

## **INQUIRY INTO PARTIAL DEFENCE OF PROVOCATION**

**Organisation:** Australian Lawyers Alliance  
**Name:** Ms Emily Price  
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# THE PARTIAL DEFENCE OF PROVOCATION

## INTRODUCTION

The Australian Lawyers Alliance (“ALA”) welcomes the opportunity to provide our Submission to the NSW Provocation in relation to the Inquiry into the partial defence of provocation.

The ALA is a national association of lawyers, academics and other professionals, dedicated to protecting and promoting justice, freedom and the rights of the individual. Further information is available at our website.<sup>1</sup>

## EXECUTIVE SUMMARY

This paper reviews the suitability of the law of provocation in NSW and other jurisdictions. The recent cases of *Won*<sup>2</sup> and *Singh*<sup>3</sup> and the surrounding media and community focus have highlighted the need for reform in the law in NSW surrounding the partial defence of provocation.

Great care must be taken however during reform of the partial defence of provocation. Fairness to the accused must be balanced with fairness to the victims. Proper regard needs to be paid to the different way in which men and women kill.

The way in which judges and juries have applied the partial defence of provocation have not always reflected modern community values regarding the use, predominantly by males, of lethal violence. Society no longer tolerates violence and a lack of self-control.

In brief we offer the following criticisms:

- the defence is unnecessary in NSW where there is a discretionary sentence for murder;
- the rationales of the defence are unsound and are archaic;
- there is possible gender bias in the way in which the defence is applied;
- the provocation defence is difficult to apply to unlawful killing by women offenders who are provoked over long periods and in circumstances involving criminal behaviour and psychological sequelae outside the daily experience of most jury members.

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<sup>1</sup> Australian Lawyers Alliance (2012) [www.lawyersalliance.com.au](http://www.lawyersalliance.com.au)

<sup>2</sup> [2012] NSWSC 855

<sup>3</sup> [2012] NSWSC 637

- the law is complex and unclear resulting in inconsistent application by a judge or jury
- the operation of the defence can result in the negative portrayal of a female victim
- criticisms of the ordinary person test, namely that
  - o it too complicated for the average juror member to be able to adequately understand and apply
  - o the victim is dead and the provocative behaviour cannot be verified.
  - o The difficulty of applying an ordinary person test in NSW's multicultural jurisdictions.
  - o research has questioned the viability of a test that is based on the premise that an ordinary person kills.
  - o The limitations of the 'ordinary person' requirement

It is the view of the ALA that the partial defence of provocation ought to be abolished in NSW.

The ALA calls for the consideration of the Homosexual Advance Defence (HAD) as part of the Inquiry. The ALA supports reform of HAD, namely to reform in which non-violent homosexual advances should not generally be regarded as conduct sufficient to amount to provocation.

The partial defence of provocation does not always serve the interests of battered women who kill their partner. The ALA support reform that creates a separate partial defence for victims who believe that killing their abusers is necessary for self-defence. The law of self-defence ought to be reformed in line with changes in Victoria, namely to introduce a crime of "defensive homicide" and crucially, to allow adducing of evidence in accordance with Section 9AH of the *Crimes Act 1958* (Vic). Expert evidence can properly inform the court of the full context of a battered woman's predicament to determine whether her actions were justified. Judicial officers, jurors and legal representatives should be given express guidance as to the relevance of such violence to self-defence.

## TERMS OF REFERENCE

The terms of Reference for this Inquiry require the Committee to inquire into and report on:

- (a) The retention of the partial defence of provocation including:
  - (i) abolishing the defence,
  - (ii) amending the elements of the defence in light of proposals in other jurisdictions,

- (b) The adequacy of the defence of self-defence for victims of prolonged domestic and sexual violence, and
- (c) Any other related matters.

## **TERM OF REFERENCE 1(a) THE PARTIAL DEFENCE OF PROVOCATION**

### **THE HISTORICAL FRAMEWORK**

In England during the 17th century homicide was only punishable by death. The partial defence of provocation emerged to provide the judiciary with an alternative to mandatory capital punishment in circumstances where men, prone to human frailty, killed others when defending their honour against other males.<sup>4</sup>

In its modern incarnation, reliance on the defence in an unlawful killing may amount to manslaughter rather than murder if the accused was provoked. Liability is reduced where the killing occurred due to the accused losing self-control in a situation where an ordinary person could also have lost self-control.

The ALA notes Graeme Coss' explanation of the way in which different genders kill:<sup>5</sup>

The literature in disciplines besides law (sociology, psychology and criminology) contains a wealth of findings on intimate partner violence (lethal and non-lethal) that reveal a clear gender asymmetry. Men are violent and kill: out of jealousy, to maintain control (or in response to losing it), or to defend their affronted honour. They are proprietary. It is not surprising that these same men who kill their intimate partners might raise the defence of provocation: that they were provoked by their partner's insults or infidelities or threats to leave. In contrast (and regardless of what defence might ultimately be raised), the comparatively few women who kill intimate partners do so mostly as a final act of desperation and self-protection (or child protection) against a violent male - radically different circumstances.

### **THE CURRENT LEGISLATIVE FRAMEWORK FOR PROVOCATION IN NSW**

Provocation is a partial defence to murder and is capable of downgrading a charge of murder to manslaughter in circumstances where an accused is provoked by his

<sup>4</sup> The Aftermath of Provocation: Homicide Law Reform in Victoria, New South Wales and England Kate Esther Fitz-Gibbon, 8 February 2012 at page 20.

<sup>5</sup> Graeme Coss, *The Defence of Provocation: An Acrimonious Divorce from Reality* Current issues in Criminal Justice Vol 18 p 51

or her victim into losing self-control. The test is loosely based on what an ordinary person would have done in the circumstances.

The legislative framework and elements of Murder are set out in Section 18(1)(a) of the Crimes Act 1900 NSW, namely:

- (1) (a) Murder shall be taken to have been committed where the act of the accused, or thing by him or her omitted to be done, causing the death charged, was done or omitted with reckless indifference to human life, or with intent to kill or inflict grievous bodily harm upon some person, or done in an attempt to commit, or during or immediately after the commission, by the accused, or some accomplice with him or her, of a crime punishable by imprisonment for life or for 25 years.*
- (b) Every other punishable homicide shall be taken to be manslaughter.*
- (2) (a) No act or omission which was not malicious, or for which the accused had lawful cause or excuse, shall be within this section*
- (b) No punishment or forfeiture shall be incurred by any person who kills another by misfortune only.*

The maximum penalty is imprisonment for life and this is contained in s 19A of the *Crimes Act*.

Provocation is one of three partial defences to murder; the others being excessive self-defence and substantial impairment by abnormality of the mind. The defence of provocation operates to provide a distinction between premeditated and non-premeditated lethal violence, being violence as a consequence of loss of self-control.

In NSW, once evidence of provocation has been raised, the prosecution needs to disprove provocation beyond reasonable doubt.

In NSW, the rules relating to the defence of provocation are contained in s 23 of the *Crimes Act 1900 (NSW)*. That section reads:

- (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 negated 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.*

In deciding whether or not an accused response is reasonable in the circumstances a judge must compare that response with what an ordinary person would have done after losing control<sup>6</sup>.

The Ordinary person test has three components:

- the ordinary person's perception of the gravity of the provocation (objective);
- the loss of the defendant's power to exercise self-control in response to that provocation (subjective); and

<sup>6</sup> *Stingel v The Queen* (1990) 171 CLR 312, 324-328, affirmed by the High Court in *Mascianotonia v The Queen* (1995) 183 CLR 58 at 66-67.



- The form of the ordinary person's response after losing self-control in comparison to the accused's response. The provocation must be such that it was capable of causing an ordinary person to lose self-control and to act in the way the accused did (objective).

The jury must consider whether, as a matter of fact, given the gravity of the provocation, an ordinary person would have lost their self-control and responded with the same actions as those carried out by the defendant.

## ABOLISHING THE DEFENCE

The terms of Reference require that the Select Committee consider abolition of the partial defence of provocation.

The defence has been widely criticised as being unnecessary and in certain circumstances creates potential bias. These will each be dealt with separately and is by no means an exhaustive list.

## CRITICISM OF THE PARTIAL DEFENCE OF PROVOCATION

1. The defence is unnecessary where there is a discretionary sentence for murder

The defence was adopted in New South Wales at a time when there was a mandatory sentence for murder and a discretionary sentence that reduced liability to manslaughter<sup>7</sup>. The situation is different where discretion cannot be exercised. For example, in Queensland, where a mandatory life sentence applies to murder, criminal lawyers have argued that it is important to keep the defence.<sup>8</sup>

On this basis there are powerful arguments that the defence should be abolished in New South Wales on the basis that it is unnecessary in a jurisdiction with a discretionary sentence for murder.<sup>9</sup>

On the other hand, it has been argued that 'the defence remains vitally important in terms of gaining community acceptance of reduced sentences for manslaughter rather than murder.'<sup>10</sup>

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<sup>8</sup> See Annie Guest, 'Provocation Defence Wound Down in Queensland' (25 March 2011) *The Sydney Morning Herald* <<http://www.abc.net.au/news/2011-03-25/provocation-defence-wound-down-in-queensland/2640410>>.

