 Mr Caldicott, the Human Rights Law Centre and others have similarly noted to SALRI in consultation the limited and uncertain sentencing latitude provided by s 32A and that it is far from clear that even egregious provocation from a deceased (recalling cases such as *Camplin* or *Butler*)<sup>593</sup> would fall within this provision to allow a court to depart from the usual mandatory minimum 20-year non-parole period.<sup>594</sup>

<sup>590</sup> Ibid 432–433 [69]–[72].

<sup>591</sup> *R v Narayan* [2011] SASFC 61 (1 July 2011).

<sup>592</sup> (2014) 119 SASR 320, 342 [71], 344–345 [78], 385–386 [258]–[261].

<sup>593</sup> See above [9.1.4].

<sup>594</sup> The Government during the 2007 parliamentary debate explained that the present s 32A was intended to cover in a suitable case provocative conduct from the deceased. See South Australia, *Parliamentary Debates*, Legislative Council, 21 June 2007, 406 (Hon P Holloway); South Australia, *Parliamentary Debates*, Legislative Council, 24 July 2004, 448 (Hon P Holloway). See also *R v Narayan* [2011] SASFC 61 (1 July 2011), [46]–[48]; *R v Li* [2016] SASFC 152 (22 December 2016), [28], [37]–[38] (Stanley J), [50]–[54], [61]–[74], [123]–[126] (Lovell J).

11.4.14 In *Narayan*,<sup>595</sup> the partial defence of provocation to a charge of murder was successful, resulting in a conviction of manslaughter. Notwithstanding that the victim’s conduct was taken into account by the jury in reaching a verdict of manslaughter, it was also taken into account by Sulan J in sentencing under s 32A(3)(a) in reducing the non-parole period below the statutory minimum applicable to the crime of manslaughter<sup>596</sup> (recalling that manslaughter is a serious offence against the person that usually requires a four-fifths minimum non-parole period of any term of imprisonment imposed).

However, such was not the case in *R v Li*.<sup>597</sup> In that case, there were three possible bases on which the jury returned a verdict of not guilty of murder but guilty of manslaughter. They were unlawful and dangerous act, excessive self-defence or provocation. In sentencing, the judge was satisfied that Li killed his mother as a result of the loss of self-control amounting to the partial defence of provocation, and sentenced, correctly as the Full Court found, on that basis. The Full Court declined to interfere with the sentencing judge’s finding that the victim’s conduct did not substantially mitigate the appellant’s conduct in strangling her to death. Stanley J, with whom Peek J agreed, considered that the conduct was not strongly mitigatory such as to justify fixing a non-parole period shorter than the prescribed period and rejected the submission that the judge should have found that special reasons existed for the purpose of s 32A(2)(b) of the *Sentencing Act 1988*. Lovell J, on the other hand, considered that the victim’s conduct substantially mitigated the offender’s conduct and that accordingly the requirement of s 32A(3)(a) was made out and that that enlivened the discretion found in s 32A(2)(b). His Honour was satisfied that special reasons for fixing a non-parole period shorter than the prescribed period did not exist. Hence, all three judges reached the same conclusion but via a different route. Lovell J appears to have taken a different approach from that suggested by the Full Court in *Hallcroft*.

## 11.5 The Effect of the Provisions if Provocation is no Longer a Partial Defence to Murder

11.5.1 It is essential to understand what the effect would be on the sentences of those convicted of provocation manslaughter if the partial defence of provocation to murder is repealed without any amendment of the present mandatory minimum non-parole period provisions. Since the introduction of the mandatory minimum non-parole provisions, SALRI’s research has identified only four convictions of manslaughter as a result of the partial defence of provocation on a charge of murder. There have been other convictions of manslaughter on other grounds where there have been suggestions of provocative conduct which have been taken into account in sentencing, but for present purposes these have been ignored (as have cases where the basis of the verdict was unclear).<sup>598</sup>

<sup>595</sup> *R v Narayan* [2011] SASCFC 61 (1 July 2011) (Doyle CJ, Nyland and David JJ).

<sup>596</sup> Indeed, the offender ultimately received a wholly suspended sentence.

<sup>597</sup> [2016] SASCFC 152 (22 December 2016) (Peek, Stanley and Lovell JJ).

<sup>598</sup> See further SALRI, *Homicide Sentencing Background Research Paper*, above n 28. SALRI is grateful to the Office of the SA DPP for kindly making available for the period 2007–2017, the publicly available sentencing remarks in South Australia for murder and manslaughter. There were about 119 such cases (83 of murder and 36 of manslaughter) identified during this period. This study cannot be regarded as complete as it omitted cases where the sentencing remarks were suppressed and in several instances it is unclear on what basis the offender was convicted of manslaughter. One case of manslaughter on the basis of provocation in 2007 (*R v Lambadgee*, Supreme Court of South Australia, 23 March 2007 (Vanstone J) No 90/2006) is omitted from the discussion in this Part as it predates the commencement of the present law.

**R v Simpson, Lovell and Grosser (2008)**

11.5.2 The defendant, Simpson, pleaded guilty to manslaughter on the basis of provocation after kicking and beating the male victim to death in a ‘sustained and violent attack’. Grosser and Ms Lovell pleaded guilty to assisting an offender. Simpson asserted that he lost control after he saw the deceased ‘groping’ his partner, Ms Lovell, in their home. The defendant was aware that the deceased was a convicted sexual offender, and that Ms Lovell had previously been in an abusive relationship and had been sexually assaulted at the age of 18. The sentencing Judge accepted that the deceased’s actions in assaulting Ms Lovell were provocative, but that the defendant’s reaction was out of proportion to the provocation. The sentencing judge, Kelly J, accepted that the deceased’s assault of Ms Lovell mitigated the defendant’s conduct and considered that this constituted a special reason under s 32A(3)(a) of the *Sentencing Act 1988*. With a total head sentence of nine years and four months, a non-parole period of six years is less than the mandatory four-fifths of the head sentence. If Simpson had been convicted of murder he would have been sentenced to imprisonment for life. His non-parole period may well have been less than 20 years but significantly more than the six years imposed.

**R v Kelleher (2010)**

11.5.3 A jury acquitted the defendant of murder but found him guilty of manslaughter. He killed the victim by hitting him violently over the head with an iron bar as he lay on his bed following taunts about the Rebels motorcycle gang. The jury accepted that the gravity of the deceased’s taunts, which he knew was a topic about which the defendant was extremely vulnerable, his behaviour and his ‘continual goading’ provoked the defendant into a loss of self-control under which he killed. The sentencing judge, Vanstone J, observed that ‘the jury must have found that the ordinary man, faced with provocative conduct of this gravity — measured through [the defendant’s] eyes — could have reacted as [the defendant] did.’ The defendant was sentenced to imprisonment for 13 years and nine months, with a non-parole period of 11 years. The non-parole period was in excess of the minimum four-fifths of the head sentence. If convicted of murder he would have been sentenced to imprisonment for life and to a non-parole period in excess of 20 years.

**R v Narayan (2011)**<sup>599</sup>

11.5.4 The defendant killed her husband by pouring petrol on him and setting him alight. On her trial for murder she was found guilty of manslaughter due to provocation following psychological and physical abuse from her husband and, on the occasion in question, verbal abuse upon confronting her husband about an affair he was having. During sentencing submissions, it was accepted that special reasons existed such that the non-parole period could be set at less than four-fifths of the head sentence and also because of the degree to which the defendant had cooperated in the investigation or prosecution of the offence and the circumstances surrounding that cooperation. She was sentenced to six years imprisonment with a non-parole period of three years, wholly suspended upon the defendant entering into a good behaviour bond. The sentence was upheld on appeal, the Court of Criminal Appeal observing that, whilst the sentence may have been merciful, it was not unduly lenient.<sup>600</sup> If convicted of murder she would have been sentenced to imprisonment for life with a possible non-parole period of a little less than 20 years. She could not have been released on a bond.<sup>601</sup>

<sup>599</sup> [2011] SASFC 61 (1 July 2011).

<sup>600</sup> *Ibid.*

<sup>601</sup> *Sentencing Act 1988* s 37.

**R v Li (2016)**<sup>602</sup>

11.5.5 The defendant was 18 years of age and he killed his mother. On a charge of murder he was found guilty of manslaughter. The sentencing judge was satisfied that the defendant lost control in the course of an altercation with the deceased and killed her by hitting her over the head and then strangling her to death while she was still in that state. He had no mental illness or condition which went to explain the killing, but the defendant had an upbringing that ‘might be expected to result in emotional difficulties’ with the deceased verbally and emotionally and sometimes physically abusing him. The sentencing judge did not find that the mother’s conduct substantially mitigated that of the defendant and held special reasons to not exist for the purposes of s 32A of the *Sentencing Act 1988*. The judge categorised the killing as in the more serious category of an offence of manslaughter and imposed a sentence of nine years imprisonment with a non-parole period of seven years, two months and 11 days, the minimum mandatory non-parole period for a sentence of nine years imprisonment. The sentence was upheld on appeal. If convicted of murder the defendant would have been sentenced to imprisonment for life with a non-parole period of not less than 20 years.

11.5.6 These four cases illustrate the dramatic effect on sentences if the partial defence of provocation to murder is abolished without significant change to the mandatory minimum non-parole period provisions of the *Sentencing Act 1988*.

11.5.7 The differences have now become even more dramatic with the insertion in 2016 of s 69(2) of the *Correctional Services Act 1982* (SA). As mentioned above, this section will require a person sentenced to life imprisonment to be on parole the whole of their life, thereby dramatically increasing the period of parole of a young person subject to a modest non-parole period.

## 11.6 Judicial and Other Criticisms of the Mandatory Minimum Non-parole Period Regime

11.6.1 Section 32A of the *Sentencing Act 1988* is difficult to understand and apply. It significantly increases the possibility of judicial error in sentencing. Some of those difficulties have been clearly identified by judges mentioned below who have had to consider the section. It is not uncommon, however, for sentencing judges to express their frustration at not being able to determine a non-parole period which is fair and reasonable.

11.6.2 As Kourakis CJ pointed out in *Hallcroft*,<sup>603</sup> this statutory intervention has distorted proportionality between offences and offenders which the common law of sentencing attempts to achieve and undermines consistency in sentencing,<sup>604</sup> thereby engendering ‘a sense of grievance on the part of the offender who is more severely dealt with, and is antithetical to the demands of justice.’<sup>605</sup> It also generates a crowding of non-parole periods around the 20 year minimum as demonstrated in Table 2 below, reproduced from his Honour’s reasons based on sentencing statistics for murder in South Australia since the mandatory non-parole provisions were inserted in the *Sentencing Act 1988*.<sup>606</sup>

<sup>602</sup> [2016] SASFC 152 (22 December 2016).

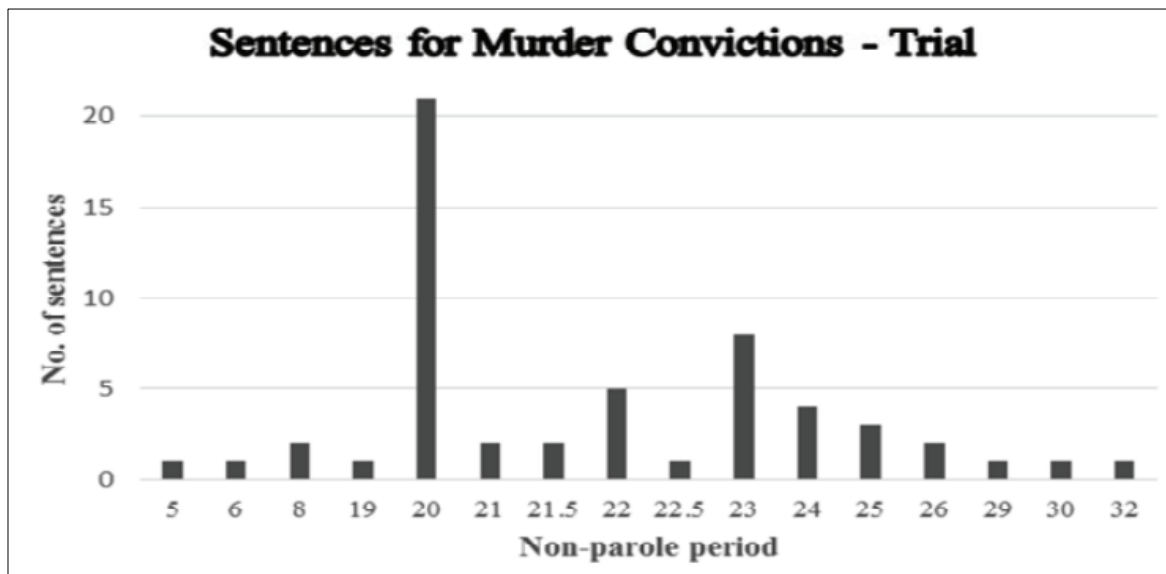
<sup>603</sup> (2016) 126 SASR 415.

<sup>604</sup> Ibid 428 [52]. See also *R v Wong* (2009) 207 CLR 584, 590–591 [5]–[7].

<sup>605</sup> (2016) 126 SASR 415, 429 [53].

<sup>606</sup> Ibid 428. A similar table (reproduced in the SALRI, *Homicide Sentencing Background Research Paper*, above n 28) showing sentences for murder convictions after a guilty plea for the same period indicates a much greater spread

Table 2:



11.6.3 Of s 32A (1) the plurality in *R v D, A* commented:

38. Parliament has chosen to identify 20 years as an appropriate non-parole period for an offence of murder “at the lower end of the range of objective seriousness”. **It is a strange benchmark.** The benchmark is identified by reference only to objective seriousness. The court has to compare a particular case, taking account of objective and subjective factors, with a benchmark that is affected by objective factors only. The court is not able to compare like with like. **The process is not easy to explain. But this is the statutory task. ...**

42. The court has to ask itself whether, bearing in mind that a non-parole period of 20 years is appropriate for an offence at the lower end of the range of objective seriousness, the special reasons present in the case warrant or support a shorter non-parole period for this offence and this offender.

43. **This is a complicated process. It will cause difficulty for sentencing courts. We cannot identify any good reason for sentencing in this fashion.** But that is Parliament’s choice.<sup>607</sup>

11.6.4 The difficulty can already be seen in the differing approaches taken by different judges in *R v L*<sup>608</sup> notwithstanding the benefit of the detailed reasons contained in *Hallcroft*.<sup>609</sup>

11.6.5 In *Narayan*, Doyle CJ observed:

Section 32A requires the Court to postulate an offence of manslaughter at the lower end of the range of objective seriousness. **But the circumstances of manslaughter are so variable that it is difficult, if not impossible, to postulate a typical offence of manslaughter at the lower end of the range of objective seriousness. ...**

To my mind the best one can do in a case like this is to proceed on the basis that the mandatory period, four-fifths the length of the head sentence, is appropriate for an offence of causing death

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of non-parole periods with 17 having a non-parole period of 20 years or more and 15 having a period of less than 20 years, no doubt because of the ‘special reasons’ relating to pleas of guilty.

<sup>607</sup> (2011) 109 SASR 197, 205 [38], 205 [42]–[43].

<sup>608</sup> [2016] SASFC 152 (22 December 2016).

<sup>609</sup> (2016) 126 SASR 415.

in circumstances reduced from murder to manslaughter by the provocation of the victim, and appropriate for such an offence at the lower end of the range of objective seriousness. The Judge then had to consider whether, bearing that in mind, the matters identified as special reasons supported a non-parole period shorter than the mandatory period.

**This is a complicated process. There is an air of artificiality about it. One cannot help wondering what the exercise achieves in terms of a meaningful sentencing exercise.** But it is what the Act requires.<sup>610</sup>

11.6.6 In each case above emphasis has been added.

11.6.7 The complexity and inflexibility of the present law has been a source of strong concern in SALRI’s consultation. The present regime has also not been without its academic criticism, with endeavours to interpret the law being described as ‘clarifying the incomprehensible’ and the law itself so complex that it has reached the point of ‘utter incomprehensibility as a matter of logic, law and, most importantly, justice’.<sup>611</sup> It has been described as the ‘toughest sentencing regime in Australia for murder’,<sup>612</sup> because ‘20 years is a high non-parole period for an offence of murder “at the lower end of the range of objective seriousness”’.<sup>613</sup>

11.6.8 In connection with this Report, SALRI held a Roundtable Discussion in May 2017. Participants in this discussion included legal academics, the Equal Opportunity Commission, the Commissioner for Victims’ Rights, representatives of the Law Society of South Australia, the Bar Association, victim support, anti-discrimination and the ALRM, human rights lawyers and both prosecution and defence lawyers practising in criminal law. Without dissent, all those attending accepted that the current sentencing law in South Australia is too restrictive and that more flexibility is appropriate in sentencing for murder, notwithstanding that differing views were expressed as to how that should best be done. The Law Society in its submission of 22 March 2018 to SALRI reiterated its view that the current law is too restrictive and that, especially if the partial defence of provocation is to be abolished, ‘much greater flexibility in sentencing than the current provisions allow’ is necessary. The Human Rights Law Centre expressed a similar view in consultation to SALRI.

11.6.9 SALRI also notes that the current law in South Australia for sentencing in this area is overly complicated for lawyers and judges. This is undesirable. The changes which SALRI proposes in this Part would not only enhance sentencing flexibility but would make the law more straightforward in application.

## **11.7 Further Criticisms Identified by SALRI**

11.7.1 Many serious crimes are committed by persons suffering a mental illness, cognitive impairment or intellectual disability<sup>614</sup> that is short of insanity (or unfitness to plead) and in circumstances of

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<sup>610</sup> [2011] SASFC 61, [42].

<sup>611</sup> Leader-Elliott, above n 267, 21.

<sup>612</sup> Hemming, above n 3, 1.

<sup>613</sup> *R v A, D* (2011) 109 SASR 197, 204 (Doyle CJ).

<sup>614</sup> SALRI uses and considers the phrases ‘mental illness, cognitive impairment or intellectual disability’ together in this Report but accepts that the terminology in this area is different and there is no universal term or indeed definition. Different terms may even overlap. See, for example, *Evidence Act 1929* (SA) s 4; cf *CLCA* s 51. ‘In some cases, courts have conflated mental illness and intellectual disability and their role in the exercise of the sentencing discretion ... In our view, such matters are different and operate on the sentencing discretion and should be



reduced responsibility.<sup>615</sup> This is further discussed in Part 12 of this Report. Such offenders are generally afforded special consideration in sentencing.<sup>616</sup> However, the present South Australian mandatory minimum non-parole period regime is unsatisfactory in that it prevents offenders convicted of murder or a serious crime against the person from being sentenced to any non-parole period below the statutory minimum.<sup>617</sup> While such a mental illness, cognitive impairment or intellectual disability may well constitute special reasons for fixing a non-parole period that is shorter than the prescribed period,<sup>618</sup> such a condition or disability is not within any of the only matters to which a court must have regard in deciding whether special reasons exist.<sup>619</sup> Such a condition or disability may be compensated for, at least to some extent, in a head sentence for manslaughter, but the mandatory minimum non-parole period will still apply. However, in the case of a person convicted of murder the present law ensures that such a person must serve a sentence of not less than 20 years.<sup>620</sup> This appears arbitrary and disproportionate. This concern now applies to children as the *Statutes Amendment (Youths Sentenced as Adults) Act 2017* extends the usual requirement to serve a sentence of not less than 20 years to children (that is offenders aged from 10 to 18) convicted of murder.<sup>621</sup>

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considered distinctly as particular categories although in the course of how they affect the exercise of sentencing discretion ... will be similar': Bagaric and Edney, above n 25, 331 n 182.

<sup>615</sup> A substantial proportion of offenders suffer from some form of mental illness, cognitive impairment or intellectual disability. See below n 719. This obviously includes offenders convicted of murder. See, for example, *R v Lindsay* [2013] SASC 104 (2 July 2013), *R v Hallcroft* (2016) 126 SASR 415. SALRI's research of the SA homicide sentencing remarks identified a relatively limited number of offenders convicted of murder or manslaughter with some form of mental illness, cognitive impairment or intellectual disability. See SALRI, *Homicide Sentencing Background Research Paper*, above n 28. However, the number may well be more. Sentencing remarks are not a complete guide to such issues.

<sup>616</sup> See *Sentencing Act 1988* s 10(1)(l). The range of such matters is more extensively defined in s 11(1)(f) of the *Sentencing Act 2017* (SA) coupled with the expansive definition of 'cognitive impairment' in s 5(1) of that Act. See also *Muldrock v R* (2011) 244 CLR 210; *R v Verdins* (2007) 16 VR 269. See further below [12.6.1]–[12.6.13].

<sup>617</sup> See also Law Council of Australia, *Mandatory Sentencing Discussion Paper* (May 2014) 32–33 [128]–[131]. 'The Law Council is also concerned that mandatory sentencing may have a particularly unjust impact on those with mental illness or intellectual disabilities. Most of the offences to which mandatory sentencing applies prevent a court from taking into account the individual characteristics of the offender, including any mental illness or disability': at 32 [128].

<sup>618</sup> *Sentencing Act 1988* s 32A(2)(b).

<sup>619</sup> *Ibid* s 32A(3). See also South Australia, *Parliamentary Debates*, Legislative Council, 24 July 2007, 448 (Hon P Holloway). This also emerged in SALRI's study of the 2007–2107 South Australian sentencing remarks. In *R v AD*, for example, Sulan J in sentencing a young offender with a cognitive impairment for murder observed: 'Section 32A(2) provides that if the court is satisfied that special reasons exist, the court may set a non-parole period shorter than the prescribed period. I note that s 32A(3), which determines the test of special reasons, has no provision that deals with the mental capacity of the person who committed the murder. In order for special reasons to exist, the individual's position, insofar as his mental development, is not a factor which would give rise to special reasons' (*R v AD*, Supreme Court of South Australia, 29 October 2010 (Sulan J) No SCCRM-10-2010). See further SALRI, *Homicide Sentencing Background Research Paper*, above n 28.

<sup>620</sup> By comparison, under relevant NSW legislation see *R v Wetherall* [2006] NSWSC 486 (18 May 2006), where the defendant was sentenced to three years imprisonment with a non-parole period of 18 months.

<sup>621</sup> The effect of the *Statutes Amendment (Youths Sentenced as Adults) Act 2017* in this (and indeed other) context is significant. 'The Bill also amends s 31A(a1) the *Criminal Law (Sentencing) Act 1988*. Section 31A(a1) [presently] states that a number of provisions do not apply in relation to a youth (whether or not the youth is sentenced as an adult or is sentenced to detention to be served in a prison or is otherwise transferred to or ordered to serve a period of detention in a prison), being ss 32(5)(ab), 32(5)(ba), 32(5a) and 32A. The Bill amends s 31A(a1) so that these provisions do apply to a young person sentenced as an adult. As a result, for a young person sentenced as an adult for murder, the requirement in s 32(5)(ab) to set a mandatory minimum non-parole requirements for murder of 20 years will be applied to a youth sentenced as an adult. In addition, for a young person being sentenced as an adult for serious offences against the person, the mandatory minimum non-parole period of four-fifths the length

11.7.2 The Bill which gave rise to the mandatory minimum non-parole period provisions of the *Sentencing Act 1988* was the *Criminal Law (Sentencing) (Dangerous Offenders) Amendment Bill*. It was introduced in the South Australian Parliament by the then Attorney-General, the Hon Michael Atkinson, on 8 February 2007.<sup>622</sup> The Bill contained a suite of measures the first of which was a requirement that sentencing courts give primary consideration to the need to protect the public from an offender’s criminal acts. The second was the introduction of minimum non-parole periods for major indictable offences resulting in death or total or permanent incapacity of the victim, and the third was legislation to detain dangerous sexual and violent prisoners in custody and to remove non-parole periods for prisoners sentenced for life where there is little prospect of rehabilitation and where the protection of the community requires the continued incarceration.

11.7.3 The only justification for the Bill given in the Second Reading Speech was to fulfil a pre-election pledge under the heading ‘Justice for Victims’ and to continue the Government’s ‘custom of bringing victims to the forefront of criminal justice policy and combating those who would threaten society and individual members of the public’, being ‘measures (that) are necessary to protect the South Australian public, whether as individuals or as a whole, from dangerous criminals’.<sup>623</sup> No statistical or factual information was provided during the debate to further justify the Bill. Little justification was provided for the fixing of mandatory minimum non-parole periods or the length. As far as SALRI is aware, no such information was relied on in subsequent debates on the Bill.<sup>624</sup>

11.7.4 The Bill as introduced differs in many respects from the Act which was eventually passed. Further attention will be given to that later in this Report. However, that does not affect the apparent lack of any justification for the Bill or the subsequent Act. The rationale of the Bill seemed to assume

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of the sentence as required in s 32(5)(ba) must be applied. The Bill will also amend section 46(1) of the *Sentencing Act 2017* (once it commences) to mirror these same changes. ‘The Bill provides that it will apply to any young offender being sentenced as an adult in a higher court after the Bill receives Royal Assent, whether the offence was committed before and after the Bill comes into effect. The Bill is a necessary and proportionate measure to reduce crime and support public protection in relation to the most serious young offenders’: South Australia, *Parliamentary Debates*, Legislative Council, 28 September 2017, 7752–7753 (Hon I Hunter). The potentially drastic impact of mandatory sentencing for murder on children was noted in consultation to SALRI by Dr Xianlu Zeng.

<sup>622</sup> South Australia, *Parliamentary Debates*, House of Assembly, 8 February 2007, 1743–1745.

<sup>623</sup> South Australia, *Parliamentary Debates*, House of Assembly, 8 February 2007, 1744. The Government later elaborated that the Bill was also intended to promote ‘proportionality’ and to increase the non-parole periods typically imposed for murder and serious offences against the person. ‘The Government’s policy is that the mandatory minimum non-parole periods that will apply to the offences of murder and serious offence against the person and related conspiracy in aiding, abetting, counselling or procuring offences should be treated by sentencing courts as the non-parole periods appropriate for offences at the lower end of the range of objective seriousness, and that there should be a corresponding increase in the non-parole periods fixed in respect of more serious cases of murder and serious offences against the person, being those in the middle and at the upper end of the range of objective seriousness’: South Australia, *Parliamentary Debates*, Legislative Council, 3 May 2007, 89 (Hon P Holloway).

<sup>624</sup> See South Australia, *Parliamentary Debates*, House of Assembly, 6 March 2007, 1934–1939; South Australia, *Parliamentary Debates*, Legislative Council, 29 March 2007, 1833–1838, 1867–1875; South Australia, *Parliamentary Debates*, Legislative Council, 3 May 2007, 89–90; South Australia, *Parliamentary Debates*, Legislative Council, 21 June 2007, 405–406; South Australia, *Parliamentary Debates*, Legislative Council, 24 July 2007, 446–449; South Australia, *Parliamentary Debates*, House of Assembly, 26 July 2007, 700–701. The Second Reading Speech was described in debate as ‘purely political window-dressing’: South Australia, *Parliamentary Debates*, Legislative Council, 29 March 2007, 1836 (Hon Robert Lawson). ‘This second reading explanation will be of no use to anybody. It is a piece of political propaganda. It is full of self-congratulatory hyperbole ... It does not explain why the legislation is necessary; it does not point out that research has shown that similar legislation adopted in other places has been effective in improving the security of the community’: at 1835.

that all serious offenders will be a continuing danger to victims and the public, and that the only reason for imprisonment is the safety of the public.

11.7.5 Section 10 of the *Sentencing Act 1988* sets out the matters which are to be taken into account in sentencing generally. One of the provisions mentioned in the Bill which was not enacted was a provision to be inserted at the head of s 10 that a primary policy of the criminal law is to protect the safety of the community. It is to be noted that there was already in s 10(2) of the Act a provision that required that in determining the sentence for an offence a court must give ‘proper effect’ to a number of matters including ‘the need to protect the safety of the community’. Section 9 of the *Sentencing Act 2017* (SA) (once it comes into effect) provides that ‘the primary purpose for sentencing a defendant for an offence must be the paramount consideration when a court is determining and imposing the sentence.’ Such provisions obviously assume significance in determining whether or not a convicted person should be imprisoned and the length of any term of imprisonment.

11.7.6 However, for someone whose sentence is a significant term of imprisonment it becomes less significant owing to the difficulty in forecasting the extent to which, if at all, the prisoner will represent a danger to the community upon his or her release. Though the protection of the community is a vital common law sentencing consideration<sup>625</sup> (now confirmed and reinforced by s 9 of the *Sentencing Act 2017*), the generalised and unjustified assumption, evident from the Second Reading Speech and the content of the legislation, is that with certain limited exceptions all prisoners will remain a danger to the community upon their release.

11.7.7 What also seems to have been overlooked is a mechanism then in place to ensure that safety of the community was to be ‘the paramount consideration’ in considering an application for release on parole. Subsection 67(3a) of the *Correctional Services Act 1982* (SA) was inserted in that Act as from 16 February 2006. It provided (and still does): ‘The paramount consideration of the Board when determining an application under this section for the release of a prisoner on parole must be the safety of the community.’

11.7.8 That is plainly a better time to assess whether or not a prisoner in each individual case will be a danger to victims or the community rather than to require a court to take what appears to be an unfounded precaution applicable to all offenders many years before their possible release. The Parole Board will be better placed and informed to make that assessment than any court at sentence ever will be.

11.7.9 It should also be pointed out that since the mandatory minimum non-parole provisions were inserted in the *Sentencing Act 1988*, the *Correctional Services Act* has been amended by the *Correctional Services (Parole) Amendment Act 2015* to provide for a right of review of a decision of the Parole Board to release on parole a prisoner sentenced to life imprisonment. Application for review of such decision can be made to an independent Parole Administrative Review Commissioner who must be a former judge of a court of the Commonwealth or of a State or Territory who is no longer holding judicial office and who is not a member of an Australian Parliament. The persons who can apply for such a review are the Attorney-General, the Commissioner of Police or the Commissioner for Victims’ Rights.<sup>626</sup> Adequate mechanisms are therefore in place to ensure that, as far as possible, persons released on parole will not be a danger to the community.

<sup>625</sup> *Veen v The Queen (No 2)* (1988) 164 CLR 465.

<sup>626</sup> The review provisions are contained in Part 6, Division 4 of the *Correctional Services Act*.

## 11.8 The Fixing of Non-parole Periods in other Australian Jurisdictions

11.8.1 A summary of the non-parole period provisions in each of the Australian jurisdictions is shown in Table 3 below. Sentencing and partial defence information for each jurisdiction (as shown in Table 1) is also shown for completeness.

**Table 3 – Non-Parole Period Provisions in all Australian Jurisdictions**

Jurisdiction	Sentence	Non-Parole Period	Partial Defences Available to Murder Charge
Western Australia	Life imprisonment (mandatory) <sup>627</sup>	Mandatory 10 years <sup>628</sup>	None
Northern Territory	Life imprisonment (mandatory) <sup>629</sup>	Mandatory 20 years <sup>630</sup>	Diminished Responsibility <sup>631</sup> Provocation <sup>632</sup>
Queensland	Life imprisonment (mandatory) <sup>633</sup>	Mandatory 15 years <sup>634</sup>	Provocation <sup>635</sup> Diminished Responsibility <sup>636</sup> Killing in an abusive domestic relationship <sup>637</sup>
South Australia	Life imprisonment (mandatory) <sup>638</sup>	Mandatory 20 years <sup>639</sup>	Provocation <sup>640</sup> Excessive Self-Defence <sup>641</sup> Suicide Pact <sup>642</sup> Unintentional killing in defence of property etc <sup>643</sup>
Victoria	Life imprisonment (maximum) <sup>644</sup>	Discretionary (but on average 10 years) <sup>645</sup>	None

<sup>627</sup> *Criminal Code* (WA) s 279(4).

<sup>628</sup> *Sentencing Act* 1995 (WA) s 90.

<sup>629</sup> *Criminal Code* 1983 (NT) s 157(1).

<sup>630</sup> *Sentencing Act* 1995 (NT) s 53A(6).

<sup>631</sup> *Criminal Code* 1983 (NT) s 159.

<sup>632</sup> *Ibid* s 158.

<sup>633</sup> *Criminal Code* 1899 (Qld) s 305(1).

<sup>634</sup> *Corrective Services Act* 2006 (Qld) s 181.

<sup>635</sup> *Criminal Code* 1899 (Qld) s 304.

<sup>636</sup> *Ibid* s 304A.

<sup>637</sup> *Ibid* s 304B.

<sup>638</sup> *CLCA* s 11.

<sup>639</sup> *Sentencing Act* 1988 s 32(5)(ab).

<sup>640</sup> This is a common law model.

<sup>641</sup> *CLCA* s 15(2).

<sup>642</sup> *Ibid* s13A.

<sup>643</sup> *Ibid* s 15A.

<sup>644</sup> *Crimes Act* 1958 (Vic) s 3.

<sup>645</sup> Between 1997–1998 to 2001–2002, a majority of people convicted of murder in Victoria received a total effective sentence for murder in the range of 15-20 years with a non-parole period of 10 years or more. Then, between 2003–2004 and 2007–2008, the average sentence for murder ranged between 18 years and 20 years 5 months. Of the 117 people convicted of murder, only two people received a sentence of less than 14 years imprisonment: Sentencing Advisory Council, *Sentencing Trends in the Higher Courts of Victoria, Murder 2003–04 to 2007–08*, cited in (Victorian) Department of Justice, *Review of the Offence of Defensive Homicide*, Discussion Paper (August 2010) 47 [197].

New South Wales	Life imprisonment (maximum) <sup>646</sup>	Discretionary (but sentencing guideline of 10 years) <sup>647</sup>	Diminished Responsibility <sup>648</sup> Excessive Self-Defence <sup>649</sup> 'Extreme' Provocation <sup>650</sup>
Tasmania	Life imprisonment (maximum) <sup>651</sup>	Discretionary <sup>652</sup>	None
Australian Capital Territory	Life imprisonment (maximum) <sup>653</sup>	Discretionary <sup>654</sup>	Diminished Responsibility <sup>655</sup> Provocation <sup>656</sup>

11.8.2 Table 3 above is a summary only. In most cases, further explanation is needed, as follows.

### **Western Australia**

11.8.3 These provisions have already been extensively discussed.<sup>657</sup> It only needs to be added that if a life sentence is handed down, pursuant to s 90(1) of the *Sentencing Act 1995* (WA) the court must either set a minimum non-parole period of at least 10 years or order that the offender must never be released.<sup>658</sup> The latter must only be made 'if it is necessary to do so in order to meet the community's interest in punishment and deterrence'.<sup>659</sup>

### **Northern Territory**

11.8.4 Similarly to South Australia, in the Northern Territory life imprisonment and a 20-year mandatory minimum non-parole period apply upon conviction of the crime of murder.<sup>660</sup> However, this is for an offence in the 'middle of the range of objective seriousness' (rather than the 'lower end' of objective seriousness in the South Australian scheme).

11.8.5 Alternatively, a sentencing judge can decline to set a non-parole period<sup>661</sup> where the culpability of the offender is 'so extreme the community interest in retribution, punishment, protection and deterrence can only be met if the offender is imprisoned for the term of his or her natural life without the possibility of release on parole'.<sup>662</sup> The statutory criteria governing the decision to decline to set a

<sup>646</sup> *Crimes Act 1900* (NSW) s 19A.

<sup>647</sup> *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21(1).

<sup>648</sup> *Crimes Act 1900* (NSW) s 23A.

<sup>649</sup> *Ibid* s 421.

<sup>650</sup> *Ibid* s 23.

<sup>651</sup> *Criminal Code* (Tas) s 158.

<sup>652</sup> *Sentencing Act 1997* (Tas) s 17.

<sup>653</sup> *Crimes Act 1900* (ACT) s 12.

<sup>654</sup> *Crimes (Sentencing) Act 2005* (ACT) s 10.

<sup>655</sup> *Crimes Act 1900* (ACT) s 14.

<sup>656</sup> *Ibid* s 13.

<sup>657</sup> See above [11.2.7]–[11.2.9].

<sup>658</sup> *Sentencing Act 1995* (WA) s 90(1).

<sup>659</sup> *Ibid* ss 90(3)–(4).

<sup>660</sup> *Criminal Code* 1983 (NT) s 157(1); *Sentencing Act 1995* (NT) s 53A(1). Notably, this is increased to 25 years if any of the circumstances in s 53A(3) apply: *Sentencing Act 1995* (NT) s 53A(1)(b).

<sup>661</sup> Under the *Sentencing Act 1995* (NT), there is a statutory presumption that when a court imposes a sentence of imprisonment of life or for a period of greater than 12 months it should impose a non-parole period: at ss 53(1)(a)–(b).

<sup>662</sup> *Ibid* s 53A(5).

non-parole period include that consideration of the nature of the offence, the past history of the offender or the circumstances of the particular case make the setting of the non-parole period inappropriate.<sup>663</sup>

11.8.6 If a non-parole period for murder is set, then the sentencing judge can only hand down a non-parole period below 20 years where ‘exceptional circumstances’ apply.<sup>664</sup> These ‘exceptional circumstances’ are codified in s 53A(7) of the *Sentencing Act 1995* (NT) and the sentencing judge must not have regard to any other matters. For there to be exceptional circumstances sufficient to justify fixing a shorter non-parole period the court must be satisfied that the offender is otherwise a person of good character and unlikely to re-offend;<sup>665</sup> or the victim’s conduct, or conduct and condition, substantially mitigates the conduct of the offender.<sup>666</sup>

11.8.7 The Northern Territory provisions bear an obvious resemblance to the South Australian provisions but are less rigid. However, they are not recommended by SALRI.

### **Queensland**

11.8.8 Pursuant to s 181 of the *Corrective Services Act 2006* (Qld), a minimum non-parole period of 15 years applies to offenders sentenced to life imprisonment (including for murder which carries a mandatory life sentence in Queensland). A minimum non-parole period of 20 years for murder applies in some circumstances,<sup>667</sup> such as where the offender is being sentenced on more than one conviction of murder, or another offence of murder is taken into account, or the person has on a previous occasion been sentenced for another offence of murder.<sup>668</sup> The sentencing judge has no discretion to fix a lower non-parole period, and therefore this scheme is not as reactive to the relative objective seriousness of the offence and subjective culpability of the offender as the discretionary regimes.<sup>669</sup>

11.8.9 With the qualifications discussed above in Part 6, provocation is still available as a partial defence to a murder charge in Queensland pursuant to s 304 of the *Criminal Code 1899* (Qld).

### **South Australia**

11.8.10 Nothing further need be said beyond the analysis set out above.

### **Victoria**

11.8.11 In Victoria, life imprisonment is the maximum sentence for a conviction for murder,<sup>670</sup> and the sentencing judge also retains discretion to determine an appropriate non-parole period. Notably, if the judge does sentence an offender to life imprisonment, then a non-parole period must be set unless

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<sup>663</sup> *Sentencing Act 1995* (NT) ss 53(1)(a)–(b). See, for example, *Serra v The Queen* [2004] NTCCA 3 (3 June 2004).

<sup>664</sup> *Sentencing Act 1995* (NT) s 53A(6).

<sup>665</sup> *Ibid* s 53A(7)(a).

<sup>666</sup> *Ibid* s 53A(7)(b).

<sup>667</sup> Where an offender is sentenced for murder, the *Criminal Code 1899* (Qld) s 305(2) applies.

<sup>668</sup> *Criminal Code 1899* (Qld) s 305, *Corrective Services Act 2006* (Qld) s 181(2)(c).

<sup>669</sup> *Criminal Code 1899* (Qld) s 305(2).

<sup>670</sup> *Crimes Act 1958* (Vic) s 3. Manslaughter is punishable by a maximum penalty of 20 years’ imprisonment.

it is considered inappropriate having regard to ‘the nature of the offence or the past history of the offender’.<sup>671</sup>

11.8.12 Section 5(2) of the *Sentencing Act 1991* (Vic) sets out the factors that must be taken into account when sentencing an adult in Victoria in similar fashion to that of ss 10, 10A and 10C of the *Sentencing Act 1988*.

11.8.13 According to the Sentencing Advisory Council’s Report, *Homicide in Victoria: Murders, Victims and Sentencing* a total of 124 offenders were sentenced to imprisonment for murder in 2007, accounting for 91 per cent of all offenders sentenced for this offence.<sup>672</sup> Imprisonment terms for murder ranged from 10 years to life imprisonment, with an average length of 19 years and one month. Of those for whom a non-parole period was set, these ranged from seven to 26 years, with an average of 15 years and four months.<sup>673</sup> As life imprisonment is the ‘maximum’ head sentence, only 10 offenders were sentenced to life imprisonment for murder (that is seven per cent of all offenders sentenced for murder) and all were men. Only one offender found guilty of murder was sentenced to life imprisonment without parole and this person was classed as a ‘serial killer’. Of the nine offenders sentenced to life imprisonment for murder and eligible for parole, non-parole periods ranged from 23 to 33 years with an average of 25 years and three months.<sup>674</sup>

11.8.14 Victoria abolished the partial defence of provocation in 2005,<sup>675</sup> but provocative conduct may be considered in the sentencing process, alongside other sentencing factors that the court must take into account to arrive at an appropriate and proportionate sentence. In its 2009 report, the Victorian Sentencing Advisory Council identified the central issues that should be considered in determining to what extent an offender’s culpability should be reduced by provocation in sentencing. These were the degree of provocation in terms of the offender having a justifiable sense of being wronged taking into consideration, the nature, context and duration of the provocation, the degree to which the offender’s response was disproportionate and whether the provocation was and remained the operative clause of the offence.<sup>676</sup>

### **New South Wales**

11.8.15 In NSW, life imprisonment is the ‘maximum’ available head sentence for murder, and the partial defence of provocation has been abolished.<sup>677</sup>

<sup>671</sup> *Sentencing Act 1991* (Vic) s 11(1); Richard Fox and Arie Freiberg, *Sentencing: State and Federal Law in Victoria* (Oxford University Press, 2<sup>nd</sup> ed, 1999) 758; *R v Denyer* [1995] 1 VR 186. See, for example, *R v Hunter* [2013] VSCA 385 (19 December 2013); *R v Cardamone* [2017] VSC 493 (25 August 2017) where the court took the rare step of declining to set a non-parole period for murder.

<sup>672</sup> Sentencing Advisory Council, *Homicide in Victoria: Murders, Victims and Sentencing* (November 2007). All of the offenders who were not sentenced to imprisonment for murder were sentenced to other custodial orders designed to treat their diagnosed mental conditions.

<sup>673</sup> *Ibid* 16.

<sup>674</sup> *Ibid* 17. See also Stewart and Freiberg, *Provocation in Sentencing* (2009), above n 119.

<sup>675</sup> *Crimes (Homicide) Act 2005* (Vic). This was followed by the introduction of the problematic new offence of ‘defensive homicide’. See further above n 96, n 141.

