

INQUIRY INTO PARTIAL DEFENCE OF PROVOCATION

Name: A/Professor Thomas Crofts and Dr Arlie Loughnan

Date received: 16/08/2012

In this submission, we advocate the retention of the partial defence of provocation as provided in Section 23 of the Crimes Act 1900. Here, our argument is based in significant part on the importance of labelling in criminal law, the role of the jury in assessing questions of culpability, as well as consideration of the diversity of cases in which provocation may be raised, and the dynamism of the defence. However, reflecting serious problems with the defence as it is currently formulated, we recommend amendments to the current law, along the lines of law reform proposals made elsewhere, to expressly exclude (a) words alone; (b) things done or said that constitute infidelity and (c) non-violent sexual advance as potential triggers for the 'loss of control' required by the defence.

The Honourable Fred Nile MP

Chair, Select Committee on the Partial Defence of Provocation

Legislative Assembly

New South Wales Parliament

16 August 2012

Dear Mr Nile,

Re: The Partial Defence of Provocation

We are writing to you in order to make a submission on the partial defence of provocation. We welcome the opportunity to provide a submission to the Committee on this important topic.

In brief, in this submission, we advocate the retention of the partial defence of provocation as provided in Section 23 of the Crimes Act 1900. Here, our argument is based in significant part on the importance of labelling in criminal law, the role of the jury in assessing questions of culpability, as well as consideration of the diversity of cases in which provocation may be raised, and the dynamism of the defence. However, reflecting serious problems with the defence as it is currently formulated, we recommend amendments to the current law, along the lines of law reform proposals made elsewhere, to expressly exclude (a) words alone; (b) things done or said that constitute infidelity and (c) non-violent sexual advance as potential triggers for the 'loss of control' required by the defence.

Please find our submission enclosed.

We hope our case for the amendment rather than abolition of the provocation defence will be self-explanatory. However, we would appreciate the opportunity to appear before the Select Committee at the public hearings should this be helpful.

We wish you and the Committee all the best with this inquiry.

Yours sincerely,

A/Professor Thomas Crofts and Dr Arlie Loughnan

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Sydney NSW 2006

Submission

Legislative Council's Select Committee on the Partial Defence of Provocation

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Submission on the Partial Defence of Provocation

1. Introduction

Provocation is a controversial part of the criminal law in NSW and we welcome the opportunity to provide a submission to the Committee on this important topic. Much ink has been spilt on the provocation defence. We are motivated to add to that pool because of our belief that a view that recognises the problems with the defence, but nonetheless sees a role for its retention (albeit in an amended form), is an important one to express.

In brief, in this submission, we advocate the retention of the partial defence of provocation as provided in Section 23 of the Crimes Act 1900. Here, our argument is based in significant part on the importance of labelling in criminal law, the role of the jury in assessing questions of culpability, as well as consideration of the diversity of cases in which provocation may be raised, and the dynamism of the defence. However, reflecting serious problems with the defence as it is currently formulated, we recommend amendments to the current law, along the lines of law reform proposals made elsewhere, to expressly exclude (a) words alone; (b) things done or said that constitute infidelity and (c) non-violent sexual advance as potential triggers for the 'loss of control' required by the defence.

2. Background Essential to Understanding the Current Law

There are two aspects of the development of provocation to which we wish to draw the Committee's attention, as they are key to understanding the current law. The first of these is the development of the defence over a period marked by the broad movement over time from informal practices of exculpation, to informal standards for criminal responsibility and legal subjectivity, and then to discrete and technical legal rules constituting distinctive doctrines and specific procedures. As a common law defence, provocation arose in the case law at a time when the clear and robust distinction between factors in mitigation (affecting sentence) and defences (affecting conviction) was as yet undeveloped. As this distinction developed in criminal law and practice, the continued existence of partial defences like provocation has been sustained by mandatory sentences for murder,¹ and by the structure of the law of homicide, which is only minimally disaggregated into murder and manslaughter.²

¹ See Law Commission for England and Wales, *Murder, Manslaughter, and Infanticide* (Law Com No 304, 2006) para 5.8. The Law Commission describes the mandatory life sentence as the 'raison d'être of the provocation plea in England and Wales' (para 5.8).

² According to this argument, because murder and manslaughter prohibit the same kind of conduct (killing), partial excuses are necessary to distinguish among defendants who fall within 'broad bands of culpability': Wasik 'Partial Excuses in Criminal Law' (1982) 45(5) *Modern Law Review* 516, 530. As Wasik argues, partial defences accommodate pressure for the recognition of moral and legal subdivision in the law of homicide (ibid., 530). It should be noted here that infanticide is also part of the law of homicide, although it is an uncommon offence in the criminal calendar and it is a specific offence having only narrow application to certain people (mothers) in certain situations.

There is a second aspect of the development of provocation that must be borne in mind. In an historical context marked by the wide use of capital punishment, provocation provided a basis for avoiding the death penalty. It represented clemency for the accused and meant the difference between life and death. Further, in this period – which extended to the first half of the twentieth century – precisely the kind of case that has, arguably, become the most controversial use of provocation – a man using fatal violence on discovering infidelity on his wife's part – was the archetypal case of provocation, and generally regarded as an appropriate use of the defence. This reflects the fact that, as a normative matter, provocation developed as a justification for fatal violence committed by men.³ But, over the course of the nineteenth century, the law developed so as to require the accused' response to the provocation to be reasonable, and, in normative terms, the defence began a slow shift away from justifying an angry response to excusing an accused who had lost control. 'Loss of control' is now the essence of the defence.⁴ We return to the point about the justificatory origins of provocation below.

It was against this background that the law of provocation developed in England and Wales. The NSW defence of provocation contained in Section 23 of the *Crimes Act 1900* (NSW) is modelled on the law of England and Wales. Provocation has recently been abolished in that jurisdiction and we discuss this below. When it existed in England and Wales, provocation provided that, where an individual would otherwise be liable for murder, he [sic] could be held liable for manslaughter instead, if he had lost self-control as a consequence of provocation, and the provocation was 'enough to make a reasonable man do as he did'.⁵ Provocation was generally considered to comprise a subjective test – whether the defendant himself actually lost self-control because of something that counted as provocation – and the objective test – whether a reasonable person, faced with the provocation would have lost self-control, and, if so, whether he would have acted as the defendant did. These two components of the defence exist in the NSW law. We take up on the issue of the objective test, which has proved particularly problematic, below.

