

INQUIRY INTO PARTIAL DEFENCE OF PROVOCATION

Name: Mr James Moshides

Date received: 24/09/2012

31 August 2012
The Director
Select Committee on the Partial Defence of Provocation
Parliament House
Macquarie Street
SYDNEY NSW 2000

Dear Director,

Having researched the law of the partial defence of provocation in England and NSW for a master of laws degree in 2011, I respectfully make submissions to the Inquiry and attach my LLM dissertation as a reference to my views.

In summary, I submit:

- i. The partial defence of provocation be retained but modified to make the defence unavailable to certain provocative acts by legislating, as did the UK¹, to give power to the judge to withhold the defence from the jury from trivial and unacceptable provocative acts. In addition, the adoption of the UK objective test that the provocative trigger be extremely grave and causing a justifiable sense of being seriously wronged.² Determining the gravity and effect of provocation objectively by community standards should ensure that alleged provocative acts such admissions of infidelity, non-violent sexual advance, affronts to honour and the like to not invoke the defence.

NSW should not adopt specific legislative exclusion of triggers/provocations being based on sexual infidelity as in the new UK defence³ because this has led to argument and a recent appeal in England (*R v Clinton*⁴). Conduct based on infidelity which cannot be regarded as extremely grave provocation can be excluded by the jury by applying the new UK defence's objective test as outlined above. There is no need for controversial explicit legislative exclusion of sexual infidelity as a provocation/trigger of the defence.

- ii. The defence requirement that the accused must have suffered a 'loss of self-control' be abolished as loss of self-control as a phenomenon is indefinable, used as an excuse by defendants and disadvantages physically and sexually abused women who kill even though the former 'suddenness' of loss of self-control requirement has been removed by legislation. Although abolished, the issue of suddenness can still arise as it does in the reformed UK defence which has a similar 'suddenness' exclusion provision.⁵

In addition to the issue of suddenness remaining in the minds of juries, actions made under loss of self control are partially excused because the person was acting irrationally at the time. If an abused person who kills pleads the defences of provocation, self-defence and excessive self-defence simultaneously, there is an inconsistent need to show a belief in rational retaliation for self-defence/excessive self-defence and then retaliation due to irrationality for provocation.

The English Law Commission recommended provocation defence provisions not requiring the element of loss of self control.⁶ However, the UK government did not

¹ Coroners and Justice Act 2009 (UK) s54(6).

² CJA s55(4)

³ CJA s55(6)(c)

⁴ [2012] EWCA Crim 2.

⁵ CJA Explanatory Notes para 337.

⁶ Law Commission UK, *Partial Defences to Murder* (Law Com No 290, 2004) para 1.13.

adopt this recommendation in the new “Loss of Control” defence replacing the provocation defence.

The UK government was concerned that, without the element of loss of self-control, cold-blooded, premeditated killings by an accused would qualify for the defence. However, the adoption of section 54(4) of the Coroners and Justice Act 2009 (UK), which precludes the defence from those who “acted in a considered desire for revenge”, should be sufficient to exclude cold-blooded killings.

- iii. The current Australian two-limbed objective test in the defence was adopted by the High Court in the case of *Stingel*⁷ by slightly modifying the test from the UK case of *Camplin*⁸. The current test should be replaced with a simple test modified from the subjective test proposed by the NSW Law Reform Commission in 1997.⁹ The two limbs of the current objective test are too subtle and confusing for jurors (see Smart J’s comment in the 2001 NSW case of *Mankotia*¹⁰). The misapplication of the objective test of the provocation defence has caused numerous expensive appeals in England and Australia.¹¹ In a 2012 NSW provocation case, the trial judge directed the jury by giving the *Camplin*¹² version of the jury direction instead of the approved *Stingel*¹³ version. This could have been a justification for appeal had the defence not been successful. The test confuses jurors and can cause inadvertent mistakes in directions to the jury.

The suggested legislation to amend s23 below is a combination of legislation recommend in the 2004 report by the UK Law Commission and the NSW Law Reform Commission report of 1997:

1) unlawful homicide that would otherwise be murder should instead be manslaughter if:

(a) the accused acted in response to

i. extremely grave provocation (meaning words or conduct or a combination of words and conduct which caused the accused to have a justifiable sense of being seriously wronged); or

ii. fear of serious violence towards the accused or another; or

iii. a combination of (a) and (b); and

2) The partial defence should not apply where

(a) the provocation was incited by the accused for the purpose of providing an excuse to use violence, or

(b) the accused acted in considered desire for revenge.

3) 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

⁷ (1990) 171 CLR 312.

⁸ [1978] AC 705.

⁹ NSW Law Reform Commission, *Partial Defences to Murder: Provocation and Infanticide* (NSW Law Reform Com No 83, 1997) para 2.127

¹⁰ (2001) 120 A Crim R 492 [18]-[19].

¹¹ J Horder, ‘Reshaping the subjective element in the provocation defence’ (2005) 25(1) OJLS 123,131-132; B Mitchell and R Mackay, ‘Loss of control and diminished responsibility: monitoring the new partial defences’ (2011) 3 Arch Rev 5.

¹² [1978] AC 705.

¹³ (1990) 171 CLR 312.

fear.

4) The partial defence should not apply to a accused who kills or takes part in the killing of another person under duress of threats by a third person.

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.¹⁴

6) the accused, taking into account all of his or her characteristics and circumstances, should be excused for having formed an intent to kill or to inflict grievous bodily harm or to have acted with reckless indifference to human life as to warrant the reduction of murder to manslaughter.¹⁵

I hope my contribution is acceptable and helpful to the Select Committee.

Yours faithfully,



James Moshides

¹⁴ Modified from recommendations made in Law Commission UK, *Partial Defences to Murder* (Law Com No 290, 2004) para 1.13

¹⁵ Modified from recommendation 2(b) NSW Law Reform Commission, *Partial Defences to Murder: Provocation and Infanticide* (NSW Law Reform Com No 83, 1997) para 2.127.

**THE PROVISIONS OF THE ‘LOSS OF CONTROL’ DEFENCE IN
ENGLAND AND WALES: MODELS FOR REFORM OF NEW SOUTH
WALES PROVOCATION LAW?**

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**Presented as part of the requirement for an award of LLM within the Modular
Scheme at the University of Gloucestershire**

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DECLARATION

This dissertation is the product of my own work and does not infringe the ethical principles set out in the University's Handbook for Research Ethics.

I agree that this dissertation may be available for reference via any and all media by and all means known or developed in the future at the discretion of the University

James Moshides

29th December 2011

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ABSTRACT

The objective of this work is to make a critical study of the New South Wales (NSW) and English provocation law and to determine whether the provisions of the new 'Loss of Control' defence in the Coroners and Justice Act 2009 are models for reform of the provocation defence in NSW.

A comparative study was completed by analytically reviewing legislation, cases, law reform reports, books, journal articles and case reviews to achieve the objective.

The main findings are that the new English defence has innovative features such as the recognition of fear as well as anger as triggers of loss of self-control, the types of provocative conduct that may be legally recognised, a provision that gives the trial judge the power to decide whether to leave the defence to the jury and the creation of certainty in the objective test about which of the defendant's characteristics are relevant.

However, abused women in NSW may be more successful pleading the murder defence of excessive self-defence as provided by s421 of the Crimes Act 1900 (NSW) rather than a 'Loss of Control' defence, which requires the establishment of actual loss of self-control.

The conclusion reached is that many of the 'Loss of Control' provisions are suitable as models for NSW reform and that NSW should await and monitor the application of the defence in England for some time before embarking upon reforms based on the new defence.

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CHAPTER 1

INTRODUCTION

1.1 Overview

The adoption of English law in New South Wales occurred when the Australian state was an English penal colony.¹ Even though NSW, through its own parliament made its own legislative criminal law provisions, these closely followed English law, and English common law on provocation was adopted in NSW with only slight modifications. Provocation law in NSW and England was very similar prior to the defence being abolished by the Coroners and Justice Act 2009, which came into effect on 4 October 2010 for England and Wales.² Provocation law in NSW, as it did in England and Wales prior to abolition, operates as a partial defence reducing a charge of murder to a conviction for manslaughter.³

Over the past several decades, the application of provocation law by the courts became problematic. The observation was made:

Since the 1940s, the provocation defence has been the subject of more decisions of the House of Lords, the Privy Council, and the Court of Appeal than perhaps any other area of the substantive criminal law.⁴

Furthermore, the objective test formulated by Lord Diplock in *Camplin*,⁵ caused much expensive litigation producing a series of conflicting cases about the extent to which the defendant's personal characteristics were relevant to the test.⁶

¹ The abbreviation of 'NSW' for New South Wales will be used from this point onwards in this study.

² The Coroners and Justice Act 2009 will be, at times in this study for brevity, referred to as the 'English law' or 'new English law' despite the provisions being legislated for England, Wales and Northern Ireland. Sections 54 and 55 will at times be referred to as the 'Loss of Control defence' or 'new English defence'.

³ Crimes Act 1900 (NSW) s23(1).

⁴ J Horder, 'Reshaping the subjective element in the provocation defence' (2005) 25(1) OJLS 123,131-132.
⁵ [1978] AC 705.

⁶ B Mitchell and R Mackay, 'Loss of control and diminished responsibility: monitoring the new partial defences' (2011) 3 Arch Rev 5.

The problem of extensive appeals to clarify provocation law on the same issues also occurred in NSW and, as recently as 2010.⁷

Provocation law has been criticised for being biased in favour of men against women, the element of loss of self-control never being properly defined and for the fact that the objective test attributes too many of the defendant's characteristics upon the 'reasonable man' of section 3 of the Homicide Act 1957.⁸

Apart from the difficulties of the objective test outlined above and the discriminatory treatment of women, the defence has been criticised as anachronistic in jurisdictions where there is no mandatory life or death sentence for murder.

In Australia, the defence was abolished by the states of Tasmania (2003), Victoria (2005) and Western Australia (2008) where there is no mandatory life sentence.⁹

In its report, the Law Commission for England and Wales identified the causes of the major problems with provocation as being the rationale of the defence, the nature of the provoking conduct, the need for a sudden and temporary loss of self-control and the 'reasonable man' test.¹⁰

The Law Commission recommended the retention of the provocation defence but in a reformed version and without the 'loss of control' element.¹¹ In England, the mandatory sentence for murder is life imprisonment and there is hesitation to abolish the provocation defence in jurisdictions which still have mandatory life sentences.

⁷See, for example, the following cases discussed in subsequent chapters: *Parker* (1963) 111 CLR 610; *Stingel* (1990) 171 CLR 312; *Chhay* (1994) 72 A Crim R 1; *Masciantonio* (1995) 183 CLR 58; *Green* (1997) 191 CLR 334; *Osland* (1998) 197 CLR 316; *Pollock* [2010] HCA 35.

⁸B Mitchell and R Mackay, 'Loss of control and diminished responsibility: monitoring the new partial defences' (2011) 3 Arch Rev 5; the 'reasonable man' is used in this study as it appeared in section 3 of the Homicide Act 1957 rather than the gender-neutral 'reasonable person'.

⁹In Tasmania by s 4 of the Criminal Code Amendment (Abolition of Defence of Provocation) Act 2003; in Victoria by insertion of s 3B into the Crimes Act 1958 (Vic); in Western Australia by s 12 of the Criminal Law Amendment (Homicide) Act 2008 (WA).

¹⁰Law Commission, *Partial Defences to Murder* (Law Com No 290, 2004) para 3.20.

¹¹ibid para 1.13.

The English government reviewed the Commission's recommendations and abolished the provocation defence and, in its place, created the new partial defence of 'Loss of Control'.¹²

In NSW, similar problems with provocation law arose in the operation of section 23 of the Crimes Act 1900 (NSW) which was, in effect, identical to section 3 of the Homicide Act 1957. Furthermore, the *Camplin*¹³ interpretation of the objective test in section 3, adopted by NSW Courts for section 23, created the same concerns and controversies which affected the English law.

Provocation as a partial defence to murder is significantly relied upon in NSW. The NSW Judicial Commission conducted empirical research over a 14 year period covering the years 1990 to 2004.¹⁴ It found that out of 897 homicide offenders, 115 defendants raised provocation as a defence (approximately 13%). The defence was successful in 75 cases (65%). The defence was raised most often in violent confrontations between men affected by alcohol. Such confrontations represented 28 of the successful provocation cases (37%). Domestic violence between partners, where violence was committed by the victim against the offender, represented 13 of the accepted provocation defence (17%). In cases of intimate relationship provocation in the context of infidelity or the breakdown of an intimate relationship, the defence was successful in 11 cases (15%). The defence was successful in 11 cases of offenders who claimed homosexual advance provocation (15%).

The prevalence of domestic violence is a significant concern in NSW. The domestic violence cases were nearly all women in an abusive relationship.

¹² Coroners and Justice Act 2009, ss54,55,56.

¹³ *Camplin* (n5).

¹⁴ Judicial Commission of NSW, *Partial Defences to Murder in NSW 1990-2004* (JCNSW Research Monograph 28, 2006).

In 2003 when the English government referred provocation to the Law Commission to consider and report on, it stipulated that the Commission should have particular regard to the impact of the partial defence in the context of domestic violence.¹⁵ This was an attempt to address, in a reformed defence, the difficulties abused women who kill face when pleading provocation.

The NSW Law Reform Commission, the statutory body tasked with law reform, recommended reform of the provocation defence but the NSW government has yet to act on those recommendations. NSW does not have a mandatory life sentence for murder as a deterrent to abolition of the defence. Nevertheless, the NSW government appears reluctant to abolish the defence as other Australian states have done so, such as Victoria. It also hesitates to reform the defence as recommended by its own statutory body. Hence, the problems with provocation remain unresolved in NSW and the opportunity to consider England's reforms arises especially since there has not been a NSW Law Reform Commission report on the defence since 1997.

1.2 Objective of this Study

The objective of this work is to provide a comparative study of the NSW and English provocation law and to determine whether the provisions of the new 'Loss of Control' defence in the Coroners and Justice Act 2009 are models for reform of the provocation defence in NSW.

1.3 Methodology

Non-empirical comparative legal research methods were employed in this study to examine primary and secondary legal sources to achieve the objective of ascertaining whether the 'Loss of Control' provisions can be applied in NSW.¹⁶

¹⁵ Law Commission, *Partial Defences to Murder* (n10) 1.

¹⁶ M Salter and J Mason, *Writing Law Dissertations* (Pearson Longman, Harlow 2007) 183.

The primary legislative sources utilised are the relevant Acts, which are the Crimes Act 1900 (NSW), the Homicide Act 1957 and the Coroners and Justice Act 2009.

Relevant English and Australian cases were also comparatively reviewed.

Secondary sources for this study consisted of law reform reports and scholarly works in the form of books, journal articles and case reviews.