<sup>676</sup> See Stewart and Freiberg, *Provocation in Sentencing* (2009), above n 119, 94 [10.1.10].

<sup>677</sup> The Office of the NSW DPP, which supported abolition, commented that the partial defence of provocation is an anomaly in the criminal law ‘as it only applies to the offence of murder, in respect of other offences it is a matter to be taken into account on sentence’: NSW Select Committee, above n 15, 68 [5.5].

11.8.16 Unlike the mandatory sentencing regimes, this does not mean that an offender *must* receive a life sentence. This remains within the discretion of the court such that the judge can consider a range of matters when deciding the appropriate sentence, including the objective seriousness of the particular offence/s, subjective features of the offender and consideration of the victim’s conduct.<sup>678</sup>

11.8.17 The position in New South Wales is unique, however, as ‘life means life’. That is, in cases where a court does exercise its discretion to impose a life sentence, this means that the offender will be imprisoned for the term of his or her natural life with no opportunity for release on parole.<sup>679</sup> Prior to the introduction of this regime in 1999, which has since been referred to as the ‘truth in sentencing’ reforms, the average time spent in prison serving a life sentence was just 13 years.<sup>680</sup> Since then (in the period October 2004 to September 2011), 148 offenders were convicted of murder in New South Wales, all received a term of imprisonment, and 91 per cent of those received a sentence ranging from 18 years to life imprisonment.<sup>681</sup>

11.8.18 Importantly, there is a high threshold for the imposition of a life sentence. Section 61 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) stipulates:

A court is to impose a sentence of imprisonment for life on a person who is convicted of murder if the court is satisfied that the level of culpability in the commission of the offence is so extreme that the community interest in retribution, punishment, community protection and deterrence can only be met through the imposition of that sentence.

11.8.19 If so satisfied, the court must then consider whether the offender’s personal or subjective circumstances are capable of negating the need for a life sentence. In doing so, the court can take into account factors such as age, history and prospects of rehabilitation.<sup>682</sup> Consequently, life sentences in this jurisdiction are very rare and are only handed down for the most serious, heinous crimes.<sup>683</sup>

## **Tasmania**

11.8.20 Tasmania similarly retains judicial discretion in the determination of both the head sentence and the non-parole period for murder, as life imprisonment is the maximum available sentence for a murder conviction. However, it is very rare that a court will impose the maximum sentence of life imprisonment.<sup>684</sup>

11.8.21 The *Sentencing Act 1997* (Tas) makes a distinction between two categories of offenders for the purpose of the setting of a non-parole period by the sentencing court. As sentencing for murder is

<sup>678</sup> *Crimes (Sentencing Procedure) Act 1987* (NSW) s 21A(3)(c).

<sup>679</sup> *Crimes Act 1900* (NSW) s 19A. In other words, in cases where life imprisonment *is* imposed, the sentencing judge has no discretion to fix a non-parole period.

<sup>680</sup> See, for example, Wali Shukoor, ‘Life Sentences in NSW: “Life Meaning Life”’ on Sydney Criminal Lawyers (3 September 2016) <<https://www.sydneycriminallawyers.com.au/blog/life-sentences-in-nsw-life-meaning-life/>>.

<sup>681</sup> NSW Select Committee, above n 15, 22 [2.77]. A breakdown of data that indicates the length of sentence imposed specifically for convictions based on manslaughter on the basis of provocation, as opposed to other types of manslaughter was not available.

<sup>682</sup> *Crimes (Sentencing Procedure) Act 1999* (NSW) s 61(1).

<sup>683</sup> *Crimes Act 1900* (NSW) s 431A. See, for example, *R v Knight* (2006) 164 A Crim R 126; *R v Hillsley* (2006) 164 A Crim R 252; *R v Stanford* [2016] NSWSC 1434 (13 October 2016) for rare cases where a life sentence has been imposed.

<sup>684</sup> This has only been invoked once, in *R v Martin Bryant* (Unreported, Supreme Court of Tasmania, Cox CJ, 22 November 1996).



discretionary in this jurisdiction, those convicted of such an offence could fall in either of these categories and as such both will be outlined. First, there are provisions related to offenders who are sentenced to a fixed term of imprisonment,<sup>685</sup> where a court has discretion whether to grant parole to the offender or not.<sup>686</sup> In doing so, the court must consider the nature and the circumstances of the offence, the offender's antecedents or character, any other sentence the offender is undergoing and any other matter the court deems necessary or appropriate.<sup>687</sup>

11.8.22 Secondly, there are provisions in respect of offenders who are sentenced to a term of imprisonment for their natural life,<sup>688</sup> where discretion is reposed in the sentencing court as to whether or not to set a non-parole period at all.<sup>689</sup> The manner in which the discretion is to be exercised is identical to the provisions above.

### **Australian Capital Territory**

11.8.23 In the ACT, life imprisonment is the maximum sentence available for a conviction for murder.<sup>690</sup> The relevant considerations for determining the sentence are provided in s 33 of *Crimes (Sentencing) Act 2005* (ACT).

11.8.24 Once the head sentence has been determined, and if this is more than one year's imprisonment, then the court is empowered to impose a non-parole period.<sup>691</sup> There is a statutory presumption in favour of setting a non-parole period.<sup>692</sup> However, this is qualified by s 65(4) of the *Crimes (Sentencing) Act 2005* (ACT) which permits the court to decline to set a non-parole period if it believes that this would be 'inappropriate' having regard to the 'nature of the offence or offences and the offender's antecedents'.

11.8.25 The ACT legislation has two provisions that are absent in all other legislation on sentencing in Australia.<sup>693</sup> First, the court when sentencing an offender to imprisonment may recommend a particular condition or conditions of the offender's parole.<sup>694</sup> Secondly, the Act has a discrete section that allows appeals against the non-parole period 'if the court fails to set, or fails to set properly, a non-parole period for a sentence of imprisonment'.<sup>695</sup> This appears to grant a right to the offender, the Director of Public Prosecutions, the Attorney-General or the Secretary of the Sentence Administration Board<sup>696</sup> in respect of the non-parole period (or failure to set a non-parole period) that is separate from a more general complaint that the sentence and the non-parole period are manifestly excessive.<sup>697</sup>

<sup>685</sup> *Sentencing Act 1997* (Tas) s 17.

<sup>686</sup> *Ibid* ss 17(2)(a)–(b).

<sup>687</sup> *Ibid* s 17.

<sup>688</sup> *Ibid* s 18.

<sup>689</sup> *Ibid* s 17 ss 18(1)(a)–(b).

<sup>690</sup> *Crimes Act 1900* (ACT) s 12(2).

<sup>691</sup> *Crimes (Sentencing) Act 2005* (ACT) s 65(1).

<sup>692</sup> *Ibid* s 65(2); Mirko Bagaric and Richard Edney, *Sentencing in Australia* (Lawbook Co, 2<sup>nd</sup> ed, 2015) [650.4240].

<sup>693</sup> Bagaric and Edney, above n 692, [650.4240].

<sup>694</sup> *Crimes (Sentencing) Act 2005* (ACT) s 67.

<sup>695</sup> *Ibid* s 65(2); Bagaric and Edney, above n 692, [650.4240].

<sup>696</sup> *Crimes (Sentencing) Act 2005* (ACT) ss 68(2)(a)–(d).

<sup>697</sup> Bagaric and Edney, above n 692, [650.4240].

## 11.9 Conclusion

11.9.1 The Supreme Court of Canada has observed that: ‘The choice is Parliament’s on the use of [mandatory] minimum sentences, though considerable differences of opinion continue on the wisdom of employing minimum sentences from a criminal law policy or penological point of view.’<sup>698</sup> Though it is clear that Parliament is entitled to enact mandatory sentencing laws,<sup>699</sup> the rationale and effectiveness of mandatory sentencing has been widely doubted.<sup>700</sup> Mandatory sentencing for serious offences has been aptly described as a ‘disproportionate and blunt instrument’.<sup>701</sup> Such laws are said to disproportionately apply to Indigenous offenders<sup>702</sup> or children.<sup>703</sup> The minimum mandatory non-parole period regime in South Australia is complex, difficult to apply, is not justified by any apparent criminological or other studies and has been criticised.<sup>704</sup>

<sup>698</sup> *R v Latimer* [2001] 1 SCR 3, [88]. See also Neil Morgan, ‘Mandatory Sentences in Australia: Where have we been and where are we going?’ (2000) 24(3) *Criminal Law Journal* 164.

<sup>699</sup> *Palling v Corfield* (1970) 123 CLR 52; *Mangaming v R* (2013) 252 CLR 381.

<sup>700</sup> The literature on mandatory sentencing is vast. See above n 97. There are various objections to mandatory sentences. The former NSW DPP, Mr Cowdery QC, sets out 22 individual objections: Cowdery, above n 97, 12–13. See also Law Council of Australia, above n 617. The common justifications for mandatory sentencing are deterrence, community protection, to ensure consistency in sentences and reflect community expectations. Yet these rationales are all widely doubted. See further Law Council of Australia, above n 617; Adrian Hoel and Karen Gelb, *Sentencing Matters: Mandatory Sentencing* (Sentencing Advisory Council, Victoria, 2008). As one study concludes: ‘Ultimately, current research in this area indicates that there is a very low likelihood that a mandatory sentencing regime will deliver on its aims. In part, this is a result of these regimes being based on assumptions about the nature of human decision making that are simply not reflected in studies to date: that a more severe sanction will deter more effectively and that imprisoning offenders will necessarily lead to a lower crime rate. In part, it also is because public perceptions of crime and sentencing are not always accurate or informed. There is, in any case, ample evidence that suggests that mandatory sentencing can and will be circumvented by lawyers, judges and juries both by accepted mechanisms (such as plea bargaining) and by less visible means. The outcome of this avoidance is to jeopardise seriously another central aim of mandatory sentencing; that is, to ensure that proportionate and consistent sentences are imposed. Even if this circumvention, both formal and informal, could be addressed, imposing a prescribed sanction or range of sanctions for offences (which invariably encompass a broad range of behaviours) guarantees only a very superficial, artificial consistency and one that trades its subtlety for simplicity ... The costs of implementing a mandatory sentencing regime alone weigh strongly against the establishment of such a system *even if* it actually manages to deliver on some of its central aims. If we bear in mind that mandatory sentencing is likely to be unsuccessful, or at best imprecise, in achieving its aims, the costs are still less acceptable to informed policy-makers and citizens alike’: at 21.

<sup>701</sup> Law Commission, *Partial Defences to Murder*, Report No 290 (2004) 9–10 [2.5].

<sup>702</sup> Law Council of Australia, above n 617, 29–31 [110]–[123]; Australian Law Reform Commission, *Incarceration of Aboriginal and Torres Strait Islander Peoples*, Discussion Paper 84 (July 2017) [4.6], [4.26], [4.30]–[4.31]; Tammy Solonec, ‘“Tough on Crime”: Discrimination by another Name, the Legacy of Mandatory Sentencing in Western Australia’ (2015) 8(18) *Indigenous Law Bulletin* 7–11.

<sup>703</sup> Law Council of Australia, above n 617, 23–26, [81]–[96], 31–32 [124]–[127]. The effect and implications (including international human rights instruments) of mandatory sentencing upon children was highlighted in consultation to SALRI by Dr Xianlu Zeng.

<sup>704</sup> See, for example, South Australia, *Parliamentary Debates*, Legislative Council, 29 March 2007, 1868–1870 (Hon R Lawson discussing concerns of the Law Society); 1870–1871 (Hon Mark Parnell), 1872–1873 (Hon Sandra Knack); Leader-Elliott, above n 267, Law Society of South Australia (2018), above n 63; Rocky Perrota, ‘Mandatory Sentencing: Not Smart on Crime’, *The Advertiser* (online), 22 March 2015, <<http://www.adelaidenow.com.au/news/opinion/rocco-perrotta-mandatory-sentencing-not-smart-on-crime/news-story/47aac45b44399dd8ba9e2966b2d0565b>>; Sean Fewster, ‘SA Judge Paul Muscat says it is “disheartening” for courts to pass harsh mandatory sentences on killer drivers who are of good character’, *The Advertiser* (online), 4 May 2017, <<http://www.adelaidenow.com.au/news/law-order/sa-judge-paul-muscat-says-it-is-disheartening-for-courts-to-pass-harsh-mandatory-sentences-on-killer-drivers-who-are-of-good-character/news-story/ba9f3e1d637a91027a872b252397aa5e>>; Sean Fewster, ‘Killer Drive Mitchell Deane

11.9.2 Most jurisdictions in Australia where mandatory minimum non-parole periods are set reserve such minima to the more serious crimes. The South Australian legislation does the reverse with a very limited and inadequate range of exceptions. Together with mandatory life imprisonment for murder the regime constitutes ‘the toughest sentencing regime in Australia for murder’.<sup>705</sup> SALRI considers that it has no place in a just and fair sentencing regime and should be abolished.

11.9.3 While no system of sentencing will command universal approbation, experience suggests that the discretionary fixing of non-parole periods, as with head sentences in all homicides, is best left to experienced judges of the highest courts. That discretion in respect of almost every other offence has for centuries been exercised by courts. There is no evidence to suggest that judges of the higher courts somehow lose that ability in the case of homicide offences.

11.9.4 It is clearly demonstrated that sentencing of provocation manslaughter, if the partial defence is abolished, will generally result in greatly increased and disproportionately high non-parole periods for that type of homicide unless the regime is substantially modified.

11.9.5 SALRI has not in this Report been concerned to analyse the remaining partial defences to murder which are available in South Australia. There would appear to be no reason, however, if the recommendations of this Report are adopted, why sentencing for those offences of manslaughter should not be placed on a similar footing.

11.9.6 The exercise of sentencing discretion is a difficult yet highly significant part of the administration of criminal justice. It is essential to the awarding of a fair and just punishment. Mandatory sentences and mandatory minimum non-parole periods severely curtail the exercise of that discretion. Besides being blunt instruments in themselves, applicable to all defendants, they are not sentencing guidelines within which the sentencing discretion may be exercised. The question must be asked whether Parliament or the courts are better suited to achieve a just and fair result in each individual case. Left to the discretion of the court, a reasoned approach, apparent from a careful study of sentencing remarks accompanying every sentence, will go far in achieving consistency and fairness in the sentencing process and in the setting of non-parole periods. All of them are potentially the subject of appeal to three judges if sentencing error is alleged and consistency is absent. The evidence suggests that, compared with other jurisdictions in Australia, and even before the fixing of mandatory minimum non-parole periods occurred in South Australia, non-parole periods for murder were generally longer, and still are, in South Australia than elsewhere.

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Franklin jailed – despite Judge’s misgivings’, *The Advertiser* (online), 12 May 2017; <[www.adelaidenow.com.au/news/law-order/killer-driver-mitchell-deane-franklin-jailed-despite-judges-misgivings/news-story/2d0c7775532c15a3ee2721ae35f0454e](http://www.adelaidenow.com.au/news/law-order/killer-driver-mitchell-deane-franklin-jailed-despite-judges-misgivings/news-story/2d0c7775532c15a3ee2721ae35f0454e)>. During the 2007 parliamentary debate, the Government noted: ‘It is fair to say that the Supreme Court judges and the Law Society disagree with the Government’s policy on mandatory minimum non-parole periods and believe this legislation may operate harshly on some offenders. The Government acknowledges these concerns but, ultimately, these are matters of policy to be decided by the Government and this Parliament’: South Australia, *Parliamentary Debates*, Legislative Council, 24 July 447 (Hon P Holloway).

<sup>705</sup> Hemming, above n 3, 1.

### 11.9.7 Recommendation:

#### **Recommendation 6**

SALRI recommends that current mandatory minimum non-parole periods (including both murder and a serious offence against the person) should be abolished and that the setting of a non-parole period should be in the discretion of the court in accordance with the other provisions of the relevant sentencing law.

## **11.10 A Possible Alternative**

11.10.1 It has already been noted above that a study of the interstate legislation concerning mandatory minimum non-parole periods, where it exists, suggests that where most mandatory minimum non-parole periods are prescribed they are reserved for the most serious offences warranting the highest penalties. One of the problems with the South Australia legislation is that it wields a blunt instrument which affects all those convicted of murder or of a serious offence against the person (as defined) where the offence is at or above ‘the lower end of the range of objective seriousness’ without regard to the circumstances of the offence or of the offender.

11.10.2 If, contrary to Recommendation 6, the current mandatory minimum non-parole period is to be retained for the offence of murder, it too should be reserved for the more serious offences attracting the highest penalties, thereby allowing greater flexibility according to the circumstances of the offence and of the offender in all cases.

11.10.3 This could be done by describing those types of offences which should attract the mandatory minimum. A sample appears in Recommendation 7 below. Other examples of such an offence or situation can be seen from the judgment of King CJ in *R v Stewart*.<sup>706</sup> In the form suggested there would be no need to prescribe exceptions.

11.10.4 Although not part of this reference, a similar approach could be taken to a serious offence against the person by prescribing that the mandatory minimum non-parole period only applies to a head sentence in excess of (say) 10 years.

### 11.10.5 Recommendation:

#### **Recommendation 7**

SALRI recommends that, if the mandatory minimum non-parole period for the offence of murder is to be retained, the *Criminal Law (Sentencing) Act 1988* (or the *Sentencing Act 2017* once it comes into effect) should be amended to provide that –

- (a) if Recommendation 5 is adopted and Recommendation 6 is not adopted, the mandatory minimum non-parole period for a person convicted of murder should apply only to a person who is sentenced to imprisonment for life; and
- (b) if neither Recommendation 5 nor Recommendation 6 is adopted, the mandatory minimum non-parole period for a person convicted of murder should apply only to a person convicted of an offence determined by the sentencing court to be one of ‘aggravated murder’, such expression being defined to include recognised categories of

<sup>706</sup> (1984) 35 SASR 477, 478–479.

serious offences such as, for example, the murder of a police officer, the murder of a child, the murder of more than one person and the murder of a person in the course of, or as a result of, committing another offence, other than manslaughter, for which the person would be liable to imprisonment for life.

### 11.11 A Possible Further Alternative

11.11.1 Much of the difficulty in the administration of s 32A of the *Sentencing Act 1988* lies in the present requirements of sub-ss (1) and (3). If mandatory minimum non-parole periods are to remain it should be sufficient to prescribe them as minimum non-parole periods for the offence or offences in question. This would be sufficient to indicate the seriousness which Parliament regards the crime is in question. However, to avoid the obvious injustices that would arise, provision could be made for a court to be able to find the existence of ‘exceptional circumstances’ which would justify a lesser period being prescribed in the exercise of the court’s discretion.

11.11.2 The expression ‘exceptional circumstances’ would not need to be defined. It is a familiar concept and is an expression often requiring construction in legislation<sup>707</sup> (including in a sentencing context).<sup>708</sup> Lord Bingham of Cornhill CJ had to consider the expression in *R v Kelly*.<sup>709</sup> The Lord Chief Justice explained:

We must construe “exceptional” as an ordinary, familiar English adjective, and not as a term of art. It describes a circumstance which is such as to form an exception, which is out of the ordinary course, or unusual, or special, or uncommon. To be exceptional, a circumstance need not be unique, or unprecedented, or very rare; but it cannot be one that is regularly, or routinely, or normally encountered.<sup>710</sup>

11.11.3 When the Criminal Law (Sentencing) (Dangerous Offenders) (Amendment) Bill was introduced on 8 February 2007 by the then Attorney-General, the Hon Michael Atkinson, s 32(5) of the Bill originally prescribed that the minimum non-parole period as prescribed in the section should apply ‘unless the court is of the opinion that some lesser period is appropriate because of the exceptional circumstances surrounding the offence’.<sup>711</sup> When the clause was considered in Committee in the House of Assembly, the Attorney-General was asked how he would interpret the expression ‘exceptional circumstances’ to which he replied: ‘On this matter I have confidence in judicial discretion.’<sup>712</sup> The clause was not then amended.

<sup>707</sup> See South Australia, *Parliamentary Debates*, Legislative Council, 29 March 2007, 1836–1837.

<sup>708</sup> See, for example, *Sentencing Act 1988* ss 20AAC(2)(a), 20BA(2)(a), 38(2ba). See also *R v Skinner* [2016] SASFC 106 (21 September 2016), [77]–[104].

<sup>709</sup> [2000] 2 QB 198.

<sup>710</sup> Ibid 208. See also *Nikac v Minister for Immigration and Ethnic Affairs* (1988) 20 FCR 65, 81; *Hicks v Aboriginal and Torres Strait Islander Commission* (2001) 110 FCR 582, 586–587; *MLC Investments Ltd v Commissioner of Taxation* [2003] FCA 1487, [76]–[77]; *R v Fowler* (2006) 243 LSJS 285; *R v Skinner* [2016] SASFC 106 (21 September 2016), [77]–[104].

<sup>711</sup> South Australia, *Parliamentary Debates*, House of Assembly, 8 February 2007, 1745.

<sup>712</sup> South Australia, *Parliamentary Debates*, House of Assembly, 6 March 2007, 1939. The Attorney-General agreed that an 87-year-old man assisting his terminally ill wife to die would fall within the expression.

11.11.4 When the Bill was initially debated in the Legislative Council, the Hon Robert Lawson, noted that ‘exceptional circumstances’ is a term often used in legislation and he did not see it as a major difficulty that the expression was not defined.<sup>713</sup> The Hon Robert Lawson explained:

That is because “exceptional circumstances” is one of those indefinable, irreducible concepts. It is like “reasonable doubt”, in that when you seek to define it you actually limit it, and it is a concept of very wide meaning ... So it is a common expression used in legislation in this state. I personally do not believe that it will give rise to difficulties, and one would hope that this provision will be wisely interpreted by the judges. I believe will that we ought to give judges a discretion in cases of this kind.<sup>714</sup>

11.11.5 While the Bill did not survive in that form it would appear that both the Government and the Opposition initially perceived that the term ‘exceptional circumstances’ would present no difficulty.

11.11.6 The Law Society in its submission of 22 March 2018 noted that should the partial defence of provocation be abolished, its preferred alternative to a wide sentencing discretion (consistent with Recommendations 5 and 6 above) is an ability for a court in an individual case to depart from the prescribed minimum non-parole in ‘special circumstances’ (not to be defined) in the exercise of the court’s discretion. The Commissioner of Victims’ Rights in consultation, whilst opposing the removal of life imprisonment or the usual minimum non-parole period of 20 years for murder, supported allowing a court to depart from the prescribed minimum non-parole period because of ‘exceptional circumstances’ such as where a victim of family violence kills their abuser after a long period of abuse.

11.11.7 SALRI considers in the alternative to Recommendation 6 above that the current narrowly defined ‘special reasons’ allowing a court to go below the prescribed period are too restrictive and should be replaced with a test of ‘exceptional circumstances’ and this term should not be defined. It is not entirely clear why the Government in 2007 decided to discard the original undefined ‘exceptional circumstances’ exemption in favour of the present tightly defined ‘special reasons’ model in s 32A as the concept of undefined ‘exceptional circumstances’ is a familiar feature of South Australian legislation (including sentencing).<sup>715</sup> This model would allow a court in any individual case to consider if

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<sup>713</sup> South Australia, *Parliamentary Debates*, Legislative Council, 29 March 2007, 1836.

<sup>714</sup> *Ibid* 1837.

<sup>715</sup> See, for example, *Sentencing Act 1988* ss 20AAC(2)(a), 20BA(2)(a), 38(2ba). See further *R v Fowler* (2006) 243 LSJS 285; *R v Skinner* [2016] SASFC 106 (21 September 2016), [87]–[104]. The Government explained that the reasons why it discarded the original undefined ‘exceptional circumstances’ test in favour of the current strictly defined ‘special reasons’ model in s 32A were to promote proportionality in sentences and to ensure courts could take into account an offender’s co-operation in sentencing. The Minister elaborated: ‘The combined effect of these new provisions is that a sentencing court may fix a non-parole period that is less than the prescribed minimum if satisfied that special reasons exist for doing so. Special reasons are limited to: the circumstances of the offence; if the person pleaded guilty to the charge of the offence, that fact and the circumstances surrounding the plea; and the degree to which the person has cooperated in the investigation or prosecution of that or a related offence, and the circumstances surrounding, and likely consequences of, any such cooperation. I should stress that these amendments do not change the government’s policy or the policy in the Bill: they give effect to it. They result from highly technical sentencing matters raised as a result of consultation with a number of experts on the Bill’: South Australia, *Parliamentary Debates*, Legislative Council, 3 May 2007, 89 (Hon P Holloway). The Law Society cogently argued that the revised version merely compounded the underlying problems of the Bill. ‘The further proposed amendments only serve to confirm and strengthen the criticisms that we have previously made of this Bill. There appears to be no reason why the mandatory minimum in the case of life imprisonment should be 20 years and why the mandatory minimum in respect of serious offences should be four-fifths, and even less reason why these proportions should be for the lower end of offences’: Law Society of South Australia, quoted in *Parliamentary Debates*, South Australia, Legislative Council, 24 July 2007, 446 (Hon Sandra Knack). The Opposition with misgivings supported the revised version (the current s 32A) but noted that it was ‘unfortunate’ that the

‘exceptional circumstances’ exist to go under 20 years and impose the most appropriate non-parole period. SALRI also considers that, while this is not the best solution, it would be a significant improvement on the present complex and overly restrictive position outlined in s 32A of the *Sentencing Act 1988*.

11.11.8 Recommendation:

#### **Recommendation 8**

SALRI recommends that if neither Recommendation 6 nor Recommendation 7 is adopted and current mandatory minimum non-parole periods are to be retained –

- (a) section 32A(1) of the *Criminal Law (Sentencing) Act 1988* (or to s 48(3) of the *Sentencing Act 2017* once it comes into effect) should be repealed; and
- (b) without being restricted by any qualifications such as those contained in s 32A(3) of the *Criminal Law (Sentencing) Act 1988* (or to s 48(3) of the *Sentencing Act 2017* once it comes into effect), a court should be able to reduce the mandatory minimum non-parole period in ‘exceptional circumstances’ (undefined).

### **11.12 The Correctional Services Act 1982 (SA)**

11.12.1 As mentioned elsewhere in this Part, a significantly aggravating feature of both the mandatory head sentence for murder and the mandatory minimum non-parole period prescribed for murder in the *Sentencing Act 1988* appears in the operation of s 69(2) of the *Correctional Services Act 1982* (SA). It is not necessary to repeat the effect of that subsection. SALRI considers that, consistent with the other recommendations in this Part, it is a provision which also requires amendment. The implications of parole are significant but are often overlooked in a law reform context.

11.12.2 Accordingly, SALRI recommends an amendment to the subsection which would complement Recommendation 6 but which would be necessary even if Recommendation 5 were not adopted.

11.12.3 Recommendation:

#### **Recommendation 9**

SALRI recommends that, in any event, s 69(2) of the *Correctional Services Act 1982* should be amended to allow the Parole Board a discretion to determine and fix a term of parole in respect of an offender who has been sentenced to imprisonment for life and whose non-parole period is less than 20 years.

### **11.13 A Final Note**

11.13.1 If these recommendations are adopted they would also provide a useful framework for sentencing persons with a mental illness, intellectual disability or cognitive impairment<sup>716</sup> who are

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Government had not retained the original undefined ‘exceptional circumstances’ as this flexibility in sentencing allayed some of the concerns about the mandatory non-parole regime. See South Australia, *Parliamentary Debates*, Legislative Council, 21 July 2007, 448 (Hon R Lawson); South Australia, *Parliamentary Debates*, House of Assembly, 26 July 2007, 701 (Ms Redmond). Ms Redmond noted that the revised version, the present ‘extremely restrictive’ s 32A, ‘has the effect of so constraining the discretion [in sentencing] that it almost disappears’: at 701.

<sup>716</sup> See further below Part 15. The recommendations in this Part would also address some, though not all, of the drastic implications of the *Statutes Amendment (Youths Sentenced as Adults) Act 2017* in respect of sentencing children convicted of murder or a serious crime against the person.

convicted of serious offences. These recommendations would provide courts with the necessary flexibility to enable a mental illness, intellectual disability or cognitive impairment to be properly taken into account at sentence if appropriate. Rather than create special provisions for such offenders and risk inflexible and incomplete categories, such conditions could properly be taken into account if relevant in the sentencing process of such persons without their being subject to present damaging head sentences and mandatory minimum non-parole periods and without prescribing any special defence.



## Part 12 – Diminished Responsibility

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### 12.1 Introduction

12.1.1 SALRI has considered, especially in the content of any abolition of the partial defence of provocation as discussed in this Report, whether a new partial defence of diminished responsibility should be adopted in South Australia. This defence operates to partially excuse the killing of a person by an offender. The defence does not apply to any offence other than homicide. Diminished responsibility applies in situations of an offender's substantial mental impairment and acts as a partial defence which, as with provocation, if made out reduces an offence of murder to manslaughter.<sup>717</sup> Diminished responsibility exists as a partial defence in the United Kingdom, the ACT, NSW, Queensland and the Northern Territory. It does not exist as a partial defence in South Australia, Victoria, Western Australia or Tasmania.

12.1.2 The present law precludes (and is intended to preclude) an offender's mental illness, intellectual disability or cognitive impairment from amounting to a 'special reason' under s 32A of the *Sentencing Act 1988* to allow a court to depart from the usual mandatory minimum non-parole period for murder or a serious offence against the person.<sup>718</sup> The real problem of homicide and other offenders with a mental illness, intellectual disability or cognitive impairment whose culpability may be substantially impaired or mitigated as a result was highlighted to SALRI.<sup>719</sup> Mr Charles of the ALRM and Mr Caldicott in their consultation with SALRI as part of the Stage 1 Report urged consideration of diminished responsibility in South Australia as a substitute partial defence should provocation be abolished. This request was repeated by the Victim Support Service and some attendees at the May 2017 consultation roundtable meeting<sup>720</sup> as well as by the Law Society in its 22 March 2018 submission

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<sup>717</sup> Diminished responsibility can be contrasted with the related statutory defence of mental impairment set out in Part 8A of the *CLCA* which derives from the common law defence of insanity. Mental impairment (as with insanity) is a complete defence that entirely absolves an offender of responsibility for an offence, though the court may make a supervision order committing the defendant to detention (see *CLCA* s 269O). Mental impairment is available to any offence, not only homicide. For mental impairment to be demonstrated, at the time of the conduct giving rise to the offence, the defendant must suffer from a mental impairment and as a consequence, not know the nature or quality of their conduct; or not know their conduct is wrong or be unable to control their conduct (*CLCA* s 269C). The defence of mental impairment is narrow in that it requires total impairment in one of these three respects to be demonstrated. In contrast, diminished responsibility only applies to murder, but offers a broader defence, in that it is intended to provide for defendants who suffer mental conditions that mean their moral responsibility is less than that of an unaffected person, but where the mental conditions are not so extreme such that they possess no responsibility for the killing. This is why diminished responsibility operates to alter the conviction that otherwise would apply, but it does not completely excuse the conduct.

<sup>718</sup> South Australia, *Parliamentary Debates*, Legislative Council, 24 July 2007, 448 (Hon P Holloway). See also above n 619.

<sup>719</sup> It is clear that a considerable proportion of offenders possess some form of mental illness, cognitive impairment or intellectual disability. About half of all offenders suffer from some form of mental illness. See Lubica Forsthe and Antonette Gaffney, 'Mental Disorder Prevalence at the Gateway to the Criminal Justice System' (Australian Institute of Criminology, 2012) *Trends and Issues in Crime and Criminal Justice* no 438. 'People with mental health disorders and cognitive impairment are significantly over-represented in the criminal justice system. This is the case for defendants through to the population in custody. For example, in NSW people with mental health disorders and cognitive impairment currently make up a significant proportion of people entering the criminal justice system, being three to nine times more likely to be in prison than the general NSW population': Ruth McCausland et al, *People with Mental Health Disorders and Cognitive Impairment in the Criminal Justice System: Cost-Benefit Analysis of Early Support and Diversion* (University of New South Wales, 2013) 1.

<sup>720</sup> See below Appendix 1, 182–183.

and by the Human Rights Law Centre. The ALRM also raised this suggestion with the SA Legislative Review Committee.<sup>721</sup> The ALRM noted to the Committee that persons with an intellectual disability may be particularly vulnerable to any reform which either increases the gravity of circumstances which must be established to successfully argue provocation or where the provocation defence is abolished.<sup>722</sup> The Committee noted its concern at this prospect but observed that it was not in a position to make any findings and that the issue of diminished responsibility was complex, controversial and beyond its reference and was potentially better suited to a separate inquiry and report.<sup>723</sup>

12.1.3 Mr Charles of the ALRM accepted the problems of the present law of provocation in consultation with SALRI but powerfully noted the need to recognise the particular situation of persons with an intellectual disability, cognitive impairment or mental illness who may kill someone (including and especially in the Aboriginal community).<sup>724</sup> Mr Charles highlighted:

the fact that there are regrettably many Aboriginal people throughout South Australia who suffer from intellectual disabilities, whether from the effects of foetal alcohol spectrum disorder, the effects of petrol sniffing or other causes. There are of course many other people in the community who suffer from the same kinds of intellectual disability.<sup>725</sup>

12.1.4 SALRI has carefully considered these themes in its examination of whether a new partial defence of diminished responsibility should be adopted in South Australia. SALRI accepts that there are cogent concerns in relation to the sentencing of homicide offenders with an intellectual disability, cognitive impairment or mental illness for murder under the current strict regime which restricts, or even precludes, a court from taking into account an intellectual disability, cognitive impairment or mental illness as a mitigating factor in sentencing for murder (unlike for any other crime). However, SALRI notes that the question of diminished responsibility as a partial defence is complex and raises difficult questions of policy and practice. The South Australian Sentencing Advisory Council has

<sup>721</sup> SA Legislative Review Committee (2017), above n 9, 28, 32.

<sup>722</sup> Ibid 31.

<sup>723</sup> Ibid 31–32.

<sup>724</sup> There are particular issues for Aboriginal defendants as research consistently suggest that Aboriginal offenders have higher levels of cognitive impairment than non-Aboriginal offenders. See, for example, Matthew Frize, Dianna Kenny and Christopher Lennings, ‘The Relationship between Intellectual Disability, Indigenous Status and Risk of Reoffending in Juvenile Offenders on Community Orders’ (2008) 52 *Journal of Intellectual Disability Research* 510; Shasta Holland and Peter Persson, ‘Intellectual Disability in the Victorian Prison System: Characteristics of Prisoners with an Intellectual Disability Released from Prison in 2003–2006’ (2011) 17 *Psychology, Crime and Law* 25; Eileen Baldry, Leanne Dowse and Melissa Clarence, *People with Intellectual and other Cognitive Disability in the Criminal Justice System* (University of New South Wales, 2012); Stephane Shepherd et al, *Aboriginal Prisoners with Cognitive Impairment: is this the Highest Risk Group?* (Report to the Criminology Research Advisory Council) (October 2017). One article ‘estimated that 95% of Aboriginal people appearing before courts in WA had either cognitive disabilities or a mental illness, and said the solution should begin at better identification and treatment of these conditions in the community’: Calla Wahlquist, ‘Intellectually Disabled Encouraged to Plead Guilty to Reduce Jail Time, Inquiry Told’, *The Guardian* (online), 19 September 2016, <<https://www.theguardian.com/australia-news/2016/sep/19/mentally-impaired-encouraged-to-plead-guilty-to-reduce-jail-time-inquiry-told>>. This over-representation may be because of brain damage or injury from causes such as fetal alcohol spectrum disorder, economic disadvantage, drug use, alcohol use, inhalant use, accidents and violence. See Melissa MacGillvray and Eileen Baldry, ‘Indigenous Australians, Mental and Cognitive Impairment and the Criminal Justice System: A Complex Web’ (2013) 8(9) *Indigenous Law Bulletin* 22, 23. Those Aboriginal offenders with a cognitive or mental impairment are more likely to be in contact with the criminal justice system and consequently more likely to be either remanded in custody or sentenced to a term of imprisonment: at 24.

<sup>725</sup> Letter from Mr C Charles, Aboriginal Legal Rights Movement to SALRI dated 8 August 2016. See also SA Legislative Review Committee (2017), above n 9, 28; Law Society of South Australia (2018), above n 63.

examined the scope and operation of the linked statutory defence of mental impairment (or insanity at common law) and made various recommendations.<sup>726</sup> The *Criminal Law Consolidation (Mental Impairment) Amendment Act 2016* amends the scope of a ‘mental impairment’, notably the role of a drug or drink induced impairment.<sup>727</sup> The original intention of the Act in relation to a drug or drink induced impairment was to restrict the scope and operation of the defence of mental impairment (though ultimately this part of the Bill was diluted in the Legislative Council<sup>728</sup> and this change was reluctantly accepted by the Government).<sup>729</sup>

12.1.5 SALRI has concluded after careful consideration that a new partial defence of diminished responsibility in South Australia is problematic and inappropriate. Rather, consistent with SALRI’s view in relation to the issue of provocation,<sup>730</sup> the preferable solution for homicide offenders with an intellectual disability, cognitive impairment or mental illness who are sentenced for murder is to provide greater flexibility to courts in sentencing to recognise these factors if appropriate and to be able to properly reflect the protection of the community, the gravity of the crime, the offender’s culpability and any genuine mitigating factors, especially an offender’s mental illness, cognitive impairment or intellectual disability.

## 12.2 Background and Role of Diminished Responsibility

12.2.1 Diminished responsibility was originally conceived in the Scottish courts in the 19<sup>th</sup> century and introduced in England in 1957 to avoid two mandatory dispositions: indeterminate detention for the legally ‘insane’ and life imprisonment, or the death penalty, for convicted murderers.<sup>731</sup> The context was somewhat different in Australia as the defence was enacted in the ACT, NSW, Queensland, and the Northern Territory after the abolition of the death penalty for murder.<sup>732</sup> A 1973 Report of the NSW Criminal Law Committee explained the ‘continuation of the mandatory life sentence for murder and the comparative inflexibility of the *M’Naghten* approach as the key reasons to introduce the defence of diminished responsibility in NSW.’<sup>733</sup>

<sup>726</sup> Sentencing Advisory Council, *Mental Impairment and the Law: A Report on Part 8A of the Criminal Law Consolidation Act 1935* (Government of South Australia, November 2014).

<sup>727</sup> South Australia, *Parliamentary Debates*, House of Assembly, 4 August 2016, 6640–6646 (John Rau, Attorney-General).

<sup>728</sup> South Australia, *Parliamentary Debates*, Legislative Council, 11 April 2017, 6420–6426; South Australia, *Parliamentary Debates*, House of Assembly, 30 May 2017, 9883 (Ms Chapman).

<sup>729</sup> South Australia, *Parliamentary Debates*, House of Assembly, 30 May 2017, 9883 (John Rau): ‘The part of this Bill that is being deleted by the Legislative Council is centred around the Government’s election promise that persons who are suffering from self-induced intoxication cannot access Part 8A. This election promise was made by the Government at the last election. We have sought to progress it as part of this Bill. It has been defeated by the Opposition and crossbenchers in the other place. This is an extremely disappointing outcome.’ For a contrary view, see South Australia, *Parliamentary Debates*, House of Assembly, 30 May 2017, 9883 (Ms Chapman).

<sup>730</sup> See above Part 11.

<sup>731</sup> LRCWA, above n 22, 249.

<sup>732</sup> Queensland enacted the defence in 1961 (*Criminal Code 1899* (Qld)), having abolished the death penalty in 1922. New South Wales enacted the defence in 1974 (*Crimes Act 1900* (NSW)), having abolished the death penalty in 1955. The Northern Territory adopted the defence in 1983 (*Criminal Code 1983* (NT)), after the abolition of the death penalty in 1973 and the ACT adopted the defence in 1990 (*Crimes Act 1990* (ACT)), also after the abolition of the death penalty in 1973.

<sup>733</sup> NSW Criminal Law Committee, *Report of the NSW Criminal Law Committee on Proposed Amendments to the Criminal Law and Procedure* (1973) 6.

12.2.2 The penalties for murder in those jurisdictions where diminished responsibility is available as a partial defence are significant, providing a rationale for the continued existence of the defence in those jurisdictions. In Queensland<sup>734</sup> and the Northern Territory,<sup>735</sup> there exists a mandatory life term for murder. In NSW and the ACT, there is some flexibility in sentencing. In NSW, where an offender is liable to prison for life (which is the case for murder) a court may still impose a sentence of imprisonment for a lesser term.<sup>736</sup> The same applies in the ACT.<sup>737</sup>

12.2.3 The partial defence of diminished responsibility or ‘substantial impairment’ (as it is now known in NSW)<sup>738</sup> provides what otherwise would be murder will be reduced to manslaughter in cases where it can be established, on the balance of probabilities, that the defendant’s ‘capacity to understand events, or to judge whether the person’s actions were right or wrong, or to control himself or herself, was substantially impaired by an abnormality of mind arising from an underlying condition.’<sup>739</sup> Diminished responsibility is premised on the notion that if insanity can completely excuse an intentional killing, then ‘partial insanity’ should reduce the criminal responsibility of a defendant in relative proportion. The rationale for this partial defence reflects the view that there should be recognition of reduced levels of culpability for some defendants who would otherwise be guilty of murder, based on the fact that their state of mind was impaired at the time of the killing.<sup>740</sup> The Model Criminal Code Officers’ Committee explained that the rationale for this defence is:

the desire for increased flexibility in dealing with defendants who display some kind of mental dysfunction, albeit not serious enough to establish the complete defence of insanity. As its name suggests, diminished responsibility partially excuses such persons on the basis that the fault element necessary to found a murder conviction, although present, is of diminished quality.<sup>741</sup>

12.2.4 Though the precise language formulating the defence of diminished responsibility varies between jurisdictions, the common elements of the defence in Australia<sup>742</sup> are:

1. That at the time of the acts or omissions causing the death the defendant was suffering from an abnormality of mind;
2. The abnormality of mind or mental function arose from an underlying condition; and
3. At the time of the offence the defendant had a significantly impaired ability to:

<sup>734</sup> *Criminal Code 1899* (Qld) s 305A(1).

<sup>735</sup> *Criminal Code* (NT) s 157(1).

<sup>736</sup> *Crimes Act 1900* (NSW) s 19A; *Crimes (Sentencing Procedure Act) 1999* (NSW) s 21.

<sup>737</sup> *Crimes Act 1900* (ACT) s 12; *Crimes (Sentencing) Act 2005* (ACT) s 32.

<sup>738</sup> *Crimes Act 1900* (NSW) s 23A.

<sup>739</sup> *Ibid* s 23A(1)(a).

<sup>740</sup> NSW Select Committee, above n 15, 15 [2.40]; Judith Ablett-Kerr, ‘A Licence to Kill or an Overdue Reform? The Case of Diminished Responsibility’ (1997) 9 *Otago Law Review* 1.

<sup>741</sup> MCCOC (Ch 5: DP), above n 22, 113.