The current formulation of the provocation defence in NSW is a product of developments in the recent decades. Following a spate of high profile domestic violence cases, in 1982, the Crimes Act was amended to modify the mandatory life sentence for murder (Section 19) and to broaden the definition of provocation (Section 23). At the same time, the courts were changing the common law of provocation as evident in the decisions of *R v Hill* and *R v R*. We return to the dynamic nature of the provocation defence again below, as we believe that the fact that it is not a static defence is a point in favour of its retention.

³ Several commentators have suggested that the historical trajectory of provocation has been from a partial justification to a partial excuse; see, eg J Dressler 'Provocation: Partial Justification or Partial Excuse?' (1988) 51(4) *Modern Law Review* 467.

⁴ For further discussion of the requirement of loss of self-control see, for example, A Reilly 'Self-Control in Provocation' (1997) 21 *Criminal Law Journal* 320; R Holton and S Shute, 'Self-Control in the Modern Provocation Defence' (2007) 27 *Oxford Journal of Legal Studies* 49.

⁵ See Homicide Act 1957 (England and Wales), s.3.

3. Identifying the Problems with the Current Defence

(a) *From a Social Perspective - Gender Norms*

The first of the problems we identify is perhaps the most intractable. This problem relates to reliance on the provocation defence in intimate partner violence particularly those that follow domestic violence. We wish to acknowledge upfront that this is a very real problem, and the most powerful argument against provocation. Much attention has been accorded to this aspect of provocation, and, indeed, it is arguments on this point that form the core of the case for the abolition of the defence. In brief, the arguments on this point include that the defence privileges stereotypically male reactions to conflict, legitimates anger as an emotional response in such circumstances, is inherently biased against women and is inappropriate in the modern era.⁶ Rather than rehearse these arguments here, we acknowledge their strength, and move directly to discuss an aspect of the problem of gender norms that is sometimes overlooked.

This somewhat abstract, but significant aspect of the problem with provocation is revealed when it is contrasted with other defences that may be available (depending on the facts) in intimate partner homicides which follow domestic violence. This problem relates to the kind of person imagined by and through particular defences in criminal law. An individual seeking to rely on provocation is constructed as if he or she was making a claim as an ordinary person in extra-ordinary conditions. By contrast, an individual seeking to rely on substantial impairment, for example, is constructed as if he or she was making a claim as an other-than-ordinary person.⁷ This is the case although provocation is now widely regarded as more of an excuse than a justification, a point we pick up again below.⁸ This means that a successful provocation defence effectively sends a different message about the defendant, when compared with a successful substantial impairment defence – despite the formal legal outcome being common to both (manslaughter). The message is that any ordinary person would have reacted in the way that the accused did. As Graeme Coss notes, however, given the rate at which relationships break down and the fact that most cases do not generate a violent response it can hardly be argued that killing in response to a relationship breakdown is typical, normal or usual.⁹

Without doubt there are a number of disturbing cases in which men have killed their female partners and then successfully pleaded provocation to reduce a murder charge to one of

⁶ See, for example, G Coss, 'Provocation, Law Reform and the Medea Syndrome' (2004) 28 Crim LJ 133 *Criminal Law Journal* 133; see also Victorian Law Reform Commission, *Defences to Homicide: Final Report* (2004).

⁷ See further A Loughnan, *Manifest Madness: Mental Incapacity in Criminal Law* (Oxford: Oxford University Press, 2012).

⁸ See J Dressler 'Provocation: Partial Justification or Partial Excuse?' (1988) 51(4) *Modern Law Review* 467.

⁹ G Coss, 'Provocation's Victorian Nadir: The Obscenity of Ramage' (2005) 29 *Criminal Law Journal* 133 at 134.

manslaughter.¹⁰ The tragedy and apparent injustice of such cases grabs media, public and academic attention and has led to calls for the abolition of the defence of provocation. These alarming cases should not, however, be taken as the paradigm cases of provocation and set the tone for abolition rather than amendment of the defence in a law reform context. To use a colloquialism, this would be “throwing the baby out with the bathwater”. We suggest it is possible to reform the law in order to exclude the possibility that provocation is pleaded in cases such as those involving intimate partner violence. Indeed, it the aim of our reform proposal to restrict provocation to ensure it is unavailable in cases such as these, circumscribing the defence around normatively desirable cases.

While intimate partner violence cases command attention, in terms of its practical operation, it is important to keep in mind the great range of offenders and kinds of provocation that may be at issue in murder cases. As the Law Commission for England and Wales has pointed out, a murder conviction in a case involving a high degree of provocation may be considered especially unjust when the defendant is a young person or is of low intelligence.¹¹ The Commission pointed to the decision of *DPP v Camplin*, in which the defendant, a 15-year-old boy, claimed he had been provoked to lose self-control and kill a man who had raped him, and had then laughed at him.¹² In our criminal justice system, as in England and Wales, we trust juries – an essential component part of the practical working of our system – to assess the validity of claims such as these. If a jury believes the defendant’s account of the circumstances of the death in cases like this, having heard all the evidence that has been put before it, we suggest it is appropriate to reflect this in a conviction of manslaughter as opposed to murder. Juries and the lay evaluation they represent form an central component of the legitimacy of criminal law decision-making and we take up this point again below.

It is our submission that recognising the problems with provocation should generate amendment of the law rather than abolition of the defence. In terms of its ability to affect positive social change in gender relations, reform of the law of provocation is preferable to its abolition. Even allowing for the problems with provocation in certain cases, it would be undesirable to remove any part of the defence armoury in the context of the most serious of criminal charges, murder, and, as we discuss below, it would give rise to significant concerns around labelling.

(b) From a Legal Perspective - The Objective Test/the Reasonable Person

The second problem with the defence as currently formulated is a legal rather than social one. As mentioned above, the objective part of the current provocation defence has caused particular consternation. In relation to the objective test, the rather vexed issue has been what characteristics that could be accorded to the reasonable person so that the jury would take

¹⁰ A prominent and recent example is provided by the case that prompted the current review where Chamanjot Singh received a sentence of six-years imprisonment after his claim that he was provoked to slit his wife's throat with a box cutter as a result of her verbal abuse was accepted by the jury.

¹¹ Law Commission for England and Wales, *Murder, Manslaughter, and Infanticide* (Law Com No 304, 2006) para 5.7.

