Submission No 12

INQUIRY INTO PARTIAL DEFENCE OF PROVOCATION

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I make three recommendations that need to be acted on as a whole. First, I recommend the abolition of the partial defence of provocation under s23 Crimes Act 1900 (NSW). I argue that the provocation defence is an anachronism, it condones violence, it is based on fallacies and is conceptually flawed, and it is gender biased. I also urge that mere reform is not the way to go, that attempting to exclude conduct seen as problematic is deluded. Secondly, I recommend that special evidentiary provisions [similar to s9AH Crimes Act 1958 (Vic)] need to be introduced to assist those victims of prolonged abuse in successfully raising a defence of self-defence under s418 Crimes Act 1900 (NSW). Such provisions will help to reveal the reality of domestic abuse, and may help to explain why the accused believed their response was necessary and why that response was reasonable, although it may have been neither immediate nor proportional. Lastly I recommend that special sentencing guidelines be introduced in keeping with the recommendations of the Stewart & Freiberg Report for the Victorian Sentencing Advisory Council.

Submission to the Legislative Council Select Committee on the Partial Defence of Provocation

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1. I recommend that the partial defence of provocation under s23 *Crimes Act 1900* (NSW) be abolished [see pp1-9]; and

2. I recommend that special evidentiary provisions need to be introduced to assist those victims of prolonged abuse in successfully raising a defence of self-defence under s418 *Crimes Act 1900* (NSW) [see pp9-12]; and

3. I recommend that special sentencing guidelines be introduced in keeping with the recommendations of the Stewart & Freiberg Report for the Victorian Sentencing Advisory Council [see pp12-13].

I urge that all three recommendations need to be acted on, not merely 1. in isolation.

1. Abolition of provocation

The momentum towards abolition of the partial defence of provocation is irresistible. Provocation has been abolished with little fanfare in Tasmania (2003)[1], and after an extensive law reform process in both Victoria (2005)[2] and Western Australia (2008).[3] It was modified in the Northern Territory (2006),[4] and also in Queensland (2008)[5] following a detailed reform investigation (arguably it would have been abolished but for the retention of

[1] *Criminal Code Amendment (Abolition of Defence of Provocation) Act 2003* (Tas). And see Rebecca Bradfield, 'The Demise of Provocation in Tasmania' (2003) 27 *Criminal Law Journal* 322.
[2] *Crimes (Homicide) Act 2005* (Vic). And see Victorian Law Reform Commission, *Defences to Homicide: Final Report* (2004).
[3] *Criminal Law Amendment (Homicide) Act 2008* (WA). And see Law Reform Commission of Western Australia, *Review of the Law of Homicide*, Project 94 (2007).
[4] *Criminal Reform Amendment Act (No 2) 2006* (NT).
[5] *Criminal Code and Other Legislation Amendment Act 2011* (Qld). See also Queensland Law Reform Commission, *A Review of the Excuse of Accident and the Defence of Provocation*, Report 64 (2008).

the mandatory life penalty for murder[6]). It was also abolished after comprehensive scrutiny in New Zealand (2009)[7] and was abolished - although replaced with a 'loss of control' defence - in England and Wales (2009).[8]

The partial defence of provocation has long been subjected to academic and judicial criticism on a number of grounds, including that it is an anachronism, that it condones violence, that it is based on fallacies and is conceptually flawed, and that it is gender biased.

Provocation as a defence to murder is an anachronism,[9] born in an era when men carried arms and fought duels, when they responded to slights to their honour with swift and lethal retorts.[10] The slight to male honour might have been a verbal insult, a slap, or witnessing an act of adultery. So the lethal retort to preserve honour was what might now be termed an honour killing. It was also an era when capital punishment applied to countless crimes, and the law chose to exercise some sympathy for a killing when, "owing to a sudden Transport of Passion, which through the Benignity of the Law, is imputed to Human Infirmity".[11] It was said that a provoked killer had had their reason undermined by their passions – but only to some extent, and only temporarily.[12] In an era when violence was the norm, such a partial defence was viewed as a necessity.[13] Over the long gestation of the provocation defence, it was eventually deemed not sufficient merely for the accused to have succumbed to their passions, and so an additional requirement was introduced, namely that a reasonable man (now ordinary person) might also have succumbed.[14]