<sup>742</sup> The defence in England was amended in 2009 by the *Coroners and Justice Act 2009* (UK) to require an abnormality of mental functioning where the abnormality arises from a recognised medical condition, and which substantially impairs the defendant’s ability to understand the nature of his or her conduct; form a rational judgment; or exercise self-control, and which provides an explanation for the defendant’s acts in doing or being a party to the killing. In contrast, none of the Australian jurisdictions that have enacted the defence explicitly require a ‘recognised medical condition’, nor do they require a causal or explanatory link between the possession of the condition and the defendant’s role in the killing.

- a. understand the events or the nature of his or her conduct;
- b. judge whether their actions were right or wrong; or
- c. control himself or herself.<sup>743</sup>

12.2.5 Where the defence of diminished responsibility is raised, it must be established by a defendant on the balance of probabilities.

12.2.6 Opinion is divided on the merits of a partial defence of diminished responsibility. Both the NSWLRC<sup>744</sup> and the English Law Commission<sup>745</sup> have supported such a partial defence. The NSWLRC noted the fear that such a defence might be open to abuse and reintroduce the gender bias of provocation, notably to be employed by violent men to excuse lethal attacks upon a female partner.<sup>746</sup> However, the NSWLRC was not convinced that such fears were justified.<sup>747</sup>

12.2.7 In contrast, the Model Criminal Code Officers' Committee,<sup>748</sup> the then Law Reform Commission of Victoria,<sup>749</sup> the VLRC<sup>750</sup> and the Law Reform Commission of Western Australia<sup>751</sup> opposed such a partial defence. The VLRC,<sup>752</sup> the Model Criminal Code Officers Committee<sup>753</sup> and the LRCWA<sup>754</sup> concluded that the issue of mental responsibility is better left to the sentencing stage.

12.2.8 It is significant that at the 2017 SALRI roundtable consultation session the same division in views seen in law reform agencies was reflected amongst the participants. There was universal support amongst all participants at the roundtable that the current law in South Australia for sentencing is too strict to recognise intellectual disability, cognitive impairment or mental illness as a valid mitigating factor, but mixed views on the value of a new partial defence of diminished responsibility to South Australia.

<sup>743</sup> See MCCOC (Ch 5: DP), above n 22, 115; Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (Lawbook Co, 2<sup>nd</sup> ed, 2005) 284.

<sup>744</sup> NSWLRC (R 82, 1997), above n 33, 27 Rec 2; NSWLRC (R 138, 2013), above n 33, 101 [4.62]–[4.65], Rec 4.1.

<sup>745</sup> Law Commission (England and Wales) (2004), above n 21, 83 [5.11]. The Law Commission's support was only 'for as long as the law of murder remains as it is, and conviction carries a mandatory sentence of life imprisonment' in England and Wales: at 106 [5.92]. A similar view was reached by an earlier English review. See Committee on Mentally Abnormal Offenders, *Report of the Committee of Mentally Abnormal Offenders* (1975) [19.27].

<sup>746</sup> NSWLRC (R 138, 2013), above n 33, 97 [4.47].

<sup>747</sup> *Ibid* 97–98 [4.48]–[4.50]. See also Law Commission (England and Wales) (2004), above n 21, 105 [5.86].

<sup>748</sup> MCCOC (Ch 5: DP), above n 22, 131.

<sup>749</sup> Law Reform Commission of Victoria, *Mental Malfunction and Criminal Responsibility* (Report 34) (October 1990) 52 [145].

<sup>750</sup> VLRC (2004), above n 15, xxxix–xl, 232–243, Rec 45 243.

<sup>751</sup> LRCWA, above n 22, 256, 259 Rec 39.

<sup>752</sup> VLRC (2004), above n 15, 241–242 [5.126]–[5.130].

<sup>753</sup> MCCOC (Ch 5: DP), above n 22, 127.

<sup>754</sup> LRCWA, above n 22, 257–258.

## 12.3 Arguments for Diminished Responsibility

12.3.1 Although SALRI ultimately concludes that the defence ought not to be adopted in South Australia, it notes that several arguments for this defence exist.<sup>755</sup> Briefly, they include that:

- (a) It is unfair to label those who are mentally afflicted who kill another person as ‘murderers’.<sup>756</sup>
- (b) It is logically contradictory to allow complete mental impairment to obviate responsibility for a killing entirely, but to not take into account that those who fall between the extremes of ‘normal’ and ‘insane’ should receive an outcome that reflects their degree of responsibility. This altered level of responsibility should be reflected in a different kind of outcome such as manslaughter rather than murder.
- (c) The defence is necessary to alleviate the harshness of sentences that are typically imposed for murder in South Australia and other Australian jurisdictions. Even where sentencing flexibility exists as in NSW and the ACT regarding murder where diminished responsibility exists as a defence, the maximum penalty for murder is still life imprisonment. It is said to be unfair that those who are mentally impaired when they kill are sentenced to such lengthy periods of imprisonment as are typically imposed in Australia for murder. This is a particular concern in South Australia where the usual mandatory minimum non-parole period for murder is 20 years.
- (d) The availability of the defence enhances the effective disposal of criminal cases where a guilty plea on the basis of diminished responsibility is accepted by the parties and the need for a murder trial is obviated.
- (e) Where the defence is raised, there is community benefit in a trial as the jury must then determine the moral culpability of the purportedly mentally impaired defendant. The jury’s determination in this regard will reflect and support community values in a way that a judge’s sentence will not.<sup>757</sup>

## 12.4 Criticisms of the Defence

### **Legal Definition**

12.4.1 The problems involved in precisely defining the somewhat inexact elements of the defence of diminished responsibility have been highlighted by various law reform bodies as ‘overwhelming’,<sup>758</sup> ‘disastrous’ and ‘beyond redemption’<sup>759</sup> and so serious that they cannot be overcome by reformulation.<sup>760</sup>

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<sup>755</sup> Andrew Hemming, ‘It’s Time to Abolish Diminished Responsibility, The Coach and Horses’ Defence through Criminal Responsibility For Murder’ (2008) 10 *University of Notre Dame Australia Law Review* 1, 9–10.

<sup>756</sup> Law Commission (England and Wales) (2004), above n 21, 85–86 [5.18]; NSWLRC (R 82, 1997), above n 33, 32–33 [3.18]; NSWLRC (R 138, 2013), above n 33, 90 [4.23], 91–92 [4.27]–[4.29], 101 [4.63].

<sup>757</sup> See, for example, NSWLRC (R 138, 2013), above n 33, 91 [4.25], 96–97 [4.43]–[4.45], 106 [4.85].

<sup>758</sup> LRCWA, above n 22, 253.

<sup>759</sup> Law Commission (England and Wales) (2004), above n 21, 92 [5.43].

<sup>760</sup> VLRC (2004), above n 15, 243 [5.132].

12.4.2 A particular concern has been in relation to the nebulous term ‘abnormality of mind’<sup>761</sup> that is used in NSW, Queensland and the ACT which is necessary for a defendant to be suffering from to be able to raise the defence. The term has been criticised on account of both its width<sup>762</sup> and vagueness.<sup>763</sup> The multitude of conditions caught within this expression is notable.<sup>764</sup> Indeed, several psychiatrists pointed out to the NSW Law Reform Commission that almost everyone who kills could be said to be suffering from an ‘abnormality of the mind’.<sup>765</sup> The notion of an ‘abnormality of mind’ has been described as ‘largely...meaningless’ because it lacks either legal or medical basis.<sup>766</sup>

12.4.3 The Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General rejected the inclusion of a defence of diminished responsibility in any national *Model Criminal Code*. The Committee found that ‘the practical problems with the partial defence ... will not be remedied by further changes to the test. This is because the concept of this partial defence is fundamentally confused’. The Committee noted that this partial defence is ‘inherently vague’ and that ‘all three elements of the defence are immersed in uncertainty’.<sup>767</sup> The VLRC reached a similar conclusion. Not only was the formulation of the defence ‘vague and therefore open to manipulation’ but the VLRC concluded that ‘the current formulations of diminished responsibility are not satisfactory and it would be too difficult to reformulate the defence in a way that would adequately resolve the current problems.’<sup>768</sup>

12.4.4 In the Australian jurisdictions that retain this defence, there is no need for there to be a causal link between the abnormality of mind and the relevant offending. The rationale for the defence is therefore undermined in circumstances where there may be no connection between an offender’s decision to kill and the mental impairment he or she is suffering from.<sup>769</sup>

12.4.5 Any question of diminished responsibility will ordinarily require the use of expert evidence as to the nature and extent of any condition suffered by a defendant. This gives rise to scope for confusing and conflicting expert evidence to be adduced. The ‘real risk’ of ‘expert shopping’ on behalf of defendants to find the opinion that best supports their case has been raised.<sup>770</sup> The Model Criminal

<sup>761</sup> The Northern Territory avoids the use of this problematic term.

<sup>762</sup> LRCWA, above n 22, 251.

<sup>763</sup> NSWLRC (R 82, 1997) above n 33, 40–41 [3.34].

<sup>764</sup> The term ‘abnormality of mind’ has a broad reach. It has been construed as including such diverse conditions as psychosis, organic brain disorder, schizophrenia, psychopathy, epilepsy, hypoglycaemia, depression, post-traumatic stress disorder, anxiety, personality disorder and pre-menstrual tension. See NSWLRC, *Provocation, Diminished Responsibility and Infanticide*, Discussion Paper 31 (1993) [4.11]. The NSWLRC recently noted the types of conditions found by the courts to amount to an ‘abnormality of mind’ include personality disorders, post-traumatic stress disorders, severe depression, paranoia, schizophrenia, epilepsy, adjustment disorder and intellectual disability/cognitive impairment. See NSWLRC (R 138, 2013), above n 33, 104 [4.76].

<sup>765</sup> NSWLRC (R 82, 1997), above n 33, 40–41 [3.34].

<sup>766</sup> *Ibid* 40 [3.34].

<sup>767</sup> MCCOC (Ch 5: DP), above n 22, 123.

<sup>768</sup> VLRC (2004), above n 15, 243 [5.132].

<sup>769</sup> This concern has been addressed in the UK which now explicitly requires the abnormality of mental functioning to provide an explanation for the defendant’s acts and omissions in doing or being a party to the killing. See *Homicide Act 1957* (UK) s 2(1)(c).

<sup>770</sup> DPP submission to NSW Law Reform Commission; NSWLRC (R 138, 2013), above n 33, 90 [4.22]. See also at 97 [4.46]; Hemming, above n 755, 29; Law Commission (England and Wales) (2004), above n 21, 92 [5.43]; NSWLRC (R 82, 1997), above n 33, 67 [3.92].

Code Officers Committee noted that cases such as *Chayna*:<sup>771</sup> ‘arguably bring the law into disrepute by creating the impression that psychiatrists can be found to express any desired view.’<sup>772</sup> Further concern has been expressed of the risk of inconsistent expert opinion<sup>773</sup> or inconsistent application.<sup>774</sup> Where experts disagree about the nature and extent of a defendant’s condition, fact-finding is likely to prove a difficult exercise for any jury.<sup>775</sup> It effectively becomes trial by expert.

12.4.6 SALRI notes that judges, in contrast, through their experience with sentencing (and frequently in their professional experience prior to appointment) are exposed to psychiatric reports and evidence. SALRI considers that judges are better placed to traverse the often difficult task of reconciling or choosing between conflicting psychiatric evidence. It is not suggested that juries are incapable, but it is not necessarily appropriate that juries should be required to conduct this often complex exercise. SALRI suggests that sentencing judges are best equipped and placed to consider the role and effect of an offender’s mental condition on his or her culpability and it is neither necessary nor desirable that juries be required to consider this complex question as part of a criminal trial.

### **Concerning implications of the employment of the defence for dangerous offenders**

12.4.7 Section 9 of the *Sentencing Act 2017* (SA) provides (once it comes into force) that ‘the primary purpose for sentencing a defendant for an offence must be the paramount consideration when a court is determining and imposing the sentence’.

12.4.8 A concern that has been raised about the availability of a diminished responsibility defence is that dangerous offenders may not receive the appropriate sentence, especially to reflect the paramount consideration of community protection. Offenders found guilty of manslaughter on the basis of diminished responsibility are likely to receive a shorter sentence and be released sooner back into the community sooner than if they were found guilty of murder. Offenders who can demonstrate the elements of diminished responsibility may be more dangerous than those who cannot make it out, precisely because those who can use the defence have a substantially impaired ability to understand events, to control their actions and to judge whether their actions are right or wrong. The defence may allow more dangerous (and more impaired) offenders to be released sooner than less dangerous offenders.<sup>776</sup>

12.4.9 Such fears are not theoretical. The two High Court *Veen* cases<sup>777</sup> are instructive. Veen first killed in 1975. Veen suffered from a major mental incapacity (though not amounting to insanity). He was originally convicted of manslaughter on the basis of diminished responsibility but was sentenced

<sup>771</sup> *R v Chayna* (1993) 66 A Crim R 178.

<sup>772</sup> The NSW Law Reform Commission disagrees with this fear. ‘Supporters of substantial impairment point out that there is little evidence of misuse of the defence. Defendants do not appear to shop for psychiatrists to support an unfounded claim of substantial impairment’: NSWLRC (R 138, 2013), above n 33, 97 [4.48].

<sup>773</sup> See, for example, NSWLRC (R 82, 1997), above n 33, 56 [3.64]–[3.66]; NSWLRC (R 138, 2013), above n 33, 103–104 [4.75]. In one 1993 case, seven psychiatrists offered different opinions as to the defendant’s mental state at the time of the killings: *R v Chayna* (1993) 66 A Crim R 178. See further at 189–191 the Chief Justice’s concerns.

<sup>774</sup> VLRC (2004), above n 15, 239 [5.113]; Law Commission of New Zealand, *Battered Defendants: Victims of Domestic Violence Who Offend*, Preliminary Paper 41 (2000) 40 [132].

<sup>775</sup> Hemming, above n 755, 11–12, 25–26; MCCOC (Ch 5: DP), above n 22, 127. See, for example, *R v Squelch* [2017] EWCA Crim 204, two experts agreed that there was substantial impairment and one expert did not.

<sup>776</sup> LRCWA, above n 22, 257–258.

<sup>777</sup> *Veen v The Queen (No 1)* (1979) 143 CLR 458; *Veen v The Queen (No 2)* (1988) 164 CLR 465.



to life imprisonment (in part because of his real danger to the community). Veen was released from prison in January 1983 following a successful High Court appeal against his original sentence. He killed a second time in October 1983 and again pleaded guilty to manslaughter on the basis of diminished responsibility. He was sentenced by Hunt J to life imprisonment, a sentence upheld by the High Court.

12.4.10 A further example raised by the NSWLRC is that of Malcolm Potts,<sup>778</sup> who was diagnosed with paranoid schizophrenia and killed his father in 2000 by stabbing him 30 times in what was described by the trial judge, Hidden J, as ‘a frenzied attack’.<sup>779</sup> Potts was charged with the murder of his father. The jury ultimately returned a verdict of not guilty of murder, but guilty of manslaughter. Potts was sentenced by Hidden J upon the basis that, at the time of the killing, he had been substantially impaired by an abnormality of mind.<sup>780</sup> Potts was sentenced to seven years imprisonment and was released in 2007.<sup>781</sup> In 2008, Potts threatened his ex-wife and killed a prostitute and was convicted of her murder, the jury rejecting a further claim of substantial impairment.<sup>782</sup> Kirby J accepted that there was ‘no question that Mr Potts represents a high risk of further violent crime’.<sup>783</sup> He was sentenced to 28 years imprisonment with a non-parole period of 21 years.<sup>784</sup>

12.4.11 These cases demonstrate that reduced sentences for manslaughter may not be the most appropriate way to deal with an offender who has killed because of an abnormality of mind. It does not follow that if an offender can establish diminished responsibility that they necessarily ought to receive a shorter period of imprisonment than an offender who cannot demonstrate the defence. As the MCLOC pointed out:

The *Veen* cases illustrate the danger underlying the diminished responsibility doctrine. Lenient penalties may not be desirable for all defendants suffering from abnormalities of the mind falling short of insanity. The paradoxical situation arises whereby a defendant successfully raising diminished responsibility is to receive a shorter sentence than a defendant who fails in that regard, even though the former may be significantly more dangerous than the latter.<sup>785</sup>

12.4.12 SALRI considers that courts should be able to flexibly sentence those who kill. Courts should be able in any individual case to adequately and appropriately take into account both the offender’s culpability (including any mental illness, cognitive impairment or intellectual disability) and the community’s protection (this being the ‘paramount consideration’ under s 9 of the *Sentencing Act 2017*). The desirability of homicide sentencing reform in South Australia to allow enhanced sentencing

<sup>778</sup> NSWLRC (R 138, 2013), above n 32, 98 [4.52].

<sup>779</sup> *R v Potts* [2001] NSWSC 753 (31 August 2001), [4].

<sup>780</sup> *Ibid* [2].

<sup>781</sup> Potts was first released in 2004 but was rearrested in that same year on a charge of intimidation, leaving him to serve the balance of his term: *R v Potts* [2010] NSWSC 731 (23 July 2010), [37].

<sup>782</sup> *Ibid* [39]–[40].

<sup>783</sup> *Ibid* [55].

<sup>784</sup> See also *R v Brown* [1993] QCA 330 (13 September 1993). Brown was charged with the murder of his wife whom he stabbed approximately 40 times after a domestic argument. Brown argued diminished responsibility on the grounds that he had substantially lost control of his actions. Medical evidence gave the relevant abnormality of mind as ‘dependent personality disorder’ which caused ‘neurotic depression’ and ‘anger to a pathological degree’. The jury convicted him of manslaughter on the grounds of diminished responsibility and he was sentenced to eight years’ imprisonment. He served five years in total. While in prison Brown met and married another woman. Only 10 months after his release from prison, and while still on parole, he killed his second wife by strangulation. He was subsequently convicted of murder and sentenced to life imprisonment. See LRCWA, above n 22, 258.

<sup>785</sup> MCCOC (Ch 5: DP), above n 22, 129. See also *Channon v The Queen* (1978) 20 ALR 1, 4–5 (Brennan J).

flexibility, as discussed in Part 11, is preferable to the introduction of a partial defence of diminished responsibility.<sup>786</sup>

### **Potential for Manipulation**

12.4.13 Concerns have long been expressed about the broad and uncertain scope of diminished responsibility, potentially allowing for its manipulation by defendants.<sup>787</sup> ‘The potential for abuse of the defence has concerned judges (and legislators) since that time when legislation recognising diminished responsibility was first introduced.’<sup>788</sup> Curtis J noted to the English Law Commission his robust view that the defence of diminished responsibility is ‘grossly abused’.<sup>789</sup> The NSW DPP has raised the ‘real risk’ of defendants ‘expert shopping’ for those who best support any defence of diminished responsibility<sup>790</sup> (though it should be noted that the NSWLRC did not find any such evidence).<sup>791</sup>

12.4.14 This concern of the manipulation of the defence has been raised in the context of those who kill others out of compassion to end the physical suffering of the victim, so-called ‘mercy killers’. It has been observed that such offenders in the United Kingdom have historically relied on the defence of diminished responsibility prior to the defence’s amendment in 2009.<sup>792</sup> Between 1982 and 1991, 20 homicides were described by the Home Office as ‘mercy killings’, with only a single murder verdict resulting in these cases. However, the apparent absence of any actual mental impairment or disorder in many of these cases has been noted.<sup>793</sup>

12.4.15 ‘Mercy killings’ may inspire a compassionate response from juries, the community and even courts. However, this is not a sound argument for the introduction of diminished responsibility in South Australia. Rather it supports SALRI’s view that the preferable solution lies in greater flexibility in sentencing for murder in South Australia to properly reflect all the relevant circumstances of the case and the offender.

12.4.16 Of greater concern to SALRI, is the use and possible manipulation of any partial defence of diminished responsibility by men who kill women in circumstances of family violence.

### **Family Violence Implications**

12.4.17 In its examination of the provocation defence, SALRI in both Stage 1 and this Report, has considered the gender and family violence implications of the present law and particularly examined the effect of the abolition of provocation on those women who may kill abusive male partners. SALRI

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<sup>786</sup> See also above [11.7.1].

<sup>787</sup> Hemming, above n 755, 34. ‘The defence drives a coach and horses through criminal responsibility for murder’: at 35.

<sup>788</sup> *R v Whitworth* [1989] 1 Qd R 437, 445 (Thomas J).

<sup>789</sup> Law Commission (England and Wales) (2004), above n 21, 92 [5.43].

<sup>790</sup> Dr Jeremy Horder, in comments to the VLRC in 2003, stated with reference to the position in England and Wales: ‘The defence can go from one doctor to the next, in search of someone willing to testify to the accused’s mental disorder, until they find someone who will give the “right” evidence’: Law Commission (England and Wales) (2004), above n 21, 92 n 42.

<sup>791</sup> NSWLC (R 138, 2013), above n 33, 97 [4.47].

<sup>792</sup> Matthew Gibson, ‘Pragmatism Preserved? The Challenges of Accommodating Mercy Killers in the Reformed Diminished Responsibility Plea’ (2017) 81 *Journal of Criminal Law* 177, 180.

<sup>793</sup> House of Lords, *Report of the Select Committee on Medical Ethics* (HL Paper 21-1 of 1993–4, [128]). See also *ibid*.

has also considered these issues and implications in relation to whether diminished responsibility should to be introduced as a partial defence in South Australia.

12.4.18 A particular concern to SALRI is that a partial defence of diminished responsibility might be open to the gender bias as has been experienced in relation to the provocation defence, and similarly, be open to misuse by violent men who have killed an intimate partner. SALRI has identified that one of the main problems with the provocation defence is it has been misused on occasion by violent men who kill women in the context of family violence, in effect blaming the female victims for ‘provoking’ the killing,<sup>794</sup> SALRI is also concerned that the diminished responsibility defence may be employed by men who have killed women in the context of family violence.

12.4.19 The NSWLRC in 2013 asserted that concerns about the inappropriate use of diminished responsibility in relation to family violence were not supported in its research.<sup>795</sup> It noted that between 1998 and 2004, there were six cases in which an offender successfully raised the partial defence of substantial impairment after killing an intimate partner. Two of these cases involved women who killed abusive partners; the remaining four male defendants involved what were referred to as ‘unusual subjective features’ and were not connected with a history of family abuse.<sup>796</sup> The NSWLRC further noted that between 2005 and 2011, substantial impairment was raised in 51 cases. It was successful in 28 cases, of which only two cases showed a history of domestic violence.<sup>797</sup>

12.4.20 With respect to the NSWLRC, SALRI considers that the concerns about the misuse of diminished responsibility in the context of family violence may not be misplaced. SALRI notes that the two cases between 2005 and 2011 identified by the NSWLRC when violent men were convicted of manslaughter on the basis of diminished responsibility after killing their partners after a history of family violence, may be thought of as two too many.

12.4.21 It is also significant that diminished responsibility in the context of family violence can be seen in more recent NSW cases. In *Ukropina*,<sup>798</sup> the offender pleaded guilty to manslaughter on the basis of diminished responsibility after he had fatally stabbed his daughter. The offender stated that he stabbed his daughter after feeling a ‘snap of anger’ towards his daughter which caused the incident.<sup>799</sup> The offender’s condition was major depression with psychosis. The defendant’s sentence was reduced on appeal to a four year non-parole period with a balance term of two years. In *R v Jenbare*,<sup>800</sup> the offender who had stabbed his wife multiple times in the course of a violent struggle was found guilty by the jury of manslaughter on the basis of strong evidence of his substantial impairment. Jenbare suffered from

<sup>794</sup> See above [7.1.1]–[7.1.3]. See also SALRI, Stage 1, above n 10, 45–47 [6.1.7]–[6.1.15].

<sup>795</sup> NSWLC (R 138, 2013), above n 33, 98 [4.49]–[4.50]. See also Law Commission (England and Wales) (2004), above n 21, 105 [5.86].

<sup>796</sup> NSWLC (R 138, 2013), above n 33, 98 [4.50].

<sup>797</sup> Ibid. The two cases were *R v Zeilaa* [2009] NSWSC 532 (12 June 2009) and *R v Paddock* [2009] NSWSC 369 (21 May 2009). In *Zeilaa*, the defendant, who had dementia, killed his wife after a history of abuse when she expressed a desire to leave him. The offender successfully raised substantial impairment and was sentenced to a non-parole period of two years and six months. A similar fact scenario occurred in *Paddock*. There were a further two cases between 2005 and 2011 in which an intimate female partner was killed in circumstances where it was difficult to discern domestic violence. In six cases where an intimate female partner was killed the defence of substantial impairment was unsuccessful. See NSWLC (R 138, 2013), above n 33, 98 [4.50].

<sup>798</sup> *R v Ukropina* [2016] NSWCCA 277 (2 December 2016).

<sup>799</sup> Ibid [16].

<sup>800</sup> [2016] NSWSC 1317 (16 September 2016).

post-traumatic stress disorder, depression and cognitive impairment. The fact that an empty suitcase was found on the bed of the main bedroom suggest that the deceased may have been in the process of leaving her husband. McCallum J regarded the crime as one of ‘considerable seriousness’ and noted the defendant’s ‘acts which caused his wife’s death were of considerable brutality; she must have died in immense pain and fear’.<sup>801</sup> McCallum J was satisfied that the fatal argument ‘probably triggered a fear of abandonment’<sup>802</sup> in Jenbare. Jenbare was sentenced to five years imprisonment with a non-parole period of four years.<sup>803</sup>

12.4.22 Concerns about the use of diminished responsibility by violent men in the context of family violence have been expressed to, and by law reform agencies. The 2006 submission of the Law Society of Western Australia to the LRCWA argued that such a defence may apply to inappropriate cases, such as men who kill their spouses and children. The Law Society stated such a consequence would serve to undermine public confidence in the criminal justice system.<sup>804</sup> The LRCWA was unconvinced of the benefit of such a defence and recommended that diminished responsibility should not be introduced in Western Australia.<sup>805</sup> This recommendation was followed by the Western Australian Government.

12.4.23 The VLRC highlighted the risk that the introduction as a partial defence of diminished responsibility in the context of family violence may provide a defence for depressed husbands who kill their partners when they end the relationship. The VLRC noted that depression is among the most common diagnoses forming the basis of the defence in the United Kingdom. The VLRC noted that in its homicide prosecutions study, depression has been the most common diagnosis among the set of cases which were not mental impairment, but which had a psychiatric report attached to the file.<sup>806</sup>

12.4.24 Professor Jeremy Horder, a former English Law Commissioner, in his submission to the VLRC referred to UK research ‘to support the argument that diminished responsibility operates in “if anything an even more gender-biased way than provocation, favouring men who have (typically) killed their spouses”’.<sup>807</sup> Professor Horder referred to the risks of introducing diminished responsibility in a jurisdiction where provocation has been abolished and cited data to suggest that ‘the defence is often run in the context of family homicides and typically by men who have killed their partners or wives’.<sup>808</sup> The VLRC stated its concern that if provocation were to be abolished, diminished responsibility would replace provocation as a partial excuse and its consultation found ‘that this could potentially be problematic in relation to homicides in the context of family violence’.<sup>809</sup> SALRI is troubled by any such prospect.

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<sup>801</sup> Ibid [35].

<sup>802</sup> Ibid [15].

<sup>803</sup> In the recent NSW case of *R v Haydar (No 3)* [2017] NSWSC 159 (31 March 2017), diminished responsibility was raised when Haydar stabbed his wife over 30 times during an argument, the ‘frenzied’ attack occurring in the presence of their daughter. In this case, Haydar, at a judge alone trial, was found guilty of murder and Garling J was not satisfied that Haydar’s control was substantially impaired by his borderline personality disorder. There had been a history of family violence.

<sup>804</sup> Law Society of Western Australia, Submission No 37 (4 July 2006); see LRCWA, above n 22, 252.

<sup>805</sup> LRCWA, above n 22, 259.

<sup>806</sup> VLRC (2004), above n 15, 240 [5.11.7].

<sup>807</sup> Ibid 240 [5.118].

<sup>808</sup> Ibid 240 [5.119].

<sup>809</sup> Ibid 240 [5.120].

12.4.25 The VLRC did not support the introduction of a new partial defence. It was especially swayed by concern that diminished responsibility could reintroduce the gender bias of the old law of provocation and be open to misuse by violent men. The VLRC concluded:

If provocation were to be abolished, in accordance with the Commission’s recommendations, diminished responsibility could be used as a replacement defence. This may be of particular concern in the cases involving men who kill their female partners at the end of a relationship. Since the Commission’s view is that provocation should be abolished, in part because of the inappropriate use of the defence by men who kill in the context of sexual intimacy, it would be illogical to create a new defence which might have many of the same defects to take its place.<sup>810</sup>

12.4.26 SALRI agrees with the reasoning of the VLRC. SALRI is especially concerned that, when a main aim is to rid this area of the criminal law of its current gender bias, the introduction of a new partial defence of diminished responsibility at the same time as recommending the abolition of provocation (partly on account of its gender bias) could ironically reintroduce the gender bias of the current law of provocation.

12.4.27 Family violence is an issue of both state<sup>811</sup> and national<sup>812</sup> concern. SALRI notes that not only may a new defence of diminished responsibility risk reimporting the gender bias of provocation into the criminal law but it may undermine the current focus that family violence offences should be treated with the utmost gravity.

12.4.28 Though diminished responsibility is of general application, its possible benefit to women who kill abusive male partners has been raised.<sup>813</sup> The suitability and problems of diminished responsibility to women who may kill their abuser in the context of family violence have been noted.<sup>814</sup> SALRI is unconvinced of the utility of this defence in a family violence context. SALRI notes the VLRC’s views:

In the case of women who kill in response to domestic violence, it has been argued that introducing diminished responsibility would only serve to entrench misleading stereotypes of women. The temptation in such circumstances might be to argue that the killing occurred as the result of a psychological disturbance rather than a defensive reaction to ongoing and severe domestic violence. This may misrepresent women’s experiences. There is also a concern that the

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<sup>810</sup> Ibid 242 [5.131].

<sup>811</sup> Government of South Australia, above n 74, 4–5; SA Social Development Committee, above n 75, 12; Victorian Royal Commission, above n 76.

<sup>812</sup> SALRI, Stage 1, above n 10, 7 [2.1.10].

<sup>813</sup> Law Commission (England and Wales) (2004), above n 21, 88 [5.22]. See, for example, *R v Thornton* [1992] 1 All ER 306; *R v Ahluwalia* [1992] 4 All ER 889.

<sup>814</sup> See, for example, Susan Edwards, *Sex and Gender in the Legal Process* (Blackstone Press Ltd, 1999) 405; Rebecca Bradfield, ‘Women who Kill: Lack of Intent and Diminished Responsibility as the Other “Defences” to Spousal Homicide’ (2001) 13 *Current Issues in Criminal Justice* 143; Judith Kerr, ‘A Licence to Kill or an Overdue Reform? The Case of Diminished Responsibility’ (1997) 9 *Otago Law Review* 1. The NSW Judicial Commission observed that these types of cases ‘emphasise the serious effects of domestic violence on mental health’: Indyk, Donnelly and Keane, above n 127, 45.

availability of diminished responsibility would mean that women will plead guilty to manslaughter on this ground<sup>815</sup> rather than relying on self-defence.<sup>816</sup>

12.4.29 SALRI concludes that, as with provocation, diminished responsibility is an inappropriate vehicle to try and provide the necessary protection for battered women who kill their abusers. The preferable solution lies elsewhere.

## 12.5 Labelling and Community Involvement in determining culpability

12.5.1 Supporters of the defence of diminished responsibility, similar to the argument raised in the provocation context,<sup>817</sup> argue that it is inappropriate to ‘label’ as ‘murderers’ those who kill in circumstances of a significant impairment by reason of abnormality of mind and that it is more appropriate that the label of ‘manslaughter’ be applied to such offenders to reflect their lesser culpability.<sup>818</sup> The NSWLRC, for example, argues, ‘people who kill while in a state of substantially impaired responsibility should not be treated as “murderers”’.<sup>819</sup>

12.5.2 SALRI does not share this view and reiterates its position in relation to the similar argument raised in the provocation context.<sup>820</sup> SALRI is unconvinced of the argument that the need for a ‘fair label’ justifies the introduction of the defence of diminished responsibility. As with provocation, an intentional killing remains murder. It is legally and factually accurate to describe these offenders as ‘murderers’, because they have committed the offence of murder. There is no cogent reason why these offenders should be labelled as having committed a different crime than other homicide offenders. Rather, as with the presence of provocation, the preferable solution is for any reduced culpability due

<sup>815</sup> It has been noted that many female victims of family violence who kill their abusive partners may pragmatically plead guilty to alternative counts of manslaughter or other lesser counts) as they are unwilling to take the risk of proceeding to trial and facing a conviction for murder (especially in a jurisdiction such as South Australia that retains a general mandatory sentence for murder). See Julia Tolmie, ‘Provocation or Self-defence for Battered Women Who Kill?’ in Stanley Yeo (ed), *Partial Excuses to Murder* (Federation Press, 2005) 38. A linked concern that has been raised interstate is what are said to be inappropriate prosecution charging and plea-bargaining practices to victims of family violence facing homicide charges. See VLRC (2004), above n 15, 105–110 [3.116]–[3.128]. SALRI notes the importance of a broad degree of prosecutorial discretion in an adversarial system (see *DPP v Chow* (1992) 63 A Crim R 316, 325–326 (Kirby J); *Maxwell v R* (1996) 184 CLR 501, 512 (Dawson and McHugh JJ), 533–535 (Gaudron and Gummow JJ)). The issue of prosecution discretion and charging practices remains beyond this Report. See also SALRI, Stage 1, above n 10, 48 n 319.

<sup>816</sup> VLRC (2004), above n 15, 239–240 [5.11.6]. Ms Toole also expressed this view in consultation to SALRI. The English Law Commission similarly noted that family violence groups noted women are reluctant to raise diminished responsibility in a family violence context and ‘were concerned that many abused women are terrified of a psychiatric diagnosis and of being viewed as “mad”. This reluctance to accept a mental illness label is, in their view, understandable as the reactions of the women in question are, in one sense, quite normal responses to the abnormal violence and abuse to which they have been subjected’: Law Commission (England and Wales) (2004), above n 21, 89 [5.25].

<sup>817</sup> See above [5.3.1]–[5.3.6], [9.1.2]–[9.1.3]. See also SALRI, Stage 1, above n 10, 22 [4.1.14], 49–51 [6.2.1]–[6.2.4], 66 [8.1.6]–[8.1.17].

<sup>818</sup> NSWLC (R 82, 1997), above n 33, 32–33 [3.18]; NSWLRC (R 138, 2013), above n 33, 90 [4.23], 91–92 [4.27]–[4.29], 101 [4.63].

<sup>819</sup> NSWLC (R 82, 1997), above n 33, [3.18].

<sup>820</sup> See above [5.3.13]–[5.3.14]. See also SALRI, Stage 1, above n 10, 22 [4.1.15]–[4.1.16], 65–66 [8.1.3]–[8.1.5], 66–67 [8.11.8].

to the presence of a mental illness, cognitive impairment or intellectual disability to be taken into account at sentence, assuming that the necessary sentencing flexibility exists.

12.5.3 It is argued, similar as in the provocation context,<sup>821</sup> in support of a defence of diminished responsibility that it is desirable that juries should be involved in determining whether diminished responsibility applies to partially excuse a killing and that community values are furthered by the making of this determination.<sup>822</sup> The NSWLRC in 1997 expressed its view that ‘the principal and fundamental reason’ for its support for the retention of diminished responsibility as a partial defence was ‘the vital importance of involving the community, by way of the jury, in making decisions on culpability and hence enhance community acceptance of the due administration of criminal justice.’<sup>823</sup>

12.5.4 SALRI does not share this view and reiterates its position in relation to the similar argument raised in the provocation context.<sup>824</sup> This view wrongly assumes that judges do not adequately further community values when sentencing. SALRI agrees with the approach of the LRCWA that ‘factors going to degrees of culpability are best dealt with during the sentencing process ... judges have long been required to assess substantial mental impairment for the purpose of verdict and sentencing’.<sup>825</sup> The LRCWA has also noted that where the defence is available, ‘it has resulted in higher rates of guilty pleas to manslaughter on the basis of diminished responsibility than actual contested trials where the defence has been raised ... this undermines the argument that the defence enhances community participation in (and acceptance of) the justice system by leaving decisions about an accused’s level of culpability to a jury.’<sup>826</sup>

## 12.6 Sentencing and Mental Illness, Intellectual Disability or Cognitive Impairment

12.6.1 SALRI considers that the issues of a mental illness, intellectual disability or cognitive impairment are better left to the sentencing stage and that the complex issue of diminished responsibility is best considered in the context of sentencing flexibility and its intersection with sentencing for murder.

12.6.2 It is well established that both a mental illness<sup>827</sup> or a cognitive impairment or intellectual disability<sup>828</sup> are potential, though not necessarily automatic, mitigating factors in sentence. The long established position at common law is that an offender’s mental condition is always a relevant factor

<sup>821</sup> See above [5.3.9]–[5.3.12]. See also SALRI, Stage 1, above n 10, 22–23 [4.1.17]–[4.1.18].

<sup>822</sup> See, for example, NSWLRC (R 82, 1997), above n 33, 27–29 [3.11]–[3.12] 30–31 [3.16], 34–35 [3.20]–[3.21]; NSWLRC (R 138, 2013), above n 33, 91 [4.25], 96–97 [4.43]–[4.45], 106 [4.85].

<sup>823</sup> NSWLRC (R 82, 1997), above n 33, 27–28 [3.11].

<sup>824</sup> See above [5.3.13]–[5.3.14]. See also SALRI, Stage 1, above n 10, 23 [4.1.19]–[4.1.21].

<sup>825</sup> LRCWA, above n 22, 256–257.

<sup>826</sup> *Ibid.*

<sup>827</sup> Bagaric and Edney, above n 25, 318–331 [9.155]–[9.170]. See, for example, *R v Anderson* (1980) 2 A Crim R 379; *R v Tsiaras* [1996] 1 VR 398; *R v Wiskich* (2000) 207 LSJS 431; *R v Hallett* [2012] SASCF 143 (20 December 2012), [60]–[64].

<sup>828</sup> See Bagaric and Edney, above n 25, 331–339 [9.175]. See, for example, *R v Masolatti* (1976) 14 SASR 124; *R v Swan* [2006] NSWCCA 47 (6 March 2006); *R v McIntosh* (2008) 191 A Crim R 370, 381 [87]; *Muldrock v R* (2011) 244 CLR 120; *R v Campbell* [2017] SASCF 79 (7 July 2017), [47]–[48].

in the sentencing process.<sup>829</sup> This is consistent with s 10(1)(l) of the *Sentencing Act 1988* which requires a sentencing court to have regard to the ‘physical or mental condition of the defendant’ in determining both the head sentence and the non-parole period. This is effectively restated in s 11 of the *Sentencing Act 2017* (once it comes into effect) which requires a court to take into account in sentence ‘the defendant’s age, and physical and mental condition (including any cognitive impairment.’<sup>830</sup> The weight to be given to the mental condition of an offender varies according to the circumstances of the offending and the nature and severity of the mental condition.<sup>831</sup>

12.6.3 The High Court in *Muldrock* confirmed that both a mental illness and an intellectual disability (even a ‘mild intellectual disability’)<sup>832</sup> are established potential mitigating factors:

The principle is well recognised. It applies in sentencing offenders suffering from mental illness, and those with an intellectual handicap. A question will often arise as to the causal relation, if any, between an offender’s mental illness and the commission of the offence. Such a question is less likely to arise in sentencing a mentally retarded offender because the lack of capacity to reason, as an ordinary person might, as to the wrongfulness of the conduct will, in most cases, substantially lessen the offender’s moral culpability for the offence. The retributive effect and denunciatory aspect of a sentence that is appropriate to a person of ordinary capacity will often be inappropriate to the situation of a mentally retarded offender and to the needs of the community.<sup>833</sup>

12.6.4 In *R v Tsiaras*,<sup>834</sup> the Victorian Court of Appeal explained that mental illness may be relevant as a mitigating factor in five ways:

Serious psychiatric illness not amounting to insanity is relevant to sentencing in at least five ways. First, it may reduce the moral culpability of the offence, as distinct from the prisoner’s legal responsibility. Where that is so, it affects the punishment that is just in all the circumstances and denunciation of the type of conduct in which the offender engaged is less likely to be a relevant sentencing objective. Second, the prisoner’s illness may have a bearing on the kind of sentence that is imposed and the conditions in which it should be served. Third, a prisoner suffering from serious psychiatric illness is not an appropriate vehicle for general deterrence, whether or not the illness played a part in the commission of the offence. The illness may have supervened since that time. Fourth, specific deterrence may be more difficult to achieve and is often not worth pursuing as such. Finally, psychiatric illness may mean that a given sentence will weigh more heavily on the prisoner than it would on a person in normal health.<sup>835</sup>

<sup>829</sup> See, for example, *R v Hallett* [2012] SASCFC 143 (20 December 2012), [60]–[64]; *R v Hronopoulos* [2017] SASCFC 143 (30 October 2017), [23].

<sup>830</sup> *Sentencing Act 2017* s 11(1)(f). ‘Cognitive impairment has a wide definition in s 5 of the *Sentencing Act*. ‘Cognitive impairment includes—

(a) a developmental disability (including, for example, an intellectual disability, Down syndrome, cerebral palsy or an autistic spectrum disorder); and (b) an acquired disability as a result of illness or injury (including, for example, dementia, a traumatic brain injury or a neurological disorder); and (c) a mental illness.’

<sup>831</sup> *R v Hronopoulos* [2017] SASCFC 143 (30 October 2017), [23].

<sup>832</sup> *Muldrock v R* (2011) 244 CLR 120, 137 [50].

<sup>833</sup> (2011) 244 CLR 120, 139 [54].

<sup>834</sup> (1996) 1 VR 398. See also *R v Verdins* (2007) 16 VR 269, 276 [32].

<sup>835</sup> (1996) 1 VR 398, 400. *Tsiaras* has been applied in South Australia. See, for example, *R v Flentjar* [2013] SASCFC 11 (12 March 2013), [39]; *R v Hronopoulos* [2017] SASCFC 143 (30 October 2017), [27].