¹² *DPP v Camplin* [1978] AC 705.

them in account in making a decision about the defendant's actions.¹³ The courts' answer to this question has varied according to whether the characteristic is alleged to have affected the gravity of the provocation (ie the seriousness of the provocation) or to have rendered the defendant less able to control him or herself (ie more provokable). In relation to the former, all kinds of characteristics including discreditable ones, may be taken into account if they become the subject of the taunt or the action (words or conduct) to which the defendant reacts. In relation to the latter, the approach has been more restrictive, with the reasonable person standard used to exclude 'unusual' people from the protection of the defence.¹⁴ As we seek to show here, it has proved extremely difficult to circumscribe the availability of the provocation defence to normatively desirable cases while it exists in its current form.

At one end of the spectrum of possible approaches to the issue of circumscribing the availability of provocation lies the House of Lords decision in *Smith (Morgan)*.¹⁵ Here, the approach given to the question of the characteristics of the reasonable person was expansive and openly moral-evaluative. The House of Lords held that the objective component of the provocation defence means that 'the jury can legitimately "give weight to factors personal to the prisoner in considering a plea of provocation"'.¹⁶ This meant that, if it grants provocation, the jury must conclude that 'the circumstances were such as to make the loss of self-control sufficiently *excusable* to reduce the gravity of the offence from murder to manslaughter'.¹⁷

At the other end of the spectrum of possible approaches to the scope of provocation, and by contrast with the broad and overtly morally-evaluative approach in *Smith (Morgan)*, lies the 2005 Privy Council decision of *Attorney-General v Holley*.¹⁸ The Privy Council took a narrow approach to the question of which of the defendant's characteristics could be taken into account for the objective part of the provocation defence. The Privy Council held that the only characteristics of the defendant that were relevant to the objective test are his or her age and sex.¹⁹ The court concluded that the question for the jury was '[w]hether the provocative act or words and the defendant's response met the "ordinary person" standard prescribed by the statute is the question the jury must consider, not the altogether looser question of whether, having regard to all the circumstances, the jury consider the loss of self-control was sufficiently excusable'.²⁰ As these comments make clear, the *Holley* decision tightened up the distinction between provocation and diminished responsibility, as substantial impairment is called in England and Wales.²¹

¹³ See further AP Simester and GR Sullivan *Criminal Law Theory and Doctrine* (Oxford: Hart Publishing, 2010) 381.

¹⁴ In the decision on this part of the reasonable person test, *DPP v Camplin* [1978] AC 705, the House of Lords held that, for the purposes of determining whether a reasonable person would have done as the defendant did, the reasonable person is to be accorded only the defendant's age and sex.

¹⁵ *R v Smith (Morgan)* [2001] 1 Cr App R 5.

¹⁶ *R v Smith (Morgan)* [2001] 1 Cr App R 5, 38 per Lord Slynn (extracting words of the Royal Commission on Capital Punishment Report 1953).

¹⁷ *R v Smith (Morgan)* [2001] 1 Cr App R 5, 58 per Lord Hoffman.

¹⁸ *Attorney-General for Jersey v Holley* [2005] 2 AC 580.

¹⁹ *Attorney-General for Jersey v Holley* [2005] 2 AC 580, 591 per Lord Nicholls.

²⁰ *Attorney-General for Jersey v Holley* [2005] 2 AC 580, 593.

²¹ These decisions generated hard-fought debate about the difference between provocation and diminished responsibility, where the latter has been regarded as the appropriate preserve of an individual who is abnormal in some way. For a flavour of this debate, see B J Mitchell et al 'Pleading for Provoked Killers: In Defence of

These judicial machinations about the characteristics that may be appropriately attributed to the reasonable person for the purposes of provocation lead us to conclude that it is extremely difficult to limit the availability of the provocation defence around normatively desirable cases while it exists in its current form. As a result, we advocate the reform to the structure or form of the provocation defence, to include clauses expressly excluding words alone, things done or said that constitute infidelity and non-violent sexual advance as triggers for a 'loss of control'.

4. Recognising the Value of Provocation - Reasons for the retention of the defence

(a) The importance of offence labels

Our first argument in favour of the retention of provocation recalls both the fundamental links between provocation and the mandatory life (and previously death) sentence attached to murder, and the fact that homicide is only minimally disaggregated (something we mentioned above). Provocation is a mechanism that reduces the charge from murder to manslaughter and thus, historically, it permitted an accused to evade the mandatory death or life sentence. Of course, capital punishment has long since been abolished and, more recently, several jurisdictions have also abolished the mandatory life sentence for murder (including NSW). On this basis, it is argued that there is no longer any need for the defence of provocation because now that there is flexibility in sentencing for murder any such mitigating matters can be taken into account at sentencing.²² This argument overlooks the fundamental importance of offence labels in criminal law and process. Aside from opening up the possibility of a sentence other than mandatory life, part of the role of provocation is to reduce (but not erase) the stigma and condemnation attached to offender's behaviour by convicting of the offence of manslaughter rather than murder.

Offence labels (here, murder and manslaughter) are of profound significance to the accused, to the criminal justice system, society at large, and arguably, and also to the victim and his/her family. The principle of fair labelling requires that distinctions between offences and their proportionate wrongfulness be recognised in the label attached to the offence.²³ The issue of what names should be attached to offences is a main concern of the principle of fair labelling. However, equally fundamentally, this principle explains the need to distinguish different forms of criminal behaviour and levels of culpability. As James Chalmers and Fiona Leverick argue:

It might be thought that the language of 'labelling' could refer only to the description attached to the offender's conduct, but in fact one of the considerations which is often

Morgan Smith' (2008) 124 Law Quarterly Review 675 and T Macklem and J Gardner 'Provocation and Pluralism' (2001) 64(6) Modern Law Review 815 and, in relation to legal practice, see *Attorney-General for Jersey v Holley* [2005] 2 AC 580 and *R v Smith (Morgan)* [2001] 1 Cr App R 31.

²² See eg Victorian Law Reform Commission, *Defences to Homicide: Final Report* (2004), para 2.31.