The broad topic of whether the provocation defence should be abolished altogether was not engaged in this study, given that NSW has declined to followed suit with Australian states that have abolished the defence.

On the assumption that NSW wishes to retain the basic structure of the provocation defence, the recent English ‘Loss of Control’ provisions were studied to determine whether they possess any features that might be improvements on NSW law.

The English government, in creating the new defence sought to avoid the use of the term ‘provocation’ because it felt that it focused on blaming the victim.¹⁷

However, even though the term ‘provocation’ is avoided, commentators on the new ‘Loss of Control’ defence describe it as being in substance very similar to the abolished provocation defence and in their articles found that using the term ‘provocation’ to describe provoking conduct, facilitated comparison of the new and old defence.¹⁸ In this comparative study the familiar term ‘provocation’ was also used when describing provoking conduct or ‘triggers’ as they are known in the new English law.

In Chapter 2, a brief explanation of the elements of the provocation defence was given as it operated in England and NSW before ‘Loss of Control’ came into effect.

¹⁷ Ministry of Justice, *Murder, manslaughter and infanticide: proposals for reform of the law* (Response to Consultation Paper CP(R)19/08, 2009) para 85.

¹⁸ A Norrie, ‘The Coroners and Justice Act 2009 – Partial Defences to Murder (1) Loss of Control’ (2010) 4 Crim LR 275; S Yeo, ‘English Reform of Partial Defences to Murder: Lessons for New South Wales’ (2010) 22 Current Issues in Criminal Justice 1.

This was intended as a reference and guide to the relevant provisions discussed in the following comparative chapters. A brief explanation of the 'Loss of Control' elements was also provided in Chapter 2 whilst their detailed discussion was left for Chapter 4.

In Chapter 3, the problems of the provocation defence in England as it existed prior to its abolition and the problems of the current NSW defence was critically examined to highlight the need for reform of the NSW provocation defence. Law reform recommendations intended to overcome the problems of the defence, made by the Law Commission of England and Wales as well as the NSW Law Reform Commission, were also examined.

In Chapter 4, the provisions of the new 'Loss of Control' defence were critically examined to determine if they can provide the basis for reform in NSW.

Chapter 5 details the findings as to whether 'Loss of Control' provisions can be models for reform of provocation law in NSW.

CHAPTER 2

THE ELEMENTS OF LOSS OF CONTROL IN ENGLAND AND PROVOCATION IN NSW

2.1 Overview

In this Chapter a brief outline of the elements of provocation is provided for current NSW law, the law in England prior to the new defence coming into effect in October 2010 and the new 'Loss of Control' defence in the Coroners and Justice Act 2009.

This outline is intended as a reference and guide for the comparative analysis in the following chapters, which discuss the law in the required detail.

The relevant legislation is reproduced in the Appendix and this chapter is intended to be read in conjunction with the Appendix.

2.1 NSW Provocation Law.

The provocation defence in NSW is provided in section 23 of the Crimes Act 1900 (NSW) and by common law.

In *Heron*,¹ Callinan J identified eight prerequisites that must be satisfied in establishing a provocation defence in current NSW law:

1. The accused lost self-control.
2. The loss of self-control caused the act or omission causing the death.
3. The provocative conduct was the conduct of the victim.
4. The provocative conduct consisted of grossly insulting words or gestures
5. The provocative conduct was directed towards or affected the accused.
6. The provocative conduct could cause the formation of an intent to kill or to inflict grievous bodily harm.
7. The provocative conduct could have induced an ordinary person in the position of the accused to think and act as the accused did.
8. The provocative conduct was of such a kind as to cause the accused, not merely to lose some self-control, but to so far lose self-control as to form the requisite intent.

¹ (2003) 197 ALR 81,82.

The objective test described in prerequisite 7 is applied according to the formulation set down by the Australian High Court in *Stingel*.² The defendant's age can only be applied to vary the level of self-control expected from the 'ordinary person' faced with the provocation. All of the defendant's characteristics are relevant in determining the gravity of the provocation to him or her.

2.2 English Provocation Law Immediately Prior to October 2010.

Prior to 4 October 2010, the provocation defence in England was provided in section 3 of the Homicide Act 1957 and by common law.

The elements are almost identical to NSW provocation law and expressly and impliedly consist of:

1. The person charged lost self-control.
2. The loss of self-control caused the death.
3. The provocative conduct was the conduct of the victim.
4. The provocative conduct consisted of things done or things said or both together.
5. The provocative conduct was directed towards or affected the person charged.
6. The provocative conduct was enough to make a reasonable man do as he did
7. The question of whether the provocation was enough to make a reasonable man do as he did shall be left to be determined by the jury; and in determining that question the jury shall take into account everything both done and said according to the effect which, in their opinion, it would have on a reasonable man

The 'reasonable man' objective test in 6 and 7 was applied according to the formulation set down in *Holley*.³ This was similar to the current NSW test except that in England, the defendant's age or sex could be applied to vary the level of self-control expected from the 'reasonable man' faced with the provocation. As with NSW law, all of the defendant's characteristics were relevant in determining the gravity of the provocation to him or her.

² (1990) 171 CLR 312.

³ [2005] UKPC 23.

2.3 'Loss of Control' in England after October 2010

Section 56 of the Coroners and Justice Act 2009 which came into effect on 4 October 2010 abolished the defence of provocation as provided in section 3 of the Homicide Act 1957 and by common law.

The new 'Loss of Control' defence is provided by sections 54 and 55.⁴

The salient elements of 'Loss of Control' are:

1. The defendant lost self-control and the killing resulted from that loss of self-control.
2. The loss of self-control was attributable to the defendant's fear of serious violence from the victim against the defendant or another identified person.
3. The loss of self-control was attributable to a thing or things done or said (or both) which constituted circumstances of an extremely grave character, and caused the defendant to have a justifiable sense of being seriously wronged.
4. The loss of self-control was attributable to a combination of 2 and 3.
3. A person of the defendant's sex and age, with a normal degree of tolerance and self-restraint and in the circumstances of the defendant, might have reacted in the same or in a similar way to the defendant.
4. In doing the killing, the defendant must not have acted in a considered desire for revenge
5. The defendant's fear of serious violence is to be disregarded insofar as it was caused by a thing that the defendant had incited in order to provide an excuse to use violence against the victim.
6. The defendant's sense of being seriously wronged is to be disregarded insofar as it was caused by a thing that the defendant had incited in order to provide an excuse to use violence against the victim.
7. The fact that the victim had done something or said something that constituted sexual infidelity is to be disregarded.

The objective test in 'Loss of Control' in 3 is similar to the test applied for the 'reasonable man' in the abolished provocation law and it essentially codifies the test in *Holley*.⁵ Unlike provocation law in NSW and in England before it was abolished, the operation of element 3 restricts the types of provocation permissible and, therefore the kinds of circumstances and characteristics of the defendant which make the provocation grave. A victim's taunt about the defendant's characteristic of being

⁴ Coroners and Justice Act 2009.

⁵ *Holley*(n3).

addicted to glue-sniffing would not be regarded as extremely grave provocation causing a justifiable sense of being seriously wronged.⁶ A non-violent homosexual advance to someone with the characteristic of homophobia would also be disregarded as extremely grave provocation causing a justifiable sense of being seriously wronged.⁷ In 'Loss of Control', the trial judge could use the power provided in section 54(6) to withhold the defence from the jury in such cases on the basis no properly directed jury could reasonably conclude that the defence might apply. Further discussion of the 'Loss of Control' provisions will be provided in the following chapters.

⁶ *Morhall* [1996] AC 90 (HL).

⁷ *Green* (1997) 191 CLR 334.

CHAPTER 3

ISSUES HIGHLIGHTING THE NEED FOR PROVOCATION LAW

REFORM IN ENGLAND AND NSW: A CRITICAL ANALYSIS

3.1 Overview

The comparative approach in this chapter critically examined common issues arising in the application of provocation law in NSW and in England where the defence operated almost identically in both jurisdictions. For comparative purposes with current NSW provocation law, the law of provocation in England prior to the Coroners and Justice Act 2009 was examined in the following sections. The Law Commission for England and Wales identified the major problems with provocation as being the rationale of the defence, the nature of the provoking conduct, the need for a sudden and temporary loss of self-control and the reasonable man test.¹ The controversial problems arising in the defence became arguments which led to its abolition in England and the creation of the new defence of 'Loss of Control'.

Identical issues arose in the NSW operation of provocation law since section 23 of the Crimes Act 1900 (NSW) was in effect identical to section 3 of the Homicide Act 1957. Furthermore, the *Camplin*² interpretation of the objective test in section 3 was adopted by NSW Courts for section 23 and the same concerns and controversies affecting the English common law have found their way into NSW law.

A comparative analysis of the issues affecting the defence of provocation in both jurisdictions was undertaken in this chapter in order to understand how the new English reforms attempted to address them in Chapter 4. This analysis may lay the foundation for the case for adoption of the new English defence in NSW.

¹ Law Commission, *Partial Defences to Murder* (Law Com No 290, 2004) para 3.20

² [1978] AC 705 (HL).

3.2 The Rationale for the Partial Defence of Provocation

The arguments for the abolition or reform of the defence of provocation have also involved the issue of its complex rationale.

The reasons for retention of the doctrine of provocation in NSW and in England prior to the 2009 reforms, according to each jurisdiction's law reform commission, appear to be similar in respect of the recognition of a lesser moral blameworthiness where a defendant killed as a result of provoked loss of self-control.

The Law Commission for England and Wales was persuaded to retain the defence in a revised form because 'the moral blameworthiness of homicide may be significantly lessened where the defendant acts in response to gross provocation'.³

The rationale for the defence has been described as justificatory as well as excusatory.

The rationale, however, has been criticised as being a confusing admixture of such justification and excuse.⁴ Given the large amount of literature analysing the rationale, the criticism of the defence being confusing appears to have substance.

Provoked homicide is partially excused because at one level it is justified by the nature of the provocative conduct and excused because the defendant's loss self-control provides an excuse.⁵

The doctrine arose out of a desire to ameliorate the injustice of the imposition of the death penalty upon persons who had reacted in the heat of passion to the circumstances of a compelling affront and to make the reaction almost understandable.⁶ Tindall CJ explained in *Hayward*⁷ by stating that the doctrine

³ Law Commission, *Partial Defences to Murder* (n 1) para 3.63.

⁴ A Norrie, 'The Coroners and Justice Act 2009 – Partial Defences to Murder (1) Loss of Control' (2010) 4 Crim LR 275, 277.

⁵ *ibid* 277.

⁶ M Goode, 'The Abolition of Provocation' in Stanley Yeo (ed) *Partial Excuses to Murder* (The Federation Press, Sydney, 1990) 37.

evolved 'in compassion to human infirmity'. This suggests as a defence it would be classified as an 'excuse' under criminal legal theory. A defence is classified as an excuse where the defendant's conduct meets with societal disapproval but society is prepared to show compassion on the defendant because of some human frailty. A defence is regarded as a justification, for example as in self-defence, where the defendant's conduct occurs in circumstances which make the conduct commendable or blameless in the eyes of society.

In modern times where there is no death penalty it is considered imperative to determine the true rationale of the defence.⁸ The rationale relies on the recognition by society that there is a difference between premeditated killings that are committed in 'cold blood' and those that occur in or subsequent to an extreme emotional state. The reduction of that societal recognition into a clear rationale is difficult. However, it is argued that if provocation continues to be accepted as an excuse-based defence with the focus being on the actions of the defendant as a concession to human frailty, then the application of the doctrine may be more expansive than is conceded.⁹ The excuse classification has been supported on historical grounds.¹⁰ Also, it is difficult to reconcile the concept of justification with a defence which ultimately leaves the person criminally liable.

Nevertheless, the complex jurisprudential debate continues on whether the defence is properly classified as a partial excuse or partial justification.¹¹ A partial justification focuses on the victim's conduct and explains that the killing is less culpable because

⁷ (1833) 6 C & P 157 at 159; 172 ER 1188 at 1189.

⁸ G Coss, 'God is a righteous judge, strong and patient: and God is provoked every day. A Brief History of the Doctrine of Provocation in England.' (1991) 13 SydLR 570, 601.

⁹ *ibid* 602.

¹⁰ *ibid* 601,602.

¹¹ See A Norrie, 'The Coroners and Justice Act 2009 – Partial Defences to Murder (1) Loss of Control' (2010) 4 Crim LR 275-89; J Dressler, 'Partial Justification Or Partial Excuse?' (1988) 51 MLR 47 and F McAuley, 'Provocation: Partial Justification, Not Partial Excuse' in Stanley Yeo (ed) *Partial Excuses to Murder* (The Federation Press, Sydney, 1990) 19.

the defendant is, to an extent, morally justified in making a punitive response against a person who has intentionally caused offence. A classification of partial excuse focuses on the defendant's retaliatory conduct and explains the accused is partially excused because she or he understandably lost self-control and is less culpable for that reason.

The excuse classification is supported by Dressler who says it is misguided to focus on the conduct of the provoker as, although it may be reprehensible, the conduct itself does not usually endanger life.¹² He points out that the life of the provoker is no less deserving of the law's protection and the killing cannot in any way be said to be justifiable. The Law Commission of England and Wales also stated the English approach to provocation was not of justification but excuse-based.¹³

The NSW Law Reform Commission rejected justification as the primary rationale.¹⁴ The justification based rationale explains the defence of provocation in terms of recognising that the victim's own blameworthy conduct has contributed to the killer's actions in circumstances which could have moved an ordinary person to retaliate.

Australian courts have been inconsistent in applying one rationale rather than the other when interpreting and applying provocation in s 23 of the Crimes Act 1900 (NSW). In *Parker*,¹⁵ Windeyer J gave emphasis to the excusatory nature of the defence. In contrast, Brooking J in *Kenney*,¹⁶ referred to justification 'tit for tat' notion underlying the defence.

¹² Dressler, J, 'Rethinking Heat of Passion: A Defense in Search of a Rationale' (1982) 73 J Criminal Law and Criminology 421, 457.

¹³ Law Commission, *Partial Defences to Murder* (n 1) para 3.21

¹⁴ NSW Law Reform Commission, *Partial Defences to Murder: Provocation and Infanticide* (NSW Law Reform Com No 83, 1997) para 2.27.

¹⁵ (1963) 111 CLR 610, 651.

¹⁶ [1983] 2VR 470, 472-473.

Consequently, the defence reflects characteristics of both justification and excuse and one can be emphasised over the other depending on the view. To the extent that it requires the accused to have lost self-control, the defence of provocation is excuse-based. On the other hand, the defence reflects a justification-based rationale to the extent that it requires the victim's conduct to have contributed to the accused's actions, in circumstances where the accused's response is understandable according to the standards of an ordinary person.¹⁷

The NSW Law Reform Commission in its reformulation of the defence of provocation gave priority to the excuse-based rationale of the defence while at the same time recognising that it remained essential to the nature of the defence that there be some kind of external trigger which incites the accused to lose self-control.