12.6.5 In *R v Verdins*,<sup>836</sup> the Victorian Court of Appeal reformulated these principles and held they were not confined to a ‘serious psychiatric illness’ but rather extended to any ‘impaired mental functioning, whether temporary or permanent’.<sup>837</sup> The *Tsiaras/Verdins* principles extend to the sentencing of offenders with an intellectual disability.<sup>838</sup>

12.6.6 The mere fact that an offender has a mental illness, cognitive impairment or intellectual disability will not always of itself be regarded as a mitigating factor. Rather ‘close analysis’ will be required. In *R v Flentjar*,<sup>839</sup> the court explained:

The mental state of a defendant at the time of his or her offending is a relevant factor in determining sentence. The circumstances in each case will vary and the weight to be given to matters personal to the defendant will depend on a number of circumstances. The severity of the defendant’s condition is important, especially in considering whether the condition can be regarded as a cause of the offending. Other circumstances will also be relevant, such as the extent to which the defendant has sought treatment. Because of this variation, a close analysis of the evidence must be conducted to reveal the full extent and impact of the condition.<sup>840</sup>

12.6.7 A question will often arise as to the causal link, if any, between an offender’s mental illness or other condition and the commission of the offence.<sup>841</sup> The offender must demonstrate how the particular condition played some causal role in the particular offending.<sup>842</sup>

12.6.8 The gravity of the offence and sentencing objectives such as the need for specific deterrence or especially the danger to the community will also affect the significance of a mental illness, cognitive impairment or intellectual disability as a mitigating consideration. Section 9 of the *Sentencing Act 2017* (SA) (when it comes into effect) provides that ‘the primary purpose for sentencing a defendant for an offence must be the paramount consideration when a court is determining and imposing the sentence’. The High Court in *Veen (No 2)* held that that, while an offender’s mental impairment may reduce his or her culpability for an offence, it may also make him or her a danger to society. In such circumstances, community protection becomes an important and legitimate sentencing consideration:

[A] mental abnormality which makes an offender a danger to society when he is at large but which diminishes his moral culpability for a particular crime is a factor which has two countervailing effects: one which tends towards a longer custodial sentence, the other towards a shorter. These effects may balance out, but consideration of the danger to society cannot lead to the imposition of a more severe penalty than would have been imposed if the offender had not been suffering from a mental abnormality.<sup>843</sup>

12.6.9 Whilst a court cannot impose a disproportionate sentence that would be more severe than that which would have been imposed had the offender not experienced a mental condition, the need for

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<sup>836</sup> (2007) 16 VR 269.

<sup>837</sup> *Ibid* 276 [32]; see also at 270–272 [3]–[13]. See also *R v Wiskich* (2007) LSJS 431; *R v Yost* [2010] SASFC 4 (16 July 2010), [21].

<sup>838</sup> *R v McIntosh* (2008) 191 A Crim R 370, 381–383 [87]–[92], 384 [101]–[104].

<sup>839</sup> [2013] SASFC 11 (12 March 2013).

<sup>840</sup> *Ibid* [42].

<sup>841</sup> *Muldock v R* (2011) 244 CLR 120, 139 [54].

<sup>842</sup> *R v Engert* (1995) 84 A Crim R 67, 68–71 (mental illness); *R v Matthews* (2004) 145 A Crim R 445 (intellectual disability).

<sup>843</sup> (1988) 164 CLR 465, 476–477 (Mason CJ, Brennan, Dawson and Toohey JJ).

community protection can lead to an increase in an offender’s sentence.<sup>844</sup> The gravity of the offence and sentencing objectives such as the need for specific deterrence or especially the danger to the community (now noting s 9 of the *Sentencing Act 2017*) may be such the level of mitigation that would otherwise apply to such an offender in light of his or her mental condition might be diminished or take a ‘back seat’.<sup>845</sup> As Brennan J explained:

An abnormality may reduce the moral culpability of the offender and the deliberation which attended his criminal conduct; yet it may mark him as a more intractable subject for reform than one who is not so affected, or even as one who is so likely to offend again that he should be removed from society for a lengthy or indeterminate period. The abnormality may seem, on one view, to lead towards a lenient sentence, and on another to a sentence which is severe.<sup>846</sup>

12.6.10 Therefore in *Veen (No 2)*, the High Court (in contrast to its conclusion in *Veen (No 1)*), upheld the sentence of life imprisonment for manslaughter on the basis of diminished responsibility on account of the gravity of the crime, Veen’s previous similar crime and ‘the grave danger to society’ that he represented.

12.6.11 It is clear that mental illness, cognitive impairment or intellectual disability are potential, though not necessarily automatic, mitigating factors in sentence. However, these established principles governing the availability of mental illness, intellectual disability or cognitive impairment as potential mitigating factors are undermined, if not displaced, by the present law in South Australia in relation to sentencing for murder.

12.6.12 The effect of the present law in South Australia presents a bleak picture for those who murder or commit a serious offence against the person in circumstances that are significantly mitigating as in the context of a relevant mental illness, intellectual disability or cognitive impairment. It is very doubtful if any flexibility in this area is accorded to the courts under the present law. Offenders who have a relevant mental illness, cognitive impairment or intellectual disability will still fall outside the tight definition of ‘special reasons’ under the present law to avoid the usual mandatory minimum non-parole period of 20 years for murder, even if their condition substantially mitigated their conduct and culpability.<sup>847</sup>

12.6.13 SALRI considers that the current South Australian law is too inflexible to homicide offenders (as well as those who commit a serious offence against the person) with mental illness, cognitive impairment or intellectual disability that may substantially mitigate their culpability. SALRI considers that the preferable solution is that courts are provided with greater flexibility to recognise these factors and properly reflect in sentence the protection of the community, the offender’s culpability, the gravity of the offence and any mitigating factors, especially an offender’s mental illness, cognitive impairment or intellectual disability.

<sup>844</sup> See, for example, *Muldrock v R* (2011) 244 CLR 120, 142 [61]; *R v Wright* [2015] VSCA 333 (10 December 2016), [6].

<sup>845</sup> ‘It is one thing to say that the principle of proportionality precludes the imposition of a sentence extended beyond what is appropriate to the crime merely to protect society; it is another thing to say that the protection of society is not a material factor in fixing an appropriate sentence. The distinction in principle is clear between an extension merely by way of preventive detention, which is impermissible, and an exercise of the sentencing discretion having regard to the protection of society among other factors, which is permissible’: *Veen v The Queen (No 2)* (1988) 164 CLR 465, 473 (Mason CJ, Brennan, Dawson and Toohey JJ).

<sup>846</sup> *Channon v The Queen* (1978) 20 ALR 1, 4–5 (Brennan J).

<sup>847</sup> See South Australia, *Parliamentary Debates*, Legislative Council, 21 June 2007, 406 (Hon P Holloway); South Australia, *Parliamentary Debates*, Legislative Council, 24 July 448 (Hon P Holloway).

## 12.7 Sentencing Implications and Conclusion

12.7.1 SALRI, after much consideration, is unconvinced of the benefits of a new partial defence of diminished responsibility and recommends that it should not be adopted in South Australia. SALRI accepts that the suggestion of diminished responsibility as a partial defence is tenable but any such defence raises its own issues and complications. SALRI notes the width and vagueness of such a defence and the prospect of ‘trial by expert’. SALRI echoes the VLRC’s concern that if the defence of provocation is to be abolished, diminished responsibility could be used as a replacement defence and it would be illogical to create a new defence which might have many of the same defects to take its place.<sup>848</sup> SALRI considers that diminished responsibility risks reintroducing many of the problems of provocation, notably its gender bias, into the law. Tasmania, Victoria and Western Australia do not have diminished responsibility and these jurisdictions have been described as ‘functioning perfectly well without the defence’.<sup>849</sup>

12.7.2 SALRI notes that the VLRC in 2004 recommended against the introduction of introducing diminished responsibility in Victoria as it should be an issue for sentencing.<sup>850</sup> The VLRC argued that it is the jury’s role to establish the defendant’s guilt or innocence and degrees of mental responsibility are better assessed during the sentencing process by a judge, who must give reasons for a decision which can be scrutinised (and are subject to appeal).<sup>851</sup>

12.7.3 A similar view was expressed by the LRCWA who also considered the sentencing process to be sufficiently flexible to allow for all relevant factors, including the culpability (including any mental impairment) and dangerousness of the defendant and the gravity of the offence.<sup>852</sup> The LRCWA cautioned that a manslaughter verdict in diminished responsibility cases risked ‘inappropriate sentencing outcomes’ and the ‘premature release of violent offenders’, as seen in *Brown and Veen*.<sup>853</sup> The LRCWA also noted that because the defence falls into the gap between total lack of control (which would satisfy a mental impairment or insanity defence), and total control, by definition when the defendant killed the victim they were still exercising some degree of control. The LRCWA noted that where a defendant has some ability to choose their actions and killed regardless, the existence of the defence is difficult to rationalise.<sup>854</sup>

12.7.4 SALRI concurs with these views of the VLRC and LRCWA against the introduction of diminished responsibility as a partial defence.

12.7.5 SALRI notes that the introduction of a partial defence of ‘diminished responsibility’ was especially raised to both it and the SA Legislative Review Committee by the ALRM. SALRI is acutely aware, as raised by the ALRM (and also the Law Society in its submission of 22 March 2018), of the established and particular problems confronting Aboriginal offenders charged with murder (and indeed generally) in relation to mental illness, cognitive impairment or intellectual disability.<sup>855</sup> Indeed, the situation of any homicide offender with a relevant mental illness, cognitive impairment or intellectual

<sup>848</sup> See VLRC (2004), above n 15, 242 [5.131].

<sup>849</sup> MCCOC (Ch 5: DP), above n 22, 123.

<sup>850</sup> VLRC (2004), above n 15, 243 Rec 43.

<sup>851</sup> *Ibid* 241–242 [5.126]–[5.127]. See also MCCOC (Ch 5: DP), above n 22, 123.

<sup>852</sup> VLRC (2004), above n 15, 259.

<sup>853</sup> *Ibid* 259.

<sup>854</sup> LRCWA (2007), above n 22, 253.

<sup>855</sup> See also above n 724.

disability who is sentenced for murder is unsatisfactory under the current law. Though it is clear that mental illness, cognitive impairment or intellectual disability are a material potential mitigating factor in sentencing, the current law in South Australia seemingly precludes reference to such conditions as a ‘special reason’ to depart from the general mandatory non-parole period of 20 years for murder.

12.7.6 SALRI considers that the current law in South Australia is too strict in relation to homicide offenders with a mental illness, cognitive impairment or intellectual disability that may substantially mitigate their culpability. It is illogical that, whilst mental illness, cognitive impairment or intellectual disability are recognised as potential (though not automatic) valid mitigating factors for all other offences, they are not recognised as such for murder. The present law in relation to sentencing for murder is at odds with the situation for all other offences and it is difficult to see why murder should be singled out for such arbitrary treatment. The present situation is also seemingly at odds with the recent focus across Australia (including South Australia) to fairly recognise and promote equality in relation to persons with mental illness, cognitive impairment or intellectual disability within the wider criminal justice system.<sup>856</sup> It appears particularly harsh that an offender who may just fall short of establishing either unfitness to plead or a complete defence of mental impairment but who has a mental illness, cognitive impairment or intellectual disability which on any view substantially impedes their reasoning and comprehension and therefore their culpability in other circumstances, will receive under the current law in South Australia the same sentence for murder as an offender without such a mental illness, cognitive impairment or intellectual disability. SALRI considers that the present law in this context is arbitrary, ineffective and inappropriate.<sup>857</sup>

12.7.7 In those cases where an offender’s culpability is materially mitigated through mental illness, cognitive impairment or intellectual disability, there is a need for greater flexibility in South Australia for sentencing for murder (and for consistency for serious offences against the person) than is afforded under the present strict law to allow a court the necessary flexibility in sentence to have regard to all relevant factors. SALRI considers that the preferable solution to the acute problem raised by the ALRM and others is not by establishing a new partial defence of diminished responsibility but rather to provide the courts with the necessary flexibility in sentencing for murder (and for consistency in relation to serious offences against the person) to properly take into account the presence of mental illness, cognitive impairment or intellectual disability (or indeed any other relevant mitigating factor).<sup>858</sup>

<sup>856</sup> See generally Australian Human Rights Commission, *Equal before the Law: Towards Disability Justice Strategies* (February 2014); NSWLRC (R 138, 2013), above n 33; NSW Law Reform Commission, *People with Cognitive and Mental Health Impairments in the Criminal Justice System: Diversion*, Report No 135 (June 2012); Eileen Baldry, Leanne Dowse and Marissa Clarence, *People with Intellectual and other Cognitive Disability in the Criminal Justice System* (University of New South Wales, 2012); Government of South Australia, *Disability Justice Plan 2014–2017* (2014), <<http://www.agd.sa.gov.au/initiatives/disability-justice-plan>>; NSW Government, *Disability Strategic Plan 2014–2016* (2014) <[http://www.correctiveservices.justice.nsw.gov.au/Documents/Disability-Strategic-Plan-2014-2016\\_Online\\_final.pdf](http://www.correctiveservices.justice.nsw.gov.au/Documents/Disability-Strategic-Plan-2014-2016_Online_final.pdf)>. ‘A grim picture of disability, disadvantage, discrimination. Our repeated failure as a nation to respect the basic human right of all Australians, including people with disability, to have equal access to justice. It is ten years since the *Convention on the Rights of Persons with Disabilities* was adopted by the United Nations. Yet we are still seeing people with disability treated as inferior to others in the criminal justice system’: Alastair McEwin, ‘Equal before the Law? How the Criminal Justice System is Failing People with Disability’ (Speech delivered at the 2016 Annual Costello Lecture, 27 September 2016) <<https://www.humanrights.gov.au/news/speeches/equal-law-how-criminal-justice-system-failing-people-disability#fn18>>.

<sup>857</sup> The problems of mandatory sentencing, including in relation to both community protection and deterrence, are well known. See, for example, Cowdery (2014), above n 97, 12–13. See further above n 700.

<sup>858</sup> See, for example, *R v Fernando* (1992) 76 A Crim R 58; *Bugmy v R* (2013) 249 CLR 571; *Munda v Western Australia* (2013) 249 CLR 600; *R v Grose* [2014] SASCFC 42 (24 April 2014) as to the significance of Aboriginality as a

SALRI considers that such sentencing flexibility as discussed above in Part 11 is likely to prove more effective and efficient in providing for these offenders than the introduction of a partial defence of diminished responsibility.

12.7.8 Recommendation:

**Recommendation 10**

SALRI recommends that any new partial defence of diminished responsibility is inappropriate and should not be adopted in South Australia.

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mitigating factor. ‘Statistically, Aboriginal people are grossly overrepresented in the criminal justice system. Further, risk factors associated with criminal offending such as unemployment, lack of education and poor health, which inhibit full participation in community life, are far more prevalent in relation to Aboriginal people. While these statistical facts say nothing about an individual before a sentencing court, the fact that they are a relatively common experience of Aboriginal defendants suggests a need for a sentencing court to be alive to the likelihood of their existence, to explore whether they are present, and, if they are, to explore their relevance to the offence and offender. The need to achieve individualised justice requires as much. Doing so may require that the court adopt a proactive approach. Again, that is not to single out Aboriginal defendants for special treatment. The same sort of approach could be required in myriad circumstances involving defendants of different ethnicities and backgrounds’: at [41] (Gray, Sulan and Nicholson JJ).

## Part 13 – Marital Coercion

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### 13.1 Introduction and History of the Defence of Marital Coercion

13.1.1 SALRI in its Stage 1 Report raised the often overlooked defence of marital coercion.<sup>859</sup>

13.1.2 Section 328A of the *CLCA* provides that, whilst any presumption of law that an offence committed by a wife in the presence of her husband is committed under the coercion of the husband is abolished,<sup>860</sup> ‘on a charge against a wife for any offence other than treason or murder, it shall be a good defence to prove that the offence was committed in the presence, and under the coercion, of the husband.’<sup>861</sup> A similar defence exists in Victoria<sup>862</sup> and may still exist in Western Australia, NSW and the ACT.<sup>863</sup>

13.1.3 Marital coercion is a complete defence to any offence in South Australia, other than murder<sup>864</sup> or treason.<sup>865</sup> However, marital coercion is confined to legally married women, to the exclusion of husbands and parties in any de facto, domestic or registered relationships and any same-sex partnership or relationship.

13.1.4 This defence has medieval origins when a wife was treated as a mere chattel of her husband. ‘Marital coercion dates to an old legal presumption, when women had no rights and no independent means of support, so any wife committing a crime in the presence of her husband had a “presumption of innocence” under coercion.’<sup>866</sup> Gradually, this concept developed into a legal presumption that, where an offence was committed by a married woman in the presence of her husband, the wife was held to have been acting under his coercion and should be acquitted of the crime, unless it could otherwise be proved that the wife was acting independently and of her own initiative in committing the offence. The mere fact of the husband’s presence at the time and place of the crime was enough

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<sup>859</sup> SALRI, Stage 1, above n 10, 51–54 [6.3.1]–[6.3.8].

<sup>860</sup> This was an old common law rule dating from medieval times. ‘This doctrine of the presumption of marital coercion originated in very early times when a wife’s subjection to her husband was severe’: Victorian Law Reform Commissioner, *Criminal Liability of Married Persons (Special Rules)*, Working Paper No 2 (January 1975) 6 [6].

<sup>861</sup> It is usually thought that the burden of proof lays on the defence to prove marital coercion on the balance of probabilities: see *R v Shortland* [1996] 1 Cr App R 116; *R v Cairns* [2003] 1 WLR 796. For duress, the burden is on the prosecution to *disprove* duress beyond reasonable doubt. In *R v Pryce* (Unreported, Southwark Crown Court, 7 March 2013), Sweeney J held that in light of the *Human Rights Act 1998* (UK) and art 6(2) of the *European Convention on Human Rights*, the burden provided by the comparable English section to s 328A of the *CLCA*, did not remain a persuasive burden on the defence (as construed in *Shortland* and *Cairns*) but rather as placing only an evidential burden on the defendant (see at <<http://www.iclr.co.uk/marital-coercion-the-ruling-in-r-v-pryce/>>). It is assumed that the position in South Australia is that the burden of proof remains on the defence to prove marital coercion on the balance of probabilities. See *Goddard v Osborne* (1978) 18 SASR 481, 495.

<sup>862</sup> *Crimes Act 1958* (Vic) s 336.

<sup>863</sup> Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (Thomson Reuters, 3<sup>rd</sup> ed, 2010) 361 [6.130].

<sup>864</sup> It appears that that marital coercion remains as a defence to even attempted murder. See also *R v Gotts* [1992] 2 AC 412 and *R v Goldman (No 4)* (2004) 147 A Crim R 472 in relation to duress and attempted murder.

<sup>865</sup> The consideration of whether the marital coercion defence should be extended to murder raises particular issues. The Victorian Law Reform Commissioner accepted that it would ‘seem appropriate’ to prevent an accused charged with murder or treason from relying on the defence of marital coercion due to the ‘extreme gravity’ of these offences. See Victorian Law Reform Commissioner, above n 860, 12 [25]. SALRI concurs with this view.

<sup>866</sup> Caroline Davies, ‘Vicky Pryce defence of marital coercion “incompatible with gender equality”’, *The Guardian* (online), 8 March 2013, <<https://www.theguardian.com/law/2013/mar/07/vicky-pryce-marital-coercion-equality>>.

to raise the presumption of marital coercion, and a lack of evidence showing that the wife was instrumental in the commission of the crime, even if there was no evidence of threats, pressure or instructions by the husband, could be sufficient to prompt an acquittal on this basis.<sup>867</sup> Part of the rationale of the presumption was that during a time when felonies carried the death penalty and men could receive a comparatively light punishment by relying on the benefit of clergy,<sup>868</sup> it allowed the courts to avoid giving manifestly unequal sentences to husbands and wives convicted of a joint offence.<sup>869</sup>

13.1.5 The presumption and defence of marital coercion were both based on the same broad view that the relationship between a husband and a wife was different to all other relationships and it was appropriate to allow married women to defend themselves by arguing marital coercion. The rationale for the defence of marital coercion is that a wife could not be held responsible for her criminal misconduct because the misconduct was the product of her husband's choice, and not her own.<sup>870</sup>

13.1.6 As early as 1922, the Avory Committee recommended that marital coercion should be abolished, not only the presumption, but also any defence of coercion which would put a wife in any better position than any other member of the community.<sup>871</sup> The presumption of marital coercion was abolished in England in 1925 and in South Australia in 1940 by s 12 of the *Criminal Law Consolidation Act Amendment Act 1940* (SA). However, the defence remains available in s 328A of the *CLCA*. Abolition of the presumption was considered justified because 'extreme subjection of a wife to her husband' is exceptional in modern circumstances and unequal sentences arising due to the benefit of clergy no longer occur.<sup>872</sup> The defence of marital coercion was retained, however, due to the 'human and social reality that, due to their special position, wives may be particularly vulnerable to pressure from their husbands to commit crimes.'<sup>873</sup>

13.1.7 However, marital coercion is rarely raised in South Australia and all parties in consultation expressed their surprise to SALRI that the defence still exists. It rarely featured in England prior to its abolition in 2014.<sup>874</sup> SALRI's research found that it has been raised in only four reported South Australian cases<sup>875</sup> (and it has only been successfully raised as a defence on one occasion in *Goddard v Osborne*<sup>876</sup> since the abolition of the presumption in 1940).

<sup>867</sup> Victorian Law Reform Commissioner, above n 860, 6 [5].

<sup>868</sup> 'Benefit of clergy' was a legal concept by which clergymen could claim an exemption from the jurisdiction of the courts by appearing wearing ecclesiastical dress to prove that he was a member of the clergy. Later, this concept evolved to allow any first-time offender to prove his clerical status by reading Psalm 51. This test was often passed by illiterate defendants who memorised the required passage.

<sup>869</sup> Victorian Law Reform Commissioner, above n 860, 6 [6].

<sup>870</sup> Anne Coughlin, 'Excusing Women' (1994) 82(1) *California Law Review* 1, 23.

<sup>871</sup> In 1925, the British Parliament, while rejecting the wider proposal of the Avory Committee, abolished the presumption of marital coercion. See *Criminal Justice Act 1925* (Eng) s 47.

<sup>872</sup> Victorian Law Reform Commissioner, above n 860, 6 [6].

<sup>873</sup> Stanley Yeo, 'Coercing Wives into Crime' (1992) 6(3) *Australian Journal of Family Law* 214, 215.

<sup>874</sup> Prior to its abolition in England, the defence had only appeared in law reports on six occasions.

<sup>875</sup> *R v Whelan* [1937] SASR 237; *Manuels v Crafter* [1940] SASR 7 (later overruled); *Goddard v Osborne* (1978) 18 SASR 481; *Brennan v Bass* (1984) 35 SASR 311.

<sup>876</sup> (1978) 18 SASR 481. The court found the defendant not guilty on the basis of duress, but also considered marital coercion (though strictly *obiter*).

## 13.2 Legal Test for Marital Coercion

13.2.1 The Supreme Court of South Australia in *Goddard v Osborne*, citing with approval a 1951 article by Edwards,<sup>877</sup> identified the elements that must be established to prove the defence of marital coercion:

- a) The crime must be completed in the presence of the defendant's husband;
- b) It is not necessary to show that the criminal act was done literally in sight of the husband, but it must be shown that he was near enough to exercise immediate control or influence over his wife's conduct;
- c) The test as to whether or not the wife was acting under the coercion of her husband is subjective, not objective;
- d) It must be left to the jury to decide whether, in the particular circumstances, the accused wife was under the domination and control of her husband to such an extent that the exercise of her own free will was rendered impotent;
- e) Coercion imports something wider than threats of, or actual, bodily harm; it may well extend to include threats deriving their force from the moral or spiritual realms.

13.2.2 The defence requires both that the offence be committed in the presence of the husband and also under his coercion. To establish the defence, the man and woman must be married at the time of the offence in relation to which coercion is claimed. The defence is only open to a wife. Any same sex relationship is ineligible. A civil partnership or de facto relationship is also ineligible and a husband is unable to raise the defence. In *R v Ditta, Hussain and Kara*,<sup>878</sup> the defendant was not in fact married at the time of the alleged offence but honestly believed that she had been. The English Court of Appeal held that a mistaken belief that a woman is married, even if reasonable, will not suffice for a defence to be successfully put forward.

13.2.3 The defence of marital coercion is similar to, but wider than, duress. For both defences, the state of mind produced is the same: "This is not my wish, but I must do it."<sup>879</sup> However, the defence of marital coercion is wider in scope than duress. Duress requires a threat to kill or cause serious harm to a person,<sup>880</sup> whilst marital coercion need not involve either physical force or the threat of force.<sup>881</sup> Marital coercion only requires 'coercion' to the extent that the wife's will was overborne due to pressure inflicted by the husband.<sup>882</sup> The coercion can be either physical or moral.<sup>883</sup> Coercion is not the same as trying to persuade someone out of loyalty but instead involves proof that the wife was forced unwillingly to participate in the offence. Even moral force or emotional threats may be enough, providing that the wife's will was overborne.<sup>884</sup>

<sup>877</sup> J Edwards, 'Compulsion, Coercion and Criminal Responsibility' (1951) 14 *Modern Law Review* 296, 313, cited in *Goddard v Osborne* (1978) 18 SASR 481, 485.

<sup>878</sup> [1988] Crim LR 42.

<sup>879</sup> *Director of Public Prosecutions v Lynch* [1975] AC 653, 694 (Lord Simon of Glaisdale).

<sup>880</sup> *R v Hurley and Murray* [1967] VR 562. See further below Part 14.

<sup>881</sup> *R v Shortland* [1996] 1 Cr App R 116.

<sup>882</sup> *Goddard v Osborne* (1978) 187 SASR 481; *R v Shortland* [1996] 1 Cr App R 116; *R v Cairns* [2003] 1 WLR 796.

<sup>883</sup> *R v Gary Richmond and Ann Richmond* [1982] Crim LR 507.

<sup>884</sup> *R v Cairns* [2003] 1 WLR 796.



13.2.4 The defence was recently explained in the controversial trial in England of Vicky Pryce by Sweeney J in the following terms:

Thus it was common ground that the law recognises, via the defence of marital coercion, that a wife is morally blameless if she committed an offence (other than murder or treason) only because her husband was present and coerced her — that is put pressure of some sort on her to commit the offence in such a way that, as a result, her will was overborne (in the sense that she was impelled to commit the offence because she truly believed that she had no real choice but to do so). There was also no dispute that, as to the wife’s will being overborne, the issue is entirely subjective. It was equally common ground that a wife’s will would not have been overborne (in the sense that I have just described) if, for example, she was persuaded by force of argument to choose (albeit reluctantly) to commit the offence rather than to take another course, or if she was persuaded (albeit reluctantly) to commit the offence out of love for, or loyalty to, her husband or family, or to avoid inconvenience (whether to herself or others). Her will must have been overborne (ie overcome) in the sense that she was impelled (ie forced) to commit the offence because she truly believed that she had no real choice but to do so.<sup>885</sup>

13.2.5 The determination of whether a wife’s will was overborne is an entirely subjective analysis. There is no requirement that the subjective pressure be analysed objectively in the context of what actions a ‘reasonable person’ would have taken in the circumstances.

### 13.3 Critical History

13.3.1 The defence of marital coercion has long proved contentious. James Stephen was critical of the defence as uncertain and irrational.<sup>886</sup> Stephen’s 1883 *History of the Criminal Law of England* noted that it is ‘quite absurd’ to grant more protection ‘to a wife than to a daughter of 15’.<sup>887</sup> As early as 1922, the Avory Committee recommended that it should be abolished, not only the doctrine of the presumption, but also any defence of coercion which would put a wife in any better position than any other member of the community.<sup>888</sup> In 1925, the British Parliament, while rejecting the wider proposal of the Avory Committee to discard the whole defence, abolished the presumption.<sup>889</sup> In 1946, Viscount Simon in *DPP v Holmes*,<sup>890</sup> remarked, ‘we have left behind us the age when the wife’s subjection to her husband was regarded by the law as the basis of the marital relation.’<sup>891</sup> The defence seemed increasingly outdated, if not anachronistic, in assuming that a typical modern wife occupies a deferential and subordinate role to her husband.

<sup>885</sup> *R v Pryce* (Unreported, Crown Court, Sweeney J, 7 March 2013), <<http://www.iclr.co.uk/marital-coercion-the-ruling-in-r-v-pryce/>>.

<sup>886</sup> James Stephen, *Digest of the Criminal Law (Crimes and Punishments)* (Macmillan, 5<sup>th</sup> ed, 1894) 395, 399; James Stephen, *A History of the Criminal Law of England* (Macmillan, 1883) vol 2, 105–106.

<sup>887</sup> Stephen, *A History of the Criminal Law of England*, above n 886, 106.

<sup>888</sup> Horace Avory, *Report of the Committee on the Responsibility of Wife for Crimes Committed under the Coercion of the Husband* (Cmd 1677) (1922).

<sup>889</sup> *Criminal Justice Act 1925* (Eng) s 47.

<sup>890</sup> [1946] AC 588.

<sup>891</sup> *Ibid* 600.

13.3.2 In 1977, the English Law Commission recommended that the defence of marital coercion should be abolished.<sup>892</sup> It noted the relative obscurity of the defence and uncertainties surrounding the operation of the defence, for example, in relation to the strictness of the requirement in law that the husband be physically present when the wife commits the offence.<sup>893</sup> The Law Commission's main concern was that the defence did not accord with modern conditions. Many married women were then (and clearly are now) financially independent from their husbands. The Law Commission noted that it is anomalous to provide a special defence to wives which is not available to other women in a similar position such as a de facto wife or a 17-year-old daughter.<sup>894</sup> The Law Commission recommended abolition of the defence 'and that a wife who commits an offence under pressure from her husband should be able to avoid liability on that account only if she can bring herself within the limits of the general defence of duress.'<sup>895</sup>

13.3.3 The Law Commission in 1993 repeated its view and cl 36(2)(b) of its proposed Criminal Law Bill suggested abolition of it as a separate defence (though allowing wives to raise duress).<sup>896</sup>

13.3.4 The defence of marital coercion was effectively rendered a dead letter in Ireland following the decision of Henchy J in *State (DPP) v Walsh and Conneely* which found that the continued existence of such a defence infringed constitutional guarantees of equality and non-discrimination.<sup>897</sup>

13.3.5 There has been 'considerable opposition' to the retention of the defence.<sup>898</sup> Sweeney J in *Pryce*<sup>899</sup> noted that the defence is rarely raised<sup>900</sup> and its abolition had been recommended on more than one occasion.<sup>901</sup> The defence is 'widely regarded as a relic of a bygone age'.<sup>902</sup> It was described as a 'relic of

<sup>892</sup> Law Commission of England and Wales, *Criminal Law Report on Defences of General Application*, Report No 83 (1977), 17–19, [3.1]–[3.9].

<sup>893</sup> Ibid 18 [3.5]–[3.6]. In a modern world where people can obviously communicate with each other at the touch of a button, this aspect has long been outdated.

<sup>894</sup> Ibid 18 [3.6]–[3.7].

<sup>895</sup> Ibid 19 [3.9]. The Law Commission noted that its consultation had found wide support and no opposition to this suggestion: at 18 [3.7].

<sup>896</sup> Law Commission, above n 892, 52 [39.6].

<sup>897</sup> [1981] IR 412.

<sup>898</sup> Susan Edwards, 'The "Straw Woman" at Law's Precipice: An Unwilling Party' in Alan Reed and Michael Bohlander (eds), *Participation in Crime: Domestic and Comparative Perspectives* (Routledge, 2013) 59, 64.

<sup>899</sup> *R v Pryce*, (Unreported, Southwark Crown Court, Sweeney J, 7 March 2013), <<http://www.iclr.co.uk/marital-coercion-the-ruling-in-r-v-pryce/>>.

<sup>900</sup> See, for example, *R v Anne and John Darwin* [2009] EWCA Crim 860, where a married couple engaged in a fraudulent life insurance conspiracy and the husband staged his apparent death at sea in a boating accident. The wife's defence of marital coercion was rejected as she was not coerced. At the time of *Darwin*, it was noted that the defence had only been raised in five reported cases in England since 1925. See Frances Gibbs, 'Anne Darwin: "marital coercion" defence extremely rare', *The Times* (online), 24 July 2008, <<http://www.thetimes.co.uk/tto/law/article2211720.ece>>. *R v Whelan* [1937] SASR 237; *Goddard v Osborne* (1978) 18 SASR 481 and *Brennan v Bass* (1984) 35 SASR 311 are the only reported South Australian examples that were found in SALRI's research. See also *R v Dempsey* [2000] VSC 527 (28 November 2000).

<sup>901</sup> See, for example, Joshua Rozenberg, 'The Vicky Pryce case highlights why "marital coercion" should be thrown out', *The Guardian*, 8 March 2013 (online), <<https://www.theguardian.com/commentisfree/2013/mar/07/vicky-pryce-marital-coercion-thrown-out>>.

<sup>902</sup> Joshua Rozenberg, 'Defence of marital coercion used by Vicky Pryce to be abolished', *The Guardian* (online), 17 January 2014, <<https://www.theguardian.com/law/2014/jan/17/defence-marital-coercion-vicky-pryce-abolished>>.

the past which ought to have been abolished long ago’ that dates back to a view that wives live under matrimonial subjection of their husbands.<sup>903</sup>

13.3.6 The defence in the aftermath of the controversial case of Vicky Pryce was abolished in England and Wales on 13 May 2014.<sup>904</sup>

13.3.7 The circumstances of *Pryce* are significant. In 2003, Vicky Pryce, a former joint head of the UK Government Economic Service, declared that she was the driver and assumed responsibility for a speeding offence committed by her then husband, Christopher Huhne MP, a prominent politician, when his car was photographed over the speeding limit. When their deception later came to light, Mr Huhne and Ms Pryce were charged with perverting the course of justice.

13.3.8 The elements of the offence were not disputed. However, Ms Pryce raised the defence of marital coercion and asserted that her husband had coerced her to lie and declare that she was driving his car. The prosecution argued that Ms Pryce was not pressured to such an extent that her will was overborne. Rather the offence committed by Ms Pryce was a result of her free choice at a time when she and Huhne were both confident that their deception would never be revealed. The prosecution also noted there was never any threat or actual physical violence in the marriage.

13.3.9 Ms Pryce’s claim of marital coercion from her husband was ultimately not accepted by the jury.<sup>905</sup> It was noted that Ms Pryce was an unlikely person to raise such a defence.<sup>906</sup> ‘Vicky Pryce was a well-educated, affluent and powerful woman, and a distinguished economist whose job had been to advise on the affairs of nations at top government level’.<sup>907</sup> The notion, as prosecution counsel submitted in his closing address, that ‘such a powerful and successful woman’ could have been ‘forced to become a quivering jelly’ was dubious.<sup>908</sup>

13.3.10 Press commentary in the aftermath of *Pryce* labelled the defence of marital coercion as ‘an anachronism’,<sup>909</sup> ‘absurd’,<sup>910</sup> ‘unusual’ and ‘archaic’,<sup>911</sup> ‘truly idiotic’<sup>912</sup> and ‘outdated and irrelevant’.<sup>913</sup> These criticisms noted its gendered application and the apparently bizarre implication that women

<sup>903</sup> David Ormerod and Karl Laird, *Smith and Hogan’s Criminal Law* (Butterworths, 11<sup>th</sup> ed, 2005) 242.

<sup>904</sup> *Anti-Social Behaviour, Crimes and Policing Act 2014* (UK) s 177.

<sup>905</sup> Though the first jury was unable to reach a verdict. See Caroline Davies, ‘Vicky Pryce Jury Discharged after failing to reach verdict’, *The Guardian* (online), 21 February 2013, <<https://www.theguardian.com/law/2013/feb/20/vicky-pryce-jury-discharged>>.

<sup>906</sup> See Siobhan Weare, ‘Marital Coercion’ (2014) 178 *Justice of the Peace Notes* 455.

<sup>907</sup> Davies, above n 866.

<sup>908</sup> See Weare, above n 906, 455.

<sup>909</sup> Thom Dyke, ‘Is marital coercion defence an anachronism?’, *The Times* (online), 7 March 2013, <<https://www.thetimes.co.uk/article/is-marital-coercion-defence-an-anachronism-bhnp89n22s7>>.

<sup>910</sup> Clive Coleman, ‘Marital coercion legal defence explained’, *BBC News* (online), 7 March 2013, <[www.bbc.com/news/uk-21447059](http://www.bbc.com/news/uk-21447059)>.

<sup>911</sup> Leo Benedictus, ‘Vicky Pryce’s marital-coercion defence and other archaic laws’, *The Guardian* (online), 9 March 2013, <<https://www.theguardian.com/law/shortcuts/2013/mar/08/vicky-pryce-marital-coercion-archaic-laws>>.

<sup>912</sup> *BBC News* (online), ‘Marital Coercion Defence “to be scrapped”’, 22 January 2014, <<http://www.bbc.com/news/uk-25852073>>.

<sup>913</sup> Ashley Fitton, ‘Women still need Vicky Pryce’s “marital coercion” plea’, *The Telegraph* (online), 13 April 2013, <<https://www.telegraph.co.uk/women/womens-life/9988070/Women-still-need-Vicky-Pryces-marital-coercion-plea.html>>.

lacked independent agency in the 21<sup>st</sup> century. The repeal of marital coercion in England was largely prompted by the critical public and press response to *Pryce*.

### 13.4 Marital Coercion in a Family Violence Context

13.4.1 It is significant that the defence of marital coercion, despite *Pryce*, is not without support, notably in a family violence context. The relatively low threshold (especially compared with the common law defence of duress)<sup>914</sup> to successfully raise marital coercion and the subjectivity involved in proving that a wife's will was overborne makes this defence potentially more accessible to women accused of committing crimes in a family violence context than other defences such as self-defence or duress. This fact was noted in consultation to SALRI, especially by the Victim Support Service, by those who were reluctant to discard the defence. The relatively low threshold of 'coercion' is consistent with the established position that family violence includes a broader range of conduct than only physical violence.<sup>915</sup> The subjective test of marital coercion also allows a court to take into account the specific circumstances of family violence experienced by the defendant, including BWS evidence, to determine if a defendant's will was overcome.

13.4.2 One author raises the continued benefit of the defence for wives 'under the patriarchal rule of the husband' given the restrictions of the common law defence of duress.<sup>916</sup> The Victorian Law Reform Commissioner also suggested the retention of the defence of marital coercion (though not the presumption)<sup>917</sup> on the basis of the limits of the defence of duress and that duress may well not assist or reflect the situation of wives subject to violence or threats from abusive husbands. It has been noted that 'retention of the defence [or marital coercion] may be justified because of the high rate of violence by men against their partners and the difficulties which women experience in seeking effective protection against such violence.'<sup>918</sup> The Victorian Law Reform Commissioner acknowledged that some women who are subjected to psychological and physical abuse may be forced to commit crimes by their husbands.<sup>919</sup>

13.4.3 The defence of marital coercion has been described as recognising the reality that given the prevalence of male family violence, women are 'particularly vulnerable' to pressure and coercion from their intimate partners, even to commit crimes.<sup>920</sup> The defence is especially supported in light of rates of intimate partner violence and the difficulties which mainly women experience in relying on the defence of duress when they are coerced to do criminal acts (or omissions) by their abuser.<sup>921</sup>

<sup>914</sup> See below Part 14.

<sup>915</sup> See, for example, the wide definition of 'domestic abuse' in s 8 of the *Intervention Orders (Prevention of Abuse) Act 2009* (SA), which includes physical injury, emotional or psychological harm, an unreasonable and non-consensual denial of financial, social or personal autonomy, or damage to the victim's property. See also above n 75.

<sup>916</sup> Edwards, above n 898, 64. See also Weare, above n 906, 455–456.

<sup>917</sup> Victorian Law Reform Commissioner, above n 860, 10 [19] and 13–14 [30].

<sup>918</sup> Yeo, 'Coercing Wives into Crime', above n 873, 215. See also VLRC (2004), above n 15, 122 [3.168].

<sup>919</sup> VLRC (2004), above n 15, 122 [3.168].

<sup>920</sup> Australian Human Rights Commission, Submission to the Special Rapporteur on Violence against Women, 20 January 2017, 3.

<sup>921</sup> VLRC (2004), above n 15, 122 [3.168].

13.4.4 The last English defendant to successfully raise marital coercion and be acquitted of drink driving as a result of pressure from her abusive husband has also supported retention of the defence.<sup>922</sup>

13.4.5 Marital coercion also received some support in consultation. Heather Stokes and others expressed the view to SALRI that this defence has some value, as it is not based on physical violence, but ‘control’ in a relationship that falls short of ‘learned helplessness’. As such, women who are socially and/or financially or otherwise dependent on their partners should still have access to a defence due to this lower threshold. However, Ms Stokes and others suggested that this should not only be available to married women, but inclusive of all relationships and be non-gender specific. Ms Stokes also noted that a non-gendered updated version of marital coercion would be preferable to a modified version of duress.<sup>923</sup> It was noted to SALRI in consultation that the defence retains particular benefit for wives from certain cultural backgrounds who may still occupy a subordinate position to their husband and may be unable to withstand pressure from a husband to commit a crime.<sup>924</sup>

13.4.6 It has been highlighted that the defence retains particular benefit in a family violence context. Women who are subject to family violence may be forced to commit crimes by their husbands as part of a wider pattern of abusive behaviour. As Yeo notes, ‘this defence fills in the gaps left by the defence of duress ... The husband’s threats are not confined to physical violence but may extend to threats which affect the wife psychologically, emotionally, morally or present her with a moral dilemma ... the defence does not impose a duty on the wife to seek police protection before it can succeed.’<sup>925</sup>

13.4.7 However, this view is not without problems. It has been described by Ramsay as a ‘troubling’ attempt to facilitate the ‘acquittal of battered women at any cost, even at the expense of stereotyping women as childlike and dysfunctional.’<sup>926</sup>

## 13.5 Criticisms of Marital Coercion

### ***Restricted to married women***

13.5.1 Marital coercion, despite its purported rationale in a family violence context, has been subject to extensive criticism based on its apparently gendered, outdated and discriminatory application. To raise the defence, it must be proved that a defendant was legally married to the man who is alleged to have coerced her into committing the crime. This reflects the idea that a wife has a particular vulnerability to pressure from a husband to whom she is legally married, because she is more likely than a non-wife to be financially dependent, have children from the relationship, and have a duty and habit of loyalty and cooperation.<sup>927</sup>

<sup>922</sup> ‘In my mind, the marital coercion defence remains an utterly relevant part of the statute books. The dynamics in a marriage are unlike any other relationship, regardless of whether the woman is a housewife or a chief executive, and that’s why a wife needs protection in law. I realise some will find my views antiquated, but only women who are married to a domineering man can really understand how much you can feel subjugated as a wife’: Fitton, above n 913.

<sup>923</sup> This view was also raised at SALRI’s May 2017 roundtable. See below Appendix 1, 183–184.

<sup>924</sup> See below Appendix 1, 183–184.

<sup>925</sup> Yeo, ‘Resolving Gender Bias in Criminal Defences’, above n 14, 109.

<sup>926</sup> Carolyn Ramsey, ‘Provoking Change: Comparative Insights on Feminist Homicide Law Reform’ (2010) 100 *Journal of Criminal Law and Criminology* 80.