²³ A Ashworth, *Principles of Criminal Law*, Oxford: Oxford University Press, 5th ed, 2006, p. 88.

taken to underpin fair labelling is the need to differentiate between different forms of wrongdoing.²⁴

The significance of fair labelling relates to the nature of criminal law; it is a liberal democratic society's most condemnatory tool. As Ashworth notes, '[i]t is the censure conveyed by criminal liability which marks out its special social significance'.²⁵ It is this censuring function of criminal law that explains why it is of fundamental importance that offenders are correctly labelled in accordance with their wrongdoing. In a sense offence labels operate as shorthand communications. While in relation to homicide, the relative level of seriousness of the killing can be taken account of at sentencing and reflected in the sentence given, this is not as transparent, as public or as enduring as the label of the offence for which the offender is convicted. As William Wilson has written, 'precise, meaningful offence labels are as important as justice in the distribution of punishment. These labels help us to make moral sense of the world.'²⁶ Offence labels allow the public to identify 'the degree of condemnation that should be attributed to the offender' and how the offender should be regarded by society.²⁷ They also convey information to operators within the criminal justice system about how the offender should be dealt with, for instance, a person's past criminal record may be drawn on in determining a future sentence.²⁸

For an individual accused, fair labelling is important in ensuring that a person is convicted, labelled and sentenced in proportion to their wrongdoing.²⁹ The label of the offence stands as a 'moral and legal record, as a testimony to the precise respect in which the defendant failed in her or his basic duties as a citizen.'³⁰ A broad offence label may not give an accurate picture of what it is that the offender has done and therefore can lead to a higher (or lower) degree of stigmatisation than is deserved. The offence label also lets the offender know exactly their how behaviour has been classified by the justice system and why he or she is being punished in a certain way.³¹ This is important if the punishment is to be meaningful to the offender and not regarded as either arbitrary or harsh.³²

In a wider perspective, but perhaps on a more fundamental level, offence labels have a symbolic and educational function in a social system. Seeing offenders convicted according to the perceived wrongfulness of the behaviour communicates society's core values and confirms in the public's mind the wrongfulness of the behaviour.³³ In this respect, fair labelling is important because, '[a] criminal provision is better able to communicate the

²⁴ J Chalmers and F Leverick note that the principle has two functions; it distinguishes and it describes, 'Fair Labelling in Criminal Law' (2008) 71 *Modern Law Review* 217, 222.

²⁵ A Ashworth, *Principles of Criminal Law*, Oxford: Oxford University Press, 5th ed., 2006, p. 1

²⁶ W Wilson, 'What's wrong with murder?' (2007) *Criminal Law and Philosophy*, 157, 162.

²⁷ J Chalmers and F Leverick, 'Fair Labelling in Criminal Law' (2008) 71 *Modern Law Review* 217, 226.

²⁸ J Chalmers and F Leverick, 'Fair Labelling in Criminal Law' (2008) 71 *Modern Law Review* 217, 231

²⁹ A Ashworth, *Principles of Criminal Law*, Oxford: Oxford University Press, 5th ed., 2006, p. 88.

³⁰ J Horder, 'Rethinking Non-Fatal Offences' (1994) 14 *Oxford Journal of Legal Studies* 335, 339

³¹ J Chalmers and F Leverick, 'Fair Labelling in Criminal Law' (2008) 71 *Modern Law Review* 217, 229

³² A P Simester and G R Sullivan, *Criminal Law: Theory and Doctrine*, Oxford: Hart, 3rd ed, 2007, p. 31

³³ See B Mitchell, 'Multiple Wrongdoing and Offence Structure: A Plea for Consistency and Fair Labelling' (2001) 64 *Modern Law Review* 393, 398

boundaries of socially acceptable behaviour if it packages crimes in morally significant ways'.³⁴

The importance of fair labelling is magnified in jurisdictions, like NSW, which have juries make determinations of fact in serious cases. Juries involve citizens 'in a dialogue with the legislature and prosecutors'.³⁵ Therefore juries relate information through the justice system about how the community views offence classification. If juries are unwilling to convict people of certain offences because the label of the offence does not coincide with community values then this may prompt the legislature to rethink how offences are defined and labelled. The classical example here is the creation of the offence of causing death by dangerous driving (dangerous driving occasioning death in NSW³⁶) – a result of the reluctance of jurors to convict for manslaughter.³⁷

It is a very real danger that, if provocation is abolished, juries may still return verdicts of manslaughter as opposed to murder where they feel that a murder conviction would not be warranted. Without a reformed defence of provocation, there would be no clear guidance on what should not be considered sufficient to mitigate a murder charge in circumstances where provocation is an ingredient of the fact scenario. Furthermore, there is also the chance that provocation-type claims will appear in other spaces. For example there is some suggestion that the new offences of 'defensive homicide' in Victoria is being used in cases that would traditionally have been based in provocation.³⁸ In addition, if the defence has raised substantial impairment, we may see the expansion of this defence.

(b) If provocation is relevant to culpability it should remain a matter for the jury

As noted above, it has been argued that, rather than take provocation into account at the stage of conviction, where there is a flexible sentencing regime, it should be taken into account at sentencing.³⁹ However, if it is assumed that provocation is relevant to culpability, it is better for the determination to be left in the hands of jurors. Shifting this decision to the sentencing judge detracts from the transparency of the conviction and denies the jury part of its fact finding role.⁴⁰ As Tolmie notes:

³⁴ W Wilson, 'What's wrong with murder?' (2007) *Criminal Law and Philosophy* 157, 162.

³⁵ M Redmayne, 'Theorising Jury Reform' in: A Duff, L Farmer, S Marshall, V Tadros, eds., *The Trial on Trial*, vol 2, Hart: Oregon, 2006, p. 102.

³⁶ *Crimes Act 1900* (NSW), s 52A.

³⁷ See W Wilson, 'What's wrong with murder?' (2007) *Criminal Law and Philosophy* 157, 162

³⁸ See D Tyson, 'Victoria's New Homicide Laws: Provocative Reforms or More Stories of Women "asking for it"?' (2011) 23 *Current Issues in Criminal Justice* 203; K Fitz-Gibbon and S Pickering 'Homicide Law Reform in Victoria, Australia' (2012) 52 *British Journal of Criminology* 159 at 169-170.

³⁹ See for example Law Reform Commission of Western Australia, *Review of the Law of Homicide: Final Report*, No 97 (2007), p 216.

⁴⁰ It is acknowledged that in practice juries may not always be involved in determinations of whether provocation is established where an accused pleads guilty to manslaughter on the basis of provocation and this plea is accepted by the prosecution (see example Law Reform Commission of Western Australia, *Review of the Law of Homicide: Final Report*, No 97 (2007), p 217). However, the fact that such "deals" are done does not detract from the strength of this argument. Indeed, the fact that "deals" between the accused and the prosecution applies to a wide range of offences, yet this cannot and should not detract from arguments about the importance of generally leaving questions of fact which determine culpability with the jury.