The NSW Commission gave its reasons that, to characterise the defence of provocation as a partial justification for killing is inconsistent with modern conceptions of civilised society, which does not approve personal acts of retaliation or retribution as opposed to acts of self-defence. It stated that a contemporary model of provocation should therefore focus on the accused's lack of self-control rather than on whether or not the victim's wrongful conduct was deserving of retribution.

As can be seen from the aforementioned arguments, it is difficult to ascertain the definitive philosophy behind reducing murder to manslaughter for a provoked killing.

An argument offered for the retention of the defence is the existence of mandatory life sentencing for murder.¹⁸ In England, the sentence for murder is a mandatory life sentence¹⁹ whereas in NSW there is provision for life imprisonment for murder²⁰

¹⁷ NSW Law Reform Commission, *Partial Defences to Murder*(n14) para 2.16.

¹⁸ Law Commission, *Partial Defences to Murder* (n 1) para 3.32.

¹⁹ The Criminal Justice Act 2003.

²⁰ Crimes Act 1900 (NSW) s19A(1),(2).

however a lesser sentence may be handed down by the court.²¹ In NSW, the mandatory life sentence for murder was abolished in 1982 and mandatory sentencing cannot be the reason for retention of the defence. The NSW Law Reform Commission recommended that the defence of provocation to be retained, but in revised form. The NSW Commission was of the view that an unlawful killing which results from a provoked loss of self-control does not fall within the worst category of unlawful killing and should be viewed by the law with a degree of compassion and the defendant not be treated as a 'murderer'.²²

Andrew Ashworth describes the symbolic function of the labels 'murder' and 'manslaughter' applied by the law and courts as 'fair labelling' to mark significant differences in culpability.²³

Hence, in England and NSW, the rationale for the retention of a defence where the defendant has lost self-control appears to be, as Alan Norrie terms it, 'compassionate excuse'.²⁴

3.3 Provoking Conduct: the Issue of Trivial and Morally Unacceptable

Provocation being left to the Jury.

The English Law Commission was concerned that the defence operated too broadly and that cases of trivial provocation have to be left to the jury.²⁵

The Law Commission cited the views of one highly experienced judge when she wrote:

The scope of provocation has been so enlarged that a judge is obliged to leave it when ... the conduct and/the words in question are trivial. The issue should only arise where circumstances are

²¹ Crimes Act 1900 (NSW) s19A(3) and Crimes (Sentencing Procedure) Act 1999 (NSW) s21(1).

²² NSW Law Reform Commission, *Partial Defences to Murder* (n 14) para 2.38.

²³ A Ashworth, *Principles of Criminal Law* (6th edn, Oxford: Oxford University Press, 2009) 78-80.

²⁴ A Norrie, 'The Coroners and Justice Act 2009' (n 4) 275-89.

²⁵ Law Commission, *Partial Defences to Murder* (n 1) paras 3.20, 3.65.

sufficiently grave to justify it. Such tightening up would not remove the last straw in the slow burn of domestic violence, although provocation must always be distinguished from revenge.²⁶

Similarly, in NSW in a trial for murder, the judge must leave a partial defence to the jury whenever there is a borderline case, regardless of the tactical decisions made by the defence. The House of Lords explained the Australian position in *Coutts*:

In Australia, as here, the trial judge's duty to direct the jury on alternative verdicts which there is evidence to support is not removed by the decisions of trial counsel.²⁷

The Law Commission was also concerned that provocation would be left to the jury on morally or politically unacceptable grounds such as provocation to the racist and cited the example of a white racist being spoken to first by a coloured person being regarded as provocation.²⁸ It wrote that a racist killing to supposed provocation would be a case where the defendant had no sufficient reason to regard it as gross provocation, and that such a defendant's attitude in regarding the conduct as provocation would be offensive to the standards of a civilised society.²⁹ The Commission stated:

No fair-minded jury, properly directed, could conclude that it was gross provocation for a person of one colour to speak to a person of a different colour. In such a case the proper course would therefore be for the judge to withdraw provocation from the jury.³⁰

The Law Commission also raised the issue of stalking (erotomania) which could be left to a jury under section 3 of the Homicide Act 1957. It referred to the Australian

²⁶ Law Commission, *Partial Defences to Murder* (n 1) paras 3.25.

²⁷ [2006] UKHL 39, 21.

²⁸ Law Commission, *Partial Defences to Murder* (n 1) para 3.70 citing J Horder, *Provocation and Responsibility* (Clarendon Press, Oxford, 1992) 144.

²⁹ *ibid.*

³⁰ *ibid* 3.71.

case of *Stingel* ³¹ where provocation was withdrawn from the jury and the defendant was able to appeal, albeit unsuccessfully, to the Criminal Court of Appeal and then to the High Court. In *Smith (Morgan)*, ³² Lord Hoffman, agreed with the decision in *Stingel* to withdraw provocation from the jury, saying that male jealousy should not today be an acceptable reason for loss of self-control leading to homicide but section 3 of the Homicide Act 1957 prevented an English judge from doing so.³³

Additionally, in cases of simple separation or infidelity, the Law Commission stated the defence of provocation should not be left to the jury.³⁴

Provoked honour killings would similarly be regarded as unacceptable grounds. In such cases, ethnicity and cultural background are allowed to be taken into account in deciding the gravity of the provocation under provocation law. In the Australian case of *Dincer*,³⁵ the defendant, a conservative Muslim Turk, killed his daughter for being in a pre-marital sexual relationship and was successful in his provocation defence.

Some Muslims objected to the use of the characteristic of being a conservative Muslim to justify the daughter's conduct as sufficiently grave provocation.³⁶

Provocation law, as it is now in NSW and, as it was in England, did not specify what were good or bad reasons for a defendant to be provoked and a judge could not rule on the matter to withhold unmeritorious cases from the jury.

To legitimise provocation claims, the Law Commission said the preferred moral basis of the defence is that the provocation was such as to cause the defendant to

³¹ (1990) 171 CLR 312.

³² [2000] UKHL 49.

³³ Ibid 169.

³⁴ Law Commission, *Partial Defences to Murder* (n 1) para 3.145.

³⁵ [1983] 1 VR 460.

³⁶ Associate Professor Jenny Morgan, Melbourne University Law School, interviewed on Law Report ABC Radio National 'Provocation - is it past its use-by-date?' 17 September 2002 <http://www.abc.net.au/rn/lawreport/stories/2002/677001.htm> accessed 29 May 2011.

have a justifiable sense of being wronged.³⁷ Under such a stipulation, a case like *Stingel* or *Dincer* would not be left to the jury on the basis that no jury could conclude there was sufficient provocation.

3.4 Loss of Self-Control by the Defendant

Actual loss of self-control by the defendant as a result of provocation was a requirement in common law which was legislated into NSW and English law.³⁸

Whether a defendant lost self-control as a result of the provocation is a pure question of fact decided by the jury on subjective grounds taking into account all the relevant characteristics of the accused,³⁹ and the totality of the deceased's conduct.⁴⁰

3.4.1 The Definition of Loss of Self-Control

There is no satisfactory definition of loss of self-control and one academic likened it to the 'fight or flight reaction' caused by an emotional response to danger.⁴¹

However, Alex Reilly argues that a survey of behavioural science literature on emotion does not offer a precise meaning for loss of self-control.⁴²

The NSW Law Reform Commission also commented on the uncertainty in the definition of loss of self-control.⁴³ It considered recommending a defining provision in the reformulation of the provocation defence but concluded it was unnecessary if its recommendation of a simpler test for provocation were adopted. This simpler test requires the jury only to consider whether the defendant should be so far excused for having lost self-control as to warrant a reduction of murder to manslaughter.⁴⁴

³⁷ Law Commission, *Partial Defences to Murder* (n 1) para 3.68.

³⁸ Crimes Act 1900 (NSW) s23(2)(a); Homicide Act 1957 s3.

³⁹ *Stingel* (n 27) 326.

⁴⁰ *Moffa* (1977) 138 CLR 601,606.

⁴¹ P Brett, 'The Physiology of Provocation' [1970] *Crim LR* 634.

⁴² A Reilly, 'Loss of Self-Control in Provocation' (1997) *Crim LJ* 320.

⁴³ NSW Law Reform Commission, *Partial Defences to Murder* (n14) paras 2.120 - 2.122.

⁴⁴ *ibid* para 2.122.

The courts too have struggled for a definition of loss of self-control. In *Oneby*⁴⁵ it was described as ‘such passion as for the time deprives him of his reasoning faculties’. In *Duffy*⁴⁶ Devlin J said of provocation ‘rendering the accused so subject to passion as to make him or her for the moment not the master of his mind’.

The Law Commission favoured some form of the provocation defence be retained but without loss of self-control as a requirement.⁴⁷ It said in summary:

the requirement of loss of self-control was a judicially invented concept, lacking sharpness or a clear foundation in psychology. It was a valiant but flawed attempt to encapsulate a key limitation to the defence - that it should not be available to those who kill in considered revenge.⁴⁸

Reilly argues that legal defences provide platforms for defendants to tell their story of events surrounding their offensive conduct. He labels these stories as ‘narratives of excuse’ and that the narrative of lost self-control inhibits the underlying narrative which explains the defendant’s conduct in its relational context.⁴⁹ While the defence of provocation is based on the concept of loss of self-control, it will obscure other elements of the defence by focussing on defendant’s narratives of excuse in the language of control resulting in the excusing of unacceptable conduct such as homicidal violence in response to sexual infidelity and non-violent homosexual advance.⁵⁰

3.4.2 Gender Inequality and Loss of Self-Control

The defence has been criticised as being gender-biased because the law has referred to loss of self-control in terms of anger, which is usually the reaction of males.

⁴⁵ (1727) 2 Ld Raym 1845; 92ER 465.

⁴⁶ [1949] 1 All ER 932.

⁴⁷ *ibid* para 3.15.

⁴⁸ *Ibid* para 3.30

⁴⁹ A Reilly, ‘Loss of Self-Control in Provocation’ (n 24) 331

⁵⁰ *ibid* 335.

Gleeson CJ of the NSW Court of Appeal commented that the law's concession seemed to be to the frailty of those whose blood was apt to boil, rather than those whose blood simmered, perhaps over a long period, and in circumstances at least worthy of compassion.⁵¹

The Law Commission, in stating its case against the inclusion of 'loss of self-control' in a reformed provocation defence, argued that it privileged men's typical reactions to provocation over women's typical reactions in that women's reactions to provocation are less likely to involve a 'loss of self-control' and this can make it difficult or impossible for women to satisfy the loss of self-control requirement, even where they otherwise deserve at least a partial defence.⁵²

English and Australian law has endeavoured to deal with gender inequality by relaxing the requirement that loss of self-control be sudden and temporary in response to the provocation.

The English Court of Appeal in *Ahluwalia* did reformulate the 'sudden and temporary' doctrine to accept the possibility of a 'slow burn' delayed reaction with Lord Taylor CJ stating that the defence should not be negated because of a delayed reaction but added that the longer the delay could make it likely the defence would be negated by the prosecution.⁵³

Delay between provocation and retaliation is still regarded as important since it suggests deliberation that is contrary to classic provocation homicide which usually involves uncontrolled violence suddenly after provocation.

⁵¹ *Chhay* (1994) 72 A Crim R 1,11.

⁵² Law Commission, *Murder, Manslaughter and Infanticide* (Law Com No 304, 2006) para 5.18

⁵³ (1993) 96 Cr App R 133,138, 139.

In NSW, the concept of ‘slow burn’ was referred to with approval in *Chhay* with Gleeson CJ citing an article on *Ahluwalia*⁵⁴ stating that women:

... typically respond by suffering a ‘slow-burn’ of fear, despair and anger which eventually erupts into the killing of their batterer, usually when he is asleep, drunk or otherwise indisposed.⁵⁵

Whilst anger is the usual response to provocation, the Australian courts have taken into account other emotions such as fear or panic as causing loss of self-control. In *Van Den Hoek*, Mason CJ held there was no convincing reason for confining the doctrine to loss of self-control arising from anger or resentment and that it naturally extends to a sudden and temporary loss of self-control due to an emotion such as fear or panic as well as anger or resentment.⁵⁶ In NSW, fear and terror were recognised as capable of causing loss of self-control.⁵⁷

The English Law Commission stated that, in accommodating ‘slow-burn’ cases, the courts have extended the concept of loss of self-control making it still more unclear.⁵⁸ It said that rule in *Duffy*⁵⁹ requiring sudden and temporary loss of self-control has operated harshly in ‘slow-burn’ cases. However, the Law Commission stated that attempts to redress the hardship by stretching the requirement for sudden and temporary loss of self-control to include slow-burn cases have had undesirable side effects of confusing ‘slow burn’ cases with revenge cases and cited the case of *Baile*⁶⁰ as an example.⁶¹

In *Baile*, the defendant became enraged when he found out the deceased had supplied drugs to his teenage sons and threatened one of them. He took time to arm

⁵⁴ D Nicholson and R Sanghvi, ‘Battered Women and Provocation’ [1993] Crim LR 728, 730.

⁵⁵ (1994) 72 A Crim R 1, 11.

⁵⁶ (1986) 161 CLR 158, 168.

⁵⁷ *Peisley* (1990) 54 A Crim R 42, 48.

⁵⁸ Law Commission, *Partial Defences to Murder* (n 1) para 3.29.

⁵⁹ *Duffy* (n 46) 932.

⁶⁰ [1995] Crim LR 739.

⁶¹ Law Commission, *Partial Defences to Murder* (n 1) para 3.136.

himself with a shot-gun and cut throat razor and stopped to buy petrol before driving to the home of the victim. His conviction for murder was overturned by the Court of Appeal on the ground that provocation should have been left to the jury as a possible defence on the slow-burn extension of loss of self-control. In The Commission's view, that *Baillie* was a clear case of considered revenge.⁶²

The Law Commission recommended instead the abandonment of loss of self-control to assist women whose reactions are delayed rather than by relaxing the concept of suddenness of loss of self-control.

In NSW, the requirement of a sudden loss of self-control in response to provocation was abolished in 1982 in response to a task force report on domestic violence.⁶³ The amended provocation legislation was to make the defence more appropriate for abused women who kill after a delayed reaction to abuse.⁶⁴

The NSW Judicial Commission considered the defence in its application to women between 1990 and 1993 and found that in all five cases where women raised the defence they were successful in having the charge reduced from murder to manslaughter.⁶⁵ The defence in that period was raised by 15 men of whom only 9 were successful. Based on the cases it reviewed and on submissions from women's groups, the Judicial Commission concluded that in NSW the defence of provocation does not appear to operate in a gender-biased manner.