<sup>9</sup> See, eg, Murphy J in *R v Voukelatos* [1990] VR 1 at 6; see also the dissent in Law Reform Commission of Victoria, *Homicide* (Report 40, 1991) at para 178.

Judges have full discretion in sentencing for murder in New South Wales<sup>11</sup>.

In the five Australian states where there is no mandatory life sentence for murder<sup>12</sup>, the ACT and NSW are the only states that have not abolished the partial defence of provocation.

In WA, alongside the abolition of the provocation defence, the government abolished the mandatory life sentence for murder and replaced it with a presumptive life sentence, representing an approach that has been praised by some researchers as 'the correct path' to reform.<sup>13</sup>

What this means is that under the current sentencing regime judges would be able to take into account evidence of provocation in sentencing for murder. However, given that provocation currently exists in statute this discretion can be largely diluted in circumstances where a judge may be bound to follow the law of provocation so far as it concerns sentencing in circumstances where a jury has made a finding. This is because the law of provocation as it currently exists is a matter for the consideration of a jury only. This is on the basis that a jury represents the community, and therefore there is community involvement in deciding whether the defence should apply and whether the accused's liability is reduced accordingly.<sup>14</sup>

However, there are certainly circumstances where it should be open to the crown to argue that the jury should not be involved in decision-making processes of provocation where there are significant evidentiary questions. For example, in the Victorian case of *James Ramage*<sup>15</sup> the jury had not accepted that the crown had negated the provocation defence and therefore the accused succeeded in the defence. This was a case where there were no witnesses to the event and relied upon the evidence of the accused to describe what had happened and how he was provoked prior to killing his ex-wife. His honour Justice Osborne of the Victorian Supreme Court was clearly not satisfied that the defence of provocation should succeed. His honour made the damning comment that:

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<sup>10</sup> New South Wales Law Reform Commission, Report 83 (1997) 'Partial Defences to Murder: Provocation and Infanticide' < <http://www.lawlink.nsw.gov.au/lrc.nsf/pages/R83CHP2>>.

<sup>11</sup> See *Crimes Act 1900* (NSW) s 19A, inserted by the *Crimes (Life Sentences) Amendment Act 1989* (NSW) Sch 1[4].

<sup>12</sup> Tasmania abolished the partial defence of provocation in 2003, Victoria in 2005 and Western Australia in 2008.

<sup>13</sup> Hemming, A. (2010), 'Provocation: A Totally Flawed Defence That Has No Place in Australian Criminal Law Irrespective of Sentencing Regime', *University of Western Sydney Law Review*, 14: 1–44

<sup>14</sup> See submissions to Law Reform Commission - Law Society, *Submission* (28 October 1993) at para 1.2.1; Women's Legal Resources Centre, *Submission* (3 December 1993) at 4; S Yeo and S Odgers, *Submission* (29 October 1993) at 2.

<sup>15</sup> *R v Ramage* [2004] VSC 508.



*"I should interpolate that it was not submitted to the Court at the conclusion of evidence that this was a case in which provocation should not be left to the jury. Furthermore, in my view the Crown was correct to adopt this position as reflecting the current law and I of course must apply the current law whatever view I may hold as to the desirability of change to it."*

On one view the provocation defence serves to dilute the powers of court in applying its full discretion in sentencing afforded by the *Crimes (Life Sentences) Amendment Act 1989* (NSW). When the court already has the power to consider all matters related to murder in sentencing it is our submission that the partial defence is simply an unnecessary consideration throughout the course of a trial and inevitably leads to potential bias that is not acceptable in today's society and is therefore out of touch with relevant gender issues.

## 2. The rationales of the defence are unsound and are archaic

It has been argued that the rationales of the defence are unsound and out of touch with contemporary standards of behaviour.

In November 2005 Attorney-General Robert Hulls stated:

*The law of provocation has failed to evolve sufficiently to keep pace with a changing society. By reducing murder to manslaughter, the partial defence condones aggression towards women and is often relied upon by men who kill partners or ex-partners out of jealousy or anger. It has no place in a modern, civilised society.*

While the defence first emerged in an era when retaliation to breaches of honour was common and generally accepted, society no longer tolerates violence. Provocation arguably 'should be abolished as a legal anachronism which perpetuates excuses for violence, especially in the domestic setting.'<sup>16</sup>

While the defence first emerged in an era when retaliation to breaches of honour was common and generally accepted, society no longer tolerates violence and a lack of self-control.

## 3. Possible gender bias

The defence has been criticised on the basis of a perceived gender bias in its application to female offenders as opposed to male offenders. The catalyst for the

<sup>16</sup> New South Wales Law Reform Commission, Report 83 (1997) 'Partial Defences to Murder: Provocation and Infanticide' < <http://www.lawlink.nsw.gov.au/lrc.nsf/pages/R83CHP2> > [55].

abolition is often identified as the trial of James Ramage<sup>17</sup> in 2004,<sup>18</sup> which has been linked to the quick response of the Government.<sup>19</sup> We note the recommendation for reform had been made by the Victorian Law Reform Commission prior to the decision in *Ramage*. Mr. Ramage was found guilty of manslaughter rather than murder on the basis that his wife had provoked him by criticising their sex life, namely that sex with him 'repulsed her and screwed up her face and either said or implied how much better her new [boy]friend was'.<sup>20</sup> The Defendant claimed that he 'lost control and attacked' his estranged wife. Forensic evidence presented at trial showed that in this period of 'lost control' Ramage had:

*struck at least two heavy blows to her face, and that she then fell to the ground striking her head severely ... having knocked her to the ground and in circumstances where she was already affected by the initial blows, you [Ramage] proceeded to deliberately strangle her with your bare hands until she appeared lifeless*<sup>21</sup>.

The courts may be seen as partly excusing violent acts of anger, given that anger is said to be the primary feature of provocation.<sup>22</sup> There is also concern that the defence is used to excuse domestic violence, including instances of victims being killed out of jealousy or possessiveness.<sup>23</sup> We accept however that the majority of violence committed within intimate relationships is perpetrated by men and on this basis the partial defence of provocation will statistically be relied upon more often by men.

A related concern is that the defence allows verbal behaviour to constitute provocation, with a particular application to women criticising their partners. For example, in Queensland in 2005, a man who killed his former girlfriend was convicted of manslaughter instead of murder; it was found that he had been provoked by having his sexual performance questioned.<sup>24</sup> In June 2012, a NSW man who slit his wife's throat was found guilty of manslaughter rather than murder

<sup>17</sup> *R v Ramage* [2004] VSC 508.

<sup>18</sup> See, eg, Kate Fitz-Gibbon and Sharon Pickering, 'Homicide Law Reform in Victoria, Australia: From Provocation to Defensive Homicide and Beyond' (2011) 52 *British Journal of Criminology* 159, 171.

<sup>19</sup> C.B. Ramsey, 'Provoking Change: Comparative Insights on Feminist Homicide Law Reform', (2010) 100 *Journal of Criminal Law and Criminology* 33; W. Howell, 'Killer Excuses' (2005).

<sup>20</sup> *Ibid*, at page 22

<sup>21</sup> *Ibid*, at page 23

<sup>22</sup> *Masciantonio v The Queen* (1995) 183 CLR 58 at 68; *Van Den Hoek v The Queen* (1986) 161 CLR 158 at 167.

<sup>23</sup> See submissions to the Law Reform Commission - P Eastal, *Submission* (14 September 1993) at 1-2; Ministry for the Status and Advancement of Women, *Submission* (22 November 1993) at 1-2; M L Sides, *Submission* (17 December 1993) at 2 and 5; Women's Legal Resources Centre, *Submission* (3 December 1993) at 3-4.

<sup>24</sup> Annie Guest, 'Provocation Defence Wound Down in Queensland' (25 March 2011) *The Sydney Morning Herald* <<http://www.abc.net.au/news/2011-03-25/provocation-defence-wound-down-in-queensland/2640410>>.

when a jury accepted that he had been provoked by her verbal abuse which included a threat to have him deported<sup>25</sup>. In sentencing, His Honour Justice McClellan said “the offender formed the view that his marriage was about to end and he would lose all his money and have nowhere to live... This caused him to lose self-control<sup>26</sup>.” The man received a six-year jail sentence<sup>27</sup>.

Where the defence of provocation is successfully invoked in a case of violence by a male partner against a female partner, judges send a problematic message ‘about male culture, and a particular message about the inequality of women’.<sup>28</sup>

On the other hand there are also circumstances where provocation can play a role in the case of battered women who kill their partners in self-defence where self-defence in its entirety may be more appropriate<sup>29</sup>. This is discussed later in the paper. Due to the extensive history of the partial defence being used by men the law of provocation lacks clarity and significance for women and needs to be addressed in this context.

The ALA submits that the partial defence of provocation is not suitable in its current form to consider the complexities of domestic relationships, gender issues and circumstances that lead to the taking of human life and if parliament is minded to retain the law it should be amended.