<sup>927</sup> Victorian Law Reform Commissioner (1975), above n 860, 9 [14].

13.5.2 Although the defence may be used to ‘fill a gap’ concerning women’s experiences that are outside the scope of duress, its availability to only legally married women is ‘absurd to modern sensibilities’.<sup>928</sup> In *Brennan v Bass*,<sup>929</sup> White J confirmed that the words ‘wife’ and ‘husband’ in s 328A of the *CLCA* mean ‘lawfully married wife’ and ‘lawfully married husband’ irrespective of statutory recognition of de facto relationships.<sup>930</sup> This strict interpretation is consistent with the justification provided for the defence’s introduction in Victoria in 1977. The Victorian Law Reform Commissioner had rejected extending the defence to de facto wives on the basis that ‘the State does not have the same concern to preserve the stability of “de facto” relationships as it has to preserve the stability of marriages’.<sup>931</sup> At this time, the defence of marital coercion was justified as ‘necessary to support the institution of marriage and the need to promote spousal loyalty and co-operation’.<sup>932</sup> This view has been criticised as merely a ‘variation of the sanctity of marriage argument which ‘conceal[s], on a juristic level, a timid and irrelevant’ approach.<sup>933</sup> This restriction also has the implicit effect of reinforcing and normalising an outdated view of marriage as an institution where ‘the wife’ is, at best, passive, or at worst, a ‘marionette, moved at will by the husband’.<sup>934</sup>

13.5.3 One view that has been raised is that the characteristic of ‘being a wife’ may increase a woman’s susceptibility to pressure from her partner as she may be more likely to be financially dependent, may have young children and have ‘the duty and habit of loyalty and co-operation’ to her husband.<sup>935</sup> SALRI does not find this view persuasive in confining such a situation to a marriage. It is clear that the risk of coercion and intimidation is not confined to a formal marriage and can be also found in de facto, registered or domestic partnerships or same sex relationships,<sup>936</sup> and also applies to the wife of a polygamous marriage, or of a customary marriage, and of a woman who mistakenly believes that she is married.<sup>937</sup> The risks of coercion or intimidation in a relationship are not defined in any tangible way by a marriage certificate.<sup>938</sup>

13.5.4 The defence has been both criticised<sup>939</sup> and praised<sup>940</sup> for being exclusively available to women. Critics argue that it publicly legitimises ‘treating men and women differently’ and that it is now outdated and inappropriate, noting that women are more likely to be financially independent from their partners.<sup>941</sup> An alternative view, as expressed by Justice Elizabeth Evatt, the former President of the

<sup>928</sup> Ibid.

<sup>929</sup> *Brennan v Bass* (1984) 35 SASR 311.

<sup>930</sup> Ibid 312 (White J). See the statutory recognition of de facto relationships in the *Family Relationships Act 1975* (SA).

<sup>931</sup> Victorian Law Reform Commissioner, *Criminal Liability of Married Persons (Special Rules)* Report 3 (1975), [83].

<sup>932</sup> Lois Bibbings and Donald Nicolson, *Feminist Perspectives on Criminal Law* (Routledge, 2013) 171.

<sup>933</sup> F Bates, ‘The Enforcement of Marriage’ (1974) 3 *Anglo-American Law Review* 75, 84–85 cited in Yeo, ‘Coercing Wives into Crime’, above n 873, 223.

<sup>934</sup> *Smith v Meyers* (1998) 54 Neb 7 cited in Bibbings and Nicolson, above n 932, 170.

<sup>935</sup> Victorian Law Reform Commissioner, above n 931, [16]. See also Victorian Law Reform Commissioner, above n 860, 9–10 [14]–[17].

<sup>936</sup> Bronitt and McSherry (2010), above n 863, 363 [6.135].

<sup>937</sup> In *R v Ditta, Hussain and Kara* [1988] 1 Cr App R 116, it was confirmed that a reasonable belief of marriage on the wife’s part is insufficient.

<sup>938</sup> Bibbings and Nicholson, above n 932, 167.

<sup>939</sup> Sweeny J in *R v Pryce* (Unreported, Southward Crown Court, 7 March 2013).

<sup>940</sup> Justice Elizabeth Evatt, in Forward to Regina Graycar and Jenny Morgan, *The Hidden Gender of Law* (Federation Press, 1990) vii.

<sup>941</sup> Hilary Allen, ‘One Law for All Reasonable Persons?’ (1988) 16 *International Journal of the Sociology of Law* 419, 430.

Australian Law Reform Commission, is that ‘the law cannot be gender-neutral in areas where the specific experience of women needs recognition, or where there is continuing disadvantage’.<sup>942</sup> Women continue to experience family violence at disturbingly high rates<sup>943</sup> and there is said to be justification for retaining a gender-specific defence under this view.

13.5.5 SALRI notes these views but again highlights the restrictions of the defence. It does not apply to either partner in a de facto or domestic partnership.<sup>944</sup> The defence is not available to a husband or any partner in a same-sex relationship (which overlooks both family violence inflicted upon men by female intimate partners<sup>945</sup> and violence in same sex partnerships<sup>946</sup>). Extending the ambit of the defence to apply to men in relationships arguably removes the benefit of having one gender-specific defence that is said to specifically respond effectively to the experiences of women who commit offences under coercion. Given the modern recognition of social norms around cohabitation beyond heterosexual marriage, SALRI notes it is simply untenable and at odds with its reference to retain a defence that is confined to legally married wives who commit offences under their husband’s coercion, but omits husbands, female de facto or domestic partners or any same sex partners who commit the same actions in similar circumstances. The factors that give rise to the possibility of coercive behaviour, ‘namely, intimacy and gendered power imbalance’, exist in de facto and domestic partnerships and same sex partnerships as well as formal heterosexual marriages.<sup>947</sup>

### **Potential for Abuse of the Defence**

13.5.6 The South Australian statutory defence does not define ‘coercion’. It instead adopts the common law interpretation of ‘will overborne’. This is difficult to define and is entirely subjective.<sup>948</sup> Although the subjective test arguably makes the defence more accessible to women who have experienced coercion in a context of family violence, it is open to criticism due to the potential for the defence to be misused in circumstances where there is no real coercion, or where the pressure inflicted by the husband is disproportionate to the offence committed.

13.5.7 The subjective test facilitates the potential application of the defence to a wife who succumbed to the husband’s pressure, even though the pressure in question would have been resisted by an ordinary woman of normal fortitude. There remains a risk with this formulation of marital coercion that a woman with a particularly nervous or fearful disposition may escape criminal liability for a serious offence, or that she may be exploited as a pawn of her husband into performing crimes on his behalf.<sup>949</sup>

<sup>942</sup> Evatt J, above n 940, vii.

<sup>943</sup> SALRI, Stage 1, above n 10, 52–53.

<sup>944</sup> *Brennan v Bass* (1984) 35 SASR 311, 312; *R v Court* (1912) 7 Cr App R 127.

<sup>945</sup> Although intimate partner violence is largely experienced by women, it is not exclusively so. Australian Human Rights Commission, Submission to the Special Rapporteur on Violence against Women, 20 January 2017, 3–4. See also above n 75, n 345.

<sup>946</sup> LGBTIQ intimate partner violence is often unacknowledged by legal, governmental, policy and service responses to family violence. See also above n 76.

<sup>947</sup> Yeo, ‘Coercing Wives into Crime’, above n 873, 224. This type of coercive behaviour also arises in intimate relationships between persons of the same sex. The often overlooked but very real problem of intimate partner violence in the LGBTIQ community should not be overlooked. See also above n 76.

<sup>948</sup> Stanley Yeo, ‘Voluntariness, free will and duress’ (1996) 70 *Alternative Law Journal* 304.

<sup>949</sup> Yeo, ‘Coercing Wives into Crime’, above n 873, 221.

13.5.8 The relatively few cases to consider the defence indicate the width of what might constitute ‘coercion’ and highlight that coercion covers a broader range of conduct than physical force or a threat of force, and may include financial, emotional or moral pressure.<sup>950</sup> The broad range of conduct that may constitute ‘coercion’ and the subjective test for the defence suggest that there is no requirement that the level of pressure should correspond with the seriousness of the alleged offence. There is a risk that a wife could claim that comparatively minor pressure inflicted by her husband such as moral or financial pressure compelled her to commit a serious offence such as an offence involving the use of violence.<sup>951</sup> Cases such as *Pryce* where wives have relied upon marital coercion indicate that women’s experiences of marriage were not necessarily characterised by family violence or subordination. In some old cases,<sup>952</sup> courts noted that the wife’s participation in the crime was prompted by a desire to protect her husband from apprehension, rather than fear or undue pressure from the husband.<sup>953</sup>

13.5.9 The Victorian Law Reform Commissioner recognised this dilemma, and posed the following solution:

For the purpose of defining “coercion” a test needs to be formulated that will protect a wife who ... has ... acted not unreasonably in yielding to severe pressure to which she has been made vulnerable by her role of wife, or wife and mother ... The formulation should be such as to require a due proportion between the gravity of the threats or pressures to which the wife is subjected, and the seriousness of the conduct with which she is charged.<sup>954</sup>

13.5.10 The Victorian statutory defence defines coercion as ‘pressure, whether in the form of threats or in any other form, sufficient to cause a woman of ordinary good character and normal firmness of mind, placed in the circumstances in which the woman was placed, to conduct herself in the manner charged’.<sup>955</sup>

### **Husband’s Presence**

13.5.11 The defence of marital coercion requires that the offence be ‘committed in the presence ... of the husband’.<sup>956</sup> This requirement was originally intended as a safeguard against misuse of the defence, but it operates to restrict the application of the defence to victims of family violence as it does not reflect the modern reality that coercion can exist in an abusive relationship regardless of the husband’s physical presence. A modern threat can be remotely relayed by phone, text, internet or social

<sup>950</sup> See *R v Richman* [1982] Crim LR 507; *R v Shortland* [1996] 1 Cr App R 116; *R v Cairns* [2003] 1 WLR 796.

<sup>951</sup> Yeo, ‘Coercing Wives into Crime’, above n 873, 221.

<sup>952</sup> See, for example, *Regina v Brooks* (1853) 6 Cox CC 148, 149; *Regina v Boober* (1850) 4 Cox CC 272, 273; *Regina v M’Clarens* (1849) 3 Cox CC 425, 426.

<sup>953</sup> Coughlin, above n 870, 36.

<sup>954</sup> Victorian Law Reform Commissioner, above n 860, 11 [22]. See also Yeo, ‘Coercing Wives into Crime’, above n 873, 221.

<sup>955</sup> *Crimes Act 1958* (Vic) s 336(3) (emphasis added); Victorian Law Reform Commissioner, above n 860, 11; *R v Williams* [1998] VR 301. The otherwise effective objective test is undermined by the unnecessary gendering of the usual ‘ordinary person’ test which raises concerns about what a ‘woman of ordinary good character’ is, and whether ‘goodness’ or ‘badness’ is relevant to this consideration. See further Graeme Coss, ‘Hakopian’s Case: Oh Chastity! What Crimes are Committed in thy Name’ (1992) 3 *Criminal Law Journal* 160; Yeo, ‘Coercing Wives into Crime’ above n 873, 222.

<sup>956</sup> *CLCA* s 328A. This does not necessarily mean direct physical presence but the husband being close enough to influence the wife into doing what he wanted. See *Gooddard v Osborne* (1978) 18 SASR 481, 493.



media, as opposed to in person.<sup>957</sup> Further, in relationships characterised by a history of cumulative or long-term family violence and where previous attempts to leave the relationship were unsuccessful, a threat made at an earlier time by an abusive partner may well prove as convincing and forceful as a threat made at the time of the offence.<sup>958</sup> Additionally, the range of pressures that may constitute ‘coercion’ in abusive relationships, including psychological, emotional or financial pressures, may accumulate progressively during a relationship and subsist even when the husband is not physically present.<sup>959</sup>

13.5.12 Family violence is generally not a series of individual episodes or threats, but is ‘constant because of the ever-present fear and stress it instils in the victim’.<sup>960</sup> In abusive relationships, various threats (not confined to threats of imminent serious harm or harm) at some time earlier than the time of the offence may prove ‘just as convincing’ as a threat made at the time, and in the presence of the partner.<sup>961</sup> This restriction may prove an obstacle in cases involving crimes such as insurance or social security fraud where wives have been coerced to engage in sustained and repeated fraud.<sup>962</sup> It is difficult to deny the strong coercive pressure of, for example, image-based digital abuse (or ‘revenge porn’) that occurs in an on-going way regardless of physical proximity.<sup>963</sup>

### **Reinforces Dependence of Wives**

13.5.13 The historical rationale of the defence of marital coercion is the concept that a married woman is wholly dependent on and submissive to her husband’s will.<sup>964</sup> However, social changes throughout the 19<sup>th</sup> and especially 20<sup>th</sup> centuries, including women’s suffrage, wider employment opportunities, the greater independence afforded to women during wartime<sup>965</sup> and greater legal and social equality prompted a fundamental shift in prevailing attitudes towards a woman’s position in society and in marriage. Given the emergence of more equal marriages and the wide, if not virtually universal, social recognition that women in marriage remain individuals (rather than the husband’s property), retaining a defence that presumes the subservience of women in relationships does not reflect the equality that women hold in modern society. The rationale underpinning the defence of marital coercion is outdated and assumes a deferential and subordinate position of modern wives that is at odds with modern equality and society (though some parties noted in consultation to SALRI that the defence retains relevance in some modern relationships and should not be dismissed).

<sup>957</sup> LRCWA, above n 22, 186.

<sup>958</sup> Ibid.

<sup>959</sup> Yeo, ‘Coercing Wives into Crime’, above n 873, 221.

<sup>960</sup> LRCWA, above n 22, 266.

<sup>961</sup> Ibid 186.

<sup>962</sup> See, for example, *R v Anne and John Darwin* [2009] EWCA Crim 860. See also below [14.5.1]–[14.5.4].

<sup>963</sup> See, for example, Clare McGlynn, Erika Rackley and Ruth Houghton, ‘Beyond “Revenge Porn”: The Continuum of Image-Based Sexual Abuse’ (2017) 25(1) *Feminist Legal Studies* 25.

<sup>964</sup> Gerry Rubin, ‘Pre-dating Vicky Pryce: the Peel case (1922) and the origins of the marital coercion statutory defence’ (2014) 34(4) *Legal Studies* 633.

<sup>965</sup> Ibid 634. Rubin argues that abolition of the presumption of marital coercion in England was prompted by feminist demands made by middle class women, rather than working class women, which had ‘greater potential for intra-family tension and for the oppression of a wife by her husband, which conduct might spill over into domestic abuse’: at 635.

## 13.6 SALRI’s Reasoning and Conclusion

13.6.1 The views expressed by the Human Rights Law Centre, the Victim Support Service and interested parties at the Stage 2 Roundtable recognised the outdated rationale for marital coercion. However, some participants expressed, perhaps surprisingly, support for retention of at least aspects of the defence and noted a strong view that marriage remains an institution that can be characterised by unequal power dynamics. In some relationships, especially from certain cultural backgrounds, women may be genuinely coerced into committing a crime and may not be able to rely on duress due to its relatively high threshold. In these circumstances, it was noted to SALRI that marital coercion may still have a valid role to play as a defence in South Australia.

13.6.2 SALRI accepts that the present common law defences of duress and necessity (as with self-defence) do not fully cater for the experience and reality of family violence.<sup>966</sup> SALRI has every sympathy for victims of family violence, but it is unable to support retention of the defence of marital coercion. The existence and operation of this defence is highly problematic. It is rarely raised.<sup>967</sup> It is outdated and assumes a subordinate role for a wife that does not reflect modern values and society. It must be proved that the defendant is the legal wife of the man who coerced her. A civil, de facto or domestic partnership does not suffice. A husband cannot claim marital coercion and it is not open in any same sex marriage or partnership. This is inconsistent with modern society as noted by the Human Rights Law Centre. The law at both a state and national level now fully recognises domestic, civil or registered partnerships and same sex marriages and relationships. Men and women should be equally protected by the criminal law if compelled to commit offences as a result of threats or intimidation from an abusive partner. The VLRC noted ‘that it is anomalous that the defence currently applies only to married women and not to women in de facto relationships’.<sup>968</sup> There are obvious difficulties with the discriminatory operation of the defence, especially given the focus of SALRI’s current reference which includes discrimination on the basis of both gender and sexual orientation (and the present defence discriminates on both grounds). As one commentator notes, this ‘rare and archaic defence is incompatible with gender equality’.<sup>969</sup> The prosecution counsel, Mr Edis QC, aptly observed at Vicky Pryce’s trial, ‘[t]he idea that someone’s criminal liability depends on whether they are man or woman or within a marriage or long-term cohabitation is, to all modern sensibilities, absurd.’<sup>970</sup>

13.6.3 SALRI agrees with the view of Mr Edis. Given recent reforms at both a state and national<sup>971</sup> level to achieve marriage equality in Australia and eliminate legislative discrimination on the grounds of gender and sexual orientation,<sup>972</sup> retaining a defence that differentially apportions criminal liability depending on the basis of gender, marital status and sexuality is untenable.

13.6.4 SALRI is unable to support the retention of the defence of marital coercion, even in a revised form. SALRI finds the English approach and its reasoning compelling for abolition of the defence.

<sup>966</sup> Yeo, above n 14, 107–108. See further below [14.6.1]–[14.6.11].

<sup>967</sup> See, for example, *R v Whelan* [1937] SASR 237, *Manuels v Crafter* [1940] SASR 7; *Ewart v Fox* [1954] VLR 699.

<sup>968</sup> VLRC (2004), above n 15, 122 [3.168]. See, for example, *Brennan v Bass* (1984) 35 SASR 311.

<sup>969</sup> Davies, above n 866.

<sup>970</sup> Paul Peachey, ‘Pryce Guilty: Marital Coercion – a defence that faces major change’, *The Independent* (online), 8 March 2013, <<http://www.independent.co.uk/news/uk/crime/pryce-guilty-marital-coercion-a-defence-that-faces-major-change-8524739.html>>.

<sup>971</sup> See the *Marriage Amendment (Definition and Religious Freedoms) Act 2017* (Cth) that commenced on 8 December 2017.

<sup>972</sup> South Australia, *Parliamentary Debates*, House of Assembly, 10 February 2016, 4209–4210 (Jay Weatherill, Premier). See also *Statutes Amendment (Gender Identity and Equity) Act 2016* (SA).

Marital coercion is outdated and discriminatory and assumes that the typical modern wife occupies a subordinate position vis-à-vis her husband that is now unrealistic. The continued existence and role of the defence of marital coercion gives rise to real concerns, notably the fact that it is confined to married woman. The defence of marital coercion is unnecessary and the legitimate concern of undue pressure or intimidation from a domestic partner overbearing the will of another is better dealt within the defence of duress (especially noting the changes to the defences of duress and necessity in the context of family violence recommended by SALRI in its Stage 1 Report and Part 14 of this Report).

13.6.5 SALRI notes the refinements recommended in its Stage 1 Report to clarify that the threat need not be imminent to give rise to a defence of duress and also to explicitly recognise evidence of family violence and social framework in the context of family violence and potential defences of self-defence. SALRI also notes its recommended further changes to duress and necessity in Part 14 of this Report.<sup>973</sup>

13.6.6 SALRI notes that in its further consultation some support was expressed for retaining, and even extending the defence of marital coercion to apply to domestic partnerships regardless of gender or sexual orientation. SALRI notes the arguments presented in favour of retaining, even extending, the defence. SALRI has every sympathy for victims of family violence but to extend marital coercion to apply to domestic partnerships regardless of gender or sexual orientation would be to undermine the role of the criminal law and provide too low a threshold to excuse potentially serious offending.

13.6.7 The criminal law, and particularly defences including duress and provocation, have developed largely based on the experiences of male defendants to the exclusion of female experiences of offending. SALRI recognises the value of a defence that is tailored to respond to and meet the needs of women who commit crimes in circumstances where their liability may be lessened, but cannot recommend that the modern law should include a gender-specific defence that assumes that one spouse is subordinate to the other spouse.

13.6.8 SALRI considers that the preferable solution to recognise the reality and dynamics of family violence is by not retaining or updating the outdated defence of marital coercion but rather to adapt the existing defence of duress to better take into appropriate account the experience and dynamics of family violence situations. Any defence must be made available to all people in abusive intimate relationships that are forced to commit crimes.

13.6.9 Recommendations:

**Recommendation 11**

SALRI recommends that the current defence of marital coercion in s 328A of the *Criminal Law Consolidation Act 1935* (SA) which is confined to a wife should be repealed.

**Recommendation 12**

SALRI recommends that certain elements of the current defence of marital coercion be included within a new revised statutory defence of duress (see below Recommendations 13 and 15).

<sup>973</sup> See below Part 14, Recommendations 13–16.

## Part 14 – Duress and Necessity

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### 14.1 Overview

14.1.1 It is necessary for consistency and completeness, as raised in the Stage 1 Report,<sup>974</sup> to examine the role and application of the defences of duress and necessity, especially in a family violence context. There is a close relationship between the four main defences discussed in both the Stage 1 and Stage 2 Reports, namely provocation, self-defence, duress and necessity. As noted by the VLRC, '[a]ll are based on a necessity to act in self-protection or to protect others from harm.'<sup>975</sup> Both duress and necessity contemplate that the criminal act must be a reasonable and proportionate response to an imminent peril or threat of a grave nature such as death or serious harm. The criminal act is seen as 'the lesser of the two evils'.<sup>976</sup>

14.1.2 In South Australia, duress and necessity are common law defences, which provide a complete defence and effectively justify a defendant's offending in circumstances where the offending conduct was compelled.<sup>977</sup> To establish duress, the offender's conduct must have been compelled by threats of serious harm by another person. To establish necessity, however, the offender's conduct must have been compelled by external non-human forces or sudden or extraordinary circumstances.<sup>978</sup>

14.1.3 The common law rule is that neither duress nor necessity are available as a defence to murder<sup>979</sup> (or possibly attempted murder)<sup>980</sup> on the moral basis that all human life is inherently equal and must be preserved and any 'ordinary person', given the choice between killing an innocent person and sacrificing his or her own life, would always choose to sacrifice him or herself.<sup>981</sup> Where necessity or duress is successfully raised, the accused is acquitted. For each defence, the prosecution, once the defence is raised, bears the onus of proving beyond reasonable doubt that the accused did not act under duress or due to necessity.<sup>982</sup>

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<sup>974</sup> SALRI, Stage 1, above n 10, 91 [10.1.1].

<sup>975</sup> VLRC (2004), above n 15, 59 [3.1].

<sup>976</sup> LRCWA, above n 22, 184–185.

<sup>977</sup> Caruso et al, above n 355, 379.

<sup>978</sup> The term 'sudden or extraordinary emergency' is used in the Australian jurisdictions with a statutory version of necessity. In England, the expression 'duress of circumstances' is often used. See *R v Conway* [1988] 3 All ER 1025; *R v Pommell* [1995] 2 Cr App R 607.

<sup>979</sup> *R v Dudley and Stephens* [1884] 14 QBD 273; *R v Howe* [1987] 2 AC 417; *R v Harding* [1976] VR 129; *R v Darrington and McGauley* [1980] VR 353; *R v Brown and Morley* [1968] SASR 467; *R v Hurley and Murray* [1967] VR 526, 543; *R v Lawrence* [1980] 1 NSWLR 122; *R v Palazoff* (1986) 43 SASR 99; *R v Emery* (1978) 18 A Crim R 49; *DPP for Northern Ireland v Lynch* [1975] AC 653.

<sup>980</sup> *R v Gotts* [1992] 2 AC 412. But see *R v Goldman [Ruling No 4]* (2004) 147 A Crim R 472; *R v Quami & Ors (No 64)* [2016] NSWSC 1269 (13 September 2016), [25]–[39]. The rule that necessity and duress do not extend to at least murder has been much criticised. See, for example, Kenneth Arenson, 'Expanding the Defences to Murder: A More Fair and Logical Approach' (2001) 5 *Flinders Journal of Law Reform* 129; Rupert Cross, 'Murder Under Duress' (1978) 28 *University of Toronto Law Journal* 369; Stanley Yeo, 'Necessity under the Griffith Code and the Common Law' (1991) 15 *Criminal Law Journal* 17; LRCWA, above n 22, 193–198; VLRC (2004) above n 15, 117–118 [3.150]–[3.153]. See further below Part 15.

<sup>981</sup> See below Part 15.

<sup>982</sup> See, for example, *R v Emery* (1978) 18 A Crim R 49; *DPP for Northern Ireland v Lynch* [1975] AC 653, 668; *R v Hasan* [2005] 2 WLR 709, 716 [20]. See further Caruso et al, above n 355, 381 [11.3]–[11.4]. There has been unease at the perceived relative ease with which duress can be raised and the difficulty for the prosecution to rebut such claims. In 1993, the English Law Commission recommended that a legal burden of proof, on the balance of probabilities,

14.1.4 The courts have been astute for reasons of policy to avoid opening the proverbial floodgate and confine the defences of duress and necessity. It is said that if these defences are ‘to form a valid and consistent part of our criminal law it must, as has been universally recognised, be strictly controlled and scrupulously limited to situations that correspond to its underlying rationale.’<sup>983</sup>

14.1.5 SALRI has previously discussed the problems that typically arise in relation to the use of self-defence by women in the context of family violence.<sup>984</sup> The defences of necessity and duress are also problematic for women to use in the context of family violence.<sup>985</sup> The strict common law requirements of duress and necessity, which were developed in response to the motives and nature of offending committed by men, often restrict, or even preclude, women who offend in circumstances of family violence from relying on these defences. As two leading English barristers observe; ‘The defence of duress is ill fitting and ineffective for victims/survivors of domestic abuse who are compelled to offend, and there are limited defences available for those who use reactive violence against a primary aggressor.’<sup>986</sup>

14.1.6 SALRI’s Stage 1 Report made certain recommendations for changes to the defences of self-defence, duress and necessity to better reflect the experience and dynamics of family violence.<sup>987</sup> These recommendations are incorporated in the Criminal Law Consolidation (Defences – Domestic Abuse Context) Amendment Bill 2017 introduced by the Hon Mark Parnell in the Legislative Council on 17 October 2017.<sup>988</sup>

14.1.7 The Stage 1 Report stated SALRI would further review the current scope of the existing defences of duress and necessity, especially in their implications and application in the context of family violence.<sup>989</sup>

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be placed on a defendant to establish a defence of duress. See Law Commission (England and Wales), *Legislating the Criminal Code: Offences against the Person and General Principles* (November 1993, Law Com No 218, Cm 2370) 55 [30.16], 62 [33.16]. See also *R v Hasan* [2005] 2 WLR 709, 716–718 [20]–[22] (Lord Bingham), 737 [71] (Baroness Hale).

<sup>983</sup> *Perka v R* [1984] 2 SCR 232, 250 (Dickson J). See also *R v Hasan* [2005] 2 WLR 709, 718 [22].

<sup>984</sup> SALRI, Stage 1, above n 10, 71–73 [9.1.1]–[9.1.17].

<sup>985</sup> See, for example, Elizabeth Sheehy, Julie Stubbs and Julia Tolmie, ‘When Self-Defence Fails’ in Kate Fitz-Gibbon and Arie Freiberg (eds), *Homicide Law Reform in Victoria* (Federation Press, 2015) 110, 111; Martha Schaffer, ‘Coerced into Crime: Battered Women and the Defence of Duress’ (1999) 4 *Canadian Criminal Law Review* 271. See further below [14.6.1]–[14.6.11].

<sup>986</sup> Paramjit Ahluwalia and Angela Rafferty QC, ‘Defences available for women defendants who are victims/survivors of domestic abuse’, Briefing note prepared by the Criminal Bar Association for Prison Reform Trust summit in London on 17th October 2017, 11, <<http://www.prisonreformtrust.org.uk/Portals/0/Documents/CBA%20domestic%20violence%20briefing.pdf>>.

<sup>987</sup> SALRI, Stage 1, above n 10, Recs 4, 5, 6, 7, 8, 10, 11 xiii–xiv.

<sup>988</sup> See South Australia, *Parliamentary Debates*, Legislative Council, 17 October 2017, 7953–7962; South Australia, *Parliamentary Debates*, Legislative Council, 29 November 2017, 8738–8740. The Bill lapsed with the end of the last Parliament.

<sup>989</sup> SALRI, Stage 1, above n 10, 92.

## 14.2 Duress

14.2.1 If a person commits an offence because another person has threatened them with death or serious harm, they may be able to rely in South Australia on the common law defence of duress.<sup>990</sup>

### **Legal Test**

14.2.2 There is no statutory basis in South Australia for the defence of duress. Rather the common law still defines the defence of duress. The elements of duress were summarised by Smith J in *R v Hurley*<sup>991</sup> (a test that forms the basis of the common law test).<sup>992</sup> Duress will be available where the accused has been required to perform the criminal act:

- i. Under a threat that death or grievous bodily harm will be inflicted unlawfully upon a human being if the accused fails to do the act.
- ii. The circumstances are such that a person of ordinary firmness would have been likely to yield to the threat in the way the accused did.
- iii. The threat was present and continuing, imminent and impending.
- iv. The accused reasonably apprehended that the threat would be carried out.
- v. The accused was induced thereby to commit the crime charged.
- vi. The crime was not murder, nor any other crime<sup>993</sup> so heinous as to be excepted from the doctrine.
- vii. The accused did not, by fault on his or her part when free from the duress, expose himself to its application.<sup>994</sup>

<sup>990</sup> For the requirements which must be satisfied, see *R v Hurley and Murray* [1967] VR 526. See further Rhain Buth, ‘Chapter 11: Duress and Necessity’ in David Caruso et al, *South Australian Criminal Law and Procedure* (Lexis Nexis, 2<sup>nd</sup> ed, 2016) 383–390 [11.8]–[11.19].

<sup>991</sup> *R v Hurley* [1967] VR 526.

<sup>992</sup> *Parker (a Pseudonym) v R* [2016] VSCA 101 (10 May 2016), [24]–[26]. See also *R v Lawrence* [1980] 1 NSWLR 122; *R v Pimentel* (1999) 110 A Crim R 30.

<sup>993</sup> Treason and attempted murder are usually included. Cf *R v Goldman [Ruling No 4]* (2004) 147 A Crim R 472.

<sup>994</sup> A qualification to very similar effect can be found in the Criminal Codes of Queensland (s 67(3)(b) and (c)), Tasmania (s 20(1)), the Northern Territory (s 41(2)), Western Australia (s 31(4)), the Commonwealth (s 10.2(3)), the ACT (s 40(3)), Canada (s 17) and New Zealand (s 24(1)). ‘The policy of the law must be to discourage association with known criminals, and it should be slow to excuse the criminal conduct of those who do so. If a person voluntarily becomes or remains associated with others engaged in criminal activity in a situation where he knows or ought reasonably to know that he may be the subject of compulsion by them or their associates, he cannot rely on the defence of duress to excuse any act which he is thereafter compelled to do by them.’: *R v Hasan* [2005] 2 WLR 709, 726 [38]. This reflects the policy that where a defendant voluntarily, and with knowledge of its nature, joins a violent criminal gang (*R v Sharp* (1987) 85 Cr App R 212) (such as an outlaw motorcycle gang) or a terrorist organisation (*R v Fitzpatrick* [1977] NILR 20) they will be unable to raise the defence where they are subjected to threats to commit the offence. The defence may be allowed where the criminal organisation is not known to be violent (see *R v Shepherd* (1988) 86 Cr App R 47). This qualification to the availability of duress should not extend to a woman who may stay in a violent relationship and is later compelled by her violent partner to commit a crime. See *R v Hasan* [2005] 2 WLR 709, 738–739 [77]–[78] (Baroness Hale).

- viii. He or she had no means, with safety to himself, of preventing the execution of the threat.<sup>995</sup>
- ix. The defence of duress applies if the threat is made against either the accused or another person.<sup>996</sup>

14.2.3 The nature of the threat levelled at an accused, the time when the threat is expected to be carried out, and the link between the threat and the offence committed are subject to significant restrictions at common law. To raise the defence of duress, the threat must be a threat of either death or grievous bodily harm. This has been taken to mean threats of ‘really serious injury’,<sup>997</sup> comparable to the definition of ‘serious harm’ in s 21 of the *CLCA*.<sup>998</sup> Conduct compelled by threats of property damage will not give rise to a defence of duress under the common law.<sup>999</sup> The threat must also be an ‘imminent and impending’ threat.<sup>1000</sup> A foreseeable threat is insufficient to establish duress. Additionally, there must be a clear link between the threat and the commission of a ‘nominated offence’, which must be more than a ‘vague prescription to consider unlawful means’.<sup>1001</sup>

14.2.4 Duress includes both a subjective and objective element. The threat must be such that a person of ordinary firmness would be likely to yield to the threat, and the threat must have caused the accused to yield. Accordingly, the accused must subjectively believe that the threat would be carried out unless the offence was committed, and the threat must be active and operational at the time that the offence was committed. Duress is not available at common law if there is a way that the accused might have safely prevented the execution of the threat without committing an offence<sup>1002</sup> (typically this will be reporting the threat to the police).<sup>1003</sup> There is no obligation on the accused to escape from the threat if they are able, but the availability of the defence is ‘subject to a condition that the accused has not failed to avail himself of an opportunity which was reasonably open to him to render the threat ineffective’.<sup>1004</sup>

<sup>995</sup> *R v Hurley* [1967] VR 526, 543 (Smith J). The common law accords much importance to whether the accused had an opportunity to report the threat to the police. A failure to take such an opportunity is highly significant, though not conclusive, in disallowing the defence.

‘The ordinary way in which a citizen renders ineffective criminal intimidation is to report the intimidators and to seek the protection of the police. That must be assumed, under ordinary circumstances, to be an effective means of neutralizing intimidation. If it were not so, society would be at the mercy of criminals who could force pawns to do their criminal work by means of intimidation. . . . in particular situations an opportunity to seek the protection of the authorities may not be an effective way of neutralizing the threat. It would be naive to ignore the existence of situations in which no amount of police protection would be effective or in which it would be unreasonable to expect a person to avail himself of such protection. But such situations must be considered to be the exception’: *R v Brown* (1986) 43 SASR 33, 39 (King CJ).

See also *R v Morris* [2006] WASCA 142, [112] (Roberts-Smith J), below n 1138. This expectation to report the threat to the police is problematic in a family violence context. See further below [14.6.1] – [14.6.11].

<sup>996</sup> *R v Hurley* [1967] VR 526, 543 (Smith J). The threat must be directed against the defendant or his or her immediate family or someone close to him or her. See *R v Hasan* [2005] 2 WLR 709, 717 [21].

<sup>997</sup> *R v Perks* (1986) 41 SASR 335.

<sup>998</sup> Caruso, et al, above n 355, 384 [11.9].

<sup>999</sup> *R v Lawrence* [1980] 1 NSWLR 122, 133.

<sup>1000</sup> *R v Hurley* [1967] VR 526, 543 (Smith J).

<sup>1001</sup> Caruso et al, above n 355, 384–385 [11.11].

<sup>1002</sup> *R v Hurley* [1967] VR 526, 543.

<sup>1003</sup> *R v Brown* (1986) 43 SASR 33, 38–39; *R v Morris* [2006] WASCA 142 (12 July 2006), [112] (Roberts-Smith J).

<sup>1004</sup> *R v Brown* (1986) 43 SASR 33, 39.

14.2.5 The defence of duress is now available in Victoria for all crimes (including murder and attempted murder) to a person if he or she believes that a threat has been made against him that will be carried out unless he or she kills another person, there is no other way the threat can be rendered ineffective, and the person’s actions and belief in the circumstances are reasonable.<sup>1005</sup> The provision specifically excludes duress from applying in circumstances where the threat was made by or on behalf of a person with whom the defendant was voluntarily associating, with the intention of avoiding the misuse of the defence by excluding the provision from applying to members of criminal gangs.<sup>1006</sup>

### 14.3 Necessity

14.3.1 Necessity (or sudden or extraordinary emergency as it is also known) is also commonly framed, like duress, as a defence that justifies an accused’s actions when faced with a ‘choice of evils’,<sup>1007</sup> where the criminal act is the lesser of two evils.<sup>1008</sup> The basis of the defence was expressed by Dickson J of the Supreme Court of Canada as follows:

As an excuse, necessity rests on a realistic assessment of human weakness, recognising that a liberal and humane criminal law cannot hold people to the strict obedience of laws in emergency situations where normal human instincts, whether of self-preservation or of altruism, overwhelmingly impelled disobedience. The defence must, however, be strictly controlled and scrupulously limited to situations that correspond to its underlying rationale. That rationale is that it is inappropriate to punish acts which are normatively involuntary.<sup>1009</sup>

14.3.2 Where the prosecution fails to disprove the defence of necessity (as with duress) beyond reasonable doubt, the accused is acquitted.<sup>1010</sup>

14.3.3 The common law test for necessity was set out in *R v Loughnan*.<sup>1011</sup> The three broad elements of the defence are:

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<sup>1005</sup> *Crimes Act 1958* (Vic) s 332O:

- (1) A person is not guilty of an offence in respect of conduct carried out by the person under duress.
- (2) A person carries out conduct under duress if—
  - (a) the person reasonably believes that—
    - (i) subject to subsection (3), a threat of harm has been made that will be carried out unless an offence is committed; and
    - (ii) carrying out the conduct is the only reasonable way that the threatened harm can be avoided; and
  - (b) the conduct is a reasonable response to the threat.
- (3) A person does not carry out conduct under duress if the threat is made by or on behalf of a person with whom the person is voluntarily associating for the purpose of carrying out violent conduct.
- (4) This section only applies in the case of murder if the person believes that the threat is to inflict death or really serious injury.

<sup>1006</sup> VLRC (2004), above n 15, xxxi.

<sup>1007</sup> Vera Bergelson, ‘Choice of Evils: In Search of a Viable Rationale’ (2012) 6 *Criminal Law and Philosophy* 289, 290; Caruso et al, above n 355, 360 [11.21].

<sup>1008</sup> Michael Bohlander, ‘Of Shipwrecked Sailors, Unborn Children, Conjoined Twins and Hijacked Airplanes—Taking Human Life and the Defence of Necessity’ (2006) 70 *Journal of Criminal Law* 147, 150–151.

<sup>1009</sup> *R v Perka* [1984] 2 SCR 232, 250,

<sup>1010</sup> *Bayley v Police* (2007) 99 SASR 413, 420–421 [32].

<sup>1011</sup> [1981] VR 443, 448.



- a) The criminal act or acts must have been done only in order to avoid certain consequences that would have inflicted irreparable evil on the accused or on others who he was bound to protect;
- b) The accused must honestly believe on reasonable grounds that he or she was placed in a situation of imminent peril; and
- c) The acts done to avoid the imminent peril must not be out of proportion to the peril to be avoided.<sup>1012</sup>

14.3.4 Necessity is generally confined to situations where the external threat or pressure comes from a non-human source.<sup>1013</sup> The defence of sudden or extraordinary emergency (or necessity) will be available where a situation of sudden or extraordinary emergency existed at the time of the offence and committing the offence was the only reasonable course of action open to the defendant to deal with the emergency, and the accused's conduct was reasonable in all the circumstances.<sup>1014</sup>

14.3.5 However, the test of necessity is not open ended.

The corollary of the notion that the defence of necessity exists to meet cases where the circumstances overwhelmingly impel disobedience to the law is that the law cannot leave people free to choose for themselves which laws they will obey, or to construct and apply their own set of values inconsistent with those implicit in the law. Nor can the law encourage juries to exercise a power to dispense with compliance with the law where they consider disobedience to be reasonable, on the ground that the conduct of an accused person serves some value higher than that implicit in the law which is disobeyed.<sup>1015</sup>

14.3.6 It has been emphasised that, if the defence of necessity is to have a place in the criminal law, it must be strictly defined and carefully limited to situations that correspond to its underlying rationale.<sup>1016</sup> Necessity is therefore a tightly constrained defence with very few successful case examples. In *R v Dawson*,<sup>1017</sup> Anderson J noted the relative absence of reported cases of necessity, but that criminal law textbooks (and one may add law student exams) often include hypothetical scenarios which raise circumstances where necessity might be successfully argued, such as a defendant causing damage to property in order to avoid a fire.<sup>1018</sup> The defence of necessity or emergency is commonly relied on

<sup>1012</sup> *R v Loughman* [1981] VR 443, 448. See also *Bayley v Police* (2007) 99 SASR 413, 427–428, [53]; *R v B, JA* (2007) 99 SASR 317, 322–323 [24]–[26]. See also *Re A (Children)* [2001] 2 WLR 480 where the court identified the three requirements that must be met to establish the defence of necessity:

1. The act must be needed to avoid inevitable and irreparable evil;
2. No more should be done than is reasonably necessary to avoid this evil; and
3. The evil inflicted must not be disproportionate to the evil avoided.

<sup>1013</sup> Sheehy, Stubbs and Tolmie, 'When Self-Defence Fails', above n 985, 126. In *R v Kaiti* [2000] 1 NZLR 117, necessity was not available where the threat comes from a human being.

<sup>1014</sup> VLRC (2004), above n 15, 117 [3.149]. See also at 116 [3.147].

<sup>1015</sup> *R v Rogers* (1996) 86 A Crim R 542, 546–547 (Gleeson CJ). See also *Petersen v Western Australia* [2016] WASCA 66 (21 April 2016), [43]. This fear is prompted by cases such as the August 1996 acquittal of four women on the dubious legal basis of necessity of damaging a British Aerospace Hawk jet in protest against their sale to repressive regimes. See, 'Jury out on Trial Research: Recent Verdicts Have Sparked Concern Says Robert Rice', *Financial Times* (London), 6 August 1996, 22.

<sup>1016</sup> *R v Perka* [1984] 2 SCR 232, 250–252. See also *R v Rogers* (1996) 86 A Crim R 542, 545–547.

<sup>1017</sup> *R v Dawson* [1978] 1 VR 536.