However, as NSW followed England in extending the 'slow burn' concept, it also makes it difficult to distinguish a delayed reaction due to 'slow burn' loss of self-control or cold-blooded revenge

⁶² *ibid.*

⁶³ NSW Law Reform Commission, *Partial Defences to Murder* (n14) para 2.141.

⁶⁴ Crimes Act 1900 (NSW) s23(3)(b).

⁶⁵ Judicial Commission of NSW, *Sentenced Homicides in NSW 1990-1993: A Legal and Sociological Study* (JCNSW Research Monograph 10, 1995) 58-63.

3.5 The Objective Test and its Controversies

One of the most controversial aspects of the defence is the application of the 'reasonable man' test as an objective standard of self-control required, by criminal law, of persons exposed to provocation. The 'reasonable man', as Lord Diplock stated in *Camplin*⁶⁶, is also known as the 'ordinary person', a term favoured in Australian law which applied the objective test in the same way as did English Law until recent times before the new 'Loss of Control' defence in the Coroners and Justice Act 2009.⁶⁷

The 'reasonable man' test was introduced by Keating J the nineteenth century case, *Welsh*.⁶⁸ In *Welsh*, Keating J asserted:

The law is, that there must exist such an amount of provocation as would be excited by the circumstances in the mind of a reasonable man, and so as to lead the jury to ascribe the act to the influence of that passion ... [I]n law it is necessary that there should have been serious provocation in order to reduce the crime to manslaughter, as, for instance, a blow, and a severe blow - something which might naturally cause an ordinary and reasonably minded man to lose his self-control and commit such an act.⁶⁹

The 'reasonable man' test was legislated into section 3 of the Homicide Act 1957 in England and into section 23(2)(b) of the Crimes Act 1900 in NSW as the 'ordinary person'.

It was left to the courts to interpret the law of the test for its application by juries.

Lord Diplock in *Camplin*⁷⁰ provided the passage which was approved in Australia as correctly stating the law:

⁶⁶ *Camplin* (n 2) 705.

⁶⁷ *Moffa* (1977) 138 CLR 601,606 (Barwick CJ); In the Crimes Act 1900 (NSW) s23(2)(b) refers to the 'ordinary person' and this concept in provocation law is the same as the 'reasonable man' in s3 of the Homicide Act 1957 and at times used interchangeably in this study.

⁶⁸ (1869) 11 Cox CC 336

⁶⁹ *ibid* 338 - 339

⁷⁰ *Camplin* (n 2) 705.

In my opinion a proper direction to a jury on the question left to their exclusive determination by section 3 of the Homicide Act 1957 would be on the following lines. The judge should state what the question is using the very terms of the section. He should then explain to them that the reasonable man referred to in the question is a person having the power of self-control to be expected of an ordinary person of the sex and age of the accused, but in other respects sharing such of the accused's characteristics as they think would affect the gravity of the provocation to him; and that the question is not merely whether such a person would in like circumstances be provoked to lose his self-control but also would react to the provocation as the accused did.⁷¹

The test as stated by Lord Diplock was interpreted as having two limbs.

The first limb is an enquiry into the gravity of the provocation to the accused and, as Lord Diplock stated, the reasonable man is to be imbued with such of the defendant's characteristics as the jury thinks would affect the gravity of provocation to him or her to lose self-control.

The second limb is taken to be an enquiry asking whether the provocation, so assessed in the first limb, could have provoked a reasonable man to retaliate as the defendant did. This limb refers to the power of self-control of the hypothetical 'reasonable man' and, as Lord Diplock stated in his direction, the 'reasonable man' is not to be imbued with the personal characteristics of the defendant except for sex and age. In *Morhall*⁷² and *Luc Thiet Thuan*⁷³, it was held that the second limb should make no allowances for characteristics which make the defendant more volatile than the reasonable man. Only age and sex, as characteristics affecting the power of self-control, are to be given consideration in the second limb of the test. With respect to

⁷¹ *Camplin* (n 2) 705, 718

⁷² (1995) 3 AER 659 (HL).

⁷³ (1997) AC 131 (PC).

age, Lord Diplock said that ‘to require old heads upon young shoulders is inconsistent with the law's compassion to human infirmity’.⁷⁴

Prior to the enactment of section 3 of the Homicide Act 1957 and the decision in *Camplin*, the House of Lords in *Bedder*⁷⁵ was regarded as conclusive evidence that the doctrine of provocation no longer operated ‘in compassion to human infirmity’.⁷⁶

The sexually impotent defendant killed a prostitute who mocked and assaulted him.

The Court refused to invest the reasonable man with the eighteen year-old defendant's physical characteristics on the determination of gravity of provocation.

The distinction proposed by Bedder's counsel was that individual characteristics, which bear on the gravity of the provocation, should be taken into account, whereas individual characteristics bearing on the accused's level of self-control should not.

Lord Simonds LC explained his reasons for rejecting the consideration of the personal characteristics of the defendant is that it would ‘make nonsense of the test’ and if the ‘reasonable man’ or the ‘normal man’ is endowed with abnormal characteristics, the test ceases to have any value.⁷⁷

However, after, *Camplin*, a characteristic such as impotence would be taken into account in determining the gravity of provocation in the first limb of the reasonable man test.

Lord Diplock’s formulation of the reasonable man test in *Camplin* was adopted in NSW in 1981.⁷⁸ In *Stingel*,⁷⁹ the High Court affirmed it except that the defendant’s age, and not sex, can be a consideration in determining the power of self-control.

⁷⁴ *Camplin* (n 2) 705,718.

⁷⁵ [1954] 2 All ER 801

⁷⁶ G Coss, G, ‘A Brief History of the Doctrine of Provocation in England.’ (n 6) 570, 589.

⁷⁷ [1954] 2 All ER 801, 803 - 804

⁷⁸ *Croft* (1981) 3 A Crim R 307, 342.

⁷⁹ *Stingel* (n31) 327-328.

The High Court stated the principle of equality of all before the law required no allowance, except for age, be made for the defendant's sex in the power of self-control of the ordinary person (reasonable man).⁸⁰

In *Masciantonio*,⁸¹ McHugh J, dissenting, stated that ethnicity should also be taken into account as well as age in determining capacity of self-control. This was rejected by the majority who restated that only age is to be considered in varying the standard of self-control expected of the ordinary person (reasonable man).⁸²

The two-limbed reasonable man test derived from *Camplin* and modified to make it gender neutral is currently the Australian law test of the 'ordinary person'. However, the law in England took controversial turns based on different interpretations of *Camplin* confusing the distinction between the defendant and the ordinary person.

The two-limbed objective test has been criticised as too difficult to apply by a jury.

When *Mankotia* was before the NSW Court of Criminal Appeal, Smart J

acknowledged the difficulty of juries in comprehending and applying the ordinary person test by stating:

In practice the gravity of [the] provocation/self-control distinction has proved hard to explain to a jury in terms which are intelligible to them... Juries struggle with the distinction and find it hard to grasp. Many do not do so. The directions on provocation and the distinction frequently lead to a series of questions indicating that these issues are causing difficulty, prolonged deliberation by juries and, not infrequently, to juries being unable to agree whether the accused is guilty of murder or manslaughter.⁸³

The NSW Law Reform Commission stated that it could be argued that the ordinary person test is too complicated for a jury to understand and apply to the facts of a particular case and it stated it may be argued that the distinction between the first and the second components of the ordinary person test is too subtle for a jury to

⁸⁰ *ibid*

⁸¹ (1995) 183 CLR 58, 74.

⁸² *ibid* 67.

⁸³ *Mankotia* (2001) 120 A Crim R 492, [18]-[19].

understand and, as a consequence, they may simply ignore the requirements of the ordinary person test in order to decide as they think fair in the circumstances.⁸⁴

Hence, it is argued that the two limbed test that was in place after *Holley*⁸⁵ and before the Coroners and Justice Act 2009 and is now current NSW law is too subtle and creates confusion and uncertainty in the minds of juries.

3.5.1 A Blurring of the Distinction of the Defendant's Characteristics between the Limbs of the 'Reasonable Man' Test

Consistent with the *Camplin* formulation, the House of Lords in *Morhall*⁸⁶ held that the deceased's taunting of the defendant about his addiction to glue sniffing may be taken into account in assessing the gravity of the provocation to the reasonable man, but not the power of self-control. The Privy Council in *Luc Thiet Thuan*⁸⁷ followed *Morhall* and rejected a murder appeal on the basis that the jury should have taken into account the defendant's brain damage when considering whether a reasonable man would have reacted to the provocation in the same way.

Lord Steyn, dissenting in *Luc Thiet Thuan*, challenged this approach, stating that the actual decision in *Camplin* did not exclude all characteristics of the defendant apart from age and sex from the power of self-control limb of the objective test as the ratio in *Camplin* was open to extension. He asserted that 'dictates of justice' required the consideration of characteristics other than age and sex.

The Court of Appeal declined to follow the decision of the majority in *Luc Thiet Thuan* in following English cases preferring the dissenting judgment of Lord Steyn.⁸⁸

⁸⁴ NSW Law Reform Commission, *Partial Defences to Murder* (n14) para 2.56.

⁸⁵ [2005] UKPC 23.

⁸⁶ *Morhall* (n 72).

⁸⁷ *Luc Thiet Thuan* (n 73).

⁸⁸ See, for example, *Campbell* (1997) 1 Cr App R 199; *Parker* (1997) Crim LR 760.

In *Smith*⁸⁹, the defendant stabbed and killed another man during the course of an argument at the defendant's flat. Psychiatric evidence was submitted that he was suffering from severe depression which reduced his threshold for erupting with violence. A majority of 3-2 of the House of Lords approved Lord Steyn's dissent in *Luc Thiet Thuan* and held that personal characteristics other than age and sex could be taken into account when determining whether the reaction to the provocation was that of a reasonable man. The majority rejected the often stated interpretation of Lord Diplock's judgment in *Camplin* that only age and sex is to be taken into account as relevant to the power of self-control.

Lord Hoffman stated:

He does not say that the same principle of compassion is incapable of applying to any other characteristics which a jury might on similar grounds think should be taken into account.⁹⁰

Lord Hoffman, in justifying the consideration of other characteristics apart from sex and age in the power of self-control, stated it was clear to him that Lord Diplock was framing a suitable direction for a case like *Camplin* and not a 'one-size-fits-all direction' for every case of provocation.⁹¹

Lord Millet, dissenting in *Smith*, expressed the view that 'by introducing a variable standard of self-control it subverts the moral basis of the defence'.⁹²

Smith was criticised as merging the pleas of provocation and diminished responsibility by drawing the jury's attention to depression through a back door to avoid the burden of proof being placed on the defendant for the purposes of establishing diminished responsibility.⁹³ *Smith* blurred the distinction between the

⁸⁹ *Smith (Morgan)* (n 32).

⁹⁰ *ibid* [1].

⁹¹ *ibid* [3].

⁹² *ibid*.

⁹³ G Virgo, 'Provocation: Muddying the Waters' (2001) 60 Cambridge LJ 23, 25

gravity of provocation limb and the power of self-control by shifting the emphasis of the effect of a characteristic from gravity of provocation to power of self-control.⁹⁴ It was argued that by broadening the power of self-control limb *Smith* subjectivised and undermined the objective test to make it superfluous.⁹⁵

However, some commentators defended *Smith* saying that the court implicitly recognised that provocation and diminished responsibility are no longer to be regarded as two separate and distinct pleas.⁹⁶

Smith was not followed by the Privy Council in *Holley*,⁹⁷ by a specially constituted bench of nine Lords of Appeal in the Ordinary.

The majority of 6-3 judges held that the correct interpretation of *Camplin* was that only sex and age are to be taken into account in the power of self-control limb and those other personal characteristics of the defendant are only to be taken into account in the gravity of provocation limb. The defendant suffered from chronic alcoholism and depression and argued that this affected his provocability. This was rejected at trial but accepted on appeals. The Attorney General for Jersey appealed to have the murder conviction reinstated. In allowing the appeal, the majority in *Holley* held that Lord Diplock was not merely framing a suitable direction for a case like *Camplin* but a model direction to apply generally in all cases of provocation.⁹⁸ In stating that the decision in *Smith* was erroneous, the majority in *Holley* also said that whether the provocation was enough to make a 'reasonable man' do as the defendant 'is to be judged by one standard, not a standard which varies from defendant to defendant' and that the statute does not leave each jury free to set whatever standard they

⁹⁴ *ibid* 24.

⁹⁵ *ibid* 25.

⁹⁶ B Mitchell, R Mackay, W Brookbanks, 'Pleading for provoked killers: in defence of Morgan Smith' (2008) 124 LQR 675.

⁹⁷ *Holley* (n85).

⁹⁸ *ibid* [14].

consider appropriate in the circumstances by which to judge whether the defendant's conduct is 'excusable'.⁹⁹

Whilst Privy Council decisions are persuasive authority in English courts, the decision in *Holley* was accepted and followed by the English Court of Appeal as 'precedent' of the law of England because it 'overruled' the House of Lords decision in *Smith* as the majority judges were House of Lords members.¹⁰⁰

Thus, the law on the objective test returned to be the same as Australian law before the provocation defence was abolished in England.

3.5.2 Moral issues concerning the Objective Test and Provocative Conduct

Following *Holley*¹⁰¹ and the High Court decision in *Stingel*¹⁰², all of the defendant's characteristics became relevant to the objective assessment of the gravity of a particular provocative act with the only limitation being the causal link between the provocative conduct and the defendant's characteristics. The deceased's conduct must be gravely provocative to the defendant because they relate to a personal characteristic.

The characteristic of being homophobic has been accepted by courts as making a non-violent homosexual advances grave provocation to reduce a charge of murder to manslaughter. In *Green*¹⁰³ the defendant killed a male friend after the friend gently touched the defendant's groin area. In attempting to establish provocation, Green sought to admit evidence that he was particularly sensitive to homosexual advances as a result of family sexual abuse. The trial judge directed the jury that this evidence was not relevant to the issue of provocation and the accused was convicted of murder.

⁹⁹ *ibid* [22], [23].

¹⁰⁰ A Ashworth, 'Appeal: precedent – Privy Council decision overruling decision of House of Lords' (2006) *Crim LR* 629.

¹⁰¹ *Holley* (n 85).

¹⁰² *Stingel* (n 31).

¹⁰³ (1997) 191 *CLR* 334.

The High Court refused to rule out that a non-violent homosexual advance was conduct sufficient to ground the partial defence of provocation and accepted Green's appeal by a majority of 3-2 on the basis that some ordinary men would feel great revulsion at the homosexual advances and could so far lose their self-control.¹⁰⁴

The High Court ordered a retrial where Green was convicted of manslaughter.