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[6] See Queensland Law Reform Commission, *A Review of the Excuse of Accident and the Defence of Provocation*, Report 64 (2008), 471.
[7] *Crimes (Provocation Repeal) Amendment Act 2009* (NZ). See also New Zealand Law Commission, *The Partial Defence of Provocation*, Report 98 (2007).
[8] *Coroners and Justice Act 2009* (UK). See also The Law Commission, *Murder, Manslaughter and Infanticide*, Report 304 (2006).
[9] See eg O'Bryan AJA in *Kumar* [2002] VSCA 139 at [176].
[10] See Victorian Law Reform Commission, *Defences to Homicide: Final Report* (2004), 21-23; Law Reform Commission of Western Australia, *Review of the Law of Homicide*, Project 94 (2007), 203; Queensland Law Reform Commission, *A Review of the Excuse of Accident and the Defence of Provocation*, Report 64 (2008), 208-212.
[11] Sir Michael Foster, *Crown Law, Discourse II of Homicide* (1762), 255.
[12] See eg Foster, *Crown Law, Discourse II of Homicide* (1762), 296.
[13] See generally Jeremy Horder, *Provocation and Responsibility,* (1992, Clarendon).
[14] *Welsh* (1869) 11 Cox CC 336.

The original basis of the provocation defence - that the killing was done suddenly in the heat of passion - was to some extent emasculated in NSW through ground-breaking statutory amendments.[15] But we are still left with a partial defence of provocation with two distinct limbs. Put overly simply, there is a subjective limb – that the accused was provoked into losing control and killed – and an objective limb – that an ordinary person might have lost control.[16]

Based on these two limbs, some argue that a provoked killer is less morally blameworthy than a murderer,[17] and that the partial defence must be retained to avoid the unwarranted stigma of 'murder'[18] – that the principle of fair labelling must be respected.[19] I prefer the reasoning of those who question this 'uniqueness' of murder, and who note that in fact societal disapprobation attaches in varying degrees to the individual circumstances of killings, that the labels of murder and manslaughter are fluid. It is compelling that society abhors the drunk driver who kills a family in a collision – but who is legally labelled a manslaughterer - and yet is sympathetic to an elderly man who kills his ailing spouse – and who is labelled murderer.[20]

In NSW, not only do we no longer have capital punishment but we also no longer have mandatory life imprisonment for murder – sentencing for murder is discretionary.[21] And hopefully we no longer tolerate violence in the way society once did. A provoked killing is still an intentional killing, a deliberate taking of human life. The partial defence of provocation does indeed condone violence by partially excusing it,[22] because the law's response is to say that this intentional killer is not a murderer – and thus receives a

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[15] Note amendments to s23 introduced in 1982: *Crimes (Homicide) Amendment Act1982* (NSW).
[16] See *Crimes Act 1900* (NSW) s23(2).
[17] See eg NSWLRC*, Partial Defences to Murder: Provocation and infanticide*, Report No 83 (1997), [2.33]. See also the discussion in New Zealand Law Commission, *The Partial Defence of Provocation*, Report 98 (2007), 51-59.
[18] See New Zealand Law Commission, *The Partial Defence of Provocation*, Report 98 (2007), 51-52.
[19] For insight into the fair labelling principle, see eg James Chalmers and Fiona Leverick, 'Fair Labelling in Criminal Law' (2008) 71 *Modern Law Review* 217.
[20] See New Zealand Law Commission, *The Partial Defence of Provocation*, Report 98 (2007), 53. See also Graeme Coss, 'Provocative Reforms: A Comparative Critique' (2006) 30 *Criminal Law Journal* 138, 142-143.
[21] *Crimes Act 1900* (NSW) s19A.
[22] See Law Reform Commission of Western Australia, *Review of the Law of Homicide*, Project 94 (2007), 211, 212.

significantly more lenient sentence (for manslaughter) than a murderer.[23] For many, the epithet manslaughter more accurately attaches to an unintentional killing.[24]

Although the provocation defence is said to be based on the notion of the accused's loss of self-control, it is not the case that the accused was suffering from some sort of mental impairment such as to impact on their capacity to exercise control. In fact the extent of loss of self-control required is mired in uncertainty.[25] 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.[26] The law has continued to ignore the science, preferring instead to rely on 'common sense'.