#### 4. Intricacies of the Provocation Defence Applied To Unlawful Killing By Women Offenders

Historically, research has questioned whether the partial defence to murder for women who kill within the context of family violence killings should fall within the realm of provocation<sup>30</sup> given that most women do not experience a sudden loss of control when killing within this context, as argued by Horder (1992: 188):

*Many battered women do not lose their self-control immediately prior to the killing of the batterer. Following long-term abuse, some battered women appear to have taken a calculated decision to kill that was not triggered by any very recent provocation; still others appear to have acted in the face of*

<sup>25</sup> Paul Bibby and Josephine Tovey, ‘Six Years for Killing Sparks Call for Law Review’ (8 June 2012) *The Sydney Morning Herald* <<http://www.smh.com.au/nsw/six-years-for-killing-sparks-call-for-law-review-20120607-1zz2r.html>>.

<sup>26</sup> Ibid.

<sup>27</sup> Ibid.

<sup>28</sup> J Morgan, ‘Provocation Law and Facts: Dead Women Tell No Tales, Tales Are Told About Them’ *Melbourne University Law Review* (1997) 237, 273.

<sup>29</sup> J Tolmie, ‘is the partial defence an endangered defence?: recent proposals to abolish provocation [2005] *NZ Law Review* 25.

<sup>30</sup> See n1, at page 29

*recent provocation, but with more or less deliberation at or close to the moment of the fact.*

Some researchers have argued that the failure of the provocation defence to account for women's perpetration of lethal violence stems from the fact that the law is structured to reflect male experiences of violence<sup>31</sup>. Tarrant<sup>32</sup> has argued that for this reason the stories of women who kill in response to prolonged family violence are 'absent' from the formulation of the partial defences, specifically provocation.<sup>33</sup>

The ALA notes reforms have included the removal of the 'sudden' requirement and the recognition of cumulative provocation. In NSW, in response to the recommendations of the NSW Parliamentary Task Force on Domestic Violence (1981), the partial defence of provocation was substantially reformed to more accurately reflect the context within which battered women kill. The reforms implemented in 1982 through the *Crimes (Homicide) Amendment Act 1982* served to remove the requirement that the use of lethal violence by the defendant must have occurred immediately after the provocative incident, provided that the defendant still used lethal violence as a result of their own loss of self-control. The revised legislation also sought to account for past incidents of provocation in understanding the use of lethal violence in response to the final provocative act, and as explained by Tolmie<sup>34</sup> 'these developments shift the emphasis from provocative actions occurring immediately prior to the homicide to actions which occur over a broad time span'.<sup>35</sup>

In relation to the abolition of the partial defence of provocation, in particular, scholars have argued that the defence plays an important role in providing a legal avenue through which to understand how and why battered women kill their domestic abusers<sup>36</sup>. Specifically, in advancing this argument in 2005, the Victorian Criminal Bar Association claimed that the abolition of the provocation defence would serve to disadvantage females who kill in response to prolonged domestic

<sup>31</sup> Tarrant, S. (1990b), 'Provocation and Self-Defence: A Feminist Perspective', *Legal Service Bulletin*, 15(4): 147–50; Yeo, S. (1993), 'Resolving Gender Bias in Criminal Defences', *Monash University Law Review*, 19(1): 104–16

<sup>32</sup> Ibid, See Tarrant

<sup>33</sup> See n1 at page 29

<sup>34</sup> Tolmie, J. (1990), 'Provocation or Self-Defence for Battered Women who Kill?', in S.M.H. Yeo (ed.), *Partial Excuses to Murder*, The Federation Press, Sydney p63.

<sup>35</sup> See n1 at page 30

<sup>36</sup> Bradfield, R. (2003), 'Contemporary Comment: The Demise of Provocation in Tasmania', *Criminal Law Journal*, 27: 322–4; Brown, A. (1999), 'Provocation as a Defence to Murder: To Abolish or To Reform', *The Australian Feminist Law Journal*, 12: 137–41; Forell, C. (2006), 'Gender Equality, Social Values and Provocation Law in the United States, Canada and Australia', *Journal of Gender, Social Policy and the Law*, 14(1): 27–71; Horder, J. (2005), 'Reshaping the Subjective Element in the Provocation Defence', *Oxford Journal of Legal Studies*, 25(1): 123–40; Tolmie, J. (2005), 'Is the Partial Defence an Endangered Defence? Recent Proposals to Abolish Provocation', *New Zealand Law Review*, 25: 25–52



abuse<sup>37</sup>. Similarly, Brown<sup>38</sup> has previously argued that without provocation as a partial defence such female defendants could be at risk of being convicted of murder rather than the less severe conviction of manslaughter.<sup>39</sup>

### The law is complex and unclear resulting in inconsistent application: Judge –v- Jury

Noting the complexities of the legal tests and the intricate factual situations in unlawful killing, it has been proposed that Judges should decide the issue of provocation. The NSW Law Reform Commission recommended that the jury be retained, noting that it represented the community involvement in the trial process.<sup>40</sup> This is seen to preserve public acceptance of, and confidence in, the criminal justice system, including the sentencing process.

Although it recommended the abolition of the provocation defence, the NZ Law Commission<sup>41</sup> did acknowledge arguments affirming the key role of the jury in deciding upon provocation defences, namely that dealing with provocation as a partial defence, at trial, allows 12 community members to make the value judgment about reduced culpability:

*... It is said that, if there is a community endorsement of the fact that there were extenuating circumstances, this will in turn provide a foundation for the judge's decision to impose a significantly lower sentence, which otherwise the community might neither accept nor understand*

A similar argument was raised by the NSW Law Reform Commission<sup>42</sup> in its 1997 review of the partial defences to murder, in which it commented that 'The question of whether a person's culpability for an unlawful killing is so significantly reduced because of a loss of self-control is an issue which should be decided by a jury, as representatives of the community'<sup>43</sup>.

<sup>37</sup> Tomazin, F. (2005), 'Provocation Defence to be Removed', *The Age*, 21 January, p. 5.

<sup>38</sup> Brown, A. (1999), 'Provocation as a Defence to Murder: To Abolish or To Reform', *The Australian Feminist Law Journal*, 12: 137–41.

<sup>39</sup> See n1 at page 31

<sup>40</sup> See New South Wales Law Reform Commission (1993), n 6 at 3.133 and New South Wales Reform Commission (1997), n6 at 2.24, 2.38

<sup>41</sup> New Zealand Law Commission (2007), 'Provocation No Excuse for Murder', Media Release, 26 October, New Zealand at 52

<sup>42</sup> New South Wales Law Reform Commission (1997), *Partial Defences to Murder: Provocation and Infanticide*, Report 83, New South Wales Law Reform Commission, Sydney.

<sup>43</sup> Ibid, at 31



We note the opposing view however, that sentencing judges are required to provide justifications for their decision-making, and therefore the public will become better informed as to why provocation is considered a mitigating factor in such cases.<sup>44</sup>

### The Operation of the Defence can result in the negative portrayal of a female victim

In *Regina v Stevens*<sup>45</sup> the Defendant's portrayal of his partner's drug use, the fact she had been out too often, leaving him with the baby, her infidelity and inadequacies as a mother were relied upon as provocation for her killing. In *Ramage*<sup>46</sup> the deceased wife's marital unhappiness, her striving for independence and her new romantic attachment were held up to ridicule.

The ALA notes that United Kingdom Minister Harriet Harman has argued that the use of the defence by men who kill a female partner means that in practice 'the law allows him, encourages him to say that it was not his fault – it was hers'. Commentator and academic Kate Esther Fitz-Gibbon relies on Horder & Hughes 2007 research<sup>47</sup> which has suggested that this trend of victim blaming by the defendant may not be unique to provocation and that in the operation of partial defences generally there is often a 'strong temptation for the defendant to exaggerate as far as possible any element of blame that can be attached to the deceased victim for what happened, to show up the defendant's own actions in a better light'.<sup>48</sup>

### Exclusion of certain types of conduct

There have been suggestions that some types of provocative conduct should be explicitly excluded from the defence.

The ALA supports the view that the following types of provocative conduct are contentious:<sup>49</sup>

- conduct occurring outside the accused's presence;
- provocation not induced by the victim;
- lawful conduct;
- self-induced provocation;
- conduct of women as victims of provoked killings; and

<sup>44</sup> Riley, M. (2008), 'Provocation: Getting Away with Murder?', *Queensland Law Student Review*, 1(1): 55–74.

<sup>45</sup> [2008] NSWSC 1370

<sup>46</sup> *R v Ramage* [2004] VSC 508

<sup>47</sup> Horder, J. & Hughes, D. (2007), 'Comparative Issues in the Law of Homicide', in J. Horder (ed.), *Homicide Law in Comparative Perspective*, Hart Publishing, Oxford page 13

<sup>48</sup> See n1 at page 27

<sup>49</sup> New South Wales Law Reform Commission, Report 83 (1997) 'Partial Defences to Murder: Provocation and Infanticide' < <http://www.lawlink.nsw.gov.au/lrc.nsf/pages/R83CHP2> > [2.81] at [2.84].

- non-violent homosexual advances.

## CRITICISMS OF THE ORDINARY PERSON TEST

We note the following criticisms:

1. The ordinary person test has given rise to significant debate among researchers, as critics have argued that both the subjective and objective elements of the ordinary person test render it too complicated for the average juror member to be able to adequately understand and apply<sup>50</sup>;

It is open to the Committee to find that the law relating to the defence of provocation is unnecessarily complex and unclear, making the operation of the defence in individual cases difficult and inconsistent. Uncertainties remain about the application of the defence to certain types of cases, such as cases where the relevant provocative conduct does not occur in the presence of the accused.

2. The victim alleged to have made the provocative comment is dead and cannot verify his or her conduct.
3. Legal and scholarly commentators have pointed to the difficulty of applying an ordinary person test in multicultural jurisdictions such as those in Australia and England<sup>51</sup>.
4. Research has questioned the viability of a test that is based on the premise that an ordinary person kills<sup>52</sup>.
5. The limitations of the 'ordinary person' requirement

The ordinary person test has been criticised on the grounds of unfairness, uncertainty in characterising the 'ordinary person', complexity, and imprecision.

Criticism and uncertainty has arisen from the central requirement of the defence that an ordinary person be capable of losing self-control when faced with the provocation with which the accused was faced.<sup>53</sup> The

<sup>50</sup> See n1 at page 23

<sup>51</sup> Ibid at page 23

<sup>52</sup> The New Zealand Law Commission (NZLC) (Law Commission 2007: 45) commented in its review of provocation that the ordinary person test was the defence's 'most telling flaw', and that problematically provocation 'assumes that the ordinary person, faced with a severely grave provocation, will in consequence resort to homicidal violence, when in fact it is arguable that only the most extraordinary person does this' (Law Commission 2007: 11).

<sup>53</sup> *Crimes Act 1900* (NSW) s 23(2)(b).

‘ordinary person’ requirement is regarded by some as unworkable in practice, as well as inherently discriminatory and unfair.

The abolition of the ‘ordinary person’ element has been recommended by law reform agencies in other jurisdictions.<sup>54</sup> In 1997, the New South Wales Law Reform Commission recommended that the ordinary person test be abolished and replaced with a subjective test together with the application of community standards.<sup>55</sup> Under the proposed new test, the defence would be available if the jury formed the view that “the accused, taking into account all of his or her characteristics and circumstances, should be excused for having so far lost self-control as to have formed an intent to kill or to inflict grievous bodily harm...as to warrant the reduction from murder to manslaughter”.<sup>56</sup>

### **Dealing With Provocation in Sentencing**

The ALA relies on the following excerpt from Kate Esther Fitz-Gibbon’s thesis<sup>57</sup> in relation to dealing with provocation in sentencing:

Alongside its recommendation to abolish the partial defence of provocation, the VLRC<sup>58</sup> recommended that issues pertaining to provocation should be taken into account during sentencing. The VLRC explained that through a consideration of the full range of options available when sentencing an offender for murder, members of the judiciary would be able to impose appropriate sentences to reflect the culpability of the offender. This contention has since been put forward by the NZ Law Commission, which, in recommending similar reforms, commented that ‘sentencing judges may be better equipped to deal with the issues in a way that is consistent, and therefore just, than juries are.’<sup>59</sup> Similar reforms were implemented in Tasmania following the abolition of provocation as a partial defence in May 2003, and have since been implemented in WA and NZ. The Law Reform

<sup>54</sup> See, eg, Law Reform Commission of Victoria, *Homicide* (Report 40, 1991) at paras 187-191; England and Wales, Criminal Law Revision Committee, *Offences against the Person* (Report 14, HMSO, London, Cmnd 7844, 1980) at paras 81-83, followed by the Law Commission of England and Wales, *A Criminal Code for England and Wales* (Law Com. 177, 1989) cl 58 and para 14.18; American Law Institute, *Model Penal Code and Commentaries (Official Draft and Revised Comments)* (Philadelphia, 1980) article 210.3; South Australia, Criminal Law and Penal Methods Reform Committee, *The Substantive Criminal Law* (Report 4, 1977) at 21-22.

<sup>55</sup> New South Wales Law Reform Commission, Report 83 (1997) ‘Partial Defences to Murder: Provocation and Infanticide’ < <http://www.lawlink.nsw.gov.au/lrc.nsf/pages/R83CHP2> > [2.81].

<sup>56</sup> *Ibid* 66.

<sup>57</sup> See n1

<sup>58</sup> Victorian Law Reform Commission (2004), *Defences to Homicide: Final Report*, Victorian Law Reform Commission, Melbourne, 58, Recommendation 1

<sup>59</sup> Law Commission. (2007), *The Partial Defence of Provocation*, Law Commission, Report 98: New Zealand

Commission of WA<sup>60</sup> believed that the sentencing process, rather than the trial phase, was 'uniquely suited to identifying those cases of provocation that call for leniency and those that do not'.<sup>61</sup>

Given that the VLRC did not recommend a specific approach or framework for the consideration of provocation within sentencing, the work of Stewart and Freiberg<sup>62</sup> has since been instrumental in providing a model framework for the consideration of provocation at this stage of the court process. The work of these authors has been praised by former Victorian Attorney-General Rob Hulls as providing 'an important resource' for sentencing in the wake of the reforms<sup>63</sup>. Stewart and Freiberg<sup>64</sup> suggest that provocation should only be considered at sentencing where 'serious provocation should be found to have given the offender a justifiable sense of having been wronged' and where the degree of provocation is proportionate to the severity of the offender's response. Specifically, they assert that<sup>65</sup>:

*Where the offender reacted particularly violently or intentionally caused serious harm or death, only the most serious examples of provocation are likely to reduce the offender's culpability. Where the harm caused by the offender is less serious, a lower degree of provocation may warrant a reduction in the offender's culpability.*

In line with the concerns identified by the VLRC<sup>66</sup>, Stewart and Freiberg argue that this judgement be made with consideration of society's common understandings and expectations of human behaviour and personal autonomy. Specifically, they propose that provocation related to a victim exercising their equality rights should not serve to reduce an offender's level of culpability at sentencing. This would be relevant to violence arising from a victim leaving an intimate relationship, a victim's formation of an intimate relationship or friendship with someone other than the offender, as well as conduct arising from the victim's decision to work or obtain an education, or any other assertions of the victim's independence.

<sup>60</sup> Law Reform Commission of Western Australia (2007), *Review of the Law of Homicide: Final Report*, Project 97, Western Australia at page 220

<sup>61</sup> The Aftermath of Provocation: Homicide Law Reform in Victoria, New South Wales and England Kate Esther Fitz-Gibbon, 8 February 2012 at page 42

<sup>62</sup> Stewart, F. & Freiberg, A. (2008), 'Provocation in Sentencing: A Culpability-Based Framework', *Current Issues in Criminal Justice*, 19(3): 283–308; Stewart, F. & Freiberg, A. (2009), *Provocation in Sentencing*, 2nd edn, Sentencing Advisory Council, Melbourne.

<sup>63</sup> Wilkinson, G. (2008), 'No Let-off for Wife Killers: Report Urges Judges to Ignore Provocation', *Herald Sun*, 7 February, p. 23

<sup>64</sup> ; Stewart, F. & Freiberg, A. (2009), *Provocation in Sentencing*, 2nd edn, Sentencing Advisory Council, Melbourne s.1.1.10

<sup>65</sup> Stewart, F. & Freiberg, A. (2008), 'Provocation in Sentencing: A Culpability-Based Framework', *Current Issues in Criminal Justice*, 19(3): 283–308 at page 294

<sup>66</sup> Victorian Law Reform Commission (2004), *Defences to Homicide: Final Report*, Victorian Law Reform Commission, Melbourne; See above nn 60, 61



In terms of sentence length, Stewart and Freiberg<sup>67</sup> discuss two potential impacts of the reforms on the length of murder sentences imposed: that abolishing provocation may 'result in a significant (upward) departure from previous sentencing practices for provoked killers'; or conversely that the prior average sentencing range for the offence of murder 'may experience a downward departure to reflect the incorporation of "provoked murderers"'. The Law Reform Commission of WA<sup>68</sup> also predicted that moving the consideration of provocation to sentencing would have disparate effects on the lengths of murder sentences:

*In some cases an offender will receive a higher sentence than would have been imposed if the offender was convicted of manslaughter, but in some cases the offender will be sentenced leniently for murder ... Not all cases of provocation deserve leniency. A person who kills his wife after discovering she is having an affair is entitled to less mitigation than a person who kills his friend after discovering him sexually abusing his child.*

Furthermore, Stewart and Freiberg<sup>69</sup> observed that, in the first four years following the implementation of the Victorian homicide law reforms, provocation did not emerge as a significant factor in Victorian murder sentencing, having only been referred to briefly in a small number of judgements.<sup>70</sup>

## THE HOMOSEXUAL ADVANCE DEFENCE (HAD)

The ALA supports consideration of the Homosexual Advance Defence (HAD) as part of the Inquiry.

The ALA supports reform of the HAD, namely to reform in which non-violent homosexual advances should not generally be regarded as conduct sufficient to amount to provocation.

HAD is a de facto defence incorporated into pleas of self-defence and provocation. In the context of provocation HAD operates to partially absolve the accused's homicidal act, converting what would otherwise be murder into a manslaughter

<sup>67</sup> Stewart, F. & Freiberg, A. (2008), 'Provocation in Sentencing: A Culpability-Based Framework', *Current Issues in Criminal Justice*, 19(3): 283–308 at page 286

<sup>68</sup> Law Reform Commission of Western Australia (2007), *Review of the Law of Homicide: Final Report*, Project 97, Western Australia at page 221

<sup>69</sup> See n 60

<sup>70</sup> See n 57 Kate Esther Fitz-Gibbon, page 45



conviction. It is the victim's nonviolent homosexual advance that constitutes the provocative act. Although HAD is often used interchangeably with Homosexual Panic Defence ('HPD'), HPD is premised on the accused having a latent homosexual tendency which causes an 'uncontrollably violent response when confronted with a homosexual proposition'.<sup>71</sup>

The ALA notes the decision of *Green*<sup>72</sup>. The majority of the High Court held that Green's special sensitivity to sexual assault, his father having sexually assaulted his sisters, was relevant to the provocation defence. It was relevant to the subjective limb of the defence and to the ordinary person's assessment of the gravity of the provocation, but not to the issue of whether the ordinary person could have lost self-control. Justice Gummow, in dissent, agreed that Green's "family history" was relevant to the ordinary person's assessment of the gravity of the provocation but held that the provocation could not have caused the ordinary person to lose self-control. Similarly, Justice Kirby stated in dissent<sup>73</sup>:

*In my 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 as to form an intent to kill or inflict grievous bodily harm.*

At the second trial, Green was found guilty of manslaughter and was sentenced to a minimum term of eight years and an additional term of two and a half years.

Official responses to HAD are confined almost exclusively to New South Wales. The exception is the Discussion Paper, *Fatal Offences against the Person*, issued by the Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General ('MCCOC'),<sup>74</sup> which sites the decision in *Green* as one ground for recommending the abolition of the provocation defence.<sup>75</sup>

In October 1997, the NSW Law Reform Commission published its report on provocation.<sup>76</sup> The Commission expressed the view that "non-violent homosexual advances should not generally be regarded as conduct sufficient to amount to provocation".<sup>77</sup> However, for the same reasons as those given in relation to domestic killings of women, it did not consider that there should be any specific

<sup>71</sup> Page 113

<sup>72</sup> *Green v The Queen* (1997) 191 CLR 334

<sup>73</sup> *Green v The Queen* (1997) 191 CLR 334 at 409

<sup>74</sup> Page 118

<sup>75</sup> Page 119

<sup>76</sup> NSW Law Reform Commission, *Partial Defences to Murder: Provocation and Infanticide*, Report 83, October 1997

<sup>77</sup> NSWLRC report, note 70, p71

legislative exception. The NSWLRC instead proposed a test requiring juries to apply their understanding of community standards on a case-by-case basis.<sup>78</sup>

The final report of the Working Party report on homosexual advance defence was published in 1998<sup>79</sup>. The Working Party advocated retaining the provocation defence, but did not recommend legislative reform of HAD<sup>80</sup>. One of the Working Party's recommendations was to enact an amendment to specifically exclude non-violent homosexual advances from forming the basis of a defence of provocation.<sup>81</sup> The Working Party expressed its disagreement with the NSW Law Reform Commission's (LRC's) approach, stating:

*Ultimately, the Working Party is of the opinion that the solution suggested by the LRC is not appropriate in relation to HAD. Even if the re-formulated test works the way the LRC intends it to, and the jury reflects the community's sympathies and concerns, the problems with HAD will still exist. A jury might apply the standards of a prejudiced community, thus reflecting and perpetuating the idea that homosexual victims deserve the violence they receive.<sup>82</sup>*

Accordingly, the Working Party recommended changes to s 23 of the *Crimes Act 1900* (NSW) to preclude nonviolent homosexual advances from forming the basis of a provocation defence.<sup>83</sup> Furthermore, the Working Party recommended 'a court of morals direction'.<sup>84</sup> That is, a judicial direction would be given 'in any trial of a violent offence in which the *unusual sexuality* of the victim has been placed before the jury'.<sup>85</sup> Jurors would be directed to reach their decision without reference to any personal sympathy or animosity towards the victim or the accused, and would also be prohibited from casting judgment on the morality of the victim's behaviour.

Clearly, the Working Party's recommendation, that HAD ought to be circumscribed legislatively, is laudable. HAD will, however, remain operative in other jurisdictions unless similar measures are adopted.

The Working Party's recommendation has not yet been implemented.

A generous reading of *Campbell*<sup>86</sup> suggests that in New Zealand HAD is condemned. At one point, Eichelbaum CJ expressly states that the 'mild' or

<sup>78</sup> Ibid 70, page 199 of article

<sup>79</sup> NSW Attorney General's Department, *Final Report of the 'Homosexual Advance Defence' Working Party*, September 1998

<sup>80</sup> Page 119

<sup>81</sup> Working Party Final Report, p4, Recommendation 2.

<sup>82</sup> Working Party Final Report, p30

<sup>83</sup> Ibid [6.7].

<sup>84</sup> Ibid [6.11]–[6.13].

<sup>85</sup> Ibid [6.11] (emphasis added).

<sup>86</sup> *R v Campbell* [1997] 1 NZLR 16

‘tentative’ nature of the homosexual advance would not of itself constitute sufficient provocation to leave to the jury. The hypothetical ordinary New Zealander could not have reacted as the accused did.<sup>87</sup> Only if there was a reasonable possibility of the homosexual advance triggering a flashback of the type alleged would provocation be a legitimate defence.<sup>88</sup> Although declining to rule on this issue of fact, the Court seemed concerned to redress the crippling effect that the trial judge’s direction on proportionality had on the defence case. It seems that this direction deprived the accused of what the Court considered to be an otherwise ‘valid’ defence. To be sure, the Court duly noted the Crown contention that ‘the flashback theory was deployed mainly to support provocation based on the appellant’s perception of what he took to be an approach of an indecent nature on the part of the deceased’.<sup>89</sup> The Court also noted the accused’s rational state of mind around the time of the killing.<sup>90</sup>

### **REFORM - AMENDING THE ELEMENTS OF THE DEFENCE IN LIGHT OF PROPOSALS IN OTHER JURISDICTIONS**

As outlined above there are significant problems with the provocation defence in light of discretionary sentencing by judges and the social framework and diversity of today’s society.

At the outset the ALA recommends that the existing partial defence of provocation be abolished in order to establish a time relevant and more applicable framework.

In Australian jurisdictions there have been significant changes to the partial defence of provocation. Both the ACT (through the *Crimes Act 1900* s 13(3)) and NT (through the *Criminal Code* s 158(5)) have implemented provisions that exclude the use of the defence in response to non-violent sexual advances.

#### Victoria

In November 2005 Victoria abolished the defence as part of a series of reforms to homicide laws. The reforms were aimed at overcoming gender bias in the operation of homicide law, especially in cases of women being killed by their partners. They came subsequent to the recommendation of the Victorian Law Reform Commission that the defence be abolished.

Explaining the Commission’s final report, Commissioner Justice Neave said the decision to recommend the abolishment of the defence was based on the Commission’s belief that rage, in situations of infidelity and estrangement, should

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<sup>87</sup> Ibid 23.

<sup>88</sup> Ibid.

<sup>89</sup> Ibid 21.

<sup>90</sup> Ibid. Specifically, the Court pointed to Campbell’s ‘deliberate actions’, including smashing an outside light to reduce the risk of detection and locking the house: at 21.

‘no longer be an excuse for intentionally killing another person.’<sup>91</sup> A similar focus on the issue of gender bias could be seen in the Government’s decision to abolish. Former Attorney-General Rob Hulls stated that:

*“Gone are the days when prehistoric assumptions about honour and violence – about male and female behaviour – should be allowed to hold traction in our legal system.”*<sup>92</sup>

Evidence of a loss of provocative behaviour of the deceased may still be taken into account by a judge in pleas of mitigation of sentence.<sup>93</sup>

Under s 9AD of the *Crimes Act 1958* (Vic), the newly introduced crime of defensive homicide is defined as occurring when ‘a person who, by his or her conduct, kills another person in circumstances that, but for section 9AC, would constitute murder’. The combined effect of ss 9AD and 9AC is that a person may now be convicted of defensive homicide (rather than the more serious offence of murder) where they killed with the belief that their actions were necessary in order to defend themselves, or another, but they had no reasonable grounds for that belief. In Victoria, as at 2011, defensive homicide cases thus far have predominantly arisen from ‘one-off, violent, confrontation[s] between two males of approximately equal strength’<sup>94</sup>, rather than from family violence. Principally, these cases have involved young male offenders with a history of drug addiction, clinically diagnosed forms of mental illness and/or prior convictions for drug or violent offences.<sup>95</sup> Furthermore, with the exception of one case,<sup>96</sup> all defensive homicide victims to 2011 had been male.

There has been criticism of the operation of the offence of defensive homicide after its introduction in Victoria,<sup>97</sup> primarily in relation to the lack of transparency accompanying the Crown accepting a guilty plea to less serious offences from an accused. It is of particular concern where non-violent exchanges precipitated the accused’s use of lethal force, because the facts in those cases may have established the more serious crime of murder; although it is impossible to tell because the full facts are not available due to the accused’s guilty plea. Here, lack

<sup>91</sup> M Neave, ‘Defences to Homicide Final Report Launch’, Victorian Law Reform Commission (2004) <<http://www.lawreform.vic.gov.au/wps/wcm/connect/LawpReform/Home/Newsroom/Speeches/LAWREFORMp-pDefencesptopHomicidep>>.

<sup>92</sup> F Shiel, ‘End Draws Near for Defence of Provocation’, *The Age* (5 October 2005) 3.

<sup>93</sup> See, for example, Victorian Law Reform Commission, *Defences to Homicide: Final Report*, 2004, pp xxvii, xxviii

<sup>94</sup> DOJ, ‘Defensive Homicide: Review of the Offence of Defensive Homicide’ (Discussion Paper, August 2010) at page 36

<sup>95</sup> *Ibid*, at 35-6

<sup>96</sup> *R v Middendorp* [2010] VSC 147 (1 March 2010).

<sup>97</sup> Bargaining With Defensive Homicide: Examining Victoria’s Secretive Plea Bargaining System Post-Law Reform Asher Flynn And Kate Fitz-Gibbon Melbourne University law review; Vol. 35, Issue: 3; 2011: 905-932



of transparency not only raises the risk that accused persons' convictions will not match their culpability, but it also hampers the public's ability to assess if that risk is realised.<sup>98</sup> An improved system of plea bargaining, which incorporates the ideals of open and transparent justice, is essential in order to adequately understand how defensive homicide has operated, particularly within the context of gendered violence. Greater transparency and scrutiny would also serve to heighten public confidence in the legal process.<sup>99</sup> Transparency of plea bargaining processes has been supported by the Victorian Law Reform Commission.<sup>100</sup> The ALA supports transparency in the plea bargaining process and recommends all negotiations around pleas are officially recorded so that statistical analysis of any reform can be properly undertaken.

The ALA notes the public concern and calls for the new laws of homicide in Victoria to be overhauled following the decision in *R v Middendorp* [2010] VSC 202. In August 2010 the Victorian Department of Justice published a Discussion Paper, *Review of the Offence of Defensive Homicide*, inviting legal professionals, experts in the field of family violence, and the wider community to comment and give feedback on the operation of the new laws. The Discussion Paper states that the reforms explicitly recognised that change was required to the law and *to the culture* of the criminal justice system

We note also however the cautious optimism that accompanied the decision of the then Director of the Victorian Office of Public Prosecutions, Jeremy Rapke QC on 27 March 2009 to drop a murder charge against a young woman from Shepparton accused of murdering her stepfather who sexually abused her on the basis that there was no reasonable prospect that a jury would convict her. There was a second case involving a female offender decided on 6 May 2009; a Magistrate dismissed the murder charges against Freda Dimitrovski accused of killing her husband, Sava Dimitrovski, after a three day committal hearing.

The caution appears justified noting a number of other Victorian cases involving women who have killed a male victim. A young Indigenous woman, Melissa Anne Kulla Kulla, pleaded guilty to one count of manslaughter after she was charged with the stabbing murder of Hussein Mumin on 10 September 2008 (*R v Kulla Kulla*). On 3 March 2011 Eileen Creamer was found guilty of the offence of defensive homicide after she killed her husband, David, with a South African weapon known as a knobkerrie (*R v Creamer*). The jury accepted the evidence led in Ms Creamer's defence, which was that she was repeatedly forced to take part in group sex with men other than her husband. On 12 April 2011, the Office of Public Prosecutions, Victoria, accepted a plea of guilty to defensive homicide in the case of Karen Black, who killed her de facto husband, Wayne Clark. The judge accepted that the killing took place in the context of a long history of drunken verbal abuse by the deceased towards the defendant and which also involved threats, intimidation, harassment, jabbing and prodding, as it did on the night in question *R v Black* [2011] VSC 152.

<sup>98</sup> Ibid at 927

<sup>99</sup> Ibid at 907

<sup>100</sup> VLRC, *Defences to Homicide: Final Report* (2004) 110



## Queensland

In Queensland, the partial defence of provocation has not been abolished, although there have been recent amendments. The onus is now on the accused to show that the defence is proved. Another modification was the inclusion of certain conduct that is now excluded as a provocative act by itself, including a change in the nature of the relationship (such as separation) or mere words or gestures. The QLD Government implemented a package of reforms aimed at ensuring that, except in exceptional circumstances, provocation would not be applicable to situations where an offender was verbally provoked or was motivated by jealousy or sexual possessiveness.

The ALA is of the opinion that mere words or gestures that incite sudden rage and violence that may invoke an intention to kill or cause grievous bodily harm is not an acceptable maxim and should not be allowed to develop any further through case law. Specifically, a court should have regard to the persistence of such words or gestures and their likely effect on the ordinary person.

## United Kingdom

In the United Kingdom the UK law reform commission conducted an inquiry into provocation and provided a number of recommendations for reform to the provocation provisions including specific exclusions for the conduct of accused persons where they actively engage in revenge or where the provocation is incited by the defendant for the purpose of providing an excuse to use violence. These recommendations include redefining the provocation defence as:

*“Unlawful homicide that would otherwise be first degree murder should instead be second degree murder [manslaughter] if:*

*(1) (a) the defendant acted in response to:*

*(i) gross provocation (meaning words or conduct or a combination of words and conduct) which caused the defendant to have a justifiable sense of being seriously wronged; or*

*(ii) fear of serious violence towards the defendant or another;*

*or*

*(iii) a combination of both (i) and (ii); and*

*(b) a person of the defendant’s age and of ordinary temperament,*

*i.e., ordinary tolerance and self-restraint, in the circumstances of the defendant might have reacted in the same or in a similar way.*

*(2) In deciding whether a person of the defendant's age and of ordinary temperament, i.e. ordinary tolerance and self-restraint, in the circumstances of the defendant, might have reacted in the same or in a similar way, the court should take into account the defendant's age and all the circumstances of the defendant other than matters whose only relevance to the defendant's conduct is that they bear simply on his or her general capacity for self-control."*<sup>101</sup>

The UK law reform commission also made recommendations as to what situations should have the defence of provocation excluded. The commission formulated this as:

*(3) The partial defence should not apply where:*

*(a) the provocation was incited by the defendant for the purpose of providing an excuse to use violence; or*

*(b) the defendant acted in considered desire for revenge.*

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

*(5) A judge should not be required to leave the defence to the jury unless there is evidence."*<sup>102</sup>

However, we note that the UK requires a mandatory life sentence for murder and this might explain why the partial defence was retained.

The ALA recommends that the Select Committee consider the recent amendments to the *Coroners and Justice Act 2009* in the UK. The first is to replace, in Section 2(1)(a) of the *Coroners and Justice Act 2009* the expression 'abnormality of mind' with 'abnormality of mental functioning', which is more acceptable to clinicians. Second, the requirement under s 23A that the mental abnormality must have arisen from an 'underlying condition' could be replaced with the much more comprehensible and manageable English requirement in that it must have arisen from a 'recognised medical condition'. Third, the NSW provision could be enhanced by including a clause specifying the causal connection between the accused's mental abnormality and the killing. We note the opinion of one commentator<sup>103</sup> that

<sup>101</sup> Law Commission (UK) *Murder, Manslaughter and Infanticide* (2006), [5.11]

<sup>102</sup> *Ibid*, 20.

<sup>103</sup> Stanley Yeo *English Reform of Partial Defences to Murder: Lessons for New South Wales* July 2010 Current Issues In Criminal Justice Volume 22 Number 1 at page 1.

drawing on the English provision, that clause could state as follows: 'The abnormality of mental functioning must provide an explanation for D's conduct in doing or being an accessory to the killing'.

We also support consideration of the adoption of the UK's amendments in relation to the ordinary person test. Namely by the describing the type of legally permissible provocative conduct in Section 55(4) of the *Coroners and Justice Act 2009* as constituting 'circumstances of an extremely grave character, which caused the accused to have a justifiable sense of being seriously wronged'. As a direct consequence of this description, only those personal characteristics or circumstances of the accused that caused him or her to have such a sense of wrongness will be material. Second, the new defence adopts the latest English judicial pronouncement on the accused's personal characteristics that are permitted to affect the power of self-control expected of the ordinary person. It does so by providing that 'a person of the defendant's sex and age, with a normal degree of tolerance and self-restraint and in the circumstances of defendant, might have reacted in the same or in a similar way to the defendant' in section 54(1)(c) of the *Coroners and Justice Act 2009*.

### New Zealand

In 2009, the New Zealand Parliament passed legislation repealing the partial defence of provocation (Crimes (Provocation Repeal) Amendment Bill 2009 (NZ)).

### The USA

In the USA federal sentencing guidelines have been issued including matters to be taken into account when considering provocation which includes things such as the accused size, strength and other relevant physical characteristics in comparison to the victim and the persistence of the victim's conduct<sup>104</sup>. The sentencing guidelines include reference to the following when determining the appropriate punishment for an accused:

1. *"The size and strength of the victim, or other relevant physical characteristics, in comparison with those of the defendant.*
2. *The persistence of the victim's conduct and any efforts by the defendant to prevent confrontation.*
3. *The danger reasonably perceived by the defendant, including the victim's reputation for violence.*
4. *The danger actually presented to the defendant by the victim.*
5. *Any other relevant conduct by the victim that substantially contributed to the danger presented.*
6. *The proportionality and reasonableness of the defendant's response to the*

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<sup>104</sup> USSC (2007) ss5k2.10. Victim's Conduct Policy Statement

*victim's provocation."*

## **REFORM**

The ALA approves, in part, the reforms and guidelines adopted in Victoria, the UK and the USA. The ALA recommends that any reform, whether it is to abolish provocation and implement sentencing amendments or to amend the existing provocation partial defence, should include reference to the following:

1. The ALA supports model proposed by Tolmie<sup>105</sup> that serves to restrict the circumstances within which the provocation defence is available. Specifically, Tolmie argues that the defence should be unavailable in circumstances where the act of the victim is provocative because it challenges the power and control that the offender believes he is justified in exercising over another person. This includes behaviours that women, as independent and autonomous actors, are entitled to do, such as leaving their relationship with the offender.
2. In relation to women who kill a violent partner, the ALA also endorses the view that provocation is not the appropriate categorisation for these types of homicide.<sup>106</sup> Women who kill after suffering prolonged domestic violence predominately act in self-preservation. We deal with our recommendations regarding self-defence below.
3. The issue of provocation ought to be decided by a jury, however it should be open to the crown to argue that the jury should not be involved in decision-making processes of provocation where there are significant evidentiary questions in dispute.
4. The onus of proving provocation is to be borne by the defendant alleging that he or she was provoked.
5. Regard should be given to:
  - a. the persistence of the victim's conduct and any efforts by the defendant to prevent confrontation.
  - b. The danger reasonably perceived by the defendant, including the victim's reputation for violence.
  - c. The proportionality and reasonableness of the defendant's response to the victim's provocation.
6. Close regard ought to be given to reform of the 'ordinary person' element.

<sup>105</sup> Tolmie, J. (2005), 'Is the Partial Defence an Endangered Defence? Recent Proposals to Abolish Provocation', *New Zealand Law Review*, 25 at 48.

<sup>106</sup> Law Commission. (2007), *The Partial Defence of Provocation*, Law Commission, Report 98: New Zealand; Morgan, J. (2002), *Who Kills Whom and Why: Looking beyond Legal Categories*, Victorian Law Reform Commission, Occasional Paper, Victoria; Tolmie, J. (1990), 'Provocation or Self-Defence for Battered Women who Kill?', in S.M.H. Yeo (ed.), *Partial Excuses to Murder*, The Federation Press, Sydney; Tolmie, J. (2005), 'Is the Partial Defence an Endangered Defence? Recent Proposals to Abolish Provocation', *New Zealand Law Review*, 25: 25–52.

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

7. There should be an official record of all stages of plea bargaining process.

If parliament is minded to retain the partial defence the ALA suggest the following areas of reform:

1. A sentencing judge should consider the gravity of the provocation (including both the duration and the nature of the provoking conduct), the emotional response of the offender and whether it was proportionate to the provocation experienced, and third, the justifiability of that response.
2. A victim exercising their equality rights should not serve to reduce an offender's level of culpability at sentencing. This would be relevant to violence arising from a victim leaving an intimate relationship, a victim's formation of an intimate relationship or friendship with someone other than the offender, as well as conduct arising from the victim's decision to work or obtain an education, or any other assertions of the victim's independence.

Finally, if parliament is minded to retain the partial defence then the ALA recommends that accused in specific matters and circumstances should be excluded from using the defence where:

1. Mere words or gestures are used by a victim. I.e. there must be a persistence of such words or gestures that would have caused the ordinary person to be provoked and act in a particular way.
2. The provocation was incited by the defendant in order to invoke the defence.
3. The defendant acted in considered desire for revenge.
4. The defendant has a propensity for violence.

## **TERM OF REFERENCE 1(b) THE ADEQUACY OF THE DEFENCE OF SELF-DEFENCE FOR VICTIMS OF PROLONGED DOMESTIC AND SEXUAL VIOLENCE**

### **SELF-DEFENCE IN NSW**

The common law has long recognised that a person is justified in using some force



when such force is used in legitimate self-defence. However, in 2002 the *Crimes Amendment (Self-Defence) Act 2001* (NSW) was enacted in NSW in order to codify the law of self-defence in this state. Further, these amendments saw the introduction of a partial defence of excessive self-defence.

Pursuant to section 418 of the *Crimes Act 1900* (NSW), a person carries out conduct in self-defence if the person believes the conduct is necessary:

- a) to defend himself or herself or another person, or
- b) to prevent or terminate the unlawful deprivation of his or her liberty or the liberty of another person, or
- c) to protect property from unlawful taking, destruction, damage or interference, or
- d) to prevent criminal trespass to any land or premises or to remove a person committing any such criminal trespass and the conduct is a reasonable response in the circumstances as he or she perceives them

Accordingly, there is both an objective and subjective element to the test for self-defence.

Moreover, the 2001 amendments to the *Crimes Act 1900* (NSW) also saw the introduction of partial defence of excessive self-defence. Under section 421 of the *Crimes Act 1900* (NSW), murder may be reduced to manslaughter where:

- a) The person uses force that involves the infliction of death; and
- b) The conduct is not a reasonable response in the circumstances as he or she perceives them but the person believes the conduct is necessary to:
  - a. defend himself or herself or another person;
  - b. prevent or terminate the unlawful deprivation of his or her liberty or the liberty of another person.

When self-defence is raised by the accused, it falls to the prosecution to prove, beyond reasonable doubt, that the accused conduct was not carried out in self-defence<sup>107</sup>. The prosecution is required to do this by establishing that the accused did not genuinely believe that what he or she did was in self-defence, or that the accused's conduct was not a reasonable response to the danger as he or she perceived it.<sup>108</sup>

## ADEQUACY OF SELF-DEFENCE FOR VICTIMS OF PROLONGED DOMESTIC AND SEXUAL VIOLENCE

As a general proposition, the law(s) pertaining to self-defence has long been criticised for the fact it appears, in practice, only to apply to cases where a person

<sup>107</sup> Section 419, *Crimes Act 1900* (NSW)

<sup>108</sup> See section 418 Katarzynski [2002] NSWSC 613 at para 23

has responded to a sudden and isolated encounter or act of violence and does not adequately extend to cases where a person has been subjected to an ongoing and sustained course of violent or oppressive conduct at the hands of another. The ALA shares the concern expressed by many other public and professional interest groups that law of self-defence in NSW is not adequately accommodate cases of homicide involving ‘battered persons’ at the present time.

The VLRC<sup>109</sup> recommended that a partial defence of excessive self-defence be implemented to provide a ‘safety net’ for women who kill in response to prolonged family violence. This recommendation emerged to address concerns that abolishing provocation might act to disadvantage women who kill in response to prolonged family violence<sup>110</sup>. Where successfully used, the proposed partial defence would operate to reduce murder to manslaughter, and would be available to persons who killed in self-defence, while still recognising that their use of lethal violence was disproportionate to the threat posed.<sup>111</sup> This recommendation was praised by Tolmie<sup>112</sup>, who commented that ‘it might encourage battered defendants to go to trial, rather than to plea-bargain, because self-defence will no longer be an all-or-nothing proposition’.

Following the publication of the VLRC’s final report, these recommendations were praised by Coss<sup>113</sup> as successfully ‘confront[ing] the reality of male violence and condemn[ing] it’. Other commentators<sup>114</sup> noted that the recommendations of the VLRC ‘mark an important step in redressing gender bias in existing homicide law, and in sending a strong message to the community that violence against women will not be tolerated or excused’.<sup>115</sup>

Since *R v Lavallee*<sup>116</sup>, this struggle to have reasonableness judged from the shoes of the battered woman has received focused judicial attention. As L’Heureux-Dube J remarked in *R v Marlatt*<sup>117</sup>:

<sup>109</sup> Victorian Law Reform Commission (2004), *Defences to Homicide: Final Report*, Victorian Law Reform Commission, Melbourne

<sup>110</sup> Seen 98

<sup>111</sup> Neave, M. (2004), *Defences to Homicide Final Report Launch*, Victorian Law Reform Commission, Australia, 18 November 2004, accessed 28 September 2009 at <http://www.lawreform.vic.gov.au/wps/wcm/connect/Law+Reform/Home/Newsroom/Speeches/LA+WREFORM+-+Defences+to+Homicide+Final+Report+Launch+speech>

<sup>112</sup> See n 109 at page 41

<sup>113</sup> Coss, G. (2006b), ‘Provocative Reforms: A Comparative Critique’, *Criminal Law Journal*, 30: 138–50 at page 138

<sup>114</sup> Eltrington, L. & Olle, L. (2005), ‘Reforming Defences to Homicide: Towards Gender Equity’, *DVIRC Newsletter*, Summer Edition 2004/2005: 3–5 at page 3.

<sup>115</sup> The Aftermath of Provocation: Homicide Law Reform in Victoria, New South Wales and England Kate Esther Fitz-Gibbon, 8 February 2012 at page 41

<sup>116</sup> [1990] 1 SCR 852

<sup>117</sup> [1998] 3 SCR 123 at 143

*The legal inquiry into the moral culpability of a woman who is ... claiming self-defence must focus on the reasonableness of her actions in the context of her personal experiences ...*

Accordingly, the full context of a battered woman's predicament must be considered to determine whether her actions were justified in self-defence, thereby warranting her acquittal. Indeed, her 'reality' must be brought into sharp relief at trial. It must be explored and explained for and to those who will be making judgments. For 'a battered woman's experiences are generally outside the common understanding of the average judge and juror'<sup>118</sup>.

Reasonableness is context dependent. It requires consideration of the rationality of a choice to use lethal force from the perspective of the killer. This does not mean that a woman who kills her batterer was necessarily acting reasonably. Human motivations are varied; some defensible, some not. What it does mean is that to assess the reasonableness of a choice to kill requires engagement with the experience of the killer. It requires those making the judgment to 'walk in her shoes' and make any decisions by reference to her experiences. An honest belief in the necessity of using lethal force is insufficient to warrant acquittal. To succeed requires that this belief be reasonable. But as judicially acknowledged at common law and in Victoria Western Australia and Queensland, this objective 'assessment is given colour and character by the battered woman's experience. It is her belief, informed by all of the circumstances in which she found herself that must be reasonable.'<sup>119</sup>

While the current self-defence provisions in NSW allow the judge and jury, at least a theoretical level, to place themselves in the position of the accused, the ALA remains concerned that there is a lack of education and guidance being provided to these facts finders in relation to the dynamics of physically and sexually abusive relationships and the experiences of 'battered persons'. As a consequence, the ALA submits that judges and jurors pre-existing and culturally entrenched understandings about the types of circumstances under which it may be reasonable or necessary to kill another have become hard to shift.

The ALA does not propose that a separate defence be created for 'battered persons' in NSW. Rather, the ALA is of the view that the legislation and policy pertaining to self-defence in NSW must be amended to ensure it accommodates situations where a person has been a victim of prolonged domestic or sexual violence. To this end, the NSW Legislation should provide judicial officers and legal representatives with express guidance as to the relevance of such violence to self-defence.

<sup>118</sup> *R v Malott* [1998] 1 SCR 23, [43] (L'Heureux-Dube J); *Lavelle* [1990] 1 SCR 852, 871-872; *Osland v The Queen* (1998) 197 CLR 316, 337 (Gaudron and Gummow JJ), 376-377 (Kirby J).

<sup>119</sup> WALKING IN HER SHOES Battered Women Who Kill In Victoria, Western Australia And Queensland Anthony Hopkins And Patricia Easteal Altj Vol 35:3 2010 p 132

## **VICTORIA – A MODEL FOR REFORM OF SELF-DEFENCE IN NSW**

The ALA notes that Victorian parliament have taken steps to address concerns regarding the ability of ‘battered persons’ to rely on self-defence. The Victorian Parliament has introduced legislative guidance relating to evidence that may be relevant and admissible to support a claim of self-defence in cases involving battered persons<sup>120</sup>.

In place of implementing a partial defence of excessive self-defence as per the recommendation of the VLRC, the Victorian Government implemented a new offence of defensive homicide. Enacted through the *Crimes Act 1958* (s. 9AD), the offence operates where a person who kills another does so in the belief that their acts were necessary to defend either themselves or another person, but has no reasonable grounds for that belief, and so may be convicted of defensive homicide, rather than the more serious offence of murder. The government felt that through this new offence jury members and judges would be provided ‘with more options than the current “all or nothing” provisions’ for self-defence cases<sup>121</sup>. Additionally, it was argued that by creating a separate offence, rather than an additional partial defence to murder, there would be greater consistency between juror verdicts and sentencing, as judges would not have to decide upon the basis on which a jury manslaughter verdict had been reached<sup>122</sup>.

Section 9AH of the *Crimes Act 1958* (Vic) provides that in circumstances where family violence is alleged, a person may have reasonable grounds for believing that his or her conduct is necessary to defend himself or herself even if he or she is responding to a harm that is not immediate; or his or her response involves the use of force in excess of the force involved in the harm or threatened harm.<sup>123</sup>

The creation of alternative homicide offences to cater for battered women has been considered in other Australian and international jurisdictions. The QLRC<sup>124</sup> recently recommended that:

<sup>120</sup> See section 9AH of the *Crimes Act 1958* (Vic)

<sup>121</sup> Office of the Attorney-General (2005), ‘Hulls Announces Major Reform to Homicide Laws’, Media Release, 4 October 2005

<sup>122</sup> Department of Justice (DOJ) (2010), *Defensive Homicide: Review of the Offence of Defensive Homicide: Discussion Paper*, Department of Justice, Victoria

<sup>123</sup> NSW Parliament Research Service, Lenny Roth and Lynsey Blayden, *Provocation and self-defence in intimate partner and sexual advance homicides*: Briefing Paper No 5/2012. Accessible:

<http://www.parliament.nsw.gov.au/Prod/parlment/publications.nsf/0/F2BA1BFEED2D87EECA257A4800001BD7>

<sup>124</sup> Queensland Law Reform Commission (2008), *A Review of the Excuse of Accident and the Defence of Provocation: Report no. 64*, Queensland Law Reform Commission, Brisbane Recommendation 21-4



*Consideration should be given, as a matter of priority, to the development of a separate defence for battered persons which reflects the best current knowledge about the effects of a seriously abusive relationship on a battered person, ensuring that the defence is available to an adult or a child and is not gender specific.*

In their review of the QLRC's recommendations, Mackenzie and Colvin<sup>125</sup> observed that consultants preferred the introduction of a separate defence for persons who kill in response to seriously abusive relationships given that 'widening the net of the general law of self-defence might protect unmeritorious defendants as well as those who deserve a defence'. It was based upon such opinion that Mackenzie and Colvin recommended to the Queensland Attorney-General that a separate partial defence to murder be created for 'victims who believe that killing their abusers is necessary for self-defence'. As seen in QLD, the Victorian experience similarly led to the creation of an alternative defence based upon the perceived inability of the law to respond to the needs of battered women who kill.<sup>126</sup>

Under section 9AH, the types of evidence that may be adduced in cases involving battered persons includes:

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

<sup>125</sup> Mackenzie, G. & Colvin, E. (2009), *Homicide in Abusive Relationship: A Report on Defences*, Report for the Attorney-General and Minister for Industrial Relations, Queensland.

<sup>126</sup> See n1 to page 46 of Kate Esther Fitz-Gibbon, 8 February 2012



- g) social or economic factors that impact on people who are or have been in a relationship affected by family violence.

It should be noted that under Section 9AH (4)(B), a family member includes a person who has or has had an intimate personal relationship with the person. Further, violence is broadly defined as meaning:

- (a) physical abuse;
- (b) sexual abuse;
- (c) psychological abuse (which need not involve actual or threatened physical or sexual abuse), including but not limited to-
  - (i) intimidation;
  - (ii) harassment;
  - (iii) damage to property;
  - (iv) threats of physical abuse, sexual abuse or psychological abuse;

It is the ALA's submission that legislative guidance similar to that which exists in Victoria, needs to be enacted in NSW so as to give greater clarity to the relevance and admissibility of evidence relating to relationships involving sexual domestic and sexual violence in homicide cases. The ALA endorses Victorian reform, rather than the Queensland and West Australian approach.

The ALA submits this would go some way toward shifting pre-existing conceptions of reasonableness and will help fact finders to gain a better understanding of the experiences of those people who are caught in relationships in which they are subjected to ongoing physical, psychological or sexual violence.

## **RECOMMENDATIONS**

1. Morgan<sup>127</sup> has highlighted that, within the Victorian context, although provocation has been successfully raised by female defendants who have killed an abusive domestic partner, it is important to consider whether such cases should in fact have led to a complete acquittal for self-defence rather than a conviction of provocation manslaughter. The ALA supports the view of Morgan that more attention should be given to ensuring that battered women are adequately protected within that category.<sup>128</sup>
2. A separate partial defence to murder should be created for victims who believe that killing their abusers is necessary for self-defence.
3. NSW Legislation should be amended to specifically provide judicial officers

<sup>127</sup> Morgan, J. (2002), *Who Kills Whom and Why: Looking beyond Legal Categories*, Victorian Law Reform Commission, Occasional Paper, Victoria

<sup>128</sup> See n1 at page 31

and legal representatives with express guidance as to the relevance of domestic and sexual violence to self-defence.

4. In drafting these amendments, regard should be had to section 9AH of the *Crimes Act 1958* (Vic) provides a useful model in this regard.
5. Such legislative guidance should be equally applicable to fatal and non-fatal offences against the person.
6. Consideration should be given to either developing a 'Bench Book' specifically dealing with homicides involving domestic and/or sexual violence or including a specific section in the current Criminal Trials Court Bench Book.