Dissenting in *Green*, Kirby J stated that for the law to accept that a non-violent sexual advance could induce in an ordinary person such a reduction of self-control as to kill would sit ill with contemporary legal, educative, and policing efforts designed to remove such violent responses from society, grounded as they are in irrational hatred and fear. In his view, the 'ordinary person' in Australian society today is not so homophobic as to respond to a non-violent sexual advance by a homosexual person by killing.¹⁰⁵

The homosexual advance defence has been successful for defendants in NSW with only three out of sixteen defendants being convicted of murder thus prompting a review.¹⁰⁶ It appears that the objective test facilitates such controversial results.

3.6 The Need for Reform of Provocation Law in NSW

The issues discussed in the previous sections have been cited as reasons for reform by the English and NSW law reform institutions and the following is a summary of these arguments for reform.

The rationale for the defence appears to be a confusing admixture of justification and excuse. There needs to be a clearer basis for excusing provoked killers from a murder conviction.

¹⁰⁴ *ibid* 339-340.

¹⁰⁵ *ibid* 716.

¹⁰⁶ Attorney-General's Department (NSW), *Review of the "Homosexual Advance Defence"*, Discussion Paper (1996) noted (1996) 20 Crim L J 305.

Trivial and morally unacceptable provocation is left to the jury with the judge essentially powerless to withhold it. This often results in public controversy as, for example, when honour killers receive manslaughter convictions. There is a need to reform the ease with which provocation is left to the jury.

The requirement for actual loss of self-control lacks a clear definition and is inconsistent with description in the behavioural sciences. Consideration is needed for reform or abandonment of this judicially created concept.

The argument remains that provocation law remains gender-biased even though it has been broadened to allow for women's delayed reactions. The English Law Commission argues that the expansion of the concept of loss of self-control to include abused women, as occurred in *Ahluwalia*,¹⁰⁷ made it difficult for the courts to distinguish between a 'provoked killing' and a 'revenge killing' thus being a case for abandonment of loss of self-control in a revised form of the defence of provocation with provisions to exclude revenge killings.

The objective test in provocation law has been controversial with appeal courts in England and NSW having to interpret the application of the reasonable man/ordinary person test. Confusion has been created over which of the defendant's characteristics could be attributable to the reasonable man to vary the standard expected for self-control as happened in *Smith*.¹⁰⁸ The confusion was apparently clarified in *Holley*,¹⁰⁹ which is consistent with current NSW law. However, as the composition of judges in appeal courts changes, a later NSW court may adopt a decision like *Smith*.

Reform by legislation may be needed to create greater certainty in the application of the limbs in the objective test. Reformers may need to consider simplifying the test to

¹⁰⁷ *Ahluwalia* (n 53)138, 139.

¹⁰⁸ *Smith (Morgan)* (n 32).

¹⁰⁹ *Holley* (n85).

avoid jury confusion. Reform is also needed to prevent morally unacceptable characteristics becoming relevant in the gravity of provocation limb of the objective test.

CHAPTER 4

ARE THE PROVISIONS IN THE ‘LOSS OF CONTROL’ DEFENCE MODELS FOR REFORM OF NSW PROVOCATION LAW?

4.1 Overview

The reforms introduced by Coroners and Justice Act 2009 are of great interest in NSW if the new defence of ‘Loss of Control’ addresses the problems with provocation that were common to both jurisdictions.

The Law Commission of England in its 2006 report proposed a restructure of the law of homicide to divide murder into first and second degree with a successful provocation defence being second degree murder instead of first degree murder.¹ The English Government considered reform of the partial defences based on the Law Commission’s proposals but only in the context of the existing homicide offence structure.²

In this chapter, a critical review was conducted as to whether the problem issues of the provocation defence and the recommendations summarised in the English Law Commission’s reports were addressed by the new defence of ‘Loss of Control’ to determine whether features of the new defence could be adopted in NSW.

¹ Law Commission, *Murder, Manslaughter and Infanticide* (Law Com No 304, 2006) para 9.6.

² Ministry of Justice, *Murder, manslaughter and infanticide: proposals for reform of the law* (Consultation Paper CP19/08, 2008a) 5.

4.2 Is the Rationale for the New ‘Loss of Control’ Defence Compatible with NSW Law Reform?

The Government, in creating the new ‘Loss of Control’ defence, adopted the justificatory elements of the Law Commission’s formulation of the defendant killing out of fear of serious violence or from a justifiable sense of being seriously wronged, which recognises responses due to anger.³ The recognition of responses due to fear was an initiative to provide the defence to abused women who kill because they fear further violence from their assailants.⁴

However, the inclusion of the requirement of loss of self-control retains the excusatory element of the provocation defence.⁵

The triggers of fear of serious violence or extremely grave circumstances causing serious wrong are justificatory elements but the reaction resulting in death is not justified completely as in self-defence but partially excused because of the loss of self-control with a finding of murder instead of manslaughter.

The new ‘Loss of Control’ defence restricts the excuse approach of the old defence of provocation by the requirement that any provocation (trigger) to loss of self-control must be from qualifying trigger,⁶ and any of the defendant’s characteristics and circumstances taken into account to determine the gravity of the trigger are not taken into account in determining the general capacity for tolerance and self-restraint except for the defendant’s sex and age.⁷

³ Coroners and Justice Act 2009, s55(4).

⁴ Ministry of Justice, *Murder, manslaughter and infanticide* (n 2) para 28.

⁵ Coroners and Justice Act 2009, s54.

⁶ *ibid*, s55..

⁷ *ibid*, s54(1)(c), s54(3).

In *Doughty*⁸, the defendant, who was under great stress caring for his wife and baby, succumbed to the provocation of the baby's crying, and killed it. Under the old law of provocation Doughty succeeded in the defence having been shown compassion for his circumstances. In the new restricted excuse approach, the provocation of a baby's crying would not likely be considered extremely grave circumstances sufficient to warrant a justifiable sense of being seriously wronged because, as the Coroners and Justice Act 2009 Explanatory Notes explain, section 55(4) is an objective test for the jury assuming the judge has decided there is enough evidence to be left to the jury.⁹ It would be difficult to find a juror with or without a baby who, on an objective assessment taking into account the circumstances and characteristic of being very stressed, would accept a baby's crying as creating grave circumstances justifying killing it.¹⁰

Therefore, there is no broad excuse-based rationale in the new 'Loss of Control' law which can take into account cases deserving of sympathy such as Doughty's. The compassionate concession to human frailty is restricted only to those who lost self-control for grave provocation justifying a sense of being wronged.

As stated above, despite being more restricting than the excuse-based provocation defence, the new 'Loss of Control' defence retains an excusatory element through the loss of self-control requirement.

The NSW Law Reform Commission, in its recommendation for a reformed provocation defence, rejected justification as the primary rationale and gave priority to the excuse-based rationale of the defence.¹¹

⁸ [1986] 83 Cr App R 319.

⁹ Coroners and Justice Act 2009 Explanatory Notes, para 346.

¹⁰ C Withy, 'Loss of control, loss of opportunity?' (2011) 4 Crim LR 263,273.

¹¹ NSW Law Reform Commission, *Partial Defences to Murder: Provocation and Infanticide* (NSW Law Reform Com No 83, 1997) para 2.27.

Whilst the 'Loss of Control' defence expands the justificatory element of the victim's provocation in the old defence to the higher level of it being required to be objectively justified, the inclusion of 'loss of self-control' as a required element in the new English defence may satisfy the NSW law reformers as being sufficiently excuse-based.

4.3 'Loss of Control' Provisions: model provisions for NSW?

4.3.1 Section 56: Abolition of the Common Law Defence of Provocation

Section 56(1) abolished the common law defence of provocation and section 56(2)(a) abolished section 3 of the Homicide Act 1957.¹²

The defence of provocation was replaced with sections 54 and 55 which created the new defence 'Loss of Control'. The English government decided not to use the term 'provocation' because some respondents to the Ministry of Justice consultation argued that the term implied judgement of the victim.¹³

The new defence covers much of the old defence, providing for provoking conduct as being 'qualifying triggers' causing the defendant's loss of self-control. The emphasis in the new law is on triggers which cause fear, justifiable anger or a combination of both. The fear causing loss of self control must be fear of serious violence.¹⁴ The anger must be due to a trigger of an extremely grave character causing a justifiable sense of being seriously wronged resulting in loss of self-control.¹⁵ The objective test to qualify the response in loss of self-control resulting in

¹² Coroners and Justice Act 2009.

¹³ Ministry of Justice, *Murder, manslaughter and infanticide: proposals for reform of the law* (Response to Consultation Paper CP(R)19/08, 2009) paras 82, 85.

¹⁴ Coroners and Justice Act 2009, s55(3).

¹⁵ Coroners and Justice Act 2009, s55(4).

homicide is similar to the two-limbed enquiry based on the *Holley*¹⁶ interpretation of the test in *Camplin*,¹⁷ which is the current objective test followed in Australia.¹⁸

The new test also confines the personal characteristics of the defendant to the enquiry to determine the gravity of the triggers. The trigger must be relevant to personal characteristics of the defendant and, when the trigger is viewed in the context of those personal characteristics, must be extremely grave and capable of causing the defendant to have a justifiable sense of being seriously wronged. This limb of the new test is much more restrictive than the gravity of provocation limb in the common law test adopted in *Holley* and *Stingel*. Unlike the abolished provocation common law in England and current NSW common law, morally undesirable characteristics would not be accepted as qualifying the gravity of provocation as ‘extremely grave’ and causing the defendant ‘to have a justifiable sense of being seriously wronged’. Additionally, the new law requires the objective standard of self-control to be that of a person with a normal degree of tolerance and self-restraint which cannot be varied except to take into account the defendant’s sex or age. This limb is similar to the limb adopted in *Camplin*, *Holley* and *Stingel*.

The similarity between the new defence and the abolished provocation defence is such that Alan Norrie, commenting on the new defence in an article in the Criminal Law Review, stated that he continues to talk in terms of ‘provocation’ because, even though it is no longer the name of the new defence, its substance remains the same.¹⁹

¹⁶ [2005] UKPC 23.

¹⁷ [1978] AC 705 (HL).

¹⁸ *Stingel* (1990) 171 CLR 312.

¹⁹ A Norrie, ‘The Coroners and Justice Act 2009 – Partial Defences to Murder (1) Loss of Control’ (2010) 4 Crim LR 275.

Stanley Yeo in a recent journal article continued to use the term of ‘provocation’ for the same reason.²⁰

Given that the substance of the new law is the same, it is arguably unnecessary for NSW to abolish the name and section of the current provocation defence for a reformed defence, should it be determined that most, if not all, of the features of the new English ‘Loss of Control’ defence are to be adopted.

4.3.2 Sections 54(1)(a) and 54(2): Loss of Self-Control Element Without the Restriction of Suddenness.

The new ‘Loss of Control’ defence requires the element of ‘loss of self-control’ provided for in section 54(1)(a) with the qualification that it need not be sudden in section 54(2).²¹ This mirrors the current NSW provocation law in section 23(2)(a) for loss of self-control and section 23(3)(b) with respect to not requiring suddenness.²²

In the new defence, the Government has qualified the requirement of loss of self-control so that unmeritorious cases will not get the defence even though there is evidence of actual loss of self-control. The element of loss of self-control in the new defence must have had a qualifying trigger²³ and sexual infidelity as a trigger is specifically excluded.²⁴ Loss of self-control causing death, as with the abolished provocation law, is subject to an objective test.²⁵

The requirement of suddenness of loss of self-control in the old provocation defence has been used to distinguish premeditated killing from spontaneous killing but has disadvantaged abused women whose reaction is usually delayed.

²⁰ S Yeo, ‘English Reform of Partial Defences to Murder: Lessons for New South Wales’ (2010) 22 Current Issues in Criminal Justice 1.

²¹ Coroners and Justice Act 2009.

²² Crimes Act 1900 (NSW).

²³ Coroners and Justice Act 2009 s54(1)(b); s55.

²⁴ *ibid* s55(6)(c).

²⁵ *ibid* s54(1)(c), s54(3).

The English Law Commission sought to exclude the requirement for loss of self-control from its recommended reformed provocation defence and proposed that premeditated killings be ruled out by legislative provisions that the defendant must not have acted in a considered desire for revenge or incited the provocation as an excuse for violence.²⁶ It wanted to remove ‘loss of self-control’ so that the provocation plea would not be ruled out for abused women who kill out of fear and after a delay to provocation.²⁷

In excluding the positive requirement of a loss of self-control, the Law Commission recognised the problem of excluding unmeritorious cases such as ‘honour’ killings which, whilst not involving cold-blooded revenge, nevertheless involved revenge, planning and the desire to make an example of the victim.²⁸

The method by which the Law Commission proposed to resolve the problem of filtering unmeritorious cases without ‘loss of self-control’ was by making the defence conditional upon the defendant not inciting the provocation from the victim (sections 55(6)(a) and (b)) or not acting in a considered desire for revenge (section 54(4)).²⁹ However, the Commission’s use of ‘honour’ killings as an example of being excluded because of an obvious considered desire for revenge is superfluous because such killings would be excluded by the Commission’s requirement that the defendant acted out of a justifiable sense of being seriously wronged in response to grave provocation. The Commission’s example of *Baillie*³⁰ better reflected their filter of no ‘considered desire for revenge’ because the defendant demonstrated deliberation and planning during the delay in reaction to the provocation.

²⁶ Law Commission, *Partial Defences to Murder* (Law Com No 290, 2004) paras 3.15-3.30; Law Commission, *Murder, Manslaughter and Infanticide* (n 1) paras 5.17-5.32.

²⁷ Law Commission, *Murder, Manslaughter and Infanticide* (n 1) para 5.27.

²⁸ *ibid* 5.24-5.25.

²⁹ Coroners and Justice Act 2009.

³⁰ [1995] Crim LR 739.

The English Government adopted the Law Commission's recommendation on revenge and legislated that the defence did not apply if the defendant acted in a considered desire for revenge.³¹

The Government, however, did not accept the Law Commission's recommendation that the requirement of 'loss of self-control' be abandoned in the reform of the defence. Whilst it acknowledged the Commission's safeguards for filtering unmeritorious cases without loss of self-control, it remained concerned the defence would be used inappropriately in cold-blooded, gang-related or 'honour' killings stating that:

[T]here is still a fundamental problem about providing a partial defence in situations where a defendant has killed while basically in full possession of his or her senses, even if he or she is frightened.³²

This implies that the Government was also concerned about some cases of abused women who kill cold-bloodedly whilst in full possession of their senses.

The Government's reasoning was criticised because it is argued that the provision for excluding revenge, which it adopted in the new law, could have excluded such cold-blooded revenge killings without the need for the additional element of loss of self-control.³³

Whilst the new 'Loss of Control' defence removes 'suddenness' as a requirement of loss of self-control, loss of self-control nevertheless needs to be established as an evidentiary matter. The Coroners and Justice Act 2009 Explanatory Notes confirm that the court can take into account any delay between the relevant incident and the killing when deciding the issue of loss of control.³⁴

³¹ Coroners and Justice Act 2009 s54(4).