One must also ask: why has loss of control been so privileged?[27] Again one needs to note the historical underpinnings of the defence: men, carrying arms, being insulted, and retaliating - and laws and a legal system of men, by men, for men. The principal emotion at play is normally anger – anger in response to insult. Why should the law continue to have special sympathy for angry killings? As Neal & Bagaric have argued:[28]

> The desire to ensure that a loved one does not die in pain (resulting in an act of mercy killing) might be just as powerful as the anger stemming from a confession of adultery. The latter should enjoy no special privilege in the law.

In those cases in which men kill their intimate partner and claim loss of self-control due to provocation, I argue that in truth what has happened is that these men have lost control of their wife/partner/girlfriend and have responded with lethal violence to an insult or a

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[23] See Felicity Stewart & Arie Freiberg, *Provocation in Sentencing. Research Report* (2nd ed, Sentencing Advisory Council, 2009), Appendix 4.

[24] See eg New Zealand Law Commission, *The Partial Defence of Provocation*, Report 98 (2007), 53; Law Reform Commission of Western Australia, *Review of the Law of Homicide*, Project 94 (2007), 218.

[25] See eg Law Reform Commission of Western Australia, *Review of the Law of Homicide*, Project 94 (2007), 206. See also Alex Reilly, 'Loss of Self-Control in Provocation' (1997) 21 *Criminal Law Journal* 320.

[26] See eg New Zealand Law Commission, *The Partial Defence of Provocation*, Report 98 (2007), 45; Luke Neal & Mirko Bagaric, 'Provocation: The Ongoing Subservience of Principle to Tradition' (2003) 67 *Journal of Criminal Law* 237.

[27] See Michael Allen, 'Provocation's Reasonable Man: A Plea for Self-Control' (2000) 64 *The Journal of Criminal Law*216; Law Reform Commission of Western Australia, *Review of the Law of Homicide*, Project 94 (2007), 211-212.

[28] Luke Neal & Mirko Bagaric, 'Provocation: The Ongoing Subservience of Principle to Tradition' (2003) 67 *Journal of Criminal Law* 237, 247.

rejection, which is a challenge to their honour and their proprietariness - their feelings of ownership, exclusivity and jealousy.[29] And what is the alleged provocation? Some case examples involve the accused (allegedly) being told: 'fuck off'; 'you are hopeless in bed'; 'I've found a better lover'; 'your parents are prostitutes'; 'go on kill yourself, see if I care'; 'I'm leaving'; 'sex with you repulses me'; 'I don't love you anymore'; 'I've never loved you'. Surely lethal violence in response to such insults warrants no special privilege.

And what of the ordinary person limb? As I have argued elsewhere,[30] ordinary people do not kill when provoked. Only the most extraordinary people do. On average, there are 77 intimate partner homicides each year in Australia, 60 involving men killing women. In the vast majority of these, the killing is the result of male proprietariness, often at the time of relationship breakdown or separation. Let's assume that 50 men kill each year in such circumstances. There are between 50,000 to 55,000 divorces each year, but one can only guesstimate the number of de facto breakdowns, to say nothing of relationship breakdowns – surely significantly higher again. The combined figure is likely to be huge. And in all of these, there would have been provocative remarks and actions, coupled with the ultimate provocative insult, the actual breakup and separation. And this is not even including the provocative insults that might occur in those relationships that do not break down – very large numbers indeed. And yet only 50 men kill in these provocative circumstances. I submit that men who kill when affronted by their partners are truly extraordinary. The test is not: could someone lose control? It is: could an ordinary person lose control? It is simply absurd for defence counsel to suggest and for judges or juries to believe that an ordinary person might lose control when subjected to such provocation. It is nonsense. The fact that these key players in a trial occasionally do believe this fallacy is cogent reason to abolish the partial defence of provocation.

[29] See Margo Wilson & Martin Daly, 'Sexual Rivalry and Sexual Conflict: Recurring Themes in Fatal Conflicts' (1998) 2 *Theoretical Criminology* 291; Margo Wilson & Martin Daly, 'Male Sexual Proprietariness and Violence Against Wives' (1996) 5 *Current Directions in Psychological Science* 2. See also Graeme Coss, 'The Defence of Provocation: An acrimonious divorce from reality' (2006) 18 *Current Issues in Criminal Justice* 51.