<sup>1018</sup> *Ibid* 539. Another example of necessity, a truck driver who deliberately drives into a building when his brakes fail, in order to avoid colliding with another car and killing the passengers, could rely on the defence of necessity to avoid criminal culpability for any offence other than murder; see VLRC (2004), above n 15, 11 [3.132].

where a defendant has been charged with a driving offence. In such cases the accused usually drives in some manner contrary to the law such as speeding in order to avoid harm or to respond to an emergency.<sup>1019</sup>

## 14.4 Duress and Necessity and Family Violence: Overview

14.4.1 The defences of duress and necessity may arise in situations of family violence in which a person's response to a threat is demanded or affected by the prior violent history of the persons involved.<sup>1020</sup> However, the application of both duress and necessity (as with self-defence)<sup>1021</sup> as defences is problematic for women in the context of family violence.<sup>1022</sup> The 'context and coercive imperatives' faced by women who have experienced family violence and who commit offences compelled by these circumstances are uneasily accommodated within the requirements of the existing defences of duress and necessity.<sup>1023</sup> Recent research undertaken by Elizabeth Sheehy, Julie Stubbs and Julia Tolmie suggests that the common law defences of duress and necessity are ill suited to the particular circumstances in which persons kill in response to prolonged family violence and as such do little to alleviate the law of recognised limitations in the operation of the complete defence of self-defence. Sheehy, Stubbs and Tolmie conclude:

Battered women may be caught between a rock and a hard place ... They may be denied duress or necessity because their actions are cast as self-defensive, even when self-defence is barred on the facts ... The poor fit of the alternate defences for women who kill and the limited scope for their reform takes us back to where we started — to self-defence.<sup>1024</sup>

14.4.2 The problems encountered by victims of family violence who kill their abusers in claiming self-defence, duress and necessity have been the focus of much academic commentary, criticism and law reform activity in Australia and elsewhere. It has, as one commentator puts it, become 'trite' to point out that the defences to murder, including self-defence, do not equitably accommodate the circumstances in which victims of family violence, typically women, tend to kill their abusers.<sup>1025</sup> SALRI reiterates that, regardless of whether the current law of provocation is ultimately retained, revised or abolished,<sup>1026</sup> it is also necessary to consider whether the other available defences are appropriate in scope to address the needs of defendants who may have genuine claims to reduced culpability. This

<sup>1019</sup> LRCWA, above n 22, 193. See, for example, *R v Warner* [1980] Qd R 207 (death by dangerous driving); *R v Conway* [1989] QB 290 (reckless driving, 'duress of circumstances'); *R v Backshall* [1998] 1 WLR 1506 (careless driving); *Bayley v Police* (2007) 99 SASR 413 (dangerous driving).

<sup>1020</sup> See Sheehy, Stubbs and Tolmie, 'When Self-defence Fails', above n 985, 120–126.

<sup>1021</sup> SALRI, Stage 1, above n 10, 70–73, [9.1.1]–[9.1.7].

<sup>1022</sup> See, for example, Schaffer, above n 985; Sheehy, Stubbs and Tolmie, 'When Self-defence Fails', above n 985, 120–126.

<sup>1023</sup> Sheehy, Stubbs and Tolmie, 'When Self-Defence Fails', above n 985, 111.

<sup>1024</sup> *Ibid* 127.

<sup>1025</sup> Tolmie, above n 486, 91. See also NZLC (2016), above n 145, 7 [22]. A succession of Australian studies has found that a high proportion of women who kill an intimate partner are responding to long-term violence by the partner. See, for example, Alison Wallace, *Homicide: The Social Reality* (Bureau of Crime Statistics and Research, 1986) 97, 103; Patricia Easteal, *Killing the Beloved: Homicide between Adult Sexual Intimates* (Australian Institute of Criminology, 1993) 73–74; Jenny Mouzos, *Homicidal Encounters: A Study of Homicide in Australia 1989–1999* (Australian Institute of Criminology, 2000) 119; VLRC (2004), above n 15, 2, n 8.

<sup>1026</sup> Indeed, SALRI has noted that its Stage 1 recommendations in relation to self-defence are such that it is argued that they can, and should, be implemented regardless of whether provocation is ultimately abolished, revised or retained. See SALRI, Stage 1, above n 10, xi, xiv Rec 11.

include consideration of the defences of duress and necessity and their application in the context of family violence.

14.4.3 SALRI's Stage 1 Report made certain recommendations for changes to the defences of self-defence, duress and necessity to better reflect the experience and dynamics of family violence. In seeking to address limitations in the existing law, SALRI in its Stage 1 Report agreed with the approach of the VLRC<sup>1027</sup> and, consistent with its suggested changes to self-defence, recommended reform of the common law defences of both duress and necessity to better accommodate the circumstances within which persons may offend in response to family violence. There is no reason to distinguish in this regard between self-defence, duress and necessity. SALRI also recommended that explicit legislative provision be made for the admission of evidence of family violence and related evidence (including 'social framework' evidence as to the nature and effect of family violence) in any case involving family violence with potential defences of self-defence, duress or necessity.<sup>1028</sup> These recommendations were incorporated in the Criminal Law Consolidation (Defences – Domestic Abuse Context) Amendment Bill 2017 introduced by the Hon Mark Parnell in the Legislative Council on 17 October 2017.<sup>1029</sup>

14.4.4 The acute problems raised by family or domestic violence are obvious.<sup>1030</sup> Both the States (including South Australia)<sup>1031</sup> and the Commonwealth have resolved their commitment to address family violence. The Stage 1 Report stated SALRI would conduct further review into the current scope of the existing defences of duress and necessity, especially in their implications and application in the context of family violence.<sup>1032</sup> SALRI has therefore examined the difficulties that victims of family violence confront when seeking to rely on duress or necessity to justify their offending, and the suggestion of expanding or clarifying the scope of duress and necessity in their application in a family violence context.

<sup>1027</sup> VLRC (2004), above n 15, 121 [3.65], 142 Rec 25. See also at 139–142 [4.25]–[4.35], 183–187 [4.125]–[4.136].

<sup>1028</sup> SALRI, Stage 1, above n 10, Recs 4–11 xiii–xiv.

<sup>1029</sup> See South Australia, *Parliamentary Debates*, Legislative Council, 17 October 2017, 7953–7962; South Australia, *Parliamentary Debates*, Legislative Council, 29 November 2017, 8738–8740. This Bill lapsed with the end of the last Parliament.

<sup>1030</sup> See Government of South Australia, above n 75, 4–5. For the some of the profound effects of family violence, see SA Social Development Committee, above n 75, 47–64; Victorian Royal Commission, above n 76, 34–41, 65–72.

<sup>1031</sup> See, for example, Social Development Committee, above n 75, 88–134; Government of South Australia, above n 75, 8–9; Victorian Royal Commission, above n 76.

<sup>1032</sup> SALRI, Stage 1, above n 10, 92.

## 14.5 Examples of Family Violence and Application of Duress and Necessity

14.5.1 SALRI has previously discussed *R v Runjajic and Kontinnen*<sup>1033</sup> and *R v Lorenz*<sup>1034</sup> as examples of cases where duress and/or necessity may apply in the context of family violence.<sup>1035</sup> Such cases are by no means unique.

14.5.2 It has been noted to SALRI in consultation that women may be subjected to violence or intimidation from violent partners to commit various crimes such as social security fraud.<sup>1036</sup> In the South Australian case of *Goddard v Osborne*,<sup>1037</sup> for example, the defence of duress was successfully raised on appeal by a woman who lived with her abusive husband and who had been ordered by him to make false claims for social service benefits under the threat of a ‘belting’ if she did not accede to his wishes. The wife had been assaulted before, sometimes with the open hand, sometimes with a closed fist. The court closely examined the circumstances and agreed that there was sufficient threat to overcome any resistance the defendant might have had to perform the prohibited conduct.<sup>1038</sup>

<sup>1033</sup> (1991) 53 A Crim R 362. Two women who lived with a very violent man claimed they had been acting under his duress when they seriously injured and falsely imprisoned another woman. The South Australian Court of Criminal Appeal held that the women should have been allowed to rely on expert evidence of BWS to support their claim of duress. The court explained that in assessing whether the defence of duress applied, it was necessary to consider whether a woman of reasonable firmness in the situation of the accused women would have acted in the way they did. Expert evidence of BWS was admissible to answer this question. See also VLRC (2004), above n 15, 121 [3.164].

<sup>1034</sup> The accused robbed a supermarket employee while armed with a knife, obtaining \$360. She fully admitted her involvement. The only issue at trial was whether she was entitled to an acquittal on the grounds of duress or necessity. The basis of these defences was a threat from her abusive de facto partner, that if she did not obtain enough money for him to be able to re-register his car, approximately \$550, he would kill her. She was at the time of the offence pregnant with his third child. The trial judge, Crispin J, accepted that the accused had previously been subjected to repeated and extreme family violence and that the threat to kill her was made. Crispin J held that the defence of duress was unavailable as the threat did not direct the accused to commit the particular offence with which she was charged. The defence is limited to where threats have been made to coerce the accused into committing the act which is the basis of the offence with which he or she is charged. There were public policy reasons to confine the defence of duress in this manner. As a matter of public policy, Crispin J observed, it is important to ensure that the ambit of the defence is not expanded to relieve people from criminal responsibility for offences to which the coercion was not directed. Crispin J also held that the threat made by the accused’s partner did not create such an imminent danger as to give rise to the defence of necessity.

<sup>1035</sup> SALRI, Stage 1, above n 10, 92–93 [10.1.6]–[10.1.13].

<sup>1036</sup> See also Patricia Easteal, Kate Hughes and Jacki Easter, ‘Battered Women and Duress’ (1993) 18(3) *Alternative Law Journal* 139. One of the authors from previous English prosecution practice can also recall cases of women subjected to family violence and compelled to commit property crime at the behest of their violent drug addicted partners. This is consistent with wider research. See further Meredith Blake, ‘Coerced into Crime: the Application of Battered Woman Syndrome to the Defence of Duress’ (1994) 9 *Wisconsin Women’s Law Journal* 67; Sarah Buel, ‘Effective Assistance of Counsel for Battered Women Defendants: a Normative Construct’ (2003) 26 *Harvard Women’s Law Journal* 217, 220–221, 254–255, 311, 315; Andrea Dennis and Carol Jordan, ‘Encouraging Victims: Responding to a Recent Study of Battered Woman who Commit Crime’ (2015) 15 *Nevada Law Journal* 1, 17–18, 30; Michelle Jacobs, ‘Prostitutes, Drug Users and Thieves: the Invisible Women in the Campaign to end Violence against Women’ (1998) 8 *Temple Policy and Civil Rights Law Review* 459.

<sup>1037</sup> (1978) 18 SASR 481.

<sup>1038</sup> The court appears to have overlooked the need for the threat from the abusive husband to be of at least serious harm.

14.5.3 There have been a number of similar cases in New Zealand where duress and necessity have arisen in this context. In *Atofia*,<sup>1039</sup> for example, the defendant was charged and convicted of benefit fraud, and raised duress based on threats of physical violence from an abusive ex-partner if she did not provide her ex-partner with fortnightly payments. However, the court reached a different conclusion to that in *Goddard v Osborne*, and held that duress was unavailable as the ex-partner had not compelled the accused to commit the specific charged offence of benefit fraud (but rather merely demanded money),<sup>1040</sup> and he was also not present when the offence was committed.<sup>1041</sup> In *Rihari*, the court found that while the female defendant's judgment in committing social security fraud may have been 'suborned' by a 'stronger' man, the immediacy of the threat<sup>1042</sup> throughout the years of falsely completing benefit application forms was not present.<sup>1043</sup> In *Witika*,<sup>1044</sup> duress could not apply where the abusive male partner was not present for the commission of the offence of the manslaughter (caused by neglect) of the defendant's daughter. The defendant had suffered prolonged family violence from her partner. She argued that her partner would have beat her if she had tried to assist her daughter.<sup>1045</sup>

14.5.4 These strict formulations of duress in New Zealand in applying duress have been criticised for failing to accommodate the reality of intimidation experienced by family violence victims.<sup>1046</sup> The requirements that the person who gives the *immediate* threat must be *physically present* (or at least closely proximate) when the offence is carried out are seen to restrict duress to 'standover' or 'gunpoint' situations.<sup>1047</sup> These requirements fail to appreciate that victims of family violence rarely offend in the presence of their abuser, but rather offend in response to the ongoing coercive control to which they are subject by nature of the abusive relationship.<sup>1048</sup>

## 14.6 Legal Discussion – Duress and Necessity in the Context of Family Violence

14.6.1 The situations described above highlight that the defences of duress and (more rarely) necessity may well arise in the context of family violence.<sup>1049</sup> However, the current formulations of the

<sup>1039</sup> *R v Atofia* [1997] DCR 1053. See also New Zealand Law Commission, *Battered Defendants: Victims of Domestic Violence Who Offend*, Discussion Paper No 41 (2000) 58 [181]. The accused was unable to raise necessity as the basis for this defence was tenuous. See *R v Atofia* [1997] DCR 1053, 1057.

<sup>1040</sup> See also *R v Lorenz* (1988) 146 FLR 366.

<sup>1041</sup> *Crimes Act 1961* (NZ) s 24(1). *R v Richards* (unreported, NZCA, 15 October 1998). See also NZLC (2001), above n 22, 60–61 [176].

<sup>1042</sup> *Rihari v Department of Social Welfare* (1991) 7 CRNZ 586. The statutory test of duress in New Zealand requires a threat of 'immediate death or grievous bodily harm': *Crimes Act 1961* (NZ) s 24(1).

<sup>1043</sup> *Rihari v Department of Social Welfare* (1991) 7 CRNZ 586, 589. See also Shevan Nouri, 'Critiquing the Defence of Compulsion as it Applies to Women in Abusive Relationships' (2015) 21 *Auckland University Law Review* 168, 180.

<sup>1044</sup> *R v Witika* [1993] 2 NZLR 424.

<sup>1045</sup> *Ibid.* See also Brenda Midson, 'The Helpless Protecting the Vulnerable? Defending Coerced Mothers Charged with Failure to Protect' (2014) 45 *Victoria University of Wellington Law Review* 297.

<sup>1046</sup> Nouri, above n 1043; Kevin Dawkins and Margaret Briggs, 'Criminal Law' [2001] *New Zealand Law Review* 317, 328–332; Sheehy, Stubbs and Tolmie, 'When Self-Defence Fails', above n 985, 122.

<sup>1047</sup> *R v Teichelman* [1981] 2 NZLR 64, 67.

<sup>1048</sup> Nouri, above n 1043, 169, 171, 192; Dawkins and Briggs, above n 1046, 331.

<sup>1049</sup> While duress and necessity conceptually overlap in excusing, from criminal liability, a person who is compelled to commit a criminal offence under external threat, the defences are differentiated in that duress applies to threats

defences of necessity and duress remain problematic for victims in abusive domestic relationships. Women who have committed offences at the behest of an abusive partner may find that the requirements of common law test of duress or necessity preclude them from relying on the defence. Duress (and necessity) require a ‘present, immediate and impending’ threat of such a nature as to cause a well-founded fear of death or serious harm, and both require that there be no reasonable opportunity to escape available to the defendant.<sup>1050</sup> Duress is ‘radically under-utilised’ by women because the pressure that women may experience in abusive relationships does not fit the common law elements of duress.<sup>1051</sup>

14.6.2 First, the common law formulation of duress requires that there be a threat of at least imminent harm. This can be difficult to show for victims of family violence. For battered women, the reality and inevitability of a threat may exist despite there being an interval of time (even a significant interval) between the threat and the offence.<sup>1052</sup> The imminence requirement of both duress and necessity fails to take account of the continual threat a battered woman may face, based on the long-term and cumulative effect of the family violence.<sup>1053</sup> It does not encompass the types of continuing threats and coercive power common in abusive relationships like ‘sexual violence, threat and intimidation, emotional<sup>1054</sup> and social abuse and economic deprivation’.<sup>1055</sup> Family violence is rarely an isolated, one-off event; rather, it typically is a long-term and cumulative pattern of violence.<sup>1056</sup> The ‘situation of imminent peril’ that prompts a defendant’s actions in a case of duress or necessity may be a relatively minor event in a pattern of highly abusive behaviour. If this is the situation, it may be difficult for a defendant to convince a court that the danger was imminent and that her actions were a proportionate response to the imminent threat.<sup>1057</sup>

14.6.3 The requirements of objective reasonableness and proportionality without reference to how perceptions of reasonableness and proportionality are likely to be shifted within family violence contexts and this may further restrict the availability of duress and necessity for victims of family

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issued by humans, whereas necessity applies to threats of nature or extraordinary emergency. See Caruso et al, above n 355, 379 [11.1]. See also *R v Kawiti* [2000] 1 NZLR 117.

<sup>1050</sup> Beth Boland, ‘Battered Women Who Act Under Duress’ (1994) 28 *New England Law Review* 603, 623–624.

<sup>1051</sup> Elisabeth McDonald, ‘Women Offenders and Compulsion’ [1997] *New Zealand Law Journal* 402, 403. The courts have made some attempt to redress these obstacles by permitting evidence of BWS to be adduced in certain duress cases to assist juries to understand why the particular accused was unable to avoid a partner’s threat or contact police. See, for example, *R v O’Brien* [2003] NSWCCA 121 (6 May 2003); *R v Runjanjic & Kontinnen* (1992) 56 SASR 114. BWS has been used to show that there was a genuine and reasonable fear of a threat (even though BWS is not a defence). See Law Reform Commission of Ireland, *Duress and Necessity*, Consultation Paper No 39 (2006) 53. However, BWS evidence has only been found as relevant to the limited extent of the *subjective* component of duress. See *R v Runjanjic* (1991) 56 SASR 114, 120. See also *Osland v The Queen* (1998) 197 CLR 316, 377–378.

<sup>1052</sup> LRCWA, above n 22, 187; Heather Skinazi, ‘Not Just a Conjured Afterthought: Using Duress as a Defense for Battered Women Who Fail to Protect’ (1997) 85 *California Law Review* 993, 1003–1004.

<sup>1053</sup> Sheehy, Stubbs and Tolmie, ‘When Self-Defence Fails’, above n 985, 127. See also *Ribari v Department of Social Welfare* (1991) 7 CRNZ 586.

<sup>1054</sup> VLRC, *Sexual Offences: Final Report*, Final Report (2004), 122; McDonald, ‘Women Offenders and Compulsion’, above n 1051, 403.

<sup>1055</sup> Partnerships against Domestic Violence, ‘What is Domestic Violence?’ (2003) cited in Belinda Fehlberg and Juliet Behrens, *Australian Family Law: The Contemporary Context* (Oxford University Press, 2008) 179. See further NZLC (2001), above n 22, 60–71 [176]–[215].

<sup>1056</sup> Sheehy, Stubbs and Tolmie, ‘When Self-Defence Fails’, above n 985, 111.

<sup>1057</sup> To assist victims of family violence in such circumstances, expert evidence of BWS and/or social framework evidence about the nature and dynamics of family violence may need to be adduced.

violence who commit offences.<sup>1058</sup> There may, for example, be no inherent logical link between the nature or type of threat and the offence the person is forced to commit.

14.6.4 The accused must have reasonably believed that there was a threat of death or serious harm that would be carried out if the offence was not committed. The threat must also be such that it would have overborne the will of a person of ordinary firmness. This means ‘that an average person of ordinary firmness of mind, of like age and sex, in like circumstances’ would have similarly yielded.<sup>1059</sup> This is designed to measure an individual defendant’s response to a threat against a standard of objectivity.

14.6.5 Victims of family violence may find it difficult to establish this requirement where a threat is not overt or explicit. A battered woman’s belief in the likelihood of a threat being carried out may ‘based on knowledge of many previous cycles of violence and contrition, but to anyone else the likelihood of harm may not be readily apparent’.<sup>1060</sup> It is said that the objective test fails to recognise ‘the effects of subtle, ongoing forms of physical and psychological abuse’.<sup>1061</sup> Research indicates that battered women may develop ‘hypervigilance’, where otherwise insignificant behaviour may serve as a very real warning of an imminent attack, but which would not appear threatening to a non-battered woman.<sup>1062</sup> A defence of duress, where the defence is based on a defendant’s subjective belief, should recognise the experience of a victim of family violence in perceiving threats rather than simply classifying it as ‘unreasonable’.<sup>1063</sup>

14.6.6 The requirement to exhaust all other alternatives such as escape or reporting the threat to the police before resorting to committing the offence and relying on duress is also problematic. Such a requirement misunderstands the cycle of family violence and how a victim’s experience of family violence will affect their assessment of alternative options.<sup>1064</sup> While the requirement to exhaust other alternatives is qualified by a need to take ‘reasonably open’ alternatives,<sup>1065</sup> State assistance may not always be, or at least perceived to be, forthcoming to victims of family violence.<sup>1066</sup> Victims may also fear further violence from their abuser in seeking assistance.<sup>1067</sup>

14.6.7 As Yeo explains:

Another requirement of the defence of duress which ignores women’s experiences is the duty to seek police protection from the threatener should a reasonable opportunity to do so arise. For many female defendants, the social reality at the time of the offence was that they were living with their threateners. However efficacious police protection might generally be, it stands little chance in cases where a woman intends to continue the relationship with her threatener. Even

<sup>1058</sup> Sheehy, Stubbs and Tolmie, ‘When Self-Defence Fails’, above n 985, 127.

<sup>1059</sup> *R v Lawrence* [1980] 1 NSWLR 122, 143.

<sup>1060</sup> McDonald, ‘Women Offenders and Compulsion’, above n 1051, 404.

<sup>1061</sup> *United States v Gaviria* (1992) 804 F Supp 476, 478.

<sup>1062</sup> McDonald, ‘Women Offenders and Compulsion’, above n 1051, 404.

<sup>1063</sup> *Ibid.*

<sup>1064</sup> Sheehy, Stubbs and Tolmie, ‘When Self-Defence Fails’, above n 985, 111, 127.

<sup>1065</sup> *R v Brown* [1968] SASR 467.

<sup>1066</sup> See further Emma Birdsey and Lucy Snowball, ‘Reporting Violence to Police: A Survey of Victims Attending Domestic Violence Services’ (Issue Paper No 91, NSW Bureau of Crime Statistics and Research, October 2013) 5–6; Victoria, Royal Commission into Family Violence, *Summary and Recommendations* (2016) 18.

<sup>1067</sup> Birdsey and Snowball, above n 1066, 5.

when women do leave the relationship and have sought police protection against their threateners, studies have shown that such protection is largely ineffective.<sup>1068</sup>

14.6.8 There are good reasons for victims of family violence to seek police protection when presented with an opportunity to do so.<sup>1069</sup> But this cannot be an absolute requirement to raise the defence of duress. Any requirement or expectation that a victim will always report the threat to the police or escape is unrealistic, especially in the context of family violence.

14.6.9 Any threat to fall within the defence of duress must be a threat to cause death or serious harm. Though this has been supported as the criminal law should set a ‘minimum standard’ of the threat employed,<sup>1070</sup> Ms Toole noted to SALRI in consultation that this may prove problematic in a family violence context. It is established that family violence is a cumulative and wide concept and extends to financial or emotional abuse.<sup>1071</sup> It seems unrealistic to confine the threat that can amount to a defence of duress to a threat of death or serious harm.<sup>1072</sup> Such ‘upper end’ threats exclude other cogent threats of violence in a family violence context that are also serious and likely to act upon a victim of family violence.<sup>1073</sup> For example, a threat to give a long suffering partner a ‘good hiding’ unless she commits a crime, as in *Goddard v Osborne*, is unlikely to amount to a threat of serious harm for the purpose of duress but is still likely to prove very significant to a victim of family violence. The current common law formulation of duress in South Australia excludes threats to commit such crimes as contravention of an intervention order,<sup>1074</sup> affray,<sup>1075</sup> stalking,<sup>1076</sup> revenge pornography,<sup>1077</sup> various types of assault<sup>1078</sup> and especially assault causing harm.<sup>1079</sup>

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<sup>1068</sup> See also VLRC, above n 1054, 122; McDonald, ‘Women Offenders and Compulsion’, above n 1051, 403. See, for example, *R v Ryan* [2013] 1 SCR 14. The Supreme Court of Canada identified the ‘disquieting fact that ... it seems that the authorities were much quicker to intervene to protect Mr Ryan than they had been to respond to her request for help in dealing with his reign of terror over her’: at [35]. Ryan’s appeal to the authorities for help (before resorting to the drastic measure of seeking a hit man to kill her abusive husband) had been dismissed as a ‘civil matter’ at [9].

<sup>1069</sup> Yeo, ‘Coercing Wives into Crime’, above n 873, 219,

<sup>1070</sup> Law Reform Commission of Ireland, above n 1051, [2.47], cited in LRCWA, above n 22, 187.

<sup>1071</sup> See the definition of ‘family violence’ in s 8 of the *Intervention Orders (Prevention of Abuse) Act 2009* (SA).

<sup>1072</sup> Yeo, for example, notes that the threats in a family violence context go beyond threats to cause death or serious bodily harm. ‘These are the kinds of threats which battered women are invariably subjected to. However, there may be other types of pressures placed on women by their spouses which the law fails to recognise. For instance, the spouse might threaten to leave the relationship thereby placing immense psychological pressure on a woman seeking to maintain the ideals of marriage and motherhood. The threats could also be of an economic nature, depriving the woman of her financial investment in the relationship and of the standard of living and the financial protection it brings. There may be moral constraints as well, compelling the woman to prevent her children from becoming fatherless following his threat to walk out on the family. These pressures are precisely the same ones which prevent a woman leaving a violent relationship. Hence, under the present law, the defence would be unavailable to a woman who, for example, committed social security fraud when her husband threatened to leave her and their children if she refused to do so’: Yeo, ‘Resolving Gender Bias in Criminal Defences’, above n 14, 107.

<sup>1073</sup> See also above [10.2.21]–[10.2.22].

<sup>1074</sup> *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 31.

<sup>1075</sup> *CLCA* s 83C.

<sup>1076</sup> *Ibid* s 19AA.

<sup>1077</sup> *Summary Offences Act 1953* (SA) Part 5A. See further McGlynn, Rackley and Houghton, above n 963.

<sup>1078</sup> *CLCA* s 20.

<sup>1079</sup> *Ibid* s 20(4).



14.6.10 SALRI accepts that the defences of duress and necessity are ill-fitting and ineffective in some respects for victims of family violence who are either pressured to offend at the behest of a violent partner or use reactive violence against such a party.<sup>1080</sup> SALRI considers that the defences of duress and necessity, as raised in the Stage 1 Report, should be clarified and revised to better reflect and recognise the experience and situation of victims of family violence, regardless of the offence committed (excepting murder and attempted murder).<sup>1081</sup> However, there is a need for a careful balance. There are sound reasons of policy to ensure that duress and necessity are strictly regulated to provide that they are available as defences only in response to truly deserving situations.

14.6.11 Recommendation:

### Recommendation 13

SALRI recommends that the defence of duress (and necessity) should be amended to provide greater recognition of the situation of victims of family violence, consistent with its recommendations in its Stage 1 Report.

## 14.7 Duress under the Model Criminal Code

14.7.1 Chapter 2 of the *Model Criminal Code* was developed by the Criminal Law Officers Committee of the Standing Committee of Attorneys-General. This *Code* contains a statutory duress provision. This provision (or versions of it) has since been adopted by the Commonwealth,<sup>1082</sup> Victoria,<sup>1083</sup> the ACT,<sup>1084</sup> the Northern Territory<sup>1085</sup> and Western Australia.<sup>1086</sup> South Australia and NSW remain governed by the common law model. Queensland<sup>1087</sup> and Tasmania<sup>1088</sup> have their own statutory versions.

14.7.2 The model provision provides:

- (1) A person is not criminally responsible for an offence if he or she carries out the conduct constituting the offence under duress.
- (2) A person carries out conduct under duress if and only if he or she reasonably believes that:
  - (a) a threat has been made that will be carried out unless an offence is committed; and
  - (b) there is no reasonable way that the threat can be rendered ineffective; and
  - (c) the conduct is a reasonable response to the threat.

<sup>1080</sup> Ahluwalia and Rafferty, above n 986.

<sup>1081</sup> See below Part 15.

<sup>1082</sup> *Criminal Code* (Cth) s 10.2.

<sup>1083</sup> *Crimes Act 1958* (Vic) s 322O.

<sup>1084</sup> *Criminal Code 2002* (ACT) s 40.

<sup>1085</sup> *Criminal Code* (NT) s 43BB. See also s 40. The Northern Territory model is complex. Section 40 is the original duress provision and still governs some offences. Section 43BB is a later addition and is based on the *Model Criminal Code*. It applies to those offences listed in Schedule 1 of the *Criminal Code*.

<sup>1086</sup> *Criminal Code 1913* (WA) s 32.

<sup>1087</sup> *Criminal Code 1899* (Qld) s 31 ('compulsion').

<sup>1088</sup> *Criminal Code 1924* (Tas) s 20.

- (3) This section does not apply if the threat is made by or on behalf of a person with whom the person under duress is voluntarily associating for the purpose of carrying out conduct of the kind actually carried out.<sup>1089</sup>

14.7.3 The Criminal Law Officers Committee noted that this defence should extend to murder<sup>1090</sup> and also should not be confined to a threat of death or serious harm.<sup>1091</sup> The objective requirement in the provision that the defendant’s response to the threat is reasonable (and therefore proportionate) ‘should provide a sufficient safeguard against abuse of the defence’.<sup>1092</sup> This view was accepted by the Commonwealth when it introduced the Criminal Code Bill 1994 (Cth). The Commonwealth Explanatory Memorandum indicates that the availability of duress should not be limited by the nature of the threat, because –

Once a person is under the influence of a threat, whatever he or she does depends on what the threatener demands. The crime demanded might be trivial or serious but it has no necessary connection with the type of threat confronting the accused. Policy reasons would, however, insist on a requirement that the accused’s response was reasonably appropriate to the threat.<sup>1093</sup>

14.7.4 The LRCWA in its Report into Aboriginal customary law supported the *Model Criminal Code* duress provision.<sup>1094</sup> The LRCWA disagreed with the argument that adopting this model would significantly extend the scope of the defence. It noted that a person would only be able to rely upon duress under its ‘proposal if there was no other reasonable way to render the threat ineffective’.<sup>1095</sup> In 2007, the LRCWA noted that it remained of the view that this model of duress should be introduced in Western Australia.<sup>1096</sup>

14.7.5 The VLRC also supported the *Model Criminal Code* duress provision and noted the gist of its preferred statutory model of duress was a threat has been made that will be carried out unless the person kills another person; there is no other way the threat can be rendered ineffective; the belief is reasonable in the circumstances and the person’s conduct is a reasonable response to the threat.<sup>1097</sup>

14.7.6 SALRI is attracted to the *Model Criminal Code* duress provision. It has the benefit of relative simplicity and makes the defence of duress more accessible for victims of family violence who may commit offences under compulsion. This model recognises that there may be no inherent logical link between the nature or type of threat and the offence the person is forced to commit. It does not require that the threat be imminent. However, the more time that elapses between the threat and the criminal

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<sup>1089</sup> *Criminal Code* (Cth) s 10.2.

<sup>1090</sup> Criminal Law Officers Committee, *Model Criminal Code: Chapter 2: General Principles of Criminal Responsibility*, Final Report (December 1992) 65. See further below Part 15.

<sup>1091</sup> Criminal Law Officers Committee, *General Principles of Criminal Responsibility*, above n 1090, 65.

<sup>1092</sup> *Ibid.*

<sup>1093</sup> Commonwealth of Australia, Senate, Criminal Code Bill 1994, Commonwealth Explanatory Memorandum, 30, quoting Stanley Yeo, ‘The Commonwealth Review Committee’s Proposals on Private Defence, Duress and Necessity’ (1991) 15 *Criminal Law Journal* 139, 143.

<sup>1094</sup> LRCWA, *Aboriginal Customary Laws: The Interaction of Western Australian Law with Aboriginal Law and Culture*, Final Report, Project No 94 (2006) 153–155, 155 Rec 27.

<sup>1095</sup> *Ibid.* 154.

<sup>1096</sup> LRCWA, above n 22, 188.

<sup>1097</sup> VLRC (2004), above n 15, 123 Rec 14.

act, the more likely it is that a court would find that there was a reasonable way that the threat could have been rendered ineffective and/or the conduct was an unreasonable response to the threat.

14.7.7 The nature of the threat levelled at a defendant by the other person under the *Model Criminal Code* is not defined and it need not be a threat of death or serious bodily harm. This makes sense. As discussed above, parties in abusive relationships may be subject to a various threats and pressures that are not recognised by the common law model of duress, but may fall within the scope of family violence. However, there is a need for a sensible balance and the threats to amount to duress cannot be too expansive. The reasonableness of the offender’s conduct is a key element in this formulation of duress. The threat and the offence committed in response must be proportional for the defence of duress to apply. A ‘moral’ threat, for example, would be unlikely to amount to an objectively reasonable response to the threat. As Yeo has stated, widening the range of threats can be appropriately balanced with a requirement that the response was reasonable.<sup>1098</sup> ‘This is precisely what the *Model Criminal Code* formulation achieves.’<sup>1099</sup>

14.7.8 The *Model Criminal Code* duress provision requires that there is no reasonable way the threat can be rendered ineffective. This element is reframed from a requirement that the offender seek police protection to an exemption only available if there is no reasonable way to negate the threat, importing a further objective safeguard into the defence.

14.7.9 The *Model Criminal Code* also includes a defence of necessity or rather ‘sudden or extraordinary emergency’. The *Model Criminal Code* provides that the defence applies if a defendant reasonably believes that:

1. Circumstances of sudden or extraordinary emergency exist; and
2. Committing the offence is the only reasonable way of dealing with the emergency; and
3. The conduct is a reasonable response to the emergency.<sup>1100</sup>

This defence contains an objective test and does not limit the nature of the emergency to only those involving a risk of death or serious bodily harm.

14.7.10 The Criminal Law Officers Committee agreed that a person should ‘not be criminally responsible for an offence if the conduct constituting the offence was carried out by him or her in response to circumstances of a sudden or extraordinary emergency’.<sup>1101</sup> This was to reflect the common law defence of necessity. The Committee was confident that the defence would only apply ‘in very limited circumstances’.<sup>1102</sup> This view was repeated by the Commonwealth in its explanation when it included the Criminal Code Bill 1994 (Cth).<sup>1103</sup>

<sup>1098</sup> Yeo, ‘Private Defence, Duress and Necessity’, above n 1093, 143.

<sup>1099</sup> LRCWA, above n 22, 187.

<sup>1100</sup> Criminal Law Committee, *General Principles of Criminal Responsibility*, above n 1090, 66.

<sup>1101</sup> *Ibid.*

<sup>1102</sup> *Ibid.* 68.

<sup>1103</sup> Commonwealth of Australia, Senate, Criminal Code Bill 1994, Commonwealth Explanatory Memorandum, 31.

14.7.11 This model has been adopted by Victoria,<sup>1104</sup> the ACT,<sup>1105</sup> the Commonwealth<sup>1106</sup> and the Northern Territory.<sup>1107</sup> The statutory models in Western Australia<sup>1108</sup> and Queensland<sup>1109</sup> are in slightly different terms. Tasmania, NSW and South Australia are still governed by the common law.

## 14.8 SALRI’s Reasoning and Conclusions

14.8.1 The similar nature of the defences of duress and necessity is apparent. They ‘seem to differ only as to the source of the peril’.<sup>1110</sup> As Lord Simon observed in *DPP v Lynch*:<sup>1111</sup>

In the circumstances where either “necessity” or duress is relevant, there are both actus reus and mens rea. In both sets of circumstances there is power of choice between two alternatives; but one of those alternatives is so disagreeable that even serious infraction of the criminal law seems preferable. In both the consequence of the act is intended, within any permissible definition of intention. The only difference is that in duress the force constraining the choice is a human threat, whereas in “necessity” it can be any circumstance constituting a threat to life (or, perhaps, limb).<sup>1112</sup>

14.8.2 SALRI agrees with the NZLC that ‘any reform of the law should be based on recognition of the essential similarity of the two species of duress’.<sup>1113</sup>

14.8.3 SALRI in its Stage 1 Report recommended certain changes to the common law defences of duress and necessity to better recognise and reflect the experience and situation of family violence. However, with the benefit of further research and consideration, SALRI considers it is preferable to replace the common law defences of duress with statutory versions of the defences as has taken place in Victoria.

14.8.4 The common law defence of duress has been criticised as ‘vague and unsatisfactory’<sup>1114</sup> and ‘extremely vague and elusive’.<sup>1115</sup> One South Australian author notes that ‘with so many elements, it is hardly surprising that the [common] law is not always clear as to what is required and what evidence explicitly relates to the corresponding element.’<sup>1116</sup> The perceived uncertainty of the law relating to duress has been the subject of frequent English judicial comment, if not complaint. In *R v Abdul-Hussain*,<sup>1117</sup> the Court of Appeal, for the fourth time in five years, emphasised ‘the urgent need for

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<sup>1104</sup> *Crimes Act 1958* (Vic) s 322R.

<sup>1105</sup> *Criminal Code 2002* (ACT) s 41.

<sup>1106</sup> *Criminal Code* (Cth) s 10.3.

<sup>1107</sup> *Criminal Code* (NT) s 43BC. See also s 30. The Northern Territory model is complex. Section 30 is the original necessity provision and still governs some offences. Section 43BC is a later addition and is based on the *Model Criminal Code*. It applies to those offences listed in Schedule 1 of the *Criminal Code*.

<sup>1108</sup> *Criminal Code 1913* (WA) s 25.

<sup>1109</sup> *Criminal Code 1899* (Qld) s 25.

<sup>1110</sup> NZLC, Preliminary Paper 41, above n 774, 49 [157].

<sup>1111</sup> [1975] AC 653.

<sup>1112</sup> *Ibid* 692.

<sup>1113</sup> NZLC, Preliminary Paper 41, above n 774, 50 [159].

<sup>1114</sup> Law Reform Commissioner of Victoria, *Duress, Necessity and Coercion*, Report No 9 (1980) 13 [2.10].

<sup>1115</sup> *DPP for Northern Ireland v Lynch* [1975] AC 653, 684 (Lord Simon).

<sup>1116</sup> Caruso et al, above n 355, 383 [11.8].

<sup>1117</sup> [1999] Crim LR 570.

legislation to define the defence of duress with precision'. The court observed that legislation relating to the defence of duress was urgently required as the law had evolved on a case by case basis and the scope of the defence was uncertain.

14.8.5 Law reform agencies have also recommended the benefit of statutory codification of the law in this area.<sup>1118</sup> The Law Commission of England and Wales noted 'the practical benefit of a clear and accessible statutory statement of the common law, even where the statute involves no substantial reform of that law.'<sup>1119</sup> The Law Commission noted that even where the broad lines of a common law defence are 'agreed as between such lawyers as have the time and inclination to make a thorough study of the common law materials ... the direct and efficient application of that law is unlikely to be achieved without its being immediately available in clear statutory form.'<sup>1120</sup> SALRI notes that many jurisdictions have explicit statutory provision for the defence of duress and/or necessity.<sup>1121</sup> It would also make sense for South Australia to do so.

14.8.6 SALRI recommends that for certainty and clarity the common law defences of duress and necessity be placed on a proper statutory footing.

14.8.7 Recommendation:

#### **Recommendation 14**

SALRI recommends that the common law defences of duress and necessity should, for clarity, be abolished and replaced with statutory versions.

14.8.8 Whilst SALRI is sympathetic to the experience and situation of victims of family violence as discussed above, there remains sound policy reasons to ensure the scope of the defences of both duress and necessity is reasonable, but strictly limited.

14.8.9 SALRI is aware that the defences of necessity or duress cannot be cast too wide and must be carefully defined. Offenders cannot be free to break the criminal law (including in a family violence context) with impunity and claim they were entitled to do so by some higher social value.<sup>1122</sup> Lord Simon in *Lynch* highlighted the need for caution in considering such defences and stated: 'Your Lordships should hesitate long lest you may be inscribing a charter for terrorists, gang-leaders and kidnappers'.<sup>1123</sup> The Supreme Court of Canada in *Latimer* similarly emphasised that the defence of necessity must be of limited application and 'were the criteria for the defence loosened or approached

<sup>1118</sup> See Law Commission of England and Wales, *Defences of General Application*, above n 892, 9 [2.23], Law Commission (England and Wales), *Legislating the Criminal Code*, above n 982, 1–2 [1.1]–[1.4], 3 [2.1]–[2.4], 46 [26.1]–[26.4].

<sup>1119</sup> Law Commission (England and Wales), *Legislating the Criminal Code*, above n 982, 46 [26.4].

<sup>1120</sup> *Ibid* 3 [2.2].

<sup>1121</sup> This is also in line with other Australian jurisdictions: *Crimes Act 1958* (Vic) ss 322O, 322R; *Criminal Code 1995* (Cth) ss 10.2, 103.3; *Criminal Code 2002* (ACT) ss 40, 41; *Criminal Code 1913* (WA) s 25; *Criminal Code 1899* (Qld) s 25; *Criminal Code* (NT) s 33.

<sup>1122</sup> *Bayley v Police* (2007) 99 SASR 413, 424–425 [43].

<sup>1123</sup> *DPP for Northern Ireland v Lynch* [1975] AC 653, 688.

purely subjectively, some fear ... that necessity would “very easily become simply a mask for anarchy”<sup>1124</sup>

14.8.10 Similar caution was expressed by Lord Bingham in *Hasan*.<sup>1125</sup> He observed that it had once been ‘possible to regard the defence of duress as something of an antiquarian curiosity, with little practical application’.<sup>1126</sup> Whilst the defence was once described as ‘very rare’,<sup>1127</sup> this was no longer the situation. As early as 1980, Dennis observed that ‘in recent years duress has become a popular plea in answer to a criminal charge’.<sup>1128</sup> Lord Bingham noted that this trend had continued borne out by the by the steady flow of criminal cases raising duress reaching the appellate courts ‘and by the daily experience of prosecutors’.<sup>1129</sup>

14.8.11 Lord Bingham’s caution about duress as a defence was heightened by what he saw as the relative ease with which the defence could be raised and the peculiar difficulty for the prosecution in seeking to investigate and rebut such a claim beyond reasonable doubt.<sup>1130</sup> As Sir John Smith QC observed in 1994, ‘duress is a unique defence in that it is so much more likely than any other to depend on assertions which are peculiarly difficult for the prosecution to investigate or subsequently to disprove’.<sup>1131</sup> Lord Bingham noted that ‘the prosecution’s difficulty is of course the greater when, as is all too often the case, little detail of the alleged compulsion is vouchsafed by the defence until the trial is under way’.<sup>1132</sup>

14.8.12 Such fears of the use (or perhaps misuse) of duress are doubted. The Hon Geoffery Muecke noted to SALRI in consultation that in his many years as both a Judge and Chief Judge of the South Australian District Court he could not recall a single trial raising duress as a defence.<sup>1133</sup> The English Law Commission in 1977 noted the fear that the defence of duress ‘offers a charter to thugs and terrorists by exonerating those whom they may intimidate from the crimes they may be forced to commit’. The Law Commission was unconvinced that such fears were justified:

we would point out that, over the many years that duress has been accepted as a defence, the few reported cases in which it has arisen for consideration, and the even fewer occasions when it has apparently been successfully relied upon, seem to indicate that the fears are without serious foundation. It is after all a defence of last resort, which entails acceptance of participation in the offence, and a degree of courage is required to advance the defence if the threats are really serious and convincing because of the possibility of reprisals against the defendant or those close to him.