³² Ministry of Justice, *Murder, manslaughter and infanticide* (n 2) para 36.

³³ S Yeo, 'English Reform of Partial Defences to Murder: Lessons for New South Wales' (n20)10.

³⁴ CJA Explanatory Notes (n 9) para 337.

Norrie argues that by retaining the loss of self-control element, the difficulty will be in delayed reactions to provocation and this may take the law back into disputes about whether there was an actual loss of self-control and into questions of suddenness because it might be thought that the only way a loss of control can be identified is by a momentary departure from being in control.³⁵ If Norrie's view is accepted that loss of self-control, by its very nature is 'sudden', then the decision to retain loss of self-control and simultaneously remove the requirement of 'suddenness' is illogical.³⁶

Norrie's argument about the issue of suddenness being reintroduced in cases of delayed reaction in the new law of 'Loss of Control' appears to have been borne out by the recent Australian High Court case of *Pollock*.³⁷ The Queensland Criminal Court of Appeal stated that the element for ruling out provocation was that the loss of self-control was not sudden. This was overruled by the High Court as the concepts of 'slow boil', 'continuing boil' and 'slow burn' to explain a defendant's delayed reaction to provocation have been recognised well before in cases such as *Parker*³⁸ and *Chhay*³⁹ and 'suddenness' was removed by NSW legislation in 1982. *Pollock* is an example of where the removal of the requirement of 'suddenness' for loss of self-control has not prevented a Court of Appeal from resurrecting it when it had ostensibly been removed by common law (and legislation in NSW).

Carol Withey argues that the requirement of loss of self-control in the new defence would make the 'slow burn' cases difficult to establish because the delay in loss of self-control would bring doubt as whether actual loss of self-control occurred despite

³⁵ A Norrie, 'The Coroners and Justice Act 2009 (n 19) 288.

³⁶ *ibid.*

³⁷ [2010] HCA 35.

³⁸ (1963) 111 CLR 610 (HC); (1964) 111 CLR 665 (PC).

³⁹ (1994) 72 A Crim R 1.

section 54(2) stating that loss of self-control need not be sudden.⁴⁰ Withey, in order to support her argument, cites the Coroners and Justice Act 2009 Explanatory Notes, which state:

Although subsection (2) in the new partial defence makes clear that it is not a requirement for the new partial defence that the loss of self control be sudden, it will remain open, as at present, for the judge (in deciding whether to leave the defence to the jury) and the jury (in determining whether the killing did in fact result from a loss of self-control and whether the other aspects of the partial defence are satisfied) to take into account any delay between a relevant incident and the killing.⁴¹

Withey states that if the Government was intent on retaining the requirement for loss of self-control it might have been better to have formulated a separate defence for domestic abuse and excessive force cases, where the loss of control requirement could be discarded.⁴²

The requirement for loss of self-control in the new defence will also make it inconsistent for defendants to plead both self-defence and loss of control. In self-defence they have to show reasonableness whereas, in claiming the Loss of Control defence in addition, they have to show unreasonableness in that the behaviour was irrational.

Despite the criticisms of the inclusion of loss of self-control in the new English defence, as stated above, the retention of actual loss of self-control as an element in a reformed provocation defence would be consistent with the excuse-based approach of NSW law reformers as its removal would make the new English defence justification-based and unacceptable to the NSW Law Reform Commission.

If NSW provocation law were abolished and the new English 'Loss of Control' defence adopted, there would be no change with respect to current NSW provocation

⁴⁰ C Withey (n 10) 268.

⁴¹ CJA Explanatory Notes (n 9) para 337.

⁴² C Withey (n 10) 268.

defence provisions for loss of self-control or the negating of 'suddenness' because sections 54(1)(a) (loss of self-control) and 54(2) (no need for loss of self-control to be sudden) are mirrored in section 23 of the Crimes Act 1900 (NSW).

As stated above, the new English defence arguably does not improve the situation for abused women who kill. They will be no better off with the 'Loss of Control' defence than current NSW provocation law if there is a delayed killing in response to provocation as the 'suddenness' issue will remain open to the court when deciding whether actual loss of self-control occurred. Also, pleading two defences, 'Loss of Control' as well as self-defence, will raise the inconsistencies of 'loss of reason' in the former and 'reasonableness' in the latter.

Abused women who kill in NSW can plead the partial defence of excessive self-defence which does not create the problems as does a defence requiring loss of self-control.⁴³ Also, excessive self-defence does not stop them from simultaneously pleading self-defence. Therefore, because of the alternative defences in NSW, women would not be disadvantaged if the 'Loss of Control' provisions are adopted in NSW.

4.3.3 Section 54(4): Considered Desire for Revenge.

Section 54(4) of the new English defence denies it to those who acted in a considered desire for revenge. The English Government adopted this recommendation from the Law Commission to prevent the defence being available to cases of 'honour killings' and 'tit-for-tat gang killings'.⁴⁴ However, as stated in the previous section, defendants in such killings would be denied the defence by the requirement that the defendant acted out of a 'justifiable sense of being seriously wronged' in response to grave provocation. The exclusion of 'a considered desire for revenge' would tend to

⁴³ Crimes Act 1900 (NSW) s421.

⁴⁴ Ministry of Justice, *Murder, manslaughter and infanticide* (response n 13) paras 56, 74.

rule out cases where there was a delayed reaction to the provocation sufficient for retaliation to be made out of revenge as, for example, in *Baillie*.⁴⁵

There is no explanation in the new legislation or the explanatory notes as to what ‘considered’ means in ‘considered desire for revenge’.

The provision clearly removes the defence for acts of revenge. It would arguably be an attractive provision for adoption in NSW if it applied to only to defendants who killed cold-bloodedly because of revenge and without loss of self-control.

However, it would not be well-received in Australian law because it excludes those who have lost self-control due to a qualifying trigger and have shown elements of revenge in their actions. Stanley Yeo argues that the express exclusion of revenge downplays the role of loss of self-control in excusing the defendant of murder.⁴⁶ Two Australian cases illustrate the point that Australian law accepts that a defendant who kills whilst losing self-control due to provocation, could also have a considered desire for revenge.

In *Osland*,⁴⁷ the High Court held that the defendant was still influenced by the provocation when cooperating, out of apparent desire for revenge, with her son to kill her abusive husband.⁴⁸ To illustrate this, the High Court referred to the facts of *Parker*⁴⁹ and stated that, had the defendant and his brother-in-law set out together to catch up with the victim and kill him, it would have been open to the jury to find the defendant was acting under provocation and also pursuant to the apparent vengeful agreement to kill.

⁴⁵ *Baillie* (n 30).

⁴⁶ S Yeo, ‘English Reform of Partial Defences to Murder: Lessons for New South Wales’ (n 20) 10.

⁴⁷ (1998) 197 CLR 316.

⁴⁸ *ibid* 360.

⁴⁹ *Parker* (1964) 111 CLR 665.

Section 54(4) could be adopted in NSW provocation law if it were modified only to exclude cold-blooded revenge. But arguably, the provision would be superfluous as cold-blooded revenge killings can be ruled out by the lack of evidence of actual loss of self-control and from the provision, if adopted, requiring a justifiable sense of being seriously wronged.

4.3.4 Sections 54(5) and 54(6): The Role of the Jury and the Judge

Unlike section 23 of the Crimes Act 1900 (NSW) and section 3 of the Homicide Act 1957, section 54(6) of the Coroners and Justice Act 2009 gives discretion to the judge in deciding, in his or her opinion, whether there is sufficient evidence for a properly directed jury to reasonably conclude the defence would apply. Section 54(5) requires the jury, if sufficient evidence is adduced to raise the defence, to assume the defence is successful if the prosecution has not negated the defence beyond reasonable doubt. This means the judge has the discretion to decide if the evidence is sufficient to raise the defence for a jury to consider. In considering whether there is sufficient evidence to refer the defence to the jury, the trial judge would need to assess that evidence with other provisions of the 'Loss of Control' defence.

The Law Commission recommended that a judge should not be required to leave the provocation defence to the jury unless there was evidence that a reasonable jury, properly directed, could conclude that it might apply.⁵⁰

The Commission was concerned that cases of trivial provocation have to be left to the jury⁵¹ and that provocation would be left to the jury on morally or politically unacceptable grounds such as a claim of provocation by a racist defendant⁵², by a

⁵⁰ Law Commission, *Partial Defences to Murder* (Law Com No 290, 2004) para 1.13.

⁵¹ *ibid* paras 3.20, 3.65.

⁵² *ibid* para 3.70 citing J Horder, *Provocation and Responsibility* (Clarendon Press, Oxford, 1992) 144.

stalker (erotomaniac)⁵³ or from a jealous partner in cases of simple separation or infidelity.⁵⁴

To legitimise provocation claims, the Law Commission stated the preferred moral basis of the defence is that the provocation was such as to cause the defendant to have a justifiable sense of being wronged.⁵⁵

To achieve this legitimisation, the Law Commission stipulated that provocation should be 'gross' and cause a 'justifiable sense of being seriously wronged' and, with a procedural power of the trial judge being provided that can allow the exercise of discretion to remove the issue from the jury where the defence is not legitimately grounded in the opinion of that judge.

The new law of 'Loss of Control' adopts the legitimisation of the defendant's response to the victim's conduct⁵⁶ and provides explicit judicial discretion on whether to leave the defence to the jury according to the Law Commission's recommendation.⁵⁷

'Loss of Control' clearly empowers judges to reject trivial provocation and to make the moral and political judgement on what is a justifiable expression of provoked anger in the name of the 'reasonable jury'. It creates greater certainty about what constitutes legally permissible provocative conduct.

The judge being empowered with the discretion to withhold the defence from the jury as in section 54(6) would be an attractive adoption in NSW as section 23 is

⁵³ *Stingel* (n 18).

⁵⁴ Law Commission, *Partial Defences to Murder* (n 47) para 3.145.

⁵⁵ Law Commission, *Partial Defences to Murder* (n 47) para 3.68.

⁵⁶ Coroners and Justice Act 2009, s55(4)

⁵⁷ *ibid* s54(6)

silent on the issue and there have been unjustified appeals in Australian law on the basis that the trial judge refused to allow provocation to the jury.⁵⁸

4.3.5 Sections 54(1)(b) and 55: Qualifying Triggers

Section 54(1)(b) stipulates that the loss of self-control had a qualifying 'trigger'. The English government sought to avoid using the terms from the abolished provocation defence and termed provocative acts and omissions 'triggers'.⁵⁹ Section 55 explains the meaning of 'qualifying trigger' as being a trigger due to fear of serious violence and, a trigger for things said and done which constituted circumstances of an extremely grave character and caused the defendant to have a justifiable sense of being seriously wronged.⁶⁰ Section 55(5) applies to loss of self-control triggered by both fear (section 55(3)) and a justifiable sense of being seriously wronged (section 55(4)). The threat, in other words, causes both fear and anger.

The excluded triggers are fear of serious violence which the defendant incited to provide an excuse for violence (section 55(6)(a)), and of being seriously wronged which the defendant incited to provide an excuse for violence (section 55(6)(b)), and things said or done constituting sexual infidelity (section 55(6)(c)).

4.3.5.1 Trigger of Fear of Serious Violence

The provision for fear of serious violence, section 55(3), is, as stated before in this study, a gender-neutralising endeavour for a provocation-based defence so as to make the defence available to abused women who kill.

The fear of serious violence covers both physical and sexual violence which can be directed towards the defendant or another identified person, such as the defendant's

⁵⁸ An example is *Stingel* (n 18).

⁵⁹ Ministry of Justice, *Murder, manslaughter and infanticide* (response n 13) para 85.

⁶⁰ Coroners and Justice Act 2009, ss 55(3), 55(4)(a), 55(4)(b).

child.⁶¹ Although it is not expressly stated in section 55(3), it is unlikely that the fear of violence has to emanate from an immediate threat because, if this was the case, women who kill their abusive partners because they are threatened with violence at some point in the near future, would not be able to rely upon the defence.

The consideration of the basis of the defendant's fear of serious violence is, as the Explanatory Notes state, a subjective test.⁶² The fear need only be genuine and it does not have to be reasonable. Section 55(6)(a) rules out fear as a trigger if the defendant incited it as an excuse to use violence.

As stated in 4.3.2, the problems created for abused women who delay in losing self-control are disadvantaged by the requirement to establish loss of self-control and also pleading self-defence alongside 'Loss of Control'.

Therefore, this element allowing fear as a trigger does little to help abused women who kill and is therefore arguably unattractive for adoption in NSW.

As stated earlier, abused women who kill are better served by excessive self-defence provided by section 421 of the Crimes Act 1900 (NSW). With this partial defence, an abused woman could argue the use of fatal force was believed to be necessary, even if objectively, it was unreasonable. It would not preclude her from also pleading self-defence.⁶³

4.3.5.2 Trigger of Extremely Grave Circumstances Causing a Justified Sense of Being Seriously Wronged

The provision for things said and done which constitute circumstances of an extremely grave character, section 55(4)(a), and caused the defendant to have a justifiable sense of being seriously wronged, section 55(4)(b), would appear

⁶¹ CJA Explanatory Notes (n 9) para 345.

⁶² CJA Explanatory Notes (n 9) para 345.

⁶³ Crimes Act 1900 (NSW) s418.

attractive to NSW reformers as it facilitates a way of excluding trivial and morally unacceptable provocation.

Two elements in the new 'Loss of Control' defence make it difficult for trivial or morally unacceptable provocation to be left to the jury.

The first element is the procedural power of the judge explained above. Trivial and morally unacceptable provocation would not be left to the jury by the judge and, as section 54(6) is discretion-based, it is unlikely that leave for an appeal would be granted by higher courts. Hence, under section 54(6), a case like *Stingel*⁶⁴ would not be appealed. *Stingel* stalked and confronted his former partner and her new partner who were engaged in intimate acts at a lover's lane. *Stingel* killed the new partner and subsequently claimed that being angrily told to leave by the victim was not trivial provocation, but grave when considered with his characteristic of being afflicted with erotomania. *Stingel* was able to utilise the resources of two appeal courts to determine ultimately that the trial judge in his case was correct in refusing to allow provocation being left to the jury.

The second element addresses the moral issue of what is a rightful or wrongful response to provocation. Provocation law did not provide a basis for determining which were good or bad reasons to be provoked.

Section 55(4) of the Coroners and Justice Act 2009 requires provocation to be of an extremely grave character causing the defendant to have a justifiable sense of being seriously wronged. This limitation on the type of provocative conduct that could give an element of justification to the defendant's reaction would exclude unmeritorious cases without a moral basis.

⁶⁴ *Stingel* (n 18).

The jury is also required to consider the gravity aspect of the objective test, as stated in sections 54(1)(c) and 54(3), with regard to the defendant's circumstances.