[30] See eg Graeme Coss, 'The Defence of Provocation: An acrimonious divorce from reality' (2006) 18 *Current Issues in Criminal Justice* 51. See also Law Reform Commission of Western Australia, *Review of the Law of Homicide*, Project 94 (2007), 209; New Zealand Law Commission, *The Partial Defence of Provocation*, Report 98 (2007), 45-46.

I do not feel it is necessary to examine the objective limb in detail here. Suffice to say that it has attracted more criticism than most aspects of the defence.[31] In fact there are troublesome sub-limbs. The ordinary person 'test' is as follows:[32] the accused's characteristics are to be attributed to the ordinary person to help understand the gravity of the provocation but, other than the age of the accused, in assessing the powers of self-control the ordinary person is otherwise devoid of the accused's personal characteristics. Perhaps it is not surprising to learn that many judges have noticed "the glazed look in the jurors' eyes" when reciting that test, and that "juries struggle with the distinction and find it hard to grasp".[33]

Context is vital, and so it is essential to recognise the very different circumstances in which men kill, and women kill – and thus the very different circumstances in which they may raise the defence of provocation.[34] Men mostly kill other men in confrontational social interactions, as retaliation to an insult to honour; when men kill women, it is usually an intimate, routinely driven by proprietariness, and again as retaliation to an insult to honour. Women mostly kill an intimate male partner, and invariably out of fear and desperation to protect themselves and/or their children. As I have argued before,[35] it would be an obscenity to treat as equivalent the case of a jealous man who kills his partner who threatens to leave him, and the case of a battered woman who kills to stay alive. And yet the courts have often done just that - or worse, shown greater compassion to the jealous male. Gender bias is not established by statistical proof that more men successfully raise provocation than women. As I have insisted before, gender bias is proved the moment a man successfully claims provocation when he kills a woman who has rejected him. The success for women who kill (protecting themselves) becomes irrelevant.

[31] See New Zealand Law Commission, *The Partial Defence of Provocation*, Report 98 (2007), 43-45; Law Reform Commission of Western Australia, *Review of the Law of Homicide*, Project 94 (2007), 206-209. See also Stanley Yeo, 'Power of Self-Control in Provocation and Automatism' (1992) 14 *Sydney Law Review* 3.
[32] See *Stingel* (1990) 171 CLR 312; *Green* [1997] 191 CLR 334.
[33] Smart AJ in *Mankotia* [2001] NSWCCA 52 at [18]-[19].
[34] See eg Jenny Morgan, *Who Kills Whom and Why: Looking Beyond Legal Categories* (VLRC Occasional Paper, 2002).
[35] Graeme Coss, 'Provocation, Law Reform and the Medea Syndrome' (2004) 28 *Criminal Law Journal* 133. See also Law Reform Commission of Western Australia, *Review of the Law of Homicide*, Project 94 (2007), 215; Adrian Howe, 'Reforming Provocation (More or Less)' (1999) 12 *Australian Feminist Law Journal* 127.

Provocation cases have had a long and murky history of victim-blaming. In an infamous Victorian case of *Ramage*,[36] he killed his estranged wife when she allegedly confessed to a new relationship and insulted him by claiming that sex with him repulsed her. At his trial, she was painted as 'duplicitous, pleasure-seeking, hormone-driven'. It was even suggested that because she had tampons in her handbag when she was killed, it was more likely that she had tetchily abused him, as he alleged. To observers, the deceased woman Julie Ramage was on trial, not her homicidal estranged husband James.[37] Incredibly, the jury supported his provocation defence. The problem in so many provocation cases is that frequently the allegation by the accused cannot be easily negated, because the only witness to the alleged provocative incident is, conveniently, dead.[38] And so defence counsel re-construct the deceased as having caused their own demise.

It is of great and continuing concern that in two recent NSW cases – *Singh* and *Won* – jealous men killed their spouse or their spouse's lover and successfully claimed provocation. In *Singh*,[39] the accused alleged that his wife had insulted him and rejected him, even threatening him with deportation, and he retaliated by cutting her throat eight times with a box cutter. But he was also desperate to maintain control over his wife, and had committed acts of physical abuse against her through their stormy relationship. Rather than losing self-control, he had really lost control of his wife. In *Won*,[40] he was suspicious that his wife was being unfaithful, parked away from their house, and walked in to find his wife in bed with a friend, and he then grabbed a knife from the kitchen and stabbed the friend seven times. This is yet another example of a man who had lost control of his wife resorting to lethal violence. One is immediately reminded of the ancient case of *Maddy*, about which Lord Holt declared in 1707: "jealousy is the rage of man, and adultery is the highest invasion of