<sup>1124</sup> *R v Latimer* [2001] 1 SCR 3, [27], citing *Southwark London Borough Council v Williams* [1971] Ch 734, 746 (Edmund-Davies LJ). See also *R v Perka* [1984] 2 SCR 232, 251; *Bayley v Police* (2007) 99 SASR 413, 424–428 [43]–[53] (Gray J).

<sup>1125</sup> [2005] 2 WLR 709, 718 [22].

<sup>1126</sup> *Ibid.*

<sup>1127</sup> Edwards, above n 877.

<sup>1128</sup> Ian Dennis, ‘Duress, Murder and Criminal Responsibility’ (1980) 96 *Law Quarterly Review* 208.

<sup>1129</sup> [2005] 2 WLR 709, [22]. One of the authors from previous prosecution practice in England also recalls that defences of duress were far from unknown.

<sup>1130</sup> *Ibid.* 20. See also Law Commission (England and Wales), *Legislating the Criminal Code*, above n 982, 55 [30.15].

<sup>1131</sup> John Smith, ‘Commentary on *R v Cole*’ [1994] *Criminal Law Review* 582, 584.

<sup>1132</sup> [2005] 2 WLR 709, [20].

<sup>1133</sup> It seems that duress is rarely raised in Australia. See, for example, LRCWA, *Aboriginal Customary Law*, above n 1094, 154. This accords with the recollection of the Hon Geoffrey Muecke from his time at the District Court.

Finally, protection against the likelihood of the defence succeeding where it should not lies in the safeguard of the decision of a properly instructed jury.<sup>1134</sup>

14.8.13 Arenson observes that ‘juries are routinely entrusted with the responsibility of separating fact from fiction’ and there is no reason to suppose that they are any less capable of doing this in the context of duress as they are in any other context.<sup>1135</sup> The VLRC similarly concluded that the potential for fabrication in relation to duress was not necessarily any greater than for other defences such as self-defence or provocation.<sup>1136</sup>

14.8.14 SALRI considers that any fears about the defences of duress or necessity are alleviated by the proposed *Model Criminal Code* provisions in relation to both duress and sudden or extraordinary emergency. These provisions provide a reasonable but strictly defined solution.

14.8.15 The objective requirements of both *Model Criminal Code* provisions are significant. Lord Lane CJ has highlighted the importance of an objective focus in this context:

As a matter of public policy, it seems to us essential to limit the defence of duress by means of an objective criterion formulated in the terms of reasonableness. Consistency of approach in defences to criminal liability is obviously desirable. ... In duress the words or actions of one person break the will of another. The law requires a defendant to have the self-control reasonably to be expected of the ordinary citizen in his situation.<sup>1137</sup>

14.8.16 SALRI notes that the Criminal Law Officers Committee, the VLRC and the LRCWA have all expressed support for the *Model Criminal Code* duress provision. The LRCWA carefully considered the provision. The LRCWA supported the *Model Criminal Code* duress provision ‘as it removes unwarranted restrictions on the availability of the defence’ such as catering for threats made against a third party; removing any requirement for the presence of the person making the threat; not confining the threats of immediate or imminent harm, not insisting on the threat being reported to the police<sup>1138</sup> and allowing any type of threat to be taken into account. The LRCWA noted ‘the reformulated defence will also better take into account the circumstances of victims of domestic violence.’<sup>1139</sup> The LRCWA concluded that the objective test significantly and appropriately narrows the scope of the defence.

14.8.17 The LRCWA concluded that the *Model Criminal Code* duress provision addressed any potentially unfair and unnecessary elements without going too far:

It will not be easy to successfully raise the defence of duress under the *Model Criminal Code* formulation. And this is consistent with how the law has historically approached the defence of

<sup>1134</sup> Law Commission (England and Wales), *Defences of General Application*, above n 892, 8 [2.19].

<sup>1135</sup> Arenson, above n 980, 140. See also *R v Howe* [1987] 2 AC 417, 434.

<sup>1136</sup> VLRC (2004), above n 15, [243]. See also Law Reform Commission of Victoria, above n 97, 106 [244]; LRCWA, above n 22, 194, 199.

<sup>1137</sup> *R v Graham* [1982] 1 WLR 294, 300. See also *R v Howe* [1987] AC 417, 458–459.

<sup>1138</sup> This remains important as ‘there are clear considerations of public policy dictating that people under threat should take opportunities to render such threats ineffective by reporting their circumstances to police or other appropriate authorities, rather than commit serious criminal offences, when presented with realistic opportunities to do so’: *R v Morris* [2006] WASCA 142, [112] (Roberts-Smith J).

<sup>1139</sup> The LRCWA acknowledged that the recommended test for duress requires a jury to assess what was reasonable. If there is a lack of understanding in the community about the circumstances and experience faced by victims of domestic violence, expert evidence may need to be admitted to ensure that the jury properly understands those circumstances. See LRCWA, above n 22, 188, n 54. See also SALRI, Stage 1, above n 10, Rec 8, 79 [9.4.3]–[9.4.4], 86–89 [9.6.1]–[9.6.14].

duress: that it should be confined within strict limits ... the *Model Criminal Code* formulation invokes a simple objective assessment ... The Commission believes that the objective test under its recommended defence is, as the Model Criminal Code Officers Committee states, a “sufficient safeguard against abuse”.<sup>1140</sup>

14.8.18 The original statutory formulation of duress in the Northern Territory is confined to a threat to commit an offence with seven or more years’ imprisonment. SALRI considers this approach is too restrictive, notably in a family violence context. The *Model Criminal Code* duress provision does not seem to have led to problems interstate where it has been adopted. There has not been an apparent floodgate of assertions of duress in Victoria under the new model.<sup>1141</sup> The objective focus of the *Model Criminal Code* provides, as noted by the LRCWA, a ‘sufficient safeguard against abuse’ of the duress defence.

14.8.19 SALRI considers that the *Model Criminal Code* duress provision should be adopted in South Australia. It is an appropriate model and would promote clarity and the effective operation of the law.

14.8.20 Recommendation:

#### **Recommendation 15**

SALRI recommends that the statutory defence of duress to be introduced in South Australia should be based on the *Model Criminal Code* defence of duress that has been adopted in Victoria, the Australian Capital Territory, Western Australia, the Commonwealth and partly in the Northern Territory. This model incorporates an objective test and does not limit duress to only threats of death or grievous bodily harm. This model provides that the defence only applies if the accused reasonably believes that a threat has been made that will be carried out unless an offence is committed; there is no reasonable way that the threat can be rendered ineffective and the conduct is a reasonable response to the threat.

14.8.21 It follows for consistency and clarity that the linked common law defence of necessity should also be placed on a statutory footing.

14.8.22 The *Model Criminal Code* includes a statutory test of necessity or ‘sudden or extraordinary emergency’. The provision provides that the defence applies if the accused reasonably believes that:

1. Circumstances of sudden or extraordinary emergency exist; and
2. Committing the offence is the only reasonable way of dealing with the emergency; and
3. The conduct is a reasonable response to the emergency.<sup>1142</sup>

14.8.23 The VLRC supported this model.<sup>1143</sup> The VLRC concluded: ‘The defence of extraordinary emergency only applies if: circumstances of sudden or extraordinary emergency exist; committing the offence is the only reasonable way to deal with the emergency; and the conduct is a reasonable response

<sup>1140</sup> LRCWA, above n 22, 189 quoting Criminal Law Officers Committee, *General Principles of Criminal Responsibility*, above n 1090, 65.

<sup>1141</sup> The main judicial consideration to date of the Victorian provision is *DPP (Vic) v Parker (a Pseudonym)* [2016] VSCA 101 (10 May 2016).

<sup>1142</sup> See also above [14.7.9]–[14.7.11].

<sup>1143</sup> VLRC (2004), above n 15, 118, 123 Rec 17.



to the emergency.<sup>1144</sup> The LRCWA also supported this model. It was ‘of the view that the adoption of the *Model Criminal Code* defence of emergency would achieve consistency and simplicity in the law’.<sup>1145</sup>

14.8.24 SALRI also supports adoption of the *Model Criminal Code* provision relating to a sudden or extraordinary emergency. The statutory statement of the defence of necessity or ‘sudden or extraordinary emergency’ would, as previously noted, promote clarity of the law. The *Model Criminal Code* version of this defence is an appropriate model. It also does not seem to have led to problems interstate where it has been adopted.

14.8.25 SALRI notes that the aspiration of the adoption of a national Criminal Code is highly unlikely as is the prospect of uniform, or even consistent, criminal laws across Australia.<sup>1146</sup> However, there is benefit in the adoption in South Australia of the *Model Criminal Code* duress and necessity provisions. These provisions have the benefit of relative simplicity and make the defences of duress and necessity clearer and more accessible, especially for victims of family violence who may commit offences under compulsion, but without inappropriately extending the law.

14.8.26 Recommendation:

#### **Recommendation 16**

SALRI recommends that the statutory defence of necessity to be introduced in South Australia should be based on the *Model Criminal Code* defence of ‘sudden or extraordinary emergency’<sup>1147</sup> that has been adopted in Victoria, the Australian Capital Territory, the Northern Territory and the Commonwealth. This model incorporates an objective test and does not limit the nature of the emergency to only those involving a risk of death or grievous bodily harm. This model provides that the defence only applies if the accused reasonably believes that circumstances of sudden or extraordinary emergency exist; committing the offence is the only reasonable way of dealing with the emergency and the conduct is a reasonable response to the emergency.

<sup>1144</sup> Ibid 123 Rec 17.

<sup>1145</sup> LRCWA, above n 22, 191.

<sup>1146</sup> See above n 50.

<sup>1147</sup> The *Model Criminal Code* provision provides:

- (1) A person is not criminally responsible for an offence if he or she carries out the conduct constituting the offence in response to circumstances of sudden or extraordinary emergency.
- (2) This section applies if and only if the person carrying out the conduct reasonably believes that:
  - (a) circumstances of sudden or extraordinary emergency exist; and
  - (b) committing the offence is the only reasonable way to deal with the emergency; and
  - (c) the conduct is a reasonable response to the emergency.

## Part 15 – Duress, Necessity, Marital Coercion and Murder

### 15.1 Overview

15.1.1 Although necessity and duress are available as defences to almost all crimes, the longstanding common law rule<sup>1148</sup> which applies in South Australia is that they cannot be relied upon as defences to murder<sup>1149</sup> (and potentially attempted murder).<sup>1150</sup> This rule is founded in moral policy that ‘the overriding objects of the criminal law must be to protect innocent human lives and to set a standard of conduct which ordinary men and women are to observe if they are to avoid criminal responsibility.’<sup>1151</sup> The common law rule was famously invoked in *R v Dudley and Stephens*<sup>1152</sup> and confirmed by the House of Lords in *R v Howe*.<sup>1153</sup> However, this rule has been much criticised.<sup>1154</sup>

15.1.2 The VLRC, for example, recommended in 2004 that the common law defences of duress and necessity should be placed on a statutory footing (based on the *Model Criminal Code*) and extend to both murder and attempted murder.<sup>1155</sup> The Victorian Parliament accepted these recommendations and abolished the common law defences of duress and necessity,<sup>1156</sup> and introduced replacement statutory

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<sup>1148</sup> The argument for excluding murder from the ambit of duress can be traced back to Hale who wrote: ‘Again, if a man be desperately assaulted, and in peril of death, and cannot otherwise escape, unless to satisfy his assailant’s fury he will kill an innocent person then present, the fear and actual force will not acquit him of the crime and punishment of murder, if he commit the fact; for he ought rather to die himself, than kill an innocent’: 1 Hale PC 5. See also Blackstone *Commentaries* IV 30.

<sup>1149</sup> *R v Dudley and Stephens* (1884) 14 QBD 273 (necessity); *R v Harding* [1976] VR 129; *R v Brown and Morley* [1968] SASR 467; *R v Darrington and McGauley* [1980] VR 353; *R v Howe* [1987] 2 AC 417. Cf *Re: A (Children)* [2001] 2 WLR 480 which is probably explicable by ‘the truly unique facts of the case’: Mirko Bagaric, *Punishment and Sentencing: A Rational Approach* (Cavendish Publishing Ltd, 2001) 178 n 54). In *Re: A*, Brooke LJ argued that the defence of necessity is available for murder where a person’s death is the lesser of two evils and their death is inevitable. In this case, the English Court of Appeal sanctioned a surgery to separate conjoined twins, Mary and Jodie. Mary (the weaker twin) was incapable of surviving independent from Jodie (the stronger twin). However, it was accepted that Jodie was incapable of sustaining both her own and Mary’s lives. The court allowed the killing of Mary through the surgery without criminal liability, to save Jodie where Mary was deemed ‘self-designated for a very early death’: [2001] 2 WLR 480, [26] (Brooke LJ).

<sup>1150</sup> *R v Gotts* [1992] 2 AC 412. Contrast *R v Goldman [Ruling No 4]* (2004) 147 A Crim R 472; *R v Quami & Ors (No 64)* [2016] NSWSC 1269 (13 September 2016).

<sup>1151</sup> *R v Howe* [1987] 2 AC 417, 433 (Lord Hailsham).

<sup>1152</sup> [1884] 14 QBD 273.

<sup>1153</sup> [1987] 2 AC 417.

<sup>1154</sup> See, for example, Arenson, above n 980; Cross, above n 980; Miriam Gur-Arye, ‘Should the Criminal Law Distinguish Between Necessity as Justification and Necessity as an Excuse?’ (1986) 102 *Law Quarterly Review* 71; Yeo, above n 980; LRCWA, above n 22, 193–198; VLRC (2004) above n 15, 117–118 [3.150]–[3.153].

<sup>1155</sup> VLRC (2004), above n 15, 118, 123, Rec 9. See also Law Reform Commissioner of Victoria, above n 1114, [2.15] (duress) and [3.33] (necessity); Law Reform Commission of Victoria, above n 97, 106 [244], Rec 31. The VLRC, whilst recommended expanding the application of duress and necessity to murder, recommended against extending the scope of marital coercion to apply to murder. In its view, the stricter elements of duress should be established where a woman kills in response to threats from her abusive partner, rather than the lower threshold of marital coercion. See VLRC (2004), above n 15, 122 [3.168]. In the event that, despite SALRI’s recommendation (see above Recommendation 11), marital coercion is retained as a defence, SALRI is strongly of the view that marital coercion should not extend to murder or attempted murder.

<sup>1156</sup> *Crimes Act 1958* (Vic) s 322Q (abolishment of common law duress), s 322S (abolishment of common law necessity).

defences of duress and sudden or extraordinary emergency.<sup>1157</sup> The statutory defences extend to murder and attempted murder where there is a threat of death or really serious injury.<sup>1158</sup>

15.1.3 Statutory duress is also available as a defence to murder and attempted murder in Western Australia,<sup>1159</sup> the ACT<sup>1160</sup> the Commonwealth<sup>1161</sup> and the Northern Territory.<sup>1162</sup> However, in New Zealand, duress by threats (called ‘compulsion’) remains unavailable in relation to murder or attempted murder.<sup>1163</sup> The statutory models of duress in Queensland<sup>1164</sup> and Tasmania<sup>1165</sup> also do not extend to murder. The common law models of duress in NSW and South Australia also do not extend to murder.

15.1.4 The application of duress at common law to attempted murder is unclear. The majority of the House of Lords in *Gotts* held that duress is not available as a defence to attempted murder.<sup>1166</sup> This approach has not been shared by Australian courts. The trial judges in *Goldman*<sup>1167</sup> and *Quami*<sup>1168</sup> preferred the dissenting view in *Gotts* and held that duress is available to attempted murder (though not murder).

15.1.5 The defences of duress and necessity may arise in the context of family violence where threats and coercion inherent in the abusive relationship compel a battered woman to kill<sup>1169</sup> (or commit other serious offences of violence).<sup>1170</sup>

15.1.6 This stark situation presented itself in *R v Neville*. The accused in *Neville* was married to her husband at a young age. He was a bikie. She was subjected to years of physical and sexual abuse. Her husband caught her having an affair with a rival bikie, a man called Wright. This enraged her husband,

<sup>1157</sup> *Crimes Act 1958* (Vic) s 322O (statutory defence of duress), s 322R (statutory defence of necessity).

<sup>1158</sup> *Ibid* ss 322O(4), 322R(3); ‘really serious injury’ is defined to include serious sexual assault: s 322H. Duress is also a defence to murder and attempted murder under the Commonwealth and ACT Criminal Codes: *Criminal Code 1995* (Cth) ss 10.2, 103.3; *Criminal Code 2002* (ACT) ss 40, 41; Necessity is also a defence to murder under the Western Australia, Queensland and Northern Territory Criminal Codes: *Criminal Code 1913* (WA) s 25; *Criminal Code 1899* (Qld) s 25; *Criminal Code* (NT) s 43BC, Sch 1.

<sup>1159</sup> *Criminal Code 1913* (WA) s 32.

<sup>1160</sup> *Criminal Code 2002* (ACT) s 40.

<sup>1161</sup> *Criminal Code 1995* s 10.2.

<sup>1162</sup> *Criminal Code* (NT) s 43BB, Sch 1. The original version of duress, *Criminal Code* (NT) s 40(2), does not ‘not extend to an act, omission or event that would constitute an offence of which serious harm or an intention to cause such harm is an element.’

<sup>1163</sup> *Crimes Act 1961* (NZ) ss 24(2)(e) and (f).

<sup>1164</sup> *Criminal Code 1899* (Qld) s 31(2): ‘This protection does not extend to an act or omission which would constitute the crime of murder, or an offence of which grievous bodily harm to the person of another, or an intention to cause such harm, is an element.’

<sup>1165</sup> *Criminal Code* (Tas) s 20(1). Duress or ‘compulsion’ is available for any offence ‘other than treason, murder, piracy, offences deemed to be piracy, attempting to murder, rape, forcible abduction, aggravated armed robbery, armed robbery, aggravated robbery, robbery, causing grievous bodily harm, and arson.’

<sup>1166</sup> *R v Gotts* [1992] 2 AC 412.

<sup>1167</sup> *R v Goldman* [Ruling No 4] (2004) 147 A Crim R 472.

<sup>1168</sup> *R v Quami & Ors* (No 64) [2016] NSWSC 1269 (13 September 2016), [25]–[39].

<sup>1169</sup> In this context, a battered woman may be compelled to kill a third party or her abuser. See Sheehy, Stubbs and Tolmie, ‘When Self-Defence Fails’, above n 985, 120–121. See, for example, *State v Norman* (1988) 366 SE 2d 586; *Neelley v State* (1993) 91 WL 1036; *R v Ryan* [2013] 1 SCR 14.

<sup>1170</sup> See, for example, *R v Ryan* [2013] 1 SCR 14. The defendant was charged with counselling the murder of her violent husband by hiring a ‘hit man’ who turned out to be an undercover police officer. The Supreme Court held that duress was unavailable as a defence on these facts as there was no threat to require the wife to commit this specific crime.

who bashed Wright and demanded \$50 000 from him. He also bashed Neville senseless with a belt, poured boiling water over her and forced her to shave her head and demanded she get a tattoo around her waist to read she was the ‘property’ of her husband. Neville subsequently killed Wright by shooting him seven times when he returned home from work one afternoon. There was evidence from a psychologist that he believed the husband had given his wife an ultimatum: to kill Wright or he would kill her.<sup>1171</sup> Neville was convicted of Wright’s murder.<sup>1172</sup> Duress and necessity would not have been available to her as defences.

15.1.7 Such cases raise the difficult question of whether the defences of duress and necessity should extend to murder in South Australia, especially in the context of family abuse victims who may kill. This gives rise to complex moral and legal issues.

## 15.2 Issues and Discussion

15.2.1 The traditional rationale against duress and necessity extending to murder is that the criminal law must protect the sanctity of human life and uphold the ‘duty’ of a moral citizen to sacrifice his or her own life when subject to duress or necessity rather than killing an innocent third person. It is argued that killing under duress or necessity cannot be said to be choosing the lesser of two evils, where both innocent lives objectively have the same value.<sup>1173</sup> Where all human life is objectively equal, one cannot be the judge of whose life has more worth and be excused from criminal liability.<sup>1174</sup> The sanctity of life argument holds that choosing to save your own life rather than another’s is never the ‘lesser of two evils’.<sup>1175</sup> This view holds that a person confronted with the choice of killing a blameless person or being killed themselves due to threat of death or serious injury has ‘a duty to sacrifice one’s own life rather than take another’s’.<sup>1176</sup> Indeed, one has a ‘plain and high’ duty to sacrifice your own life instead of killing an innocent person.<sup>1177</sup>

15.2.2 The doctrine of necessity in relation to murder famously arose in the case of *R v Dudley and Stephens*.<sup>1178</sup> Following a shipwreck, two sailors, Dudley and Stephens, were stranded in the ocean without apparent prospects of a rescue. After 18 days in desperation they killed and ate the cabin boy,

<sup>1171</sup> Bernadette McSherry and Bronwyn Naylor, *Australian Criminal Laws: Critical Perspectives* (Oxford University Press, 2004) 553. See also N Mercer, ‘Kill or be Killed’, *The Age*, 18 December 2001, 11; Sean Cowan and Gary Adshead, ‘Violent times in Reign of Bikie Gangs’, *The West Australian* (online), 1 June 2010, <<https://thewest.com.au/news/australia/violent-times-in-reign-of-bikie-gangs-ng-ya-210395>>.

<sup>1172</sup> (2004) 145 A Crim R 108. The issue at trial was one of recognition or identification as the murder was clearly caught on Wright’s security CCTV. ‘The shooting of the deceased was, on any view of it, a cold-blooded and ruthless execution’: at 111 [9] (Miller J).

<sup>1173</sup> Arenson, above n 980, 142.

<sup>1174</sup> See NZLC (2001), above n 22, 70 [213]; Law Reform Commission of Canada, above n 22, 35–36.

<sup>1175</sup> LRCWA, above n 22, 193; *R v Howe* [1987] 2 AC 417, 433 (Lord Hailsham). Common examples given as justification for killing under duress or necessity include: (1) the English Channel ferry disaster where a man frozen with fear on the ladder of the sinking ferry was pushed off so that others could escape and avoid drowning; (2) the hypothetical mountaineer who cuts the rope holding a fellow climber in order to save their own life, over both climbers falling to their deaths: G T Trotter, ‘Necessity and Death: Lessons from *Latimer* and the Case of the Conjoined Twins’ (2003) 40(4) *Alberta Law Review* 817; Bohlander, ‘Taking Human Life and the Defence of Necessity’, above n 1008, 149.

<sup>1176</sup> Victorian Law Reform Commissioner, *Duress, Coercion and Necessity*, Working Paper No 5 (1978) 23 [2.55]. See also VLRC (2004), above n 15, 112 [3.134].

<sup>1177</sup> *R v Dudley and Stephens* [1884] 14 QBD 273, 287–288 (Lord Coleridge CJ). See also Hale, above n 1148.

<sup>1178</sup> (1884) 14 QBD 273.

Parker. A third sailor present refused to participate. The rationale behind their actions was that allegedly all would have died if two had not killed and eaten the cabin boy, and they honestly and reasonably believed that this course of action was the only chance of preserving their lives. This was not accepted as a justification for their actions at trial. Lord Coleridge observed that society sets ‘standards we cannot reach ourselves... [b]ut a man has no right to declare temptation to be an excuse, though he might himself have yielded to it, nor allow compassion for the criminal to change or weaken in any manner the legal definition of the crime.’<sup>1179</sup> No matter the dire situation the sailors found themselves, it was a vital standard of morality that there is no ‘absolute or unqualified necessity to preserve one’s life’.<sup>1180</sup>

15.2.3 The sanctity of life argument from *Dudley and Stephens* (and the main rationale for the present law in relation to both duress and necessity) is widely disputed. It is said that while such sacrifice is morally commendable, it is too demanding a moral (and legal) standard to place on the ordinary person.<sup>1181</sup> It is unrealistic to elevate ‘every person to the status of a hero’ and presume that the ordinary person would ‘always choose to sacrifice his or her own life rather than kill an innocent person’.<sup>1182</sup> As the criminal law accepts reasonable concessions to human frailty as relevant to one’s criminal culpability,<sup>1183</sup> it is held as ‘wrong’ for the criminal law to demand heroism in demanding self-sacrifice.<sup>1184</sup> In 1978, the Victorian Law Reform Commissioner recommended duress be extended to murder based on this reasoning.<sup>1185</sup>

15.2.4 The Law Commission of England and Wales similarly disagreed with the sanctity of life argument:

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<sup>1179</sup> Ibid.

<sup>1180</sup> The jury returned a special verdict and the court sentenced Dudley and Stephens to death (though under no expectation that the sentences would ever be carried out), but their sentences were later commuted amidst much public sympathy to six months’ imprisonment. See further Michael Mallin, ‘In Warm Blood: Some Historical and Procedural Aspects of *R v Dudley and Stephens*’ (1967) 34 *University of Chicago Law Review* 387; A W Brian Simpson, *Cannibalism and the Common Law* (University of Chicago Press, 1984); Glanville Williams, ‘A Commentary on *R v Dudley and Stephens*’, (1977) 8 *Cambrian Law Review* 94. Necessity has been raised in other dire situations. In 1933, for example, the United States submarine *Squalus* was practising a crash dive when the main induction valve failed to close. Water flooded the engine rooms, causing the submarine to sink 200 metres below the water surface to the ocean floor. The captain ordered that the doors to the engine rooms be closed in order to prevent the water from entering the rest of the vessel. However, 26 men were trapped and drowned. The remaining 33 men in other parts of the submarine were eventually rescued. Closing the door trapped the people inside the engine rooms and almost certainly caused their deaths, but it was described as a ‘lesser evil in that it resulted in a net saving of lives’. See John Cohan, ‘Homicide by Necessity’ (2006) 10 *Chapman Law Review* 119, 132. Similarly, in 1987, a ferry (the unfortunately named *Herald of Free Enterprise*) sank in the English Channel. The only escape route available to the trapped passengers was via a rope-ladder. One passenger commenced his descent, but became ‘frozen in panic in the midst of rising waters’, trapping other passengers on the sinking ferry. Another passenger, after repeatedly shouting at him to move, ordered those below him on the ladder to pull him off, because his immobility was seriously jeopardising the safety of all the other passengers. The man was pulled off the ladder, fell into the water, and drowned. The other passengers escaped. The Coroner found that the death was a ‘reasonable act of ... self-preservation ... that also includes in my judgment, the preservation of other lives; such killing is not necessarily murder at all.’ No criminal charges were ever brought. See at 132–133.

<sup>1181</sup> Arenson, above n 980, 139.

<sup>1182</sup> Ibid.

<sup>1183</sup> Ibid 145.

<sup>1184</sup> LRCWA, above n 22, 195.

<sup>1185</sup> Victorian Law Reform Commissioner, above n 1176, 23 [2.57].

[I]t is not only futile, but also wrong, for the criminal law to demand heroic behaviour. The attainment of a heroic standard of behaviour will always count for great merit; but failure to achieve that standard should not be met with punishment by the State.<sup>1186</sup>

15.2.5 It is also asserted that an individual should not be held criminally liable in a situation ‘not of his [or her] own making’, under circumstances of pressure that no ordinary person could resist (and that if one’s will is overborne, the intent element of murder cannot be established).<sup>1187</sup>

15.2.6 It is argued that any murder committed in the extreme circumstances of under duress or necessity is involuntary. The VLRC was adamant that a person should not be held criminally responsible for killing someone if she or he has had to kill owing to external threats or a situation of sudden or extraordinary emergency.<sup>1188</sup> Where a person kills an innocent third person under duress in the form of threat of death or serious injury, ‘it cannot be said, in a moral sense, [that] the person has acted voluntarily’,<sup>1189</sup> as the person’s actions were coerced. While a person who resists those threats may be ‘morally superior’ to someone who complies with the threat, the VLRC was of the view that the criminal law should not label a person as a ‘murderer’ because he or she does not demonstrate the same moral fortitude.<sup>1190</sup> Similarly, when a person facing a sudden or extraordinary emergency is forced to kill, he or she should not be held criminally liable provided he or she acted reasonably.<sup>1191</sup> The Victorian Parliament accepted this approach. During the parliamentary debate, it was noted that it is wrong to hold a person responsible for murder where a person has ‘no realistic choice’ but to kill when under duress or necessity.<sup>1192</sup>

15.2.7 It is asserted that it is ‘illogical’ to exclude only murder and attempted murder.<sup>1193</sup>

15.2.8 The VLRC stated that the suggestion that the threat of a murder conviction deters a person from killing someone as a result of duress or necessity is unrealistic. ‘If a person is really in a desperate situation, it is unlikely he or she will resist the immediate threat because of the prospect of a murder conviction at some time in the future.’<sup>1194</sup> SALRI has previously discussed the application of duress and necessity in the context of family violence<sup>1195</sup> and in the prospect of a murder conviction may be seen as especially unlikely to deter a killing in such a stark situation of family violence as in *Neville*.

15.2.9 Another common fear of extending duress or necessity to murder is ‘it might be made the legal cloak for unbridled passion and atrocious crime.’<sup>1196</sup> Unlike other defences, duress typically relies on facts completely separate from those constituting the offence charged: facts that are likely to only be

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<sup>1186</sup> Law Commission (England and Wales), *Legislating the Criminal Code*, above n 982, 54 [30.11].

<sup>1187</sup> Victorian Law Reform Commissioner (1978), above n 1176, 23 [2.55].

<sup>1188</sup> VLRC (2004), above n 15, xxx.

<sup>1189</sup> *Ibid.*

<sup>1190</sup> *Ibid* xxx-xxxi.

<sup>1191</sup> *Ibid* xxxi.

<sup>1192</sup> Victoria, *Parliamentary Debates*, Legislative Assembly, 6 October 2005, 1289–1397 (Rob Hulls, Attorney-General) 1351–1352. Mr Hulls also noted that in extending the defences, given the value placed on human life, a high threshold must be satisfied, before criminal liability can be excused: at 1351.

<sup>1193</sup> LRCWA, above n 22, 189, 196–197.

<sup>1194</sup> VLRC (2004), above n 15, 117 [3.151]. See also Law Reform Commissioner of Victoria (1980), above n 1114, [2.34].

<sup>1195</sup> See above [14.5.1]–[14.6.10].

<sup>1196</sup> *R v Dudley and Stephen* (1888) 14 QBD 273, 288 (Lord Coleridge).

known to the accused. The defences of necessity and especially duress are said to be easy to raise but difficult to investigate and for the prosecution to disprove beyond reasonable doubt.<sup>1197</sup> This difficulty is exacerbated where the details of the alleged threat (under which the accused was allegedly compelled) are only revealed when the trial is under way.<sup>1198</sup>

15.2.10 This fear is disputed. It is questionable whether in every case the evidence supporting a defence of duress or necessity can only be found in the mind of the accused.<sup>1199</sup> Further, any potential for fabrication in relation to duress is arguably no greater than exists for other defences.<sup>1200</sup> Juries remain as capable of ‘separating fact from fiction’, whether or not duress and necessity extend to murder.<sup>1201</sup> The VLRC concluded in 2004, that the objective test of reasonableness under the *Model Criminal Code* for both duress and emergency ‘will ensure these defences apply only in extreme situations, and prevent them from being raised too readily’.<sup>1202</sup>

15.2.11 One suggestion is that any exceptional circumstances which may make a defendant’s choice to kill appear justifiable, are better left to the sensible exercise of prosecution discretion.<sup>1203</sup> However, a reliance on prosecution discretion has been questioned on the basis of a lack transparency, accountability and the risk of inconsistency and uncertainty.<sup>1204</sup> In *Howe*, Lord Hailsham, while upholding the sanctity of life principle, noted that duress and necessity may be taken into account in sentencing.<sup>1205</sup> However, a reliance on judicial discretion to ensure the sentence reflects the circumstances of the crime has also been questioned.<sup>1206</sup>

15.2.12 New Zealand maintains a statutory defence of duress<sup>1207</sup> and a common law defence of necessity.<sup>1208</sup> Neither defence extends to murder or attempted murder.<sup>1209</sup> The New Zealand Law Commission has recommended that duress or necessity should not extend to murder or attempted murder.<sup>1210</sup> The Commission concluded that the law must prevent an accused from escaping criminal liability for killing based on the subjective value judgment that their life (or the life of a loved one) has

<sup>1197</sup> *R v Hasan* [2005] 2 WLR 709, 716 [20]. One of the authors can confirm from prosecution practice in London that this fear is not fanciful.

<sup>1198</sup> *Ibid.*

<sup>1199</sup> LRCWA, above n 22, 194.

<sup>1200</sup> *Ibid.*

<sup>1201</sup> Arenson, above n 980, 140; *R v Howe* [1987] 2 AC 417, 434.

<sup>1202</sup> VLRC (2004), above n 15, 120 [3.163]. See also LRCWA, above n 22, 194, 199.

<sup>1203</sup> NZLC (2001), above n 22, 70–71 [214]. The NZLC gave the example of the English Channel ferry disaster as an exceptional circumstance in which the defendant’s choice to kill may be seen as justifiable: at 70–71 [214]. See also above n 1180.

<sup>1204</sup> LRCWA, above n 22, 194; Law Commission (England and Wales), *Legislating the Criminal Code*, above n 982, 54 [30.14].

<sup>1205</sup> *R v Howe* [1987] AC 417, 433. See also VLRC (2004), above n 15, 112 [3.134]; Caruso et al, above n 355, 390 [11.20].

<sup>1206</sup> Arenson, above n 980, 142; Bohlander, ‘Taking Human Life and the Defence of Necessity’, above n 1008, 149. It should also be noted that given the mandatory sentence of life imprisonment for murder and the mandatory minimum non-parole period of 20 years for murder in South Australia, there is very limited room for discretion under the present law. See further above Part 11.

<sup>1207</sup> *Crimes Act 1961* (NZ) s 24(1).

<sup>1208</sup> *Kapi v Ministry of Transport* [1992] 1 NZLR 227; *R v Hutchinson* [2004] NZAR 303.

<sup>1209</sup> *Crimes Act 1961* (NZ) s 24(2)(e) (duress); *Kapi v Ministry of Transport* [1992] 1 NZLR 227 (necessity).

<sup>1210</sup> NZLC (2001), above n 22, 60–78.

greater value than that of the person killed.<sup>1211</sup> The Commission further noted that where homicide seems justifiable under duress or necessity, ‘sensible’ prosecutorial discretion may take account of these circumstances.<sup>1212</sup>

15.2.13 As in New Zealand, neither the statutory defence of duress nor the common law defence of necessity extends to murder or attempted murder in Canada.<sup>1213</sup> The Law Reform Commission of Canada has recommended that neither defence should extend to murder or attempted murder,<sup>1214</sup> arguing in a similar manner to the New Zealand Law Commission, that an accused cannot place the value of their own life before that of the person to be killed.<sup>1215</sup>

15.2.14 The LRCWA concluded that both duress<sup>1216</sup> and necessity<sup>1217</sup> should extend to murder. The LRCWA believed ‘that it is necessary that the criminal law provides for the possibility that in extreme circumstances an accused should not be held criminally responsible for killing under duress.’<sup>1218</sup>

### 15.3 SALRI’s Views and Conclusions

15.3.1 SALRI reiterates that the extension of duress and necessity to murder raises complex moral and legal issues.<sup>1219</sup> SALRI accepts that the present situation is problematic and that valid arguments can be presented to extend duress and necessity to murder as they are in Victoria, notably in the context of family violence. Many authors<sup>1220</sup> and law reform agencies<sup>1221</sup> are critical of the rule that precludes duress and necessity from applying to murder and have argued that duress and necessity should extend to murder. Where a person acts under duress or necessity, they do act in a real sense morally involuntarily.<sup>1222</sup>

15.3.2 It may be arbitrary and inconsistent that duress and necessity are available as a complete defence for every offence apart from murder and attempted murder. However, SALRI highlights the complex moral, legal and policy questions involved within this question and that overturning over a

<sup>1211</sup> Ibid 70 [213].

<sup>1212</sup> Ibid 70–71 [214].

<sup>1213</sup> *Criminal Code*, RSC 1985, c C-46, s 17 (duress); *R v Perka* [1984] 2 SCR 232 (necessity).

<sup>1214</sup> Law Reform Commission of Canada, above n 22, 35–36.

<sup>1215</sup> Ibid. However, there has been suggestion that the statutory exclusion of duress to murder may be at risk of being struck down in Canada as unconstitutional (*R v Ryan* [2013] 1 SCR 14, [83]–[84]). The Court of Appeal of Ontario has declared the exclusion of murder from applying to duress is unconstitutional: *R v Aravena* [2015] ONCA 250.

<sup>1216</sup> LRCWA, above n 22, 199.

<sup>1217</sup> Ibid 200.

<sup>1218</sup> Ibid 199. See also Criminal Law Committee, *General Principles of Criminal Responsibility*, above n 1090, 65.

<sup>1219</sup> SALRI, Stage 1, above n 10, 92 [10.1.4]. See also George Christie, ‘The Defence of Necessity Considered from the Legal and Moral Points of View’ (1999) 48 *Duke Law Journal* 975.

<sup>1220</sup> See, for example, Arenson, above n 980; Cross, above n 980; Gur-Arye, above n 1154; Yeo, above n 980.

<sup>1221</sup> See, for example, Law Commission (England and Wales), *Defences of General Application*, above n 892, 15 [2.43]–[2.44]; Law Reform Commissioner of Victoria, above n 1114, 16 [2.15] (duress) and 36 [3.33] (necessity); Law Reform Commission of Victoria (1991), above n 97, 106 [244], Recommendation 31; Criminal Law Officers Committee, *General Principles of Criminal Responsibility*, above n 1090, 64–67; LRCWA, above n 22, 193–198; VLRC (2004) above n 15, 117–118 [3.150]–[3.153]; Law Commission (England and Wales), *Legislating the Criminal Code*, above n 982, 56–58 [31.1.]–[31.8]; Law Commission (England and Wales), *Murder, Manslaughter and Infanticide*, above n 148, 117 [6.28], 119–127 [6.36]–[6.72].

<sup>1222</sup> Law Commission (England and Wales), *Defences of General Application*, above n 892, [2.22]; VLRC (2004), above n 15, 117 [3.150].



century of established law and policy as reflected in cases such as *Dudley and Stephens* and *Howe* should not be lightly undertaken. It could be suggested that these are issues for Parliament.

15.3.3 SALRI is also concerned at the potential for misuse of such a defence.<sup>1223</sup> The LRCWA was convinced that ‘in practical terms, it is unlikely that the defence would ever be successfully raised in a murder trial’.<sup>1224</sup> SALRI notes the fear that were duress or necessity to extend to murder, ‘it might be made the legal cloak for unbridled passion and atrocious crime.’<sup>1225</sup> SALRI is aware of the risks of too relaxed a test for duress and necessity, especially if these defences were extended to murder. Such risks also extend to the context of family violence.<sup>1226</sup> Just as people who kill in the context of family violence ‘clearly should not have an automatic claim to self-defence,’<sup>1227</sup> caution needs to be taken in relation to duress or necessity.

15.3.4 SALRI accepts that, although valid arguments can be presented to extend duress and necessity to murder and attempted murder (especially in a family violence context), such an extension raises complex and ultimately intractable issues of law, morality and policy. SALRI agrees with the views of both the NZLC and the Canadian Law Reform Commission that necessity and duress should not extend to murder. It is not for the criminal law to excuse criminal liability where one person places the value of their life, or the life of a loved one (a value subjectively determined by any accused) over the life of an innocent other. In line with this principle, the defences of duress and necessity should not be extended to murder (and attempted murder). SALRI notes that duress is not available as a defence to murder in Queensland, Tasmania, South Australia, NSW, England, Ireland, Canada and New Zealand.

15.3.5 SALRI also notes that the flexibility in sentencing recommended in this Report also partly addresses any concern at the likely very rare event that an offender, especially in the context of family violence, has a valid claim of duress or necessity (and is unsuccessful in raising either self-defence or excessive self-defence) and is compelled to resort to murder. Such a fact can be properly taken into account in sentencing<sup>1228</sup> (assuming SALRI’s recommendations in respect of greater flexibility in sentencing for murder as discussed in Part 11 are accepted).

<sup>1223</sup> See also above [14.8.8]–[14.8.19].

<sup>1224</sup> LRCWA, above n 22, 198. See also VLRC (2004), above n 15, 120 [3.163].

<sup>1225</sup> *R v Dudley and Stephen* (1888) 14 QBD 273, 288 (Lord Coleridge).

<sup>1226</sup> The law clearly should not allow killings, even by abused spouses, in retaliation or revenge to amount to self-defence, duress or necessity. As was observed in the Canadian case of *R v Craig* (2011) 276 OAC 117, [35] (Doherty JA) in relation to the Canadian law of self-defence in a family violence context: ‘Not every killing by an abused person in response to prolonged abuse is justified under the self-defence provisions of the *Criminal Code*. Self-defence is a justification for what would otherwise be culpable homicide, based on the necessity of self-preservation. It is a recognition that in the circumstances described in the various self-defence provisions of the *Criminal Code* society accepts that a person is justified in killing another to save one’s self. A person who kills another to escape from a miserable life of subservience to that person does not act in self-defence absent reasonably perceived threats of significant physical harm and reasonably held beliefs that the killing is necessary to preserve one’s self from significant physical harm or death.’ See also, *The Queen v R* (1981) 28 SASR 321, 325–326 (King CJ): ‘The law of a well-ordered and civilized society cannot countenance deliberate killing, even to the extent of treating it as extenuated, as a response to the conduct of another however abhorrent that conduct might be. Nor can society countenance killing as a means of averting some apprehended harm in the future.’

<sup>1227</sup> VLRC (2004), above n 15, 68 [3.28].

<sup>1228</sup> See, for example, *R v P, LJW* [2007] SASFC 361 (12 October 2007), [31]–[40], [68]–[71]. See also Caruso et al, above n 355, 390 [11.20].

15.3.6 The question of whether duress should apply to attempted murder is not simple.<sup>1229</sup> The trial judge in *Qaumi*<sup>1230</sup> agreed with the dissenting view of Lord Keith in *Gotts* that murder is ‘special’ and duress could and should be available as a defence to attempted murder:

There is much to be said in favour of the view that the generally accepted wisdom then was that the defence [of duress] was only withheld in cases of murder and treason. Murder is in a category of its own. The fact that it involves the actual destruction of life makes its nature special.<sup>1231</sup>

15.3.7 SALRI disagrees with this view. It would be inconsistent to have one rule for murder and another for attempted murder.<sup>1232</sup> As the English Law Commission observed, ‘Attempted murder requires an intention to kill, and it thus could not be logical to deny the defence for the full offence but to allow it for the attempt.’<sup>1233</sup> SALRI recommends that duress and necessity should not extend to murder or attempted murder.