Therefore, section 55(4) would not only limit the type of provocative conduct justifying the defendant's reaction, but would also confine the jury to consider only those personal characteristics or circumstances of the defendant to which the provocation could cause a defendant to have a justifiable sense of being seriously wronged. It would doubtless exclude, among others, a defendant's characteristics such as religious conservatism, homophobia, misogyny, erotomania and racism as characteristics from being regarded as making provocation grave, where that provocation would not be regarded as grave in persons without the characteristic.⁶⁵ Under the new 'Loss of Control' law, the honour killing English case of *Mohammed (Faqir)*⁶⁶ would have also resulted in a murder conviction as it did under provocation law. In that case, the Muslim father killed his daughter after discovering a man in her bedroom. The conduct of the daughter could not be regarded as extremely grave circumstances causing the father to have a justifiable sense of being seriously wronged so as to lose self-control and kill. Section 55(4) is an objective test and it is unlikely that the jury would agree that the evidence qualifies for a successful 'Loss of Control' defence, assuming the judge has decided there is enough evidence to leave to the jury.⁶⁷

The facts in *Mohammed (Faqir)* are similar to the Australian honour killing case of *Dincer*,⁶⁸ except that the Muslim Dincer succeeded with his provocation defence.

Under the new English law, a defendant such as *Dincer*, would not be able to claim

⁶⁵ S Yeo, 'English Reform of Partial Defences to Murder (n 20) 10.

⁶⁶ [2005] EWCA Crim 1880.

⁶⁷ CJA Explanatory Notes (n 9), para 346.

⁶⁸ [1983] 1 VR 460.

his unmarried daughter having sex with her boyfriend as legitimate provocation justifying a killing to save family honour.

Under section 55(4), a homophobic defendant would not be able to claim provocation in killing a person who made a non-violent sexual advance towards him as occurred in the NSW case of *Green*.⁶⁹ In *Green*, the trial judge refused to allow non-violent homosexual advance to be sufficient provocation to be left for the jury. On appeal in the High Court, the judges dissented and the majority allowed a non-violent homosexual advance to be sufficient provocation to leave to the jury.

However, the case would be different if an equivalent provision to section 55(4) of the Coroners and Justice Act 2009 applied in NSW. A NSW jury, made up from a society with its general acceptance of homosexuality, would likely reject a non-violent homosexual advance as being of an extremely grave character causing the defendant 'to have a justifiable sense of being seriously wronged'.⁷⁰ In reflecting this general Australian acceptance of homosexuality, an Australian jurisdiction has removed non-violent sexual advance as provocation from its provocation legislation in response to *Green* and such cases.⁷¹

The adoption in NSW of section 54(6) would empower a trial judge to prevent non-violent sexual advance from going to the jury without fear of making an error subject to appeal.

Section 54(4) excludes the defence to defendants who killed in a considered desire for revenge. Section 55(4)(a) excludes the defence from those who cannot demonstrate the trigger caused by the victim constituted circumstances of an extremely grave character. Section 55(4)(b) excludes the defence from those who

⁶⁹ (1997) 191 CLR 334.

⁷⁰ *Green* (n 69) 408 (Kirby J).

⁷¹ Crimes Act 1900 (Australian Capital Territory) s13(3).

cannot demonstrate the trigger could cause a justifiable sense of being seriously wronged.

The adoption in NSW of sections 54(4), 55(4)(a) and 55(4)(b) alongside the adoption of section 54(6) would allow the trial judge to decide whether the facts of a case conform to the elements of those sections for a properly directed jury to reasonably conclude that the defence might apply. If the evidence is insufficient in the judge's opinion, the power under section 54(6) would allow the judge to withhold the defence from the jury.

The adoption of the above 'Loss of Control' provisions would appear to be an advance that NSW reformers could adopt as it facilitates a way of excluding unmeritorious cases from succeeding with the defence.

4.3.5.3 The Excluded Trigger of Sexual Infidelity

Section 55(6)(c) of Coroners and Justice Act 2009, eliminates revelations of sexual infidelity as a 'qualifying trigger' for loss of self-control.

The Government explained its rationale behind this exclusion as:

It is quite unacceptable for a defendant who has killed an unfaithful partner to seek to blame the victim for what occurred. We want to make it absolutely clear that sexual infidelity on the part of the victim can never justify reducing a murder charge to manslaughter.⁷²

However, the Government felt it necessary to include the limitation in the new defence, despite its impact assessment study indicating that juries do not accept sexual infidelity by jealous partners for a successful provocation defence, thus making it of little practical utility.⁷³

⁷²Ministry of Justice, *Murder, manslaughter and infanticide* (n 2) para 32.

⁷³ Ministry of Justice, *Murder, manslaughter and infanticide: proposals for reform of the law* (Impact Assessment CP19/08, 2008b) 11-12.

Rather than draft the specific exclusion of sexual infidelity, it may have been better for the government to leave such matters to the discretion of the judge under section 54(6) to exclude the defence. If the judge does not exclude the defence in such cases, the defence is likely to fail when the jury apply the limits already imposed by the objective test, the requirement that the trigger be extremely grave and cause a justifiable sense of seriously being seriously wronged, and the express exclusion of revenge killings.⁷⁴

The express exclusion of sexual infidelity was opposed by several respondents to the English government's consultation paper who argued the defence should be allowed if the sexual infidelity constituted an exceptional circumstance giving the defendant a justifiable sense of being seriously wronged and the jury accepted that a person of ordinary tolerance and self-restraint could have acted in the same way.⁷⁵ Carol Withey questions why sexual infidelity was singled out for specific exclusion in a legislative provision above other unacceptable reasons for killing, for example, honour killings.⁷⁶ She argues the public might sympathise with a person who receives the mandatory life sentence because they killed their partner upon the discovery of their adultery as recent media reports involving celebrity affairs have shown how the public frown on those who cheat on their loved ones.

Alan Norrie states that, while cases that rely upon the bare fact of infidelity as causing anger may be easily excluded, the difficult cases will be where one partner habitually taunts another with the example of their infidelity, either by itself, or as part of a range of taunts.⁷⁷ He argues that there are many cases where sexual

⁷⁴ J Miles, 'The Coroners and Justice Act 2009: a "dog's breakfast" of homicide reform' (2009) 10 Arch News, 1,3-4.

⁷⁵ Ministry of Justice, *Murder, manslaughter and infanticide*(Response n 13) para 48.

⁷⁶ C Withey (n10) 272.

⁷⁷ A Norrie (n19) 288-289.

infidelity has been used as a taunt. The Law Commission recognised sexual taunting as being a situation which should be left to the judge and jury to come to a decision.⁷⁸

Jo Miles, another critic of section 55(6)(c) argues:

And how, in reality, is the jury to “disregard” sexual infidelity when it may be intimately bound up with a number of other (permissible) triggers arising in a domestic context? ... This sort of “micro-management” of the defence may prove to do more harm than good.⁷⁹

Given the controversy the new defence creates with the express exclusion of sexual infidelity, this part of ‘Loss of Control’, arguably, should not be adopted by NSW. As stated previously, unmeritorious cases of sexual infidelity could be excluded by the use of section 55(4) requiring extremely grave circumstances causing the defendant to have a justifiable sense of being seriously wronged, in concert with the judge’s discretion, the exclusion of revenge and the objective test. These section 55(4) provisions would arguably benefit provocation reform in NSW without the need for a specific provision to exclude sexual infidelity as provocation.

4.3.5.4 Excluded Trigger of Self-Induced Provocation

The provisions which exclude the defence from defendants who incited the victims to provoke them as an excuse to use violence are, section 55(6)(a) for the trigger of fear of serious violence, and section 55(6)(b) for the trigger of grave circumstances causing a sense of being seriously wronged.⁸⁰

In NSW this exclusion is a well-established common law rule that the defence of provocation will be denied to a defendant who has sought the provocation as an

⁷⁸ Law Commission, *Partial Defences to Murder* (n 50) para 3.147.

⁷⁹ J Miles (n 74) 4.

⁸⁰ Coroners and Justice Act 2009.

excuse to kill the victim.⁸¹ This rule was expressly stipulated in section 23 of NSW provocation law but was removed in the 1982 amendments to the section.

In the case of *Stingel*,⁸² section 55(6)(b) may arguably apply in that Stingel incited the provocation, providing himself with the excuse to use violence to kill his sexual rival. He stalked his former partner and followed her and her new partner to a lover's lane. He approached them in such an inappropriate way that he was told to leave with abusive words.

The adoption of section 55(6) to exclude self-induced provocation in NSW would be welcome by Australian legal commentators albeit with the modification of the 'excuse to use violence' being changed to the 'excuse to kill'.⁸³ Yeo argues that section 55(6) could also be adapted in NSW legislation on self-defence and excessive self-defence to exclude these defences from defendants who induced the victim to attack them for the purpose of providing an excuse to use violence.⁸⁴

4.3.6 Sections 54(1)(c) and 54(3): the Objective Test in 'Loss of Control'

The Law Commission proposed an objective test, stating that the standard should be that of a person 'of the defendant's age and of ordinary temperament, that is, ordinary tolerance and self-restraint, in the circumstances of the defendant'.⁸⁵

The Government modified it slightly and added sex in addition to age so that the new law in section 54(1)(c) states:

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 a similar way to D.

⁸¹ *Newman* [1948] VLR 61,66; *Allwood* (1975) 18 A Crim R 120.

⁸² *Stingel* (n 18).

⁸³ P Fairhall and S Yeo, *Criminal Defences in Australia* (4th edn, LexisNexis, Sydney, 2005); S Yeo, 'English Reform of Partial Defences to Murder: Lessons for New South Wales' (2010) 22 *Current Issues in Criminal Justice* 1,15.

⁸⁴ S Yeo, 'English Reform of Partial Defences to Murder' (n 20) 15.

⁸⁵ Law Commission, *Partial Defences to Murder* (n 47) para 3.15.

In section 54(3), the law states:

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.

The new test no longer refers to the ‘reasonable man’ or ‘characteristics’ but to a person of the defendant’s sex and age with a normal degree of tolerance and self-restraint and in the circumstances of the defendant. There are two limbs to the new objective test as there was with the common law test in *Camplin*⁸⁶ and *Holley*.⁸⁷

The first limb concerns the gravity of provocation.

The second limb is concerned with comparing the defendant’s response to the possible response of a person with a normal degree of tolerance and self-restraint faced with the same circumstances experienced by the defendant.

All of the defendant’s relevant circumstances and characteristics are to be taken into account in the determination of the gravity of the trigger caused by the victim. These circumstances, according to section 55(4)(a), must be of an extremely grave character and, according to 55(4)(b), caused the defendant to have a justifiable sense of being seriously wronged.

In the objective determination of whether a person with a normal degree of tolerance and self-restraint might have reacted in the same or a similar way to the defendant, sex and age are the only characteristics of the defendant that can be considered.

In the taking into account the defendant’s age and sex as general characteristics affecting capacity for self-control (tolerance and self-restraint), the new law follows the *Camplin*⁸⁸ formula restated in *Holley*.⁸⁹

⁸⁶ *Camplin* (n 17).

⁸⁷ *Holley* (n 16).

⁸⁸ *Camplin* (n 17).

⁸⁹ *Holley* (n 16).

In its objective test, the Law Commission only included age in its formulation because ‘capacity for self-control is an aspect of maturity, and it would be unjust to expect the same level of a 12-year-old and an adult’.⁹⁰

It recognised the problem that age does not always indicate maturity and that adult defendants may have the same level of immaturity as a child, but for policy reasons did not support the extension of taking into account age beyond that for the ‘child of normal development’ to avoid undermining the objective test.⁹¹

The Government’s addition of sex in the new law goes against the Law Commission’s view, supported by women’s groups that, as a matter of principle, criminal law should be gender neutral unless it was absolutely necessary to depart from that principle.⁹² The inclusion of sex in the new law could be a way of indicating that abused women behave differently when losing self-control and this may be related to their physical vulnerability in their relations with stronger men. Stanley Yeo criticises the recognition of sex as varying the provocability of the person with a normal degree of tolerance and self-restraint as, by implication, it condones the highly debatable stereotype that women generally have a higher capacity for tolerance and self-restraint than men.⁹³

The two-limbed test approved in *Holley*,⁹⁴ draws a distinction between characteristics affecting the gravity of provocation and those affecting provocability of the defendant. The question of which of the defendant’s personal characteristics or circumstances may be attributed to the reasonable man for the purpose of assessing

⁹⁰ Law Commission, *Partial Defences to Murder* (n 50) para 3.110

⁹¹ *ibid* paras 3.129-3.134.

⁹² *ibid* para 3.78

⁹³ S Yeo, ‘English Reform of Partial Defences to Murder’ (n 20) 11.

⁹⁴ *Holley* (n 16).

the gravity of the provocation, is intertwined with that of whether the victim's conduct amounts to 'grave' provocation.

There can be no blurring between gravity of provocation and capacity for self-control enquiries by overlaying the defendant's characteristics in both enquiries. The two-limbed common law test has essentially been enacted in the new Loss of Control defence but with slightly different wording.

The decision in *Holley* required that where the provocation relies on a characteristic of the defendant, it must be directed at the characteristic if it is to be taken into account. If a person suffers from alcoholism, this is irrelevant to the loss of self-control unless a taunt was directed at the fact the defendant was an alcoholic.⁹⁵

Norrie argues that whilst *Holley* narrowed the objective test, it did not address the nub of the problem which was that there was no substantive moral or political standpoint from which to evaluate the factor which caused the provocation.⁹⁶ No distinction was made between morally acceptable and unacceptable characteristics of the defendant.

Therefore, it was impossible to distinguish in law those provoking factors that should not be excused from those that should. After *Holley*, the defendant's characteristic of being addicted to glue-sniffing as in *Morhall*⁹⁷ could still be relied upon to provide the basis for excusable provocation, provided the taunt was directed to the addiction thereby making it relevant to the gravity of provocation limb of the objective test.

The moral attribute of the condition, addiction to glue-sniffing, did not matter.

Morally unworthy characteristics were still admissible provided they are directed to the provocation. In the case of provocation consisting of a non-violent sexual

⁹⁵ A Norrie, 'The Coroners and Justice Act 2009 (n 19) 283

⁹⁶ *ibid.*

⁹⁷ [1996] AC 90 (HL).

advance, the defendant's characteristic of deep-seated psychosexual problems was also admissible to the objective test because the provocation is directed to that characteristic. Accepting a non-violent sexual advance as grave provocation is not supported by most in the community and one Australian jurisdiction has removed it from provocation law.⁹⁸

While provocation law after *Holley* allowed unworthy conditions to provide a basis for provocation to be grave enough for the defendant to be excused with a manslaughter conviction instead of murder, arguably sympathetic psychological conditions such as the stress and pressure of caring for a new-born baby (*Doughty*),⁹⁹ or suffering from emotional immaturity (*Humphreys*),¹⁰⁰ or being of low intelligence (*Acott*),¹⁰¹ would not because they do not provide a direct link to the provocation and its gravity.¹⁰²

Whilst the new 'Loss of Control' defence provides ways to prevent the defendant's morally unworthy conditions being considered in its objective test, Norrie argues that it will prevent sympathetic cases like *Doughty* from getting the defence.¹⁰³

Ultimately on appeal, *Doughty* was granted the defence because his psychological condition caused by severe emotional stress was the factor which made the baby's incessant crying sufficient provocation.