[36] *Ramage* [2004] VSC 508.
[37] See eg Karen Kissane, *Silent Death: The Killing of Julie Ramage* (Hatchette, 2006). See also Graeme Coss, 'Provocation's Victorian Nadir: the obscenity of Ramage' (2005) 29 *Criminal Law Journal* 133.
[38] See Jenny Morgan, 'Provocation Law and Facts: Dead Women Tell No Tales, Tales Are Told About Them' (1997) 21 *Melbourne University Law Review* 237.
[39] *Singh* [2012] NSWSC 637.McClellan CJ at CL sentenced Singh to 6 years non-parole.
[40] *Won* [2012] NSWSC 855. Fullerton J sentenced Won to 5 years non-parole. As to the provocative incident, Fullerton J noted at [29]: "However confronting and upsetting proof of infidelity might prove to be when it is exposed, where a marriage or other relationship is unhappy (as I am satisfied this marriage was), regrettable though it might be, a lack of fidelity is not uncommon."

property".[41] It seems that ancient tract is still as valid as ever, given the jury apparently took under an hour to reach their verdict.

In both cases juries were satisfied either that the prosecution had failed to disprove beyond reasonable doubt that the accused had lost control and killed due to provocation, or that an ordinary person may have lost control. I submit that both men deserve nothing less than the epithet 'murder' for their angry, brutal, jealous and intentional killings. If some people feel sympathy is warranted, then that can be satisfied at sentencing.[42]

Why does the provocation defence succeed in such problematic circumstances? A number of studies, both in Australia and overseas, have shown that tolerance of jealousy-inspired violence is, insidiously, all too common.[43] While ordinary people might condemn violent acts in general, those same people may view with far greater 'understanding' and generosity violent acts inspired by a jealousy-provoked incident. I submit that as a society we need to be less tolerant of violent acts, especially lethal retorts by men motivated by proprietariness. Abolishing the provocation defence will deny such men the opportunity to play on the generosity and tolerance of juries.

Further, the defence has also been abused by men who used lethal retaliation to an alleged homosexual advance by another man. There have been a catalogue of these disturbing killings[44] and I will not detail them here. Suffice to say that this aspect of the provocation defence merely adds more fuel to the fire that will hopefully completely engulf the defence of provocation.

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[41] *Mawgridge* (1707) Kel 119; 84 ER 1107.
[42] Victorian Law Reform Commission, *Defences to Homicide: Final Report* (2004), 33.
[43] See eg Anne Mary McMurray et al, 'Post-Separation Violence: The Male Perspective' (2000) 6 *Journal of Family Studies* 89; Sylvia Puente & Dov Cohen, 'Jealousy and the Meaning (or Nonmeaning) of Violence' (2003) 29 (4) *Personality and Social Psychology Bulletin* 449.
[44] See eg Stephen Tomsen, *Hatred, Murder and Male Honour. Anti-Homosexual Homicides in NSW, 1980-2000* (Australian Institute of Criminology Research and Public Policy Series No 43, 2002); Stephen Tomsen and Thomas Crofts, 'Social and Cultural Meanings of Legal Responses to Homicide Among Men: Masculinities, Sexual Advances and Accidents' (2012) 45 (3) *Australian & New Zealand Journal of Criminology* (forthcoming).

Lastly, I urge caution against merely tinkering with the provocation defence, including by attempting to exclude certain conduct from its purview.[45] The VLRC warned that "it is likely the provocative conduct will simply be redefined in a way that allows it to fall within the scope of the defence".[46] Recently, we have seen telling evidence of that very practice. As already mentioned, in England and Wales the defence was supposedly abolished, but replaced with a 'loss of control' defence. It should be noted that that new defence explicitly excluded evidence of infidelity from the qualifying trigger for loss of control,[47] and yet that has recently been undermined by the Court of Appeal.[48] That court ruled that if there was no other triggering incident, then the subsection would apply; but in circumstances where infidelity was one of a number of potential triggering factors, it must be left for consideration by a jury.[49]

Enough. The time has come to abolish provocation.