‘[t]he trial stage is more rule-based and publicly visible. The result is greater publicity and expert scrutiny (and input) if issues of moral culpability are reflected in criminal defences, rather than being relegated to mitigating factors at sentencing.’⁴¹

Leaving decisions about issues of culpability with the jury permits community input into the trial and conviction process and should also help foster community confidence in the justice system, and contributes to the legitimacy of criminal law and procedure.

Furthermore, juries are the appropriate body to make determinations of fact. As Mike Redmayne points out, most jury research ‘paints a positive picture of the jury’s fact-finding abilities.’⁴² Juries have attributes that mean that they may be in a more advantageous position than a judge or small panel of judges at determining from the facts. This is partly due simply to the size of the jury; in the words of Lord Devlin, ‘I think it must be agreed that there are some determinations in which twelve minds are better than one, however skilled.’⁴³ The jury is also likely to have a broader range of experience than a judge and can draw on these different experiences to reach a decision. Indeed, the controversy surrounding provocation is precisely a reason to keep it in the hands of the jury rather than the judge.

(c) Provocation is not a static defence

The second argument we wish to make in favour of retaining provocation concerns the development of the defence over recent decades. This argument has two parts. The first part concerns change in the normative meanings attached to the defence. Here, we are invoking criminal law theory to make a point about the normative dimension of provocation. The part of criminal law theory we wish to harness for this purpose is that relating to the organization of defences by normative type, which is arguably the most popular way of categorizing criminal defences. This entails classifying defences either as justifications or excuses, or justifications, exemptions, or excuses.⁴⁴ As these terms suggest, this categorization of defences tracks social practices of responsibility attribution.⁴⁵ As we mentioned above, while provocation began its life as a justification – reflecting social norms, then prevailing, about the appropriateness of lethal violence in certain situations – the defence has morphed in recent decades. Within modern Australian criminal law, it is now reasonably well established that provocation does not operate to justify the action of the person who responds with fatal violence in the sense that a judgment is made that it was right to kill in the circumstances (as is the case with self-defence). Rather, provocation acts (merely) to excuse the behaviour of the provoked person, thus the behaviour is seen as wrongful even as it is in some sense an understandable reaction. This distinction is reflected in the difference between self-defence

⁴¹ J Tolmie, ‘Is the Partial Defence an Endangered Defence? Recent Proposals to Abolish Provocation’ [2005] *New Zealand Law Review* 25 at 33.

⁴² M Redmayne, ‘Theorising Jury Reform’, in: A Duff, L Farmer, S Marshall and V Tadros (eds), *The Trial on Trial*, vol. 2, Oregon: Hart, 2006, p. 102.

⁴³ P Devlin, *Trial by Jury*, London: Stevens, 1956, p. 149

⁴⁴ This approach to criminal defences was advanced in Anglo-American criminal law in large part by the work of George Fletcher: see G P Fletcher *Rethinking Criminal Law* (New York: OUP, 2000) and G P Fletcher ‘The Nature of Justification’ in J Horder and J Gardner (eds) *Action and Value in Criminal Law* (Oxford: Clarendon Press, 1993).

⁴⁵ For discussion of these social practices, see M Baron ‘Excuses, Excuses’ (2007) 1 *Law and Philosophy* 21 and V Tadros ‘The Scope and Grounds of Responsibility’ (2008) 11 *New Criminal Law Review* 91.

operating as a full defence and provocation operating merely as a partial defence reducing a charge of murder to manslaughter.

The second aspect of our argument about the development of the defence over recent decades concerns changes in the parameters of the defence – as a matter of law rather than a normative issue. While the defence stems from a time when male honour was important and thus, it has been argued that the defence perpetuates male forms of behaviour, it is important to take seriously the degree to which the present form of the defence has been adapted – and, we submit, can be *further* adapted – to take into account criticisms about the way it has operated historically (and, in particular, the gendered nature of the operation of the defence historically). For instance, traditionally, provocation required a clear provocative incident of sufficient gravity to warrant an immediate reaction. It has been argued that this requirement meant that the defence only applied to a typically male response to an act of provocation but did not reflect female patterns of behaviour. In particular, it has been suggested that women may not react immediately in the face of a provocative incident but may have a ‘slow burn reaction’ to provocation.⁴⁶ In response to such concerns, courts have gradually relaxed the requirement of a clearly identifiable sufficiently provocative incident or incidents.⁴⁷ Now, courts are willing to permit consideration of cumulative acts of provocation and take into account the context of the provocative act. For instance, in *Mehmet Ali* it was stated that:

The final wrongful act or insult might, of itself, be comparatively trifling, but when taken with what had gone before, might be the last straw in a cumulative series of incidents which finally broke down the accused’s self-control and caused him to act in the heat of passion.⁴⁸

Similarly, in *R v R*, it was found that wider context can be taken into account to determine the provocativeness of the behaviour. In this case this trigger was the act of a husband cuddling his wife and saying they would be ‘one happy family’.⁴⁹ Without context this might have been viewed as insufficiently provocative to amount to provocation. However, the context which turned this act into a provocative one was the fact that the accused had recently discovered that her husband has been sexually abusing their daughters.

In *Chhay*, it was found that the fact that there was no clear triggering incident did not mean that there could be no defence of provocation. As Gleeson CJ noted:

‘[T]imes are changing, and people are becoming aware that a loss of self-control can develop even after a lengthy period of abuse, and without the necessity for a specific triggering incident.’⁵⁰

Alongside relaxing the conditions which were thought to mean that the defence worked mainly for male patterns of behaviour changes have also been made to reduce the scope of the defence in the traditional paradigm cases of male behaviour, such as killing an adulterous

⁴⁶ See, eg. Victorian Law Reform Commission, *Defences to Homicide: Issues Paper* (2002), para 6.11.

⁴⁷ See, for example, S Bronitt and B McSherry, *Principles of Criminal Law*, 3rd ed, 2010, LBC, 298.

⁴⁸ *Mehmet Ali* (1957) 59 WALR 28, 39.

⁴⁹ *R v R* (1981) 28 SASR 321.