The new law strengthens the objective basis of the defence, specifying with section 55(4) the requirement that the circumstances of the provocation must be extremely grave and for the defendant having a justifiable sense of being seriously wronged.¹⁰⁴

This requirement for extreme gravity and justifiable sense of being seriously

⁹⁸ Crimes Act (Australian Capital Territory) s13(3).

⁹⁹ *Doughty* (n 8).

¹⁰⁰ *Humphreys* [1995] 4 All ER 1008; [1996] Crim LR 431 CA (Crim Div).

¹⁰¹ *Acott* [1997] 1 WLR 306; [1997] 2 Cr App R 94 (HL).

¹⁰² A Norrie, 'The Coroners and Justice Act 2009 (n 19) 283.

¹⁰³ *ibid.*

¹⁰⁴ Coroners and Justice Act 2009.

wronged intertwines with sections 54(1)(c) and 54(3), thus limiting the provocation to be applied to the objective test to the type which is legally permissible. Hence, the idea of a 'justifiable' sense of being 'seriously' wronged directs the jury to consider whether the provocation and the defendant's view of it were morally or socially acceptable before going to the step of considering the response to it compared with what a person 'with a normal degree of tolerance and self-restraint' might do.

The new Loss of Control law creates certainty in the way its objective test is applied with sections 54(1)(c) and 54(3) but, in doing so, cases such as Doughty would not get the defence as no jury could find the baby's crying could cause him to have a justifiable sense of being seriously wronged. The judge would no doubt exercise power to withhold the defence from the jury in such a case.

Cases like Doughty's may not obtain assistance in the new partial defence of diminished responsibility under sections 52 and 53.¹⁰⁵ The requirement of a 'recognised medical condition' reduces the ability to introduce psychiatric testimony of anything less, and a temporary stressed psychological state induced by overwhelming caring demands may not qualify.

Loss of Control creates certainty for the objective test but it leaves no avenues for a partial defence in cases like Doughty's whose circumstances have been described by Norrie as 'sympathetic'.¹⁰⁶

The NSW Law Reform Commission in 1997 favoured the retention of the provocation defence but with abandonment of the objective test in NSW, which is currently similar to the objective test in 'Loss of Control'. Instead, it proposed a subjective test:

¹⁰⁵ Coroners and Justice Act 2009.

¹⁰⁶ A Norrie, 'The Coroners and Justice Act 2009 (n19) 283.

[T]he accused, taking into account all of his or her characteristics and circumstances, should be excused for having so far lost self-control as to have formed an intent to kill or to inflict grievous bodily harm or to have acted with reckless indifference to human life as to warrant the reduction of murder to manslaughter.¹⁰⁷

However, as recently as 2008, the Queensland Law Reform Commission, after reviewing criticisms of the defence, favoured its retention and the objective test with its gravity of provocation and capacity for self-control limbs as *Holley*¹⁰⁸ and *Stingel*¹⁰⁹ interpreted the test in *Camplin*,¹¹⁰ and is currently Australian law. The Queensland Commission did not consider the test so complex as to be unworkable.¹¹¹ If the NSW government retains the objective test in a reformed provocation defence it would be significantly improved and create certainty if it adopts the provisions of sections 54(1)(c) and 54(3), which codify the two-limbed approach of common law. It is likely that NSW law would accept the inclusion of age, not sex, in its reformed objective test. Alongside a provision such as section 55(4) which limits morally and socially unacceptable provocation, killings involving homophobia, misogyny, erotomania and the like would not succeed with the defence.

¹⁰⁷ NSW Law Reform Commission, *Partial Defences to Murder* (n 11) Recommendation 2(b).

¹⁰⁸ *Holley* (n 16).

¹⁰⁹ *Stingel* (n 18).

¹¹⁰ *Camplin* (n 17).

¹¹¹ Queensland Law Reform Commission, *A review of the excuse of accident and the defence of provocation* (QLD LRC Report No 64, 2008) para 21.127.

CHAPTER 5

CONCLUSION AND FUTURE CONSIDERATIONS

The objective in this study is whether the provisions of the new English defence of 'Loss of Control' are a model for reform of provocation law in NSW. The new defence in England resulted as an attempt to resolve the problems with the provocation defence, which it faced, and which were common to NSW as provocation law was almost identical in operation to that in England.

In this concluding chapter, the results of the comparative analysis of the new defence and the law in NSW within this study are reviewed to determine whether the objective has been achieved.

The findings of this study are:

- i. The rationale for 'Loss of Control' as a partial defence is consistent with the recommendations of the statutory body charged with provocation law reform in NSW. The NSW Law Reform Commission favours an excusatory approach over a purely justificatory approach which is evidenced in its report.¹ The new 'Loss of Control' defence retains an excusatory element, which is the requirement that the defendant killed because of a loss of self-control.
- ii. The reform of NSW law need not be by way of abolition of NSW legislation and common law as occurred to create the English 'Loss of Control' defence. It is argued that the substance of the new law is the same

¹ NSW Law Reform Commission, *Partial Defences to Murder: Provocation and Infanticide* (NSW Law Reform Com No 83, 1997) para 2.27.

as the abolished provocation law.² Given that the new law is arguably in substance provocation law, reform of NSW law based on the new English defence is likely to proceed by amendment of section 23 rather than by its abolition to create a new partial defence.

- iii. As elaborated upon in 4.3.2, the inclusion of the element ‘loss of self-control’ in the new defence may disadvantage abused women who kill as suddenness will still be a consideration despite section 54(2) stating loss of self-control need not be sudden.³ This is evidenced by the English government’s Explanatory Notes on ‘Loss of Control’, which state that delay in response is a factor which can still rule out actual loss of self-control.⁴ The requirement of suddenness has been removed from NSW provocation law, which is still based on the element of loss of self-control. Therefore, there would not be a need to reform NSW law to adopt the substance of the English defence of ‘Loss of Control’.

The adoption would not affect abused women as, unlike English women, they have the option in NSW to the alternative defences of self-defence or excessive self-defence.

- iv. The provision, section 54(4), which denies the ‘Loss of Control’ defence to those who acted in revenge would be regarded as an attractive provision to reform NSW provocation law. However, it would need to be modified so that it only excludes cold-blooded revenge such as honour and gang-related killings. In its current form, section 54(4) excludes revenge from all

² A Norrie, ‘The Coroners and Justice Act 2009 – Partial Defences to Murder (1) Loss of Control’ (2010) 4 Crim LR 275; S Yeo, ‘English Reform of Partial Defences to Murder: Lessons for New South Wales’ (2010) 22 Current Issues in Criminal Justice 1.

³ A Norrie, ‘The Coroners and Justice Act 2009 (n 2) 288; .C Withey, ‘Loss of control, loss of opportunity?’ (2011) 4 Crim LR 263,268.

⁴ Coroners and Justice Act 2009 Explanatory Notes, para 337.

killings including hot-blooded killings, which result from provoked loss of self-control. As discussed in 4.3.3, the evidence is that NSW law accepts that a provoked defendant who kills after losing self-control could also have a 'considered desire for revenge'.⁵

- v. The provision in 'Loss of Control' giving the trial judge discretion to withhold the defence from the jury would be of benefit to NSW provocation law and, arguably, should be adopted because the withholding of provocation by a trial judge often leads to appeals by the defendants. In trivial and morally unacceptable cases, a NSW judge is inclined to leave provocation to the jury to avoid appeals because section 23 of the Crimes Act 1900 (NSW) has no provision empowering a judge to withhold the defence. In Australia, the unmeritorious case of *Stingel* demonstrates that, if a judge refuses to leave provocation to the jury, leave for appeal by a higher court is likely to be granted.⁶

An appeal from a trial judge's decision to withdraw provocation from the jury would not occur if NSW adopted section 54(6).

- vi. The qualifying trigger of fear of serious violence in 'Loss of Control' may be an unnecessary provision for NSW provocation reform. Defendants who kill in fear have the option in NSW of pleading self-defence or excessive self-defence (or both).⁷

The defendant's need in 'Loss of Control' to establish actual loss of self-control may disadvantage abused women who kill in fear because a delay between loss of self-control and the killing may allow the jury to question

⁵ Osland (1998) 197 CLR 316; *Parker* (1963) 111 CLR 610.

⁶ *Stingel* (1990) 171 CLR 312.

⁷ Crimes Act 1900 (NSW) s421.

whether actual loss of self-control occurred. This consideration of delay in deciding whether actual loss of self-control occurred is stated in the 'Loss of Control' Explanatory Notes despite a provision in the new defence that loss of self-control need not be sudden.⁸ Furthermore, it makes it difficult for an abused English woman to plead self-defence as well as 'Loss of Control' because establishing loss of self-control involves demonstrating unreasonable actions whereas self-defence requires establishing a reasonable response.

- vii. The specific exclusion of sexual infidelity has proven controversial as evidenced by English and Australian critics of this provision.⁹ It could exclude a legitimate case where there have been systematic and aggravated taunts about sexual infidelity by the victim. NSW would be well warned not to consider such a provision.¹⁰ Unmeritorious cases involving alleged provocation of sexual infidelity could be excluded by the adoption of section 55(4), which requires the provocation to constitute extremely grave circumstances and causing the defendant to have a justifiable sense of being seriously wronged.
- viii. The requirement that the trigger constitutes extremely grave circumstances and causing a justified sense of being seriously wronged (section 55(4)) would, by its construction in 'Loss of Control', undoubtedly prevent a successful defence in killings due to family honour, homophobia,

⁸ CJA Explanatory Notes (n 4) para 337.

⁹ A Norrie, 'The Coroners and Justice Act 2009 (n 2) 288-289; .C Withey, 'Loss of control, loss of opportunity?' (2011) 4 Crim LR 263,268; S Yeo, 'English Reform of Partial Defences to Murder (n 2) 12.

¹⁰ S Yeo, 'English Reform of Partial Defences to Murder (n 2) 12.

misogyny, erotomania, racism and other unwarranted cases of provocation.¹¹

This 'Loss of Control' provision would also have the attraction of narrowing the current NSW objective test where, in the gravity of provocation determination, unworthy characteristics such as being a conservative Muslim or a homophobic are currently allowed to be considered in viewing the provocation as grave. Under section 55(4), such characteristics and circumstances of a defendant would be precluded from consideration to allow the defence.

- ix. Self-induced provocation, as excluded by sections 55(6)(a) and (b), would be acceptable to NSW law, to restore the previous provisions excluding it. The legislative provision would add certainty to the existing Australian common law rule excluding self-induced provocation. The only modification recommended would be that the provisions be redrafted 'from excuse to use violence' to the 'excuse to kill'.¹²
- x. The objective test in 'Loss of Control' is similar to the current test used by NSW provocation law, however, there is no direction in NSW legislation as to which of the defendant's characteristics are relevant in the objective test of the 'ordinary person'. In NSW, only age is allowed by common law to vary the level of self-control expected of an 'ordinary person' and all of the defendant's characteristics are relevant to determining the gravity of provocation.¹³

¹¹ *ibid* 10.

¹² S Yeo, 'English Reform of Partial Defences to Murder (n 2)15.

¹³ *Stingel* (n 6).

The objective test in ‘Loss of Control’ essentially codifies the common law followed by NSW and, if adopted, would create greater certainty in avoiding a potential problem with the Australian High Court changing the common law test as happened in England with the case of *Smith*.¹⁴

From the aforementioned findings of this study, the conclusion reached is that some of the provisions of new ‘Loss of Control’ are arguably models for reform of NSW provocation law.

The new ‘Loss of Control’ defence came into effect over a year ago and two English academics intend to monitor the operation of the defence for one year and have invited legal practitioners to refer cases to them.¹⁵ Recently, one of these academics confirmed that there are no reported cases and the three cases he is aware of do not appear to be significant.¹⁶

It would be prudent for NSW law reformers to await an impact assessment of the ‘Loss of Control’ defence, such as that being conducted by Mitchell and Mackay, before considering future reform of NSW provocation law.

¹⁴ [2000] UKHL 49.

¹⁵ B Mitchell and R Mackay, ‘Loss of control and diminished responsibility: monitoring the new partial defences’ (2011) 3 Arch Rev 5,6..

¹⁶ Email from Professor Barry Mitchell to author (19 September 2011).

APPENDIX

LEGISLATION RELEVANT TO PROVOCATION AND 'LOSS OF CONTROL' DEFENCES

1. Crimes Act 1900 (NSW)

Section 23, 'Trial for murder-provocation':

(1) Where, on the trial of a person for murder, it appears that the act or omission causing death was an act done or omitted under provocation and, but for this subsection and the provocation, the jury would have found the accused guilty of murder, the jury shall acquit the accused of murder and find the accused guilty of manslaughter.

(2) For the purposes of subsection (1), an act or omission causing death is an act done or omitted under provocation where:

(a) the act or omission is the result of a loss of self-control on the part of the accused that was induced by any conduct of the deceased (including grossly insulting words or gestures) towards or affecting the accused, and

(b) that conduct of the deceased was such as could have induced an ordinary person in the position of the accused to have so far lost self-control as to have formed an intent to kill, or to inflict grievous bodily harm upon, the deceased,

whether that conduct of the deceased occurred immediately before the act or omission causing death or at any previous time.

(3) For the purpose of determining whether an act or omission causing death was an act done or omitted under provocation as provided by subsection (2), there is no rule of law that provocation is negatived if:

(a) there was not a reasonable proportion between the act or omission causing death and the conduct of the deceased that induced the act or omission,

(b) the act or omission causing death was not an act done or omitted suddenly, or

(c) the act or omission causing death was an act done or omitted with any intent to take life or inflict grievous bodily harm.

(4) Where, on the trial of a person for murder, there is any evidence that the act causing death was an act done or omitted under provocation as provided by subsection (2), the onus is on the prosecution to prove beyond reasonable doubt that the act or omission causing death was not an act done or omitted under provocation.

(5) This section does not exclude or limit any defence to a charge of murder.

2. Homicide Act 1957

Section 3, 'Provocation':

Where on a charge of murder there is evidence on which the jury can find that the person charged was provoked (whether by things done or by things said or by both together) to lose his self-control, the question whether the provocation was enough to make a reasonable man do as he did shall be left to be determined by the jury; and in determining that question the jury shall take into account everything both done and said according to the effect which, in their opinion, it would have on a reasonable man.

3. Coroners and Justice Act 2009

Sections 54, 55, 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).

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