2. Strengthening self-defence

The abolition of the partial defence of provocation will mean that abused women who kill will no longer be able to raise it. Given the gendered asymmetry of intimate partner killings, it should be obvious that provocation is not really the appropriate defence for an abused woman to claim.[50] Their killing is invariably to protect themselves and/or their children. Under s418 *Crimes Act 1900* (NSW), an accused may be successful in claiming self-defence, and thus be acquitted, if they believed the conduct was necessary (inter alia) to defend themselves or another (or to prevent/terminate the unlawful deprivation of liberty), and the

[45] For cogent arguments as to why merely reforming the defence is unsatisfactory, see Victorian Law Reform Commission, *Defences to Homicide: Final Report* (2004), 43-47. See also Graeme Coss, 'Provocative Reforms: A Comparative Critique' (2006) 30 *Criminal Law Journal* 138, 146.
[46] Victorian Law Reform Commission, *Defences to Homicide: Final Report* (2004), 46.
[47] *Coroners and Justice Act 2009* s56(6)(c).
[48] *Clinton* [2012] 1 Cr App R 26.
[49] The ruling has been rebuked for completely disregarding the intention of the legislation: 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.
[50] See eg Julie Stubbs and Julia Tolmie, 'Falling Short of the Challenge? A Comparative Assessment of the Australian Use of Expert Evidence on the Battered Woman Syndrome' (1999) 23 *Melbourne University Law Review* 709; Elizabeth Sheehy, Julie Stubbs & Julia Tolmie, 'Defences to Homicide for Battered Women: A Comparative Analysis of Laws in Australia, Canada and New Zealand' (2012) 34 (3) *Sydney Law Review* (forthcoming); Kate Fitz-Gibbon, 'Provocation in NSW: The Need for Abolition' (2012) 45 *Australian & New Zealand Journal of Criminology* 194.

conduct was a reasonable response in the circumstances as perceived by them. It should be noted that if a jury finds that the accused believed their conduct was necessary, but do not accept that the response was reasonable, then they can find manslaughter under s421 *Crimes Act 1900* (NSW).

On the surface, s418 should not pose special problems for abused women who kill their tormentor. But self-defence, as with provocation, carries with it centuries of baggage.[51] It developed in times of tavern brawls between men of comparable strength or weaponry. Traditionally, self-defence required three key components: the accused to have retreated first before retaliating, then an immediate retaliation, and also a proportional retaliation. For a woman subjected to perhaps years of psychological, physical and/or sexual abuse, these 'traditional requirements' become impossible burdens. An abused woman may have nowhere to flee to, she may have children to protect, she may be financially dependent, she may genuinely fear for her life should she attempt to leave – and so on. An abused woman may not be able to respond immediately to a violent male – with all the dangers that entails – and instead may need to wait until he is incapacitated or asleep. An abused woman may not enjoy physical dominance over her violent partner, and so may need to use a weapon in retaliation. As with provocation, the circumstances of interpersonal violence and the responses to it are significantly gendered.

The other aspect of historical baggage that attaches to self-defence when being utilised by an abused woman is that judges and juries over the years have first asked themselves the question: why didn't she just leave? Countless sociological and psychological studies have answered that uninformed question with total cogency.[52] And yet the question has not entirely gone away. Thus it may be difficult to satisfy a jury that she honestly believed it was necessary to do what she did. And even more so, it may be difficult for a jury to accept that the response was reasonable in the circumstances.[53]

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[51] See eg Graeme Coss, 'Killing Violent Men' (2002)26 *Criminal Law Journal* 133.

[52] See eg Rebecca Dobash, Russell Dobash, Kate Cavanagh, & Ruth Lewis, 'Just an Ordinary Killer – Just an Ordinary Guy. When Men Murder an Intimate Woman Partner' (2004) 10 (6) *Violence Against Women* 577.

[53] See Anthony Hopkins & Patricia Easteal, 'Walking in Her Shoes: Battered Women Who Kill in Victoria, Western Australia and Queensland' (2010) 35*Alternative Law Journal* 132; Elizabeth Sheehy, Julie Stubbs & Julia Tolmie, 'Defences to Homicide for Battered Women: A Comparative Analysis of Laws in Australia, Canada and New Zealand' (2012) 34 (3) *Sydney Law Review* (forthcoming).