⁵⁰ *Chhay* (1994) 72 A Crim R 1, 13.

partner. Courts have reduced the scope for claims that acts of infidelity are sufficient to found a claim of provocation. For example, in *Hart v The Queen*, it was found that the sight of the accused's estranged wife kissing another man was not sufficiently provocative to found a claim of provocation.⁵¹ Similarly, courts have found that words alone cannot amount to provocation unless they are of 'exceptional' character or 'violently provocative'.⁵²

Some of these common law changes have found their way into legislation. For example, the Criminal Code of Queensland has been amended to clarify that words can no longer found a claim of provocation except in the most extreme circumstances and provocation can no longer be pleaded in relation to domestic relationships except in extreme circumstances. The new defence of loss of self-control in the UK (which replaces provocation) also bars a person from claiming that an act of infidelity caused them to lose self-control. Other legislative interventions have followed those case law discussions of provocation that have exposed the defence as problematic. For instance, and rather infamously, in *R v Green*⁵³ the High Court failed to rule out the possibility that a non-violent sexual advance might be considered to be provocative. However, the ACT and the NT have amended the defence to bar claims of provocation based on a non-violent sexual advance. The possible reforms are further discussed below as possible reform options for New South Wales.

In sum, the modern defence of provocation has changed significantly and is open to further, legislative reform that would go a significant way toward eliminating many of the problematic aspects of this defence while preserving the option to make a concession to human frailty in deserving cases.

(d) There are cases in which a concession to human frailty is warranted

As mentioned above, much of the debate about the need to abolish provocation focuses on cases that are deemed unworthy of a partial defence, despite it having been pleaded or even pleaded successfully. However, such criticisms have a tendency to overlook the fact that there may be cases where provocation is appropriately granted and no other defence could/would be applicable or appropriate. A common claim, for example, in relation to women who kill in response to domestic abuse is that the defence of self-defence is more appropriate and, in those cases where the accused' response is deemed to be unreasonable, then excessive self-defence (where available) is a more fitting alternative to provocation. Such reasoning saw the abolition of provocation in Western Australia and a reformulation of self-defence and introduction of excessive self-defence.⁵⁴ The advantage of this approach is that it allows an accused to argue self-defence but does not rule out the possibility of a partial defence if the jury finds that the action was taken in self-defence but the accused' response was not reasonable in the circumstances. This may well mean that the accused no longer has to make a choice between arguing self-defence or provocation, pleas which may be mutually inconsistent. As Julia Tolmie notes: 'The advantage of having such a defence [excessive self-

⁵¹ *Hart v The Queen* (2003) 27 WAR 441.

⁵² See eg *R v Thorpe (No 2)* [1999] VR 719.

⁵³ *Green v The Queen* (1997) 148 ALR 659.

⁵⁴ Law Reform Commission of Western Australia, *Review of the Law of Homicide: Final Report*, Project No 97, (2008) 180.

defence] is that it might encourage battered defendants to go to trial, rather than to plea-bargain, because self-defence will no longer be an all-or-nothing proposition.’⁵⁵

However, it is not necessarily the case that the introduction of excessive self-defence will be a suitable defence for those who kill as a result of domestic abuse. As Tolmie writes:

‘it is also important to acknowledge that not all battered defendants who have been the victims of ongoing and severe violence, and who finally respond to that violence, will be purporting to act in self-defence. For these defendants provocation might be an appropriate defence. For example, in *R v Epifania Suluape* the defendant, who successfully claimed the defence of provocation, killed her husband against a background of physical and emotional abuse, infidelity, and degradation. However, she was responding to emotional rather than physical abuse at the time she killed him. Indeed, it is not uncommon for victims of domestic violence, including victims of severe physical abuse, to observe that the physical abuse is easier to withstand than the emotional abuse experienced in such a relationship.’⁵⁶

In such instances, provocation may still have an important role to play. Julia Tolmie notes that:

‘The partial defences are designed to deal with a grey area of criminal culpability: cases where the choice between outright acquittal and a murder conviction is too stark.’⁵⁷

Abolishing provocation with the hope of ensuring abused women may more readily claim self-defence could lead to situations in which defence narratives have to be remoulded to fit the available defence(s). Where this remoulding is not convincing, the accused may well be deprived of a half-way house defence, and thus any defence at all. Furthermore, although such circumstances can be taken into account at sentencing, the offence label of murder will still attach to the accused. This label is one of the most heinous that the criminal justice system can attach to a person.⁵⁸ As Oliver Quick and Celia Wells point out, when a person has killed in response to abuse, it is not just the sentence that is relevant to the victim but the offence label and associated stigma. These authors quote *Justice for Women* who note that: ‘shaking off the shackles of a murder label is often as important a focus of the post-conviction struggle of abused women who kill, as is their quest for freedom.’⁵⁹ Thus, we would argue that if a person is regarded as less culpable for a killing (because of provocation) this should be reflected in the label of the offence for which they are convicted and not just get taken into account at sentencing (i.e. manslaughter rather than murder).

⁵⁵ J Tolmie, ‘Is the Partial Defence an Endangered Defence? Recent Proposals to Abolish Provocation’ [2005] *New Zealand Law Review* 25 at 41.

⁵⁶ J Tolmie, ‘Is the Partial Defence an Endangered Defence? Recent Proposals to Abolish Provocation’ [2005] *New Zealand Law Review* 25, 42 [references omitted].

⁵⁷ J Tolmie, ‘Is the Partial Defence an Endangered Defence? Recent Proposals to Abolish Provocation’ [2005] *New Zealand Law Review* 25, 38.

⁵⁸ J Tolmie, ‘Is the Partial Defence an Endangered Defence? Recent Proposals to Abolish Provocation’ [2005] *New Zealand Law Review* 25, 28.

⁵⁹ Cited in O Quick and C Wells, ‘Getting Tough With Defences’ (2006) *Criminal Law Review* 514 at 516.

In addition to cases such as these, there may well be other instances, where, although a violent response is not condoned, it is accepted that an ordinary person might also have reacted in a similar way. For example, as already noted above, the Law Commission of England and Wales felt that cases such as *DPP v Camplin* [1978] AC 705 (discussed above) warrant retention of a form a partial defence based on loss of self-control.

5. Possible models for reform

(a) A 'Gross Provocation' Defence

In terms of a model for reform of the defence of provocation, we encourage the Committee to consider an earlier reform proposal developed by the Law Commission for England and Wales.⁶⁰ In the context of a review of the law of murder (to encompass first and second degree murder), the Commission recommended a reformulation of the defence which restricted it to circumstances in which the defendant acted in response to 'gross provocation' which caused the defendant to have 'a justifiable sense of being seriously wronged' or to 'fear serious violence towards the defendant or another', or a combination of both, and where a person of the same age and 'ordinary temperament' 'might have reacted in the same or similar way'.⁶¹ This reform proposal also contained important exclusions ie express identification of circumstances in which it will not be possible for the defence to make a provocation plea. We have extracted this proposed reform of the provocation defence in full (see **Appendix A**).