15.3.8 SALRI considers that if statutory provision is made for duress, it should also be made for necessity. It would also be inconsistent to have one rule for duress and another for necessity.<sup>1234</sup>

15.3.9 SALRI has also considered whether as a compromise position, a new partial defence of manslaughter owing to the presence of duress or necessity, especially in a family violence context, might be of benefit. This suggestion has been made.<sup>1235</sup> The rationale for this is similar to the partial defence of provocation. A defendant should be held responsible for the voluntary taking of a life, but the crime and penalty should recognise the difficult situation that those who fall under duress (or necessity) are placed in.<sup>1236</sup>

15.3.10 SALRI does not support such a new partial defence. The utility of such a new partial defence is doubtful and gives rise to problems of policy and practice.<sup>1237</sup> It could have the undesirable effect of replacing one partial defence, provocation, with another, and a new partial defence is likely to draw the same criticism as provocation for being too complex and potentially having unintended application.

15.3.11 SALRI concludes that duress and necessity should not extend to murder or attempted murder.

15.3.12 Recommendation:

#### **Recommendation 17**

SALRI recommends that the defences of duress and necessity (or sudden or extraordinary emergency) should not extend to murder or attempted murder.

<sup>1229</sup> See also above [15.1.14].

<sup>1230</sup> *R v Qaumi & Ors (No 64)* [2016] NSWSC 1269 (13 September 2016), [25]–[39].

<sup>1231</sup> *R v Gotts* [1992] 2 AC 412, 418 (Lord Keith).

<sup>1232</sup> The Western Australian DPP noted that it was inconsistent to exclude murder but include attempted murder in the defence. See LRCWA, above n 22, 189 n 70.

<sup>1233</sup> Law Commission (England and Wales), *Legislating the Criminal Code*, above n 982, 58 [32.1].

<sup>1234</sup> LRCWA, above n 22, 184.

<sup>1235</sup> See, for example, Victorian Law Reform Commissioner (1978), above n 1176, 24 [2.58], 27 [2.68]; *R v Howe* [1986] QB 626, 641 (Court of Appeal); Paul Fairall and Stanely Yeo, *Criminal Defences in Australia* (4th ed) (Lexis Nexis Butterworths, 2005) 155 [8.50].

<sup>1236</sup> Law Reform Commission of Ireland, above n 1051, 82 [3.86]. See also LRCWA, above n 22, 197.

<sup>1237</sup> LRCWA, above n 22, 197; Law Commission (England and Wales), *Legislating the Criminal Code*, above n 982, 55–56 [30.17]–[30.22], 58 [32.1].

## Part 16 – Killing for Preservation in an Abusive Domestic Relationship

16.1.1 The Stage 1 Report did not consider the merits and operation of the Queensland partial defence of killing for preservation in an abusive domestic relationship set out in s 304B of the *Criminal Code 1899* (Qld). SALRI stated it would examine the operation of the Queensland defence of killing for preservation in an abusive domestic relationship and the extent to which its initial operation has achieved its aim of improving legal responses for persons who kill in response to prolonged family violence.<sup>1238</sup>

16.1.2 Section 304B acts as a partial defence to reduce what would otherwise be murder to manslaughter for a person who reasonably believed that it was necessary for self-preservation to use lethal force in a seriously abusive domestic relationship.<sup>1239</sup> The defence applies where (1) the deceased has committed acts of serious domestic violence against the accused in an abusive domestic relationship, (2) the accused believed it was necessary for their preservation from death or grievous bodily harm to kill the deceased, and (3) there were reasonable grounds for such a belief.<sup>1240</sup> An abusive domestic relationship is defined as a domestic relationship involving a history of acts of serious domestic violence.<sup>1241</sup> The reasonableness of an accused's belief is determined with regard to the abusive domestic relationship and 'all circumstances of the case.'<sup>1242</sup> The defence may apply even if the accused acted in response to an act of family violence that, viewed in isolation from the abusive history, would not warrant the accused's response.<sup>1243</sup>

16.1.3 This defence was introduced in February 2010 to address concerns relating to family violence in response to a Report by two Bond University academics commissioned by the Queensland Government (the 'Bond Report').<sup>1244</sup> This Report was promoted by the recommendation of the Queensland Law Reform Commission to consider the creation of a separate defence for victims of family violence:

Rather than distort the defence of provocation in an attempt to accommodate the position of a battered person who kills in desperation, the Commission recommends that consideration be given, as a matter of priority, to the development of a separate defence for battered persons which reflects the best current knowledge about the effects of a seriously abusive relationship on a battered person, ensuring that the defence is applicable to an adult or a child and is not gender-specific.<sup>1245</sup>

<sup>1238</sup> SALRI, Stage 1, above n 10, 54–55 [6.4.1]–[6.4.3].

<sup>1239</sup> *Criminal Code 1899* (Qld) s 304B.

<sup>1240</sup> *Ibid.*

<sup>1241</sup> *Ibid* s 304B(2). 'Domestic violence' is given the same meaning as in s 8 of the *Domestic and Family Violence Protection Act 2012* (Qld); The use of the word 'serious' in relation to domestic violence 'is used as a matter of emphasis to place the nature of the domestic violence in the Supreme Court murder trial in context': Queensland, *Parliamentary Debates*, Legislative Assembly, 26 November 2009, 3670 (Cameron Dick, Attorney-General and Minister for Industrial Relations).

<sup>1242</sup> *Criminal Code 1899* (Qld) s 304B(1)(c).

<sup>1243</sup> *Ibid* s 304B(4).

<sup>1244</sup> Geraldine Mackenzie and Eric Colvin, *Homicide in Abusive Relationships: A Report on Defences* (6 July 2009). See also QLRC, above n 27, 500 Rec [21.4].

<sup>1245</sup> QLRC, above n 27, 491 [21.138]. See also at: 501 Rec 21-4.

16.1.4 The new partial defence sought to address the concerns about the inadequacy of legal options to persons, typically women, who kill in response to family violence, as experience ‘demonstrates that victims of seriously abusive relationships often offend in circumstances that fall outside the operation of existing defences like self-defence and provocation because of their experiences within the seriously abusive relationships’.<sup>1246</sup> The new defence was also intended to provide courts with more flexibility and reduce an offence of murder to manslaughter, allowing greater sentencing discretion.<sup>1247</sup>

16.1.5 The rationale of the new Queensland partial defence is explained by Douglas:

In theory at least, what distinguishes this defence from existing defences of self-defence and provocation in Queensland is that the preservation defence does not rely on the accused person responding to a specific assault or imminent threat from the deceased person and there is no emphasis on the timeframe between the actions of the deceased and the killing by the accused person ... In practice, however, judicial developments in Queensland self-defence law, accentuated subsequent to the reforms, suggest that the role of the preservation defence may be extremely limited. The reforms did not include a specific evidentiary provision.<sup>1248</sup>

16.1.6 The new Queensland partial defence, despite its laudable intentions, met with academic concern.<sup>1249</sup> Several commentators expressed caution about the unintended consequences of creating new legal categories.<sup>1250</sup> Commentators argued that the reform also failed to address the problematic requirement for victims of family violence for a specific ‘triggering’ assault to establish self-defence.<sup>1251</sup> Michelle Edgely and Elena Marchetti have been especially critical of the Queensland defence.<sup>1252</sup> Describing it as ‘ineffective’,<sup>1253</sup> Edgely and Marchetti argue that the introduction of this abuse-specific partial defence further entrenches gender bias in the operation of defences to homicide and may also impede women’s access to the preferable and complete defence of self-defence.<sup>1254</sup> Edgely and Marchetti also criticise the defence in failing to extend to such killings as protection of a third party such as a child, whereas the protection of a third party is included under self-defence.<sup>1255</sup> Other commentators have questioned the extent to which the partial defence will ever be used in practice, including Professor Heather Douglas whose analysis of the few Queensland cases to date has noted an initial trend towards employing the complete defence of self-defence as opposed to the new partial defence.<sup>1256</sup>

16.1.7 The Queensland legal profession and others in comments to the Bond Report preferred a separate partial defence for killing in an abusive domestic relationship, rather than changes to self-

<sup>1246</sup> Queensland, *Parliamentary Debates*, Legislative Assembly, 26 November 2009, 3669.

<sup>1247</sup> Queensland, *Parliamentary Debates*, Legislative Assembly, 26 November 2009, 3669. Queensland maintains a mandatory life imprisonment for murder. See above [11.8.8]–[11.8.9].

<sup>1248</sup> Douglas, above n 129, 374.

<sup>1249</sup> Michelle Edgely and Elena Marchetti, ‘Women who Kill their Abusers: How Queensland’s New Abusive Domestic Relationships Defence Continues to Ignore Reality’ (2011) 13 *Flinders Law Journal* 125.

<sup>1250</sup> See, for example, Douglas, above n 129; Anthony Hopkins and Patricia Easteal, ‘Walking in Her Shoes: Battered Women Who Kill in Victoria, Western Australia and Queensland’ (2011) 35 *Alternative Law Journal* 132.

<sup>1251</sup> Edgely and Marchetti, above n 1249, 140.

<sup>1252</sup> *Ibid* 125.

<sup>1253</sup> *Ibid*.

<sup>1254</sup> *Ibid* 153; Hopkins and Easteal, above n 1250, 132–137.

<sup>1255</sup> Edgely and Marchetti, above n 1249, 152. Cf *R v Rose* (1883) 15 Cox CC 540; *R v Duffy* [1967] 1 QB 63.

<sup>1256</sup> Douglas, above n 129.

defence, fearing that extending the scope of self-defence could allow the acquittal of ‘unmeritorious defendants’.<sup>1257</sup> A fear is that extended self-defence might even translate into ‘open season’ on abusive spouses.<sup>1258</sup>

16.1.8 The Queensland defence of killing for preservation has proved something of a dead letter. Since its introduction, it has been raised in only a few cases and it does not seem to have been employed to date.<sup>1259</sup> Indeed, the rationale of the defence seems unnecessary given the expansive interpretation of the defence of self-defence in the 2010 Queensland case of *R v Falls*.<sup>1260</sup>

16.1.9 In *Falls*,<sup>1261</sup> Susan Falls had been subjected to extensive family violence from her abusive husband and he finally threatened to kill their young son. Ms Falls drugged her abusive husband, waited for him to fall unconscious and then shot him twice in the head.<sup>1262</sup> She asserted that she did so to protect her infant son.<sup>1263</sup> She raised both self-defence and the partial defence of killing for preservation at trial.

16.1.10 Despite the strict need for a specific assault to rely on self-defence, which was not present,<sup>1264</sup> Ms Falls was found not guilty at trial and fully acquitted on the basis of self-defence.<sup>1265</sup> Applegarth J directed the jury that to satisfy self-defence, there need not be an actual or imminent assault.<sup>1266</sup> Rather, it was sufficient that there was an ongoing possibility that an assault could happen at any time, and inevitably will, happen in the future based on a consideration of the dangerous nature of the relationship, including the repetitive nature of the violence and the level of entrapment felt by the victim.<sup>1267</sup> The possibility of an assault continues even when the deceased abuser is ‘temporarily unable to carry out the threat’ (as in *Falls* where the deceased was unconscious). Applegarth J also directed the jury that the level of danger posed to the defendant and the proportionality of the response to the threat is to be determined by what is reasonable for a person to have done in a similar situation to the defendant (that is, with a similar history of abuse). Applegarth J further noted that merely because s 304B was introduced for the explicit purpose of providing a defence for victims of family violence

<sup>1257</sup> Mackenzie and Colvin, above n 1244, 9, 25 [3.2], 32 [3.30]. See also SALRI, Stage 1, above n 10, 84 n 609.

<sup>1258</sup> Tristan Swanwick, ‘Warning Over Susan Falls Acquittal: “It’s Not Open Season on Abusive Husbands”’, *The Australian* (online), 4 June 2010, <<http://www.theaustralian.com.au/archive/news/warning-over-susan-falls-acquittalits-not-open-season-on-abusive-husbands/newsstory/f0fef8a600fefca8e1ccf11ead533c0c>>. See also above n 1226.

<sup>1259</sup> Crofts and Tyson, above n 75, 864.

<sup>1260</sup> *R v Falls* (Unreported, Supreme Court of Queensland, Applegarth J, 2–3 June 2010) discussed in detail in Elizabeth Sheehy, Julie Stubbs and Julia Tolmie, ‘Securing Fair Outcomes for Battered Women charged with Homicide: Analysing Defence Lawyering in *R v Falls*’ (2014) 38 *Melbourne University Law Review* 666.

<sup>1261</sup> See further Sheehy, Stubbs and Tolmie, ‘Securing Fair Outcomes’, above n 1260; Edgely and Marchetti, above n 1249, 141–148.

<sup>1262</sup> Sheehy, Stubbs and Tolmie, ‘Defences to Homicide for Battered Women’, above n 108, 481.

<sup>1263</sup> Edgely and Marchetti, above n 1249, 145.

<sup>1264</sup> *Ibid* 147.

<sup>1265</sup> The jury after a two week trial, only took two hours to find Ms Falls not guilty. See *Ibid* 148.

<sup>1266</sup> Sheehy, Stubbs and Tolmie, ‘Securing Fair Outcomes’, above n 1260, 675–678. This approach accords with the self-defence model in Victoria (*Crimes Act 1958* (Vic) ss 322K–322N). See also as recommended for South Australia by SALRI (SALRI, Stage 1, above n 10, Rec 5, xiii–xiv).

<sup>1267</sup> Sheehy, Stubbs and Tolmie, ‘Securing Fair Outcomes’, above n 1260, 675–678. In providing this definition of assault, Applegarth J developed the reasoning of *R v Stjernquist* (Unreported, Cairns Circuit Court, Derrington J, 18 June 1996), *R v Secretary* (1996) 86 A Crim R 119, *R v MacKenzie* (2000) QCA 324 (11 August 2000). See also Douglas, above n 129, 376–377.

who kill, this did not mean that other defences such as self-defence are unavailable as s 304B was intended to supplement, not replace, other defences.<sup>1268</sup>

16.1.11 The more expansive definition of self-defence applied in *Falls* is likely to allow more victims of family violence who kill their abusers to rely on the complete defence of self-defence.<sup>1269</sup> In the case of *R v Irsigler*,<sup>1270</sup> for example, self-defence was successfully raised by a woman who killed her abusive husband (though this was in more a ‘traditional’ self-defence scenario than in *Falls*). Michele Irsigler and her daughter were held hostage by Irsigler’s abusive husband for three days. She escaped, but returned later with a friend to collect her belongings. The husband set upon Michele’s friend and Michele shot him. In the only other cases that have raised s 304B since its introduction, diminished responsibility was successfully argued once,<sup>1271</sup> and in two cases the defendants were convicted of murder.<sup>1272</sup>

16.1.12 Given the broad interpretation of self-defence applied in *Falls*, the utility of the Queensland defence is limited. Victims of family violence who resort to lethal violence are likely to be better accommodated (and to rely upon) the full defence of self-defence rather than the partial Queensland defence. Even where the lethal response of a victim of family violence response is deemed unreasonable,<sup>1273</sup> the existence of a partial defence of excessive self-defence, as in South Australia,<sup>1274</sup> as a ‘fall-back’ for family abuse victims, renders any Queensland style partial defence otiose and unnecessary. SALRI suggests that improving legal responses for victims of family violence who kill in response to such abuse is unlikely to be achieved under the Queensland defence, but rather through a combination of a revised self-defence model, retention of the existing partial defence of excessive self-defence and linked changes such as explicit legislative provision for the use of social framework evidence as to the nature and effect of family violence.

16.1.13 SALRI notes that the VLRC was unconvinced of the merit of a Queensland style defence:

In the Commission’s view, the focus of reforms in this area should be on ensuring self-defence properly accommodates women’s experiences, rather than on creating a special defence for women who kill in response to family violence. We believe it is possible to ensure that self-defence is defined and understood in a way that takes adequate account of women’s experiences of violence through reforms to evidence and clarification of the scope of the defence. For this

<sup>1268</sup> *R v Falls* (Unreported, Supreme Court of Queensland, Applegarth J, 2-3 June 2010) 14 cited in Sheehy, Stubbs and Tolmie, ‘Securing Fair Outcomes,’ above n 1260, 671, n 19; Edgely and Marchetti, above n 1249, 148.

<sup>1269</sup> While there have not been many cases after *Falls* to apply Applegarth J’s approach, the expansive interpretation of self-defence is consistent with other cases that have taken a similar broad approach to killings in abusive domestic relationships, suggesting a potential common judicial approach: see Douglas, above n 129, 376–377; Edgely and Marchetti, above n 1249, 136–137, 170–171.

<sup>1270</sup> *R v Irsigler, Pilkington & Bundesan* (Unreported, Supreme Court of Queensland, Mullins J, 24 February 2012) cited in Douglas, above n 129, 375.

<sup>1271</sup> *R v Ney* (Unreported, Supreme Court of Queensland, Dick AJ, 8 March 2011) cited in Douglas, above n 129, 374–375.

<sup>1272</sup> *R v Jones* [2015] QCA 161 (1 September 2015); *R v Gaskell* [2016] QCA 302 (18 November 2016).

<sup>1273</sup> For example, where an abusive relationship has ‘skew[ed] a woman’s assessment of a violent situation’ so that her belief in the need of lethal force is not reasonable even in the abusive context; see Kellie Toole, ‘Defensive Homicide on Trial in Victoria’ (2013) 39(2) *Monash University Law Review* 473, 483.

<sup>1274</sup> *CLCA* s 15(2). Excessive self-defence is also available in NSW (*Crimes Act 1990* (NSW) s 421) and Western Australia (*Criminal Code 1913* (WA) s 248).

reason, the Commission recommends against the introduction of a new defence for people who kill in response to family violence.<sup>1275</sup>

16.1.14 SALRI agrees with the view of the VLRC as supported by the operation of the Queensland defence to date. SALRI considers that the Queensland defence is unnecessary in a South Australian context.

16.1.15 Recommendation:

**Recommendation 18**

SALRI recommends that the Queensland partial defence of killing for preservation in an abusive domestic relationship set out in s 304B of the *Criminal Code 1899* (Qld) is inappropriate and should not be adopted in South Australia.

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<sup>1275</sup> VLRC (2004), above n 15, 68 [3.26].

## Part 17 – Cultural Change

17.1.1 As early as 1993, Yeo commented of the importance of education and cultural change to ensure effective legal reform: ‘The task ahead then is for judges, lawyers, and indeed the general community, to be educated to displace their male stereotypical perceptions of defence situations and to adopt perceptions which integrate women’s circumstances and experiences.’<sup>1276</sup>

17.1.2 This theme has been emphasised to SALRI. A consistent theme that has emerged in SARI’s consultation is the importance of education and cultural change. Her Honour Judge Lees of Snaresbrook Crown Court in London highlighted to SALRI the importance of cultural change and that any legislative reform in areas such as family violence, addressing gender bias or improving the situation of vulnerable parties will only prove effective if it is accompanied by the necessary training and cultural changes, especially amongst lawyers and judges. Consultees similarly stated to SALRI that any legislative reforms in the area of family violence should be accompanied by education of legal practitioners, the judiciary and community groups to ensure that any reforms have the maximum impact in practice and can effectively assist victims of family violence, including women who kill those who commit family violence against them.<sup>1277</sup> The importance of training and education for judicial officers, the legal profession and investigators about the nature and dynamics of family violence (and to help counter some of the many myths and misconceptions in this area)<sup>1278</sup> was expressed, notably by specialist family violence groups.

17.1.3 It was noted to SALRI that, changing the law, whilst an important and welcome measure, is not necessarily enough to bring about real change in practice. The NSW Select Committee similarly noted that the success of such proposals ‘rely heavily on their acceptance by key players in the criminal justice system’.<sup>1279</sup> The NSW Select Committee quoted the following comments of Professor Stubbs: ‘The difficulty is that whatever you come up with you will need to persuade the legal profession to come on board. [The effectiveness of any] recommendation you make ... will depend very much on how the legal profession interprets and applies this. Having them on board is very important.’<sup>1280</sup>

17.1.4 In 2004, the VLRC examined the importance of education and training for the judiciary, legal profession and police in the nature and dynamics of family violence.<sup>1281</sup> The VLRC supported such education<sup>1282</sup> and viewed it as:

essential to the effective operation of defences and informed decisions being made concerning pleas and sentencing. The issue of legal education goes beyond whether defence lawyers and members of the judiciary understand the relevance of a history of violence to self-defence — the dynamics and nature of family violence, and social circumstances of people in violent

<sup>1276</sup> Yeo, ‘Resolving Gender Bias in Criminal Defences’, above n 14, 116.

<sup>1277</sup> Australian Law Reform Commission/NSW Law Reform Commission (ALRC/NSWLRC), *Family Violence – A National Legal Response*, Report 118 (2011) 651 [14.99]–[14.102]; NZLC (2016), above n 145, 7 Recs 1–4.

<sup>1278</sup> See VLRC (2004), above n 15, 161–169, for a summary of some of these common misconceptions.

<sup>1279</sup> NSW Select Committee, above n 15, 188 [8.146].

<sup>1280</sup> Professor Stubbs, Evidence, 28 August 2012, 58–59, quoted by NSW Select Committee, above n 15, 188 [8.146].

<sup>1281</sup> VLRC (2004), above n 15, 194–199 [4.153]–[4.168].

<sup>1282</sup> Ibid 202 Recs 35–36. See also Danielle Tyson et al, ‘The Effects of the 2005 Reforms on Legal Responses to Women who kill Intimate Partners’ in Kate Fitz-Gibbon and Arie Freiberg (eds) *Homicide Law Reform in Victoria: Retrospect and Prospects* (Federation Press, 2015) 76, 92–93; NZLC (2016), above n 145, 7 Recs 1–4.



relationships, are generally not well understood. Professional education may assist to overcome the myths and stereotypes that we all share, and increase understanding by legal practitioners and judges about the nature of violent relationships and their long-term effects.<sup>1283</sup>

17.1.5 Any laws, as the 2016 Victorian Royal Commission commented, will only be as effective as those who enforce, prosecute and apply them. Improving these practices — through education, training and embedding best practice and family violence expertise in the courts — is likely to be more effective than simply creating new offences<sup>1284</sup> (or defences).

17.1.6 SALRI concurs with these sentiments.

17.1.7 Recommendation:

### **Recommendation 19**

SALRI recommends that, consistent with its Stage 1 Report, the South Australian Government develop and implement an education package targeting the legal sector and the community more broadly on the nature and dynamics of family violence.

<sup>1283</sup> VLRC (2004), above n 15, 199–200 [4.169]. The VLRC (at 202 Rec 36) noted such professional training on family violence could aim to assist judges and lawyers ‘to understand the nature of family violence and could include discussion of issues such as: common myths and misconceptions about family violence; the nature and dynamics of abusive relationships; the social context in which family violence occurs; barriers to disclosure of abuse and seeking the assistance of police and other service agencies, including the additional barriers faced by persons who are Indigenous, from a culturally and linguistically diverse background, who live in a rural or remote area, who are in a same-sex relationship, who have a disability and/or have a child with a disability; the emotional, psychological and social impact of family violence; the relationship between family violence and other offences, including murder and manslaughter; how expert evidence about family violence may assist in supporting a plea of self-defence or duress [or necessity] and the use of expert reports on family violence in sentencing.’

<sup>1284</sup> Victorian Royal Commission, above n 76, 27.

## Part 18 – Conclusion

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18.1.1 This Report concludes SALRI’s reference into its examination of LGBTIQ and gender discrimination in South Australia. This has proved a major Report and an important and involved reference.

18.1.2 SALRI is grateful for all the parties who kindly contributed to the research and writing of this Report, including the input of the Law Reform class at Adelaide University. SALRI is grateful for the input of Amy Teakle to duress, necessity and marital coercion and Lucy Line to diminished responsibility. SALRI is particularly grateful for the valuable input of the Hon David Bleby QC and Megan Lawson to the important but complex Sentencing part of this Report.

18.1.3 This reference has enabled SALRI to hear a wide range of views from interested parties and the community about the most appropriate way to provide for a modern and effective and above all fair and non-discriminatory legal system. SALRI has been struck by the considered and generous participation of the many individuals, interested parties and organisations in the preparation of both this Report and its previous reports as part of this reference. SALRI is especially grateful to all those who have shared their personal stories. SALRI has heard many frank and compelling accounts in its consultation.

18.1.4 SALRI wishes to thank the South Australian community for engaging so thoughtfully and generously with this entire reference, and for sharing personal stories of how these laws impact their lives and families

## Appendix 1 – Minutes of Roundtable – May 2017



### Welcome and Overview

*Participants were welcomed and reminded about Chatham House rules. The process for reporting on the Roundtable was described. It was noted that attendees should not refer to private material that is not in the public domain and any such material won't be included in any Report.*

Overview provided of SALRI's Stage 1 work on the partial defence of provocation:

- Part of broader LGBTIQ reference that included extensive consultation with community to identify areas of priority for reform and has culminated in six separate Law Reform Reports to date.
- Provocation identified as a priority area for reform – has clearly discriminatory elements (including 'gay panic'/non-violent heterosexual advance aspect).
- Clear position coming out of Stage 1 was that all the discriminatory aspects of provocation must be removed including gay panic and gender.

SALRI also alive to range of other issues and concerns arising from the partial defence. For this reason, a widening of the initial reference was sought from the Attorney-General in order for SALRI to consider the partial defence in more detail (including sentencing). This is 'Stage 2' of the process.

Stage 2 requires consideration of a range of technical and legal issues relating to sentencing, the appropriateness of other existing offences and whether alternative models of defences applied in other States have relevance for South Australia.

### In principle views on whether the partial defence of provocation should be abolished

*Roundtable participants were asked for their in-principle views as to whether (or in what circumstances) the partial defence of provocation should be abolished.*

Different views were expressed.

A number of contributors expressed the view that if provocation was abolished consideration would need to be given to enacting specific protections for: victims of family violence; people committing a homicide in circumstances of extreme provocation; and people with cognitive disabilities.

Some attendees supported retention of the current provocation law but accepted that, if it is abolished, there would need to be significant changes to the present law to import more flexibility to the current sentencing law. For many contributors, the abolition of provocation would be more attractive if accompanied by sentencing reform, or at least changes to increase flexibility when it comes to imposing

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sentences for murder where exceptional or extraordinary circumstances apply. For a number of contributors, sentencing reform was considered necessary before support could be given to the abolition of provocation.

A number of other participants expressed the view that the partial offence should be abolished, citing a range of serious shortcomings with the existing law. It was also noted that sentencing flexibility was a preferable vehicle.

### In-principle views on what changes should be made to current sentencing laws if the partial defence of provocation was abolished

*There was an introduction of the issues relating to provocation and mandatory minimum sentences for murder noting that:*

The partial defence reflects a perception of a less blameworthy killing than murder.

The penalty for murder in South Australia is a mandatory life sentence and a mandatory non-parole period of 20 years. Exceptions apply (special circumstances – s 32A(3)(a) of the *Criminal Law (Sentencing) Act 1988*)

This can be compared with the penalty for manslaughter, which carries a maximum of life but in practice is often far less. For manslaughter, there is a mandatory non-parole period of 80% of the head sentence.

It was noted that South Australia is relatively unusual in Australia for its mandatory murder sentencing.

The following local cases demonstrate the effect which the partial defence of provocation can have on sentencing in a jurisdiction with a mandatory sentence for murder.

- *Li*:
  - Student strangled mother. Actions precipitated by an abusive upbringing.
  - Head sentence of 9 years.
  - Special circumstances not made out (s 32A(3)(a)).
  - If convicted of murder, the special circumstances would also not have been made out. This would have vastly affected his sentence given the mandatory sentence for murder.
- *Simpson*:
  - Battered victim to death. Victim had been assaulting his fiancée.
  - Head sentence of 8 years; non-parole period of 6 years (?)
  - Section 32A(3)(a) test made out – reduced the non-parole period.
  - If convicted of murder, the head sentence and non-parole period would have been significantly higher.
- *Narayan*:
  - Section 32A(3)(a) test made out.
  - 3 year non-parole period – 43% of head sentence.
  - If convicted of murder, her likely non-parole period would have been just less than 20 years.

These cases show the impact that the partial defence can have on the severity of sentence, and demonstrates why care must be taken when evaluating reform options, including abolition. Currently, there is limited flexibility for South Australian

courts when it comes to sentencing for murder. The extent of the present flexibility is unclear as the law is very complex.

There is also a need to be aware that if provocation is abolished, and changes are made to increase flexibility in sentencing, the conduct of the victim may become a significant issue to consider at the time of sentence - and this could give rise to its own difficulties.

*Roundtable participants were asked for their in-principle views as to whether (or in what circumstances) the partial defence of provocation should be abolished.*

All attendees accepted that the current sentencing law is too restrictive and more flexibility is appropriate in sentencing for murder.

A number of attendees supported expanding existing s 32A(3)(a) to give courts a greater discretion to go below the 20 year non-parole period when sentencing for murder such as in domestic violence circumstances or intellectual disability or cognitive impairment). There was particularly strong support for adding a subsection to s 32A to recognise offenders with a cognitive impairment. However it was also noted that there would still be a risk of having very high sentence if you keep the mandatory life head sentence for murder in place.

Another attendee also agreed that some discretion was needed when it comes to sentencing for murder where exceptional circumstances, such as some of the circumstances that currently give rise to the partial defence of provocation, apply.

Others noted that the vast majority of exceptional cases would be covered by other defences, including excessive self-defence.

There was initial formulation of an option that would provide courts with flexibility when sentencing for murder, but also require high head sentences and high non-parole periods for the most serious circumstances. This could be achieved by amending s 32(3)(a).

Others noted the need for a normative discussion about provocation and for consistency in the policy arguments being advanced to justify the abolition of provocation (ie if provocation is to be abolished because it no longer reflects community standards to impose lesser criminal culpability for those who kill after 'losing control', then why are we trying to provide courts with the option of imposing much lighter penalties for those who kill in these circumstances?).

It was raised that simply transferring existing cases of provocation to sentencing flexibility is misplaced. There is a crucial normative statement to be made that even a provoked killing under a 'loss of control' remains and should remain murder. It was noted though that this normative statement is very important but it should not be an absolute proposition as there well may be extraordinary cases where the degree of provocation and/or other mitigation is such (*Butler* and *Camplin* were noted as examples) that it would be unfair for the sentence to be the same as in other murders.

The potential disparity between existing sentences for manslaughter and likely sentences for murder (even allowing for greater flexibility in sentencing under present law) was also noted.

All contributors agreed that it is likely to be a politically difficult prospect to abolish or drastically change the mandatory minimum sentence for murder.

*Roundtable participants also discussed the general concerns with mandatory sentencing for murder and noted:*

Mandatory sentencing was seen as ineffectual and has a disproportionate effect on Aboriginal & Torres Strait Islander people and has no demonstrated deterrent effect.

However, if increased flexibility is introduced into the sentencing system that allows consideration of the role of the victim, there is a risk that the same concerns arising with respect to victim blaming and the discriminatory aspects of the partial defence of provocation could emerge again at the sentencing stage. For example, some contributors expressed concern at the capacity for all members of the judiciary to fully understand the experiences of minority groups in the community, including the lived experiences of discrimination among the LGBTIQ communities. There was support for training for the judiciary to ensure that they were aware of and were able to overcome unconscious bias. Some contributors also expressed the view that something more concrete was required to guard against discriminatory treatment.

It was noted that South Australia's approach to mandatory head sentences and mandatory minimum non parole periods for murder was unique among other Australian jurisdictions. Four states impose a mandatory head sentence for murder, others have a maximum sentence of life imprisonment.

One approach would be to put forward reforms that introduced a level of flexibility in sentencing but that also allowed courts to impose harsher non-parole penalties for the most serious murder cases.

### Views on the need to ensure that the applicable law is as clear and comprehensible as possible to judges and juries

*It was noted that it is part of SALRI's terms of reference to ensure that the law is accessible and clear for all South Australians. The current law is widely seen as too complex.*

Roundtable participants agreed reform options pursued in this space must be as accessible as possible, and visible and clear to the community as well as judge and jury.

One attendee emphasised the need to consider the broader public audience when contemplating reform and to consider the vast range of scholarship undertaken on the issue of fair labelling and fair warning.

### Views on whether to explore a partial defence of diminished responsibility in South Australia

*It was explained that there is a possible gap in the current law in circumstances where the offender has a substantial cognitive impairment that mitigates offending but falls short of the existing insanity/mental impairment defence. The NSW/UK partial defence of diminished responsibility was discussed and that law reform agencies are much divided on it and there are pros and cons.*

Roundtable participants discussed whether there is a need to explore a partial defence of diminished responsibility in South Australia, especially if provocation is abolished. While it was agreed that a person's mental impairment or condition should be taken into account, a range of views were expressed as to whether this should be considered at the culpability stage (eg through a new partial defence) or at the sentencing stage (eg through changes to s 32(3)(a)).

For example, contributors noted that:

- Such a partial defence could reintroduce some of the gender bias that affects provocation; a concern especially raised by the VLRC;
- Care should be taken not to be seen as 'swapping one defence for another';

- Diminished responsibility would be more appropriately considered as a sentencing issue, in line with the Victorian Law Reform Commission's approach;
- The NSW approach could offer a model – it allows the consideration of medical evidence about the extent of the mental impairment and its impact on the offender's responsibility and the onus is on the defence to establish it on a civil standard as a fair and workable balance;
- There is particular utility in such a defence for the situation of Indigenous offenders. It was accepted by all attendees that there is a need to consider the particular implications for the Indigenous community. A partial defence, that allows for medical evidence of the frontal lobe issues that can arise from petrol sniffing, for example, could make a substantive difference in many cases; and
- Care must be taken not to confuse the primary driver for reform, which seems to be the removal of mandatory sentencing which has a particularly unfair impact on Indigenous communities, and the temptation to engage in legal transplants from other jurisdictions; and
- Consideration would need to be given as to how to balance this with the new sentencing reforms where protection of the community is required to be the primary consideration.
- The complication of the current Bill<sup>1</sup> that restricts the defence of mental impairment through a drink or drug induced condition.

In brief, there was universal agreement that an offender's intellectual disability or cognitive impairment should be taken into account in homicide cases but an even split between whether this was preferable as an issue for a new partial defence or more flexibility in sentencing.

### Should the defence of marital coercion in s 328A of the *Criminal Law Consolidation Act 1935 (SA)* be reformed or repealed?

*The current defence of marital coercion was described and some of its problematic features including: the defence's inherent gender bias and the fact that you cannot raise this defence if in a de facto relationship or in a non-heterosexual relationship and it is confined to a wife. It is also outdated and reflects outdated medieval attitudes to marriage and the position of spouses. It has been recently abolished in England.*

Roundtable participants were generally surprised to hear of the existence of the defence, and agreed that its discriminatory elements required reform.

However, some participants also saw merit in retaining at least some features of the defence. For example, some parties noted that the underlying rationale of the defence appears to be the recognition of the power imbalance that has historically been a feature of domestic relationships and made sense as part of our misogynistic

<sup>1</sup> This refers to the *Criminal Law Consolidation (Mental Impairment) Amendment Bill 2016* (now the *Criminal Law Consolidation (Mental Impairment) Amendment Act 2017*) which amends the scope of a 'mental impairment', notably the role of a drug or drink induced impairment.

history. Such a power imbalance continues to exist in many marriages today, particularly non-Anglo Saxon relationships, and thus the defence may continue to have some relevance to modern relationships. For example, it may have some application in cases of coerced participation in welfare fraud.

Others noted that the inherent discrimination of the current law and noted that the power imbalance issue would be better addressed through broader strategies (including legislative strategies such as the defence of duress) designed to prevent and combat domestic violence and other forms of domestic abuse.

It was noted that the defence does not apply to charges of murder.

The Victorian experience was noted of 'defensive homicide' that was intended to address a similar power imbalance issue, but was in fact used by men who kill their domestic partners. This underscores the need to be careful about unintended consequences of such provisions.

### Views on the scope of the existing common law defences of necessity and duress

Roundtable participants briefly considered the current common law defences of necessity and duress and noted the overlap with some of the circumstances that would currently fall within the marital coercion defence (discussed above).

It was noted that some changes to necessity and duress to accord with the self-defence family violence changes had been flagged the stage 1 Report but stage 2 would look at wider changes as in Victoria (including in a family violence context). This would include issues within the existing defence of marital coercion.

There was no discussion of a specific Queensland homicide defence for victims of family violence in the absence of Dr FitzGibbon.

### Homicide Victim Blaming Restrictions

The Victorian law that allows a court to restrict gratuitous victim blaming in homicide cases was noted. This was a result of cases such as *Ramage* and unfair victim blaming had been perceived to be a particular concern in gay panic and family violence situations.

Roundtable participants discussed the issue of gratuitous victim blaming in homicide cases, with some noting that a South Australian court already has the discretion to exclude such evidence, especially if irrelevant.

Some participants were particularly opposed to fettering the court's existing discretion to explore recourse by a deceased victim to violent behaviour if it is relevant to the defence raised. It was noted that there are other rules of court procedure and obligations on lawyers designed to prohibit aggressive or argumentative questioning.

It was emphasised that trial lawyers in South Australia are overwhelmingly responsible and professional and the gratuitous deceased 'victim bashing' seen in other jurisdictions such as Victoria is not a problem here. This view was widely shared by attendees who did not support any such laws in South Australia and saw no need for such laws here.

Many participants expressed trust in the judiciary to regulate this issue, however others (were more sceptical, noting that it was disingenuous to say that gratuitous victim blaming evidence is never raised in South Australian trials, and expressing particular concern at the capacity for judges to appropriately exclude their own unconscious bias in certain cases such as involving LGBTIQ parties.



There was little support overall for a Victorian style homicide victim blaming law.

### Views on the NSW model of ‘extreme provocation’ as set out in s 23 of the *Crimes Act 1900* (NSW)

*There was a brief description of the ‘extreme provocation’ provisions in place in NSW and noted the discussion in the Stage 1 Report that highlights the flaws in this model which include the prospect of undertaking a ‘separate trial’ into the conduct of the victim to determine if their conduct constituted an indictable offence.*

Roundtable participants generally agreed that the NSW extreme provocation approach had serious flaws and was very problematic as a model for South Australia.

It was noted that many forms of domestic violence will not qualify as a major indictable offence, so the extreme provocation defence would not address the gender bias inherent in the South Australian common law defence.

It was also noted that the NSW laws are very complex and difficult to apply and for a jury to understand.

### General comments:

*Before closing the Roundtable, any final comments were asked for and it was emphasised that the Stage 2 work would build upon but not reiterate the discussion and findings made in the Stage 1 Report.*

Roundtable participants noted that discussion of this area (particularly the issue of sentencing for murder) is effected by distortions in the media about criminal law.

### List of Participants

The Hon David Bleby QC	Zita Ngor, Womens' Legal Service of SA
Dr David Plater, Deputy Director, SALRI	Debra Spizzo, Victim Support Services
Sarah Moulds, Senior Project Officer, SALRI	Zoey Campbell, SA Rainbow Advocacy Alliance
Kellie Toole, University of Adelaide	Rhiannon Davies, Flinders University
Professor Ngaire Naffine, University of Adelaide	Amy Teakle, University of Adelaide
Ian Leader-Elliott, University of Adelaide	Monique Bianchi, Law Society of South Australia, Human Rights Committee
Dr Kate Fitz-Gibbon, Monash University	Tony Kerin, Law Society of South Australia, Criminal Law Committee
Trish Spargo, Equal Opportunity Commission	Craig Caldicott, Law Society of South Australia, Criminal Law Committee
Ritchie Hollands, Equal Opportunity Commission	Lee Carnie, Human Rights Law Centre
Sarah Adams, Equal Opportunity Commission	Christopher Charles, Aboriginal Legal Rights Movement
Michael O'Connell, Commissioner for Victims' Rights	Michelle Roberts-Thomson, DPP
Jan Martin, SA Bar Association	Bill Boucout SC, Len King Chambers
Greg Mead SC, Legal Services Commission	Megan Lawson, University of Adelaide
Kate Thomas, Student, University of Adelaide	Kaeli Convey, Student, University of Adelaide
Charles Hamra, Student, University of Adelaide	Jordan Teng, Student, University of Adelaide
Stephanie Roger, Student, University of Adelaide	James Williams, Student, University of Adelaide

## Appendix 2 – Section 23 CRIMES ACT 1900 (NSW)

### SECT 23 - Trial for murder-partial defence of extreme provocation

#### 23 Trial for murder—partial defence of extreme provocation

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

## **Appendix 3 – Sections 54–56 *Coroners and Justice Act 2009* (UK)**

### **Partial defence to murder: loss of control**

#### **54 Partial defence to murder: loss of control**

- (1) Where a person (“D”) kills or is a party to the killing of another (“V”), D is not to be convicted of murder if—
  - (a) D's acts and omissions in doing or being a party to the killing resulted from D's loss of self-control,
  - (b) the loss of self-control had a qualifying trigger, and
  - (c) a person of D's sex and age, with a normal degree of tolerance and self-restraint and in the circumstances of D, might have reacted in the same or in a similar way to D.
- (2) For the purposes of subsection (1)(a), it does not matter whether or not the loss of control was sudden.
- (3) In subsection (1)(c) the reference to “the circumstances of D” is a reference to all of D's circumstances other than those whose only relevance to D's conduct is that they bear on D's general capacity for tolerance or self-restraint.
- (4) Subsection (1) does not apply if, in doing or being a party to the killing, D acted in a considered desire for revenge.
- (5) On a charge of murder, if sufficient evidence is adduced to raise an issue with respect to the defence under subsection (1), the jury must assume that the defence is satisfied unless the prosecution proves beyond reasonable doubt that it is not.
- (6) For the purposes of subsection (5), sufficient evidence is adduced to raise an issue with respect to the defence if evidence is adduced on which, in the opinion of the trial judge, a jury, properly directed, could reasonably conclude that the defence might apply.
- (7) A person who, but for this section, would be liable to be convicted of murder is liable instead to be convicted of manslaughter.
- (8) The fact that one party to a killing is by virtue of this section not liable to be convicted of murder does not affect the question whether the killing amounted to murder in the case of any other party to it.

#### **55 Meaning of “qualifying trigger”**

- (1) This section applies for the purposes of section 54.
- (2) A loss of self-control had a qualifying trigger if subsection (3), (4) or (5) applies.
- (3) This subsection applies if D's loss of self-control was attributable to D's fear of serious violence from V against D or another identified person.
- (4) This subsection applies if D's loss of self-control was attributable to a thing or things done or said (or both) which—
  - (a) constituted circumstances of an extremely grave character, and

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

## **56 Abolition of common law defence of provocation**

- (1) The common law defence of provocation is abolished and replaced by sections 54 and 55.
- (2) Accordingly, the following provisions cease to have effect—
  - (a) section 3 of the *Homicide Act 1957* (c. 11) (questions of provocation to be left to the jury);
  - (b) section 7 of the *Criminal Justice Act (Northern Ireland) 1966* (c. 20) (questions of provocation to be left to the jury).

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