One key evidentiary device has been used in recent decades, the so-called battered woman syndrome (BWS).[54] Although it has had its success (in assisting abused women to successfully argue provocation, self-defence, and duress), it has also been subjected to scathing criticisms in academic and reform literature. It requires expert confirmation, usually from a psychiatrist, and is thus seen as pathologising women and creating a new stereotype into which battered women must fit: if they were not totally submissive and suffering from 'learned helplessness', BWS may not be established. As Ian Leader-Elliott has concluded, such notions are contemptuous of abused women.[55]

Rather than tinker with the wording of s418, I recommend NSW legislating to include evidentiary provisions similar to those enacted in Victoria under s9AH of the *Crimes Act 1958* [see Appendix A] – to properly utilise evidence of domestic violence.[56] I submit that that provision could be copied and pasted into our *Crimes Act* - with minor but necessary adjustments given that Victoria has a differently worded provision on self-defence, and their terminology specifies 'family' violence (rather than 'domestic' violence). I have made a rough attempt at a draft [see Appendix B].[57] I also note caveats expressed by some commentators that such provisions might be exploited by men who kill.[58] Given that men kill with far greater frequency than women, I fear that that risk is always possible. Thus I would recommend monitoring the application of the provision to determine its effectiveness.

This provision can be used to provide evidence that helps to explain the nature and dynamics of domestic violence, not only in general but also for a particular accused. That evidence will come from experts in the field of domestic violence, and so will not be limited to the evidence of psychiatrists. Crucially, the provision helps to explain why the belief that a response was necessary may have existed and why the response may have been reasonable.

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[54] See eg Julie Stubbs and Julia Tolmie, 'Falling Short of the Challenge? A Comparative Assessment of the Australian Use of Expert Evidence on the Battered Woman Syndrome' (1999) 23 *Melbourne University Law Review* 709.

[55] Ian Leader-Elliott, 'Battered but Not Beaten: Women Who Kill in Self Defence' (1993) 15 *Sydney Law Review* 403.

[56] See Anthony Hopkins & Patricia Easteal, 'Walking in Her Shoes: Battered Women Who Kill in Victoria, Western Australia and Queensland' (2010) 35*Alternative Law Journal* 132.

[57] I confess it is very rough. Experienced legislative drafters will doubtless cringe.

[58] See eg Victoria Department of Justice, *Defensive Homicide. Review of the Offence of Defensive Homicide*. Discussion Paper (2010); Danielle Tyson, 'Victoria's new homicide laws: provocative reforms or more stories of women 'asking for it'?' (2011) 23 *Current Issues in Criminal Justice* 203.

It also helps to explain why a response may not have been immediate, and may not have been proportional. The definition of violence is appropriately broad, encompassing not merely physical and sexual violence, but a range of psychological abuses as well. And it notes that violence is not necessarily limited to a discrete major incident, but may involve a pattern of conduct that includes less major incidents. In short, one anticipates that it will help to reveal "what it must really be like to live in a situation of ongoing violence".[59] It is to be hoped that abused women may then more readily- and successfully - plead self-defence. It is also to be hoped that fewer abused women will be persuaded to plead guilty to manslaughter (on the grounds that although they believed their conduct was necessary, it was an unreasonable response). This illuminating evidentiary provision is an essential addition once the partial defence of provocation is abolished.

3. Related matter: Sentencing

The abolition of the partial defence of provocation results in provocation being relegated solely to a matter to be considered at sentencing.[60] Unlike decisions of juries which are not open to scrutiny, judges must make public their decisions regarding sentencing. And those decisions are potentially appealable. I submit that this is a not-insignificant distinction.

If a prime motivation for the abolition of provocation is to deny jealous violent men recourse to the defence, then it would be absurd to grant those same men a significant reduction in sentence merely because they claimed that they were provoked.[61] It is crucial that guidelines are provided to judges to assist them in gauging the impact on culpability of the alleged provocative incident/s. The Stewart & Freiberg Report for the Victorian Sentencing Advisory Council is an invaluable document on this issue.[62] It recommended a focus on the impact of provocation on culpability, and on the notion of the extent to which the accused had a justifiable sense of being wronged – but cautioned that conduct by a victim which amounted

[59] See Rebecca Bradfield, Submission to the Victorian Law Reform Commission, *Defences to Homicide: Final Report* (2004), [4.18], as quoted in Anthony Hopkins & Patricia Easteal, 'Walking in Her Shoes: Battered Women Who Kill in Victoria, Western Australia and Queensland' (2010) 35*Alternative Law Journa*l 132, at 134.
[60] See *Crimes (Sentencing Procedure) Act 1999* (NSW) s21A(3)(c).
[61] Victorian Law Reform Commission, *Defences to Homicide: Final Report* (2004), [7.5].
[62] Felicity Stewart & Arie Freiberg, *Provocation in Sentencing. Research Report* (2nd ed, Sentencing Advisory Council, 2009). See also Felicity Stewart & Arie Freiberg, 'Provocation in Sentencing: A Culpability-Based Framework' (2008) 19 *Current Issues in Criminal Justice* 283.

to them exercising a right to equality (eg to personal autonomy) should not fall within that notion.

Rather than analyse in detail here the Stewart & Freiberg Report for the Victorian Sentencing Advisory Council, I commend their arguments and recommendations as warranting adoption once the partial defence of provocation is abolished.

APPENDIX A

***Crimes Act 1958* (Vic)**

9AH Family violence

(1) Without limiting section 9AC, 9AD or 9AE, for the purposes of murder, defensive homicide or manslaughter, in circumstances where family violence is alleged a person may believe, and may have reasonable grounds for believing, that his or her conduct is necessary—
(a) to defend himself or herself or another person; or
(b) to prevent or terminate the unlawful deprivation of his or her liberty or the liberty of another person
— even if—
(c) he or she is responding to a harm that is not immediate; or
(d) his or her response involves the use of force in excess of the force involved in the harm or threatened harm.

(2) Without limiting the evidence that may be adduced, in circumstances where family violence is alleged evidence of a kind referred to in subsection (3) may be relevant in determining whether—
(a) a person has carried out conduct while believing it to be necessary for a purpose referred to in subsection (1)(a) or (b); or
(b) a person had reasonable grounds for a belief held by him or her that conduct is necessary for a purpose referred to in subsection (1)(a) or (b); or
(c) a person has carried out conduct under duress.

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

(4) In this section—
child means a person who is under the age of 18 years;
family member, in relation to a person, includes—
(a) a person who is or has been married to the person; or
(b) a person who has or has had an intimate personal relationship with the person; or
(c) a person who is or has been the father, mother, step-father or step-mother of the person; or
(d) a child who normally or regularly resides with the person; or
(e) a guardian of the person; or
(f) another person who is or has been ordinarily a member of the household of the person;

family violence, in relation to a person, means violence against that person by a family member;
violence means—

(a) physical abuse;

(b) sexual abuse;

(c) psychological abuse (which need not involve actual or threatened physical or sexual abuse), including but not limited to—

(i) intimidation;

(ii) harassment;

(iii) damage to property;

(iv) threats of physical abuse, sexual abuse or psychological abuse;

(v) in relation to a child—

(A) causing or allowing the child to see or hear the physical, sexual or psychological abuse of a person by a family member; or

(B) putting the child, or allowing the child to be put, at real risk of seeing or hearing that abuse occurring.

(5) Without limiting the definition of **violence** in subsection (4)—

(a) a single act may amount to abuse for the purposes of that definition;

(b) a number of acts that form part of a pattern of behaviour may amount to abuse for that purpose, even though some or all of those acts, when viewed in isolation, may appear to be minor or trivial.

APPENDIX B

***Crimes Act 1900* (NSW)**

418A Domestic violence

(1) For the purposes of a killing alleged to have been done in self-defence under s418, in circumstances where **domestic violence** is alleged a person may believe that his or her conduct is necessary—
(a) to defend himself or herself or another person; or
(b) to prevent or terminate the unlawful deprivation of his or her liberty or the liberty of another person
— even if—
(c) he or she is responding to a harm that is not immediate; or
(d) his or her response involves the use of force in excess of the force involved in the harm or threatened harm.

(2) Without limiting the evidence that may be adduced, in circumstances where domestic violence is alleged evidence of a kind referred to in subsection (3) may be relevant in determining whether—
(a) a person has carried out conduct while believing it to be necessary for a purpose referred to in subsection (1)(a) or (b); or
(b) the conduct is a reasonable response in the circumstances as he or she perceives them — even if—
(c) he or she is responding to a harm that is not immediate; or
(d) his or her response involves the use of force in excess of the force involved in the harm or threatened harm.

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The remainder of the section can follow s9AH exactly, other than to insert 'domestic violence' rather than 'family violence'.
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