We regard this model for a partial defence of provocation has having four (4) main advantages. First, the defence is restricted to 'gross provocation' that limits the scope of the defence. Second, the defence refers to a person of 'ordinary temperament' that is something a jury is likely to grasp readily. Third, this formulation of the defence expressly directs the jury to take into account 'all the circumstances of the defendant' other than those matters that affect his or her capacity for self-control. Finally, this formulation of the defence includes express prohibitions on pleading provocation in particular circumstances. This avoids the possibility that the provocation defence will be misused by defendants or misapplied by juries in the context of morally dubious cases.

In addition to the exclusions applying to defendants who incite the provocation to provide an excuse to use violence, or those who act in desire for revenge, which are included in this model, we recommend that the provocation defence be expressly made unavailable where the 'trigger' incident is (a) words alone, (b) things done or said that constitute infidelity and (c) a non-violent sexual advance. We discuss this part of our proposal below.

If the replacement of the current law of provocation with a 'gross provocation' defence along these lines is not the Committee's preference, we encourage the Committee to consider the current law in England and Wales. In the Coroners and Justice Act 2009, England and Wales

⁶⁰ See Law Commission for England and Wales, *Murder, Manslaughter, and Infanticide* (Law Com No 304, 2006).

⁶¹ Law Commission for England and Wales, *Murder, Manslaughter, and Infanticide* (Law Com No 304, 2006), para 5.11. See also Appendix A.

abolished the provocation defence.⁶² The new Act replaced provocation with a partial defence to murder, ‘loss of control’ which requires that the defendant killed as a result of a ‘loss of self-control’ (which had a ‘qualifying trigger’) and a person of the defendant’s same sex and age, ‘with a normal degree of tolerance and self restraint’, and in the circumstances of the defendant, might have reacted in the same way (see **Appendix B**).⁶³ It has been suggested that these changes to the law in England and Wales may narrow the scope of the provocation defence.⁶⁴ It is for this reason that this alternative to the provocation defence also represents an attractive reform option.

A ‘home-grown’ alternative reform option has been developed in Queensland and it is to this we now turn.

(b) The Queensland Model

Reforms that have been enacted in Queensland echo but extend beyond developments in common law to curtail the more problematic uses of provocation, and to expand the cases in which a person subject to abuse may escape a murder conviction. These changes have been achieved one the one hand by amending provocation provisions in the Criminal Code to expressly state that certain behaviours will not be deemed sufficient to amount to provocation,⁶⁵ and, on the other hand, by providing a new partial defence of ‘killing for preservation in an abusive domestic relationship’⁶⁶.

The defence of provocation has been amended in two significant ways in Queensland. First, the Criminal Code (Qld) s 304(2) expressly excludes the defence if the sudden provocation is based on words, unless ‘in circumstances of a most extreme and exceptional character’ (see **Appendix C**). This may cut out many instances for example where a person claims that they responded to confessions of infidelity or indeed, where he or she responded to a non-violent sexual advance. It should, however, be noted that, in relation to the latter, this may reduce the chances of a non-violent homosexual advance being used as the basis for a claim of provocation but it does not eliminate this possibility, particularly where there may be some physical contact.⁶⁷ Two recent Queensland cases in which provocation was raised successfully to reduce charges of murder to manslaughter on the basis of an alleged non-violent homosexual advance have once again ignited concern about the fact that a non-violent homosexual advance may still found a claim of provocation in that state. Following a review of the homosexual advance defence by a Working Party set up in November 2011 in Queensland the former Attorney-General of Queensland pledged in January 2012 to amend the Criminal Code (Qld) to ‘ensure that an unwanted sexual advance would not be enough to establish provocation unless there were exceptional circumstances. ...There is no place for

⁶² See Coroners and Justice Act 2009, ss 54-56, amending Homicide Act 1957, s 3.

⁶³ See A Norrie, ‘The Coroners and Justice Act 2009 – partial defences to murder (1) Loss of control’ [2010] *Crim LR* 275 for discussion.

⁶⁴ See R M Mackay ‘The Coroners and Justice Act 2009—Partial Defences to Murder (2)’ [2010] *Crim LR* 275. Mackay also posits that, given the changes to the defence of provocation (now ‘loss of control’) that were enacted at the same time in the Coroners and Justice Act 2009, it will be more difficult to raise both ‘loss of control’ and diminished responsibility (295).

⁶⁵ Section 304 *Criminal Code* (Qld).

⁶⁶ Section 304B *Criminal Code* (Qld).

⁶⁷ A Berman, ‘A gay advance is no excuse for murder’ *Brisbane Times*, 27 April 2011.

these kinds of acts in a civilised society'.⁶⁸ Such amendment would follow the example of the Australian Capital Territory and the Northern Territory (discussed below). However, the new Queensland Government has made clear that it is not in favour of further reform to expressly exclude a non-violent sexual advance as a basis for a plea of provocation. This means that Queensland and New South Wales are the only Australian jurisdictions that retain provocation but do not provide (as a matter of law) that a non-violent sexual advance cannot amount to provocative conduct for the purposes of this defence.⁶⁹

A further amendment to the Criminal Code (Qld) provides that the defence of provocation is not available – except in the most extreme and exceptional circumstances – in cases in which one partner of a domestic relationship unlawfully kills the other partner on the basis of anything done or believed to be done by the deceased to end the relationship, change the nature of the relationship or indicate that the relationship may, should or will end or change.⁷⁰ This amendment to the law further restricts provocation and goes a significant way toward addressing the issues arising from reliance on provocation in the context of domestic violence, which we mentioned above.

In addition to such changes to reduce the availability of provocation in those paradigm cases of male violence in a domestic relationship, a new partial defence, 'Killing for preservation in an abusive domestic relationship', has been introduced in Queensland. This partial defence operates to reduce a charge of murder to manslaughter where a person kills in response to acts of serious domestic violence in the course of an abusive relationship and that person believed that it was necessary to kill to avert death or grievous bodily harm.⁷¹ The belief must be reasonable having regard to the abusive relationship and all other circumstances. This new partial defence operates on a similar basis to excessive self-defence but is clearly linked to situations of domestic abuse. Thus, it addresses the concerns raised in Victoria that men who would have claimed provocation are now claiming 'defensive homicide' in the wake of reform to the law in that state. Nonetheless, given that this provision requires a belief that force must be necessary to avert physical harm, we suggest it does not remove the need for a partial defence of provocation in those abusive situations in which an accused person does not respond to a fear of death or grievous bodily harm but to emotional abuse, degradation and intimidation (as per our discussion above).

