In September 2005, Damien Sebo, then aged 28, admitted to killing 16 year old Taryn Hunt who died two days after having been bashed with a steering wheel lock on a Pacific Motorway overpass. The jury found Sebo not guilty of murder on the basis that he had been provoked at the time he attacked Ms Hunt and he was convicted of manslaughter. Sebo was sentenced to imprisonment for 10 years.

This Research Brief discusses the origins of the partial defence of provocation in Queensland’s criminal laws, when murder was a capital offence, and its use in the present day. It then looks at s 304 of the Queensland Criminal Code establishing the partial defence of provocation which can, if successful, reduce a charge of murder to manslaughter. The complex legal elements of the defence are then discussed, including some illustrative case examples. The high profile case of Sebo is then examined against this historical and legal context, and the various reactions to the verdict. The Brief then turns to a more fundamental discussion of the literature about the continuing relevance of and justification for maintaining the partial defence of provocation and briefly explores the ways in which men and women have relied upon it.

Consideration of reforms to the law of provocation in other jurisdictions, including its abolition in Tasmania and Victoria, is then provided before turning to the Discussion Paper Audit on Defences to Homicide: Accident and Provocation released by the Queensland Attorney-General in October 2007. The issue of provocation as a partial defence has been referred to the Queensland Law Reform Commission which has been asked to report to the Attorney-General by 25 September 2008.
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EXECUTIVE SUMMARY

In September 2005, Damien Sebo, then aged 28, admitted to killing 16 year old Taryn Hunt who died two days after having been bashed with a steering wheel lock on a Pacific Motorway overpass. Sebo pleaded guilty to manslaughter but opposed his murder charge on the basis of the partial defence of provocation. It is reported that Sebo claimed that when Ms Hunt – affected by alcohol – taunted him about her unfaithfulness during an argument, he ‘exploded’ in an ‘uncharacteristic’ display of violence. The jury found Sebo not guilty of murder on the basis that he had been provoked at the time he attacked Ms Hunt and he was sentenced to imprisonment for 10 years.

This Research Brief discusses the origins of the partial defence of provocation in Queensland’s criminal laws, when murder was a capital offence, and its use in the present day. The partial defence is found in s 304 of the Queensland Criminal Code: see Sub-section 2.1 of this Brief.

An extensive discussion of the complex elements establishing the provocation defence, including illustrations from High Court and other superior court cases, is provided in Sub-sections 2.2-2.4.

Against this background, Section 3 discusses the recent case of Sebo and reactions to the verdict by the victim’s family and by others.

The Research Brief then turns, in Section 4, to a more fundamental discussion of the literature about the continuing relevance of, and justification for, maintaining the partial defence of provocation in our criminal justice system. It includes an examination of the different ways in which men and women seek to rely on the partial defence, a brief overview of its relevance in ‘battered women syndrome’ cases, and some statistics about intimate partner violence.

A brief overview of reforms to the law of provocation in other jurisdictions is then provided in Section 5, including a discussion about its abolition in Tasmania and Victoria.

Finally, the Brief turns to the Discussion Paper Audit on Defences to Homicide: Accident and Provocation released by the Queensland Attorney-General in October 2007: Section 6. On 14 May 2008, the Attorney-General referred the matter to the Queensland Law Reform Commission for review.
1 INTRODUCTION

In September 2005, Damien Sebo, then aged 28, admitted to killing 16 year old Taryn Hunt. Sebo pleaded guilty to manslaughter but opposed his murder charge on the basis of the partial defence of provocation. The jury found Sebo not guilty of murder on the basis that he had been provoked at the time he attacked Ms Hunt, but guilty of manslaughter. In passing sentence, the trial judge commented that ‘responding to the taunts of this alcohol affected 16 year old girl, in a jealous rage, [Sebo] attacked her with a steering wheel lock, striking her head several times with great force. She died from the severe injuries [Sebo] inflicted in this frenzy’. 1 Sebo was sentenced to 10 years in jail.

The victim’s family joined with the Queensland Homicide Victims’ Support Group in a statewide letter writing campaign to seek review of the defence, with a possible view to its abolition. 2

On 18 July 2007, the Queensland Attorney-General and Minister for Justice, the Hon Kerry Shine MP, announced that murder trials over the last five years (initially) would be audited by the Queensland Department of Justice and Attorney-General to assess the operation of the defence of provocation under s 304 of the Queensland Criminal Code to a charge of murder. 3 In October 2007, the results of that audit, contained in the Discussion Paper Audit on Defences to Homicide: Accident and Provocation, were released by the Queensland Attorney-General. On 14 May 2008, the Attorney-General referred the issue of whether the partial defence of provocation should be abolished or recast to the Queensland Law Reform Commission. 4

This Research Brief discusses the origins of the partial defence of provocation in Queensland’s criminal laws, when murder was a capital offence, and its use in the present day. It then looks at s 304 of the Queensland Criminal Code establishing the partial defence which can, if successful, reduce a charge of murder to

1 R v Damien Karl Sebo (Byrne J, Sentencing Remarks, Supreme Court of Queensland, Criminal Jurisdiction, Brisbane Indictment No 977/2006, 30 June 2007).

2 Leanne Edmistone, ‘State lags behind on provocation defence - Attorney-General under increasing pressure’, Courier Mail, 5 July 2007, p 5.


4 Hon K Shine MP, ‘QLRC to Consider Murder and Manslaughter Defences’, Queensland Media Statement, 14 May 2008. A review of the accident defence is also part of the reference to the QLRC.
manslaughter. The complex legal elements of the defence are then discussed, including some illustrative case examples. The high profile case of Sebo is examined against this historical and legal context, and the various reactions to the verdict. The Brief then turns to a more fundamental discussion of the literature regarding the continuing relevance of, and justification for, maintaining the provocation defence, and briefly explores the different ways in which men and women have relied upon it.

Consideration of reforms to the law of provocation in other jurisdictions, including its abolition in Tasmania and Victoria, is then provided before turning to the *Discussion Paper Audit on Defences to Homicide: Accident and Provocation*.

## 2 BACKGROUND

In Queensland, under s 305 of the Criminal Code, a person convicted of murder must be sentenced to mandatory life imprisonment or to an indefinite sentence under Part 10 of the *Penalties and Sentences Act 1992* (Qld). Queensland criminal law distinguishes between an intention to take a person’s life – murder – and other killings where the circumstances do not amount to murder. Such instances include where there is a lack of intent to kill or where there exists a partial defence to murder, such as provocation. Manslaughter attracts a maximum life sentence (s 310) but the court has some discretion regarding sentence. The partial defence of provocation can, if successful, reduce a murder conviction to manslaughter.

A ‘partial defence’ allows a jury to make a concession for human frailty even though the other elements for murder exist. The provocation ‘partial defence’ recognises that there can be provoking conduct which causes a loss of self control by the accused who kills while being so deprived of self control, and which could be capable of causing an ordinary person to react in the same way. Simply put, a person can suffer from a wave of anger which overcomes his or her capacity to behave in a normal lawful fashion. Other partial defences include diminished responsibility and infanticide.

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5 However, if a person is found to be a ‘serious violent offender’, Part 9A of the *Penalties and Sentences Act 1992* (Qld) requires that the person must serve the shorter of 80% of the sentence or 15 years before being eligible for parole.


There has been some argument that, where murder no longer carries a mandatory life sentence, the defence of provocation is not needed because circumstances mitigating the fault or culpability of the accused could be taken into account in the sentencing process rather than by the jury in determining criminal responsibility. However, unlike a number of other Australian jurisdictions, including Tasmania and Victoria where provocation has been abolished, Queensland has mandatory life imprisonment for murder (or an indefinite sentence) and the judge has no discretion to order a shorter term.

2.1  HISTORICAL CONTEXT

It is necessary to appreciate the historical context of the defence of provocation in order to understand it properly. Provocation was fashioned as a defence to murder in the early 1700s. This was an era where ‘honour killings’ to avenge insults or attacks upon reputation were accepted – even expected to avoid the slur of cowardice – and men carried weapons on their person to carry them out; hence, the defence of ‘sudden provocation’. To have killed when provoked, in the heat of passion, needed distinction from premeditated killing because, at this time, murder was a capital offence. Thus, the provocation defence provided an accused with a means of avoiding the death penalty.

Very early cases involving provocation, during the 17th and 18th centuries, sometimes involved a matter that would then have been a very serious insult – discovering one’s wife in bed with another man. Such behaviour would have been regarded as ‘the highest invasion of property’ in an age when women were regarded as the property of men. Reactions of sexual jealousy, anger and revenge played a part in the availability of the defence and if there had been ‘time for the

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9 *Discussion Paper Audit on Defences to Homicide: Accident and Provocation*, pp 6, 8.


blood to cool’ the defence was not open.\textsuperscript{13} As time passed and the law moved into the 19\textsuperscript{th} century, the defence of provocation altered in some ways. Malice and an evil motive were no longer required to establish murder so provocation became premised upon a ‘loss of self control’ and, to contain the operation of the defence, the objective ‘ordinary person’ test was established.\textsuperscript{14}

In Queensland, as in many parts of the world, capital punishment for murder was still in force in 1899 when the Queensland \textit{Criminal Code} came into force. Until 1922, convicted murderers in Queensland could be hanged.\textsuperscript{15} While the punishment for murder may have provided a context within which the defence of provocation was fashioned, there has been debate about whether it does so today, particularly in jurisdictions where mandatory life imprisonment no longer exists.

There are claims that the historical overtones of the jealous and possessive male, who kills in reaction to a threat to his property or slur upon his honour, continue to influence the use and success of the defence to this day. Some believe that provocation is an anachronistic and gender biased concept.\textsuperscript{16} It had its genesis as a protection for sudden and aggressive behaviour in men motivated by anger, jealousy, and/or loss of control over a partner or property.\textsuperscript{17} Research suggests that, even today, the threat of separation by a partner, confessions of infidelity, and failure to maintain control have been seen as main determinants of violence and killing by a jealous and possessive male.\textsuperscript{16}

Accordingly, men who kill in such circumstances may well raise the provocation defence, arguing that they were so provoked by their partner’s insults, or unfaithfulness, or threats to leave that they lost control. The defence is sometimes successful and a reduced sentence is given.\textsuperscript{19} This is, of course, not to say that women have not relied upon the defence of provocation. There has (as will be discussed later) been a growing tendency for female accused who kill in the context of a prolonged history of domestic abuse to raise the defence, some

\begin{itemize}
\item \textsuperscript{13} S Bronitt.
\item \textsuperscript{14} S Bronitt.
\item \textsuperscript{15} \textit{Criminal Code Amendment Act 1922} (Qld), s 2.
\item \textsuperscript{16} See, for example, the VLRC Report, pp 28-29 and the studies and articles cited there.
\item \textsuperscript{17} VLRC Report, pp 27-29.
\item \textsuperscript{18} G Coss, pp 53-54, citing a number of works such as MI Wilson & M Daly, ‘Sexual rivalry and sexual conflict: recurring themes in fatal conflicts’, \textit{Theoretical Criminology}, 3(2), 1998, pp 291-310.
\item \textsuperscript{19} G Coss, pp 51-52.
\end{itemize}
successfully. However, the type of ‘heat of passion’ killing involved is one believed to be more fitting to the male pattern of aggression.\textsuperscript{20}  

Research has found that there are significant differences between male and female violence – the violence perpetrated by women occurs mainly in the context of self-defence or self-protection.\textsuperscript{21} It would also seem that when men kill their female partners, this tends to occur without any prior violence by the female partners. On the other hand, when a woman kills her male partner, in a large proportion of cases, it is the prior aggression of the male that sets the stage for the lethal violence that follows.\textsuperscript{22}

\section{2.2 Provocation Under the Queensland Criminal Code}

Section 302 of the Queensland \textit{Criminal Code} establishes the crime of \textit{murder}. In essence, a person is guilty of murder if they unlawfully kill another, intending to kill or cause grievous bodily harm.

Section 303 provides that a person who unlawfully kills another under such circumstances as not to constitute murder is guilty of \textit{manslaughter}.

The partial defence of \textit{provocation} is set out in s 304 which provides –

\begin{quote}
304 When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation, and before there is time for the person’s passion to cool, the person is guilty of manslaughter only.
\end{quote}

It has been held that while the Code (in s 268) defines ‘provocation’ in the context of assault offences, it is limited to that context alone.\textsuperscript{23} Thus, the common law must be looked to in providing a definition of ‘provocation’ in respect of murder.\textsuperscript{24}

\begin{flushright}
20 See, for example, VLRC Report, pp 27-29; G Coss pp 51ff.
\end{flushright}

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23 In jurisdictions where criminal law is governed by the common law (judge made laws and precedents), provocation operates only in relation to murder. However, in jurisdictions where a criminal code exists – such as Queensland – it also operates in the context of offences which have assault as an element to provide a complete defence (s 269).
\end{flushright}

\begin{flushright}
24 \textit{R v Johnson} [1964] Qd R 1. Recent cases have noted the consistent support for this view by Queensland authorities. However, there are no longer great differences between the common law and statutory meanings: RG Kenny, \textit{An Introduction to Criminal Law in Queensland and Western Australia}, 6\textsuperscript{th} ed., 2004, Butterworths, Sydney, para 12.54.
\end{flushright}
The elements (i.e. the ‘ingredients’) that must exist to establish the partial defence of provocation are –

(a) Is there a killing of another under circumstances which (but for s 304) would constitute murder?

(b) Did the accused lose self control and kill under provocation? The gravity of the conduct said to constitute the provocation must be assessed by reference to the relevant characteristics of the accused such as age, sex, race, ethnicity, physical features, personal attributes, relationships or past history. The provocation must be put in context and it is only by having regard to the attributes and characteristics of the accused that this can be done.

(c) Could provocation of that degree of gravity cause an ordinary person to lose self control and act in a manner which would encompass the accused’s actions? This is an objective test which lays down the minimum standard of self control required by the law. The characteristics of the ordinary person are merely those of a person with ordinary powers of self control, not the characteristics of the accused.

It appears that any conduct can constitute provocation provided it satisfies the relevant tests, above. Whether words can amount to provocation seems to depend upon the circumstances. More will be said about words as provocation later.

If evidence of provocation is raised by the defence and the prosecution cannot disprove it beyond reasonable doubt, the conviction will be reduced from murder to manslaughter (under s 303).

The elements of the provocation defence are well explained by Kenny. The requirements and relevant observations are set out under the following headings.

### 2.2.1 Did the Accused Kill in the Heat of Passion Caused by Sudden Provocation?

The requirement of ‘acting in the heat of passion’ is a subjective test and all the circumstances may be considered. These may include the personal attributes and characteristics of the accused and the history of past conduct between the accused

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26 G Coss, p 51.

and the victim. Anger, resentment or fear may be contributing causes to the loss of self control.

In the High Court decision of Masciantonio v R, the majority justices said that ‘[c]onduct which might not be insulting or hurtful to one person might be extremely so to another because of that person’s age, sex, race, ethnicity, physical features, personal attributes, personal relationships or past history’. In Stingel v R, the Full Bench of the High Court noted that, were it otherwise, it would be impossible to identify the gravity of the particular provocation. Their Honours observed that even mental instability or weakness could, in some circumstances, itself be a relevant consideration. ‘For example, it may be of critical importance to an assessment of the gravity of the last of a series of repeated insults suggesting that the person to whom they are addressed is "mad" to know that that person has, and understands that he has, a history of mental illness.

In Masciantonio, the accused, who had suffered from stress and depression, killed his son-in-law. The accused was worried about the son-in-law’s violent treatment of the accused’s daughter. The accused had gone to the location where the killing occurred to seek out the son-in-law to raise these concerns. The son-in-law verbally abused the accused, attempted to kick him and then pushed him to the ground. The majority justices considered that, in the context of his long standing concerns about his daughter, a reasonable jury might regard the son-in-law’s rejection of the accused as highly provocative to the accused. There was also evidence that the accused was fearful of the son-in-law. Thus, all surrounding circumstances must be taken into account as well as any relevant history of past conduct between the parties which might give the relevant incident of provocation greater significance.

2.2.2 Could An Ordinary Person Have Been Provoked Into Losing Self Control?

Having assessed the gravity of the provocation in the manner described above – with regard to all of the circumstances and the characteristics/attributes of the accused – it is then necessary to ask whether provocation of that degree of gravity

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29 Masciantonio v R, para 28.


31 Masciantonio v R, para 31.
could cause an ‘ordinary person’ to lose self-control and act in a manner which would encompass the accused's actions.\textsuperscript{32}

The test is an \textit{objective} test – the characteristics of the ordinary person are merely those of a person, not exceptionally excitable or pugnacious, but possessed of ordinary powers of self control. They are not the characteristics of the accused, although the age of the accused can be a factor in some circumstances because of his or her immaturity.\textsuperscript{33} Apart from age, the ordinary person is not notionally given any attributes peculiar to the accused such as race, disability, sex or ethnicity. The High Court has indicated that although there are classes or groups within the community whose average powers of self control may be higher or lower than the community average, the concept of equality before the law requires that differences be reflected only in the limits within which a particular level of self control can be characterised as ordinary. The lowest level of self control falling within those limits or range is required of all members of the community (qualified by age).\textsuperscript{34}

In \textit{Stingel}, the High Court said that the objective test will be affected by contemporary conditions and attitudes. Things may matter more in one age than in another.\textsuperscript{35}

There have been suggestions that the ‘ordinary person’ test should take the accused’s cultural background into account in assessing, not just the gravity of the provocation but, also, the powers of self control of the ordinary person.\textsuperscript{36} Not surprisingly, there have been many opponents to such an approach. The New South Wales Law Reform Commission rejected expanding the ‘ordinary person’ test to include cultural background or sex, arguing that it would be unfair if an accused person were able to succeed on the provocation defence because expert witnesses give evidence that there is a lesser capacity for self control among members of the accused person’s cultural background or sex. The law should not apply different standards of criminal behaviour depending upon a person’s background.\textsuperscript{37} The VLRC endorsed this view.\textsuperscript{38}

\begin{itemize}
\item \textsuperscript{32} \textit{Masciantonio v R}, paras 27-28.
\item \textsuperscript{33} \textit{Masciantonio v R}, para 28.
\item \textsuperscript{34} \textit{Stingel v R}, para 24.
\item \textsuperscript{36} VLRC Report, p 49, noting responses during consultation in the course of its \textit{Defences to Homicide} reference.
\item \textsuperscript{37} New South Wales Law Reform Commission (NSWLRC), \textit{Partial Defences to Murder: Provocation and Infanticide Report}, No 40, para 2.68.
\item \textsuperscript{38} VLRC Report, p 50.
\end{itemize}
It has been observed that the objective test is quite vague and general, thereby inviting disagreement among judges in applying the test. A judge in the Victorian Court of Appeal noted that:

*In those circumstances there is a real risk that the decision whether the defence should be left to the jury will be affected by the judges' views of what a reasonable person should or should not do when confronted by the suggested provocation - that is, by a moral judgement of what minimal standard of self-control ought to be applied - rather than by reference to what a reasonable jury might regard as being the ordinary person's reaction to the suggested provocation. Although applying what is said to be an objective standard, the trial judge must inevitably be applying his or her own moral standards and be adopting an approach which is as much subjective as it is objective. Judges may well bring to bear their own moral judgment of what minimal standards of self control ought to be applied to the ordinary person.*

Various criticisms of the ‘ordinary person’ test are discussed further below.

### 2.3 Other Matters

The proportionality of response or degree of retaliation by the accused may be an important consideration in deciding the issue of provocation but it is not a separate requirement. It is one of the factors that the jury may consider when determining if there was actual loss of self control and in determining the effect of the provocation on the ordinary person.

The act done in the heat of passion by the accused must be *caused* by the provocation – thus requiring a nexus between the provoking action and the response of the accused (i.e. the accused acted *because of* the provocation).

‘Caused by the sudden provocation’ requires that the heat of passion must be caused by the sudden provocation, suggesting that the provocative act must be unexpected by the accused, rather than a requirement that the accused must respond suddenly/immediately to the provocative act. It has been noted that the defence can operate in situations where the accused has not acted – killed –

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40 See *Masciantonio v R*, para 29 and RG Kenny, para 12.67, citing cases including *R v Johnson* [1964] Qd R 1.

41 RG Kenny, para 12.59.

42 RG Kenny, para 12.62.
suddenly/immediately in response to the provocative act, such as in the ‘battered spouse’ cases where the victim might be killed sometime after a provocative act.\textsuperscript{43} However