6. Further Explanation of the Necessary Exclusions

(a) Words alone

It is appropriate that words alone should only rarely be held sufficient to amount to provocation. Currently, words alone can constitute provocation but they must be 'grossly

⁶⁸ P Lucas, 'State Government to change "gay panic" defence', Ministerial Media Statement, 25 January 2012

⁶⁹ South Australia also has the defence of provocation but this is not anchored in statute, rather it remains a matter of common law.

⁷⁰ Section 304(3) Criminal Code (Qld).

⁷¹ Section 304B(1) Criminal Code (Qld).

insulting’ or otherwise ‘violent, threatening or otherwise distressing’.⁷² In *Lees*, the court held that Section 23 reference to ‘conduct’ is wide enough to include words, as well as physical acts and gestures.⁷³ The court concluded that the words in brackets are words of inclusion not addition. Thus as the common law currently stands, words can constitute provocation and this part of the defence is not confined to words constituting an insult – words could be violent, distressing or threatening but not form an insult. We think this limitation could be stronger and advocate amendment of the defence to include an express prohibition on ‘words alone’ as a basis for provocation.

(b) Things done or said that Constitute Infidelity

As noted above, the Queensland Criminal Code has been amended to expressly exclude claims of provocation based on the ending or changing of a relationship (unless there are extreme and exceptional circumstances). Similarly, the Coroners and Justice Act 2009 (England and Wales), s55(6)(c) expressly states that ‘the fact that a thing done or said constituted sexual infidelity is to be disregarded’ in determining whether there was a triggering act for the loss of self-control. We recommend the adoption of a similar limitation into the law of provocation.

(c) Non-violent sexual advances

We support the inclusion of a clause that provides that conduct consisting of non-violent sexual advances, is not, by itself, a sufficient basis for a defence of provocation. This reform has been implemented in the ACT and the Northern Territory.⁷⁴ A good model for this amendment is provided by the Crimes Act 1900 (ACT). Section 13(3) of that Act specifies that conduct of the deceased consisting of a non-violent sexual advance cannot be regarded sufficient by itself for an ordinary person to lose self-control.

(d) Modification of express exclusions

If the Committee is inclined to include express prohibitions on certain fact scenarios forming the basis of a trigger of ‘loss of control’ for the purposes of provocation, we suggest that it may also consider the inclusion of an additional provision stating that these exclusions apply ‘other than in circumstances of a most extreme and exceptional character’ (as per S304(3) Criminal Code (QLD), see **Appendix C**). This would make clear that these exclusions mean that in most cases the defence of provocation should not be left to the jury, however, it does not rule out the possibility that there may be exceptional circumstances where it may be appropriate for the jury to consider the defence.

7. Summary

We acknowledge that there have been and continue to be real concerns about the defence of provocation. However, the defence of provocation has developed beyond its historical roots and is capable of further reform. We therefore urge that the defence of provocation be

⁷² *R v Lees* [1999] NSWCCA 301.

⁷³ *R v Lees* [1999] NSWCCA 301. An appeal was granted in this case but the proviso applied so the appeal was dismissed on the basis that overall direction was satisfactory.

⁷⁴ Crimes Act 1900 (ACT), s 13(3); Criminal Code (NT), s158(5).

retained but that legislative reforms be enacted to ensure that the defence of provocation is fit and appropriate for the current era. Such reform will, we suggest, preserve the value of a partial defence of provocation, and go a significant way towards eliminating the problematic dimensions of the defence as it currently stands.

Appendix A

Law Commission for England and Wales, *Murder, Manslaughter, and Infanticide* (Law Com No 304, 2006) para 5.11 [footnotes omitted].

In our review of the defence of provocation in 2004, we concluded that the circumstances in which it should in future be available ought to be changed, in the ways indicated below. Our conclusions were reached after widespread and detailed consultation. We see no compelling reason to depart from them in substance, although we will indicate below where our conclusions remain controversial and, therefore, where there is an issue that could profitably be taken further in the next stage of the review. We are recommending that the defence be reformed as follows:

(1) Unlawful homicide that would otherwise be first degree murder should instead be second degree murder if:

(a) the defendant acted in response to:

- (i) gross provocation (meaning words or conduct or a combination of words and conduct) which caused the defendant to have a justifiable sense of being seriously wronged; or
- (ii) fear of serious violence towards the defendant or another; or
- (iii) a combination of both (i) and (ii); and

(b) a person of the defendant's age and of ordinary temperament, i.e., ordinary tolerance and self-restraint, in the circumstances of the defendant might have reacted in the same or in a similar way.

(2) In deciding whether a person of the defendant's age and of ordinary temperament, i.e. ordinary tolerance and self-restraint, in the circumstances of the defendant, might have reacted in the same or in a similar way, the court should take into account the defendant's age and all the circumstances of the defendant other than matters whose only relevance to the defendant's conduct is that they bear simply on his or her general capacity for self-control.

(3) The partial defence should not apply where:

- (a) the provocation was incited by the defendant for the purpose of providing an excuse to use violence; or
- (b) the defendant acted in considered desire for revenge.

(4) A person should not be treated as having acted in considered desire for revenge if he or she acted in fear of serious violence, merely because he or she was also angry towards the deceased for the conduct which engendered that fear.

(5) A judge should not be required to leave the defence to the jury unless there is evidence on which a reasonable jury, properly directed, could conclude that it might apply.

Appendix B

Coroners and Justice Act 2009 (England and Wales) Ss54-56

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).

Appendix C

Criminal Code 1899 (QLD)

304 Killing on provocation

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

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

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

(a) a domestic relationship exists between 2 persons; and

(b) one person unlawfully kills the other person (the deceased); and

(c) the sudden provocation is based on anything done by the deceased or anything the person believes the deceased has done—

(i) to end the relationship; or

(ii) to change the nature of the relationship; or

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

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

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

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

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

(8) When 2 or more persons unlawfully kill another, the fact that 1 of the persons is, under this section, guilty of manslaughter only does not affect the question whether the unlawful killing amounted to murder in the case of the other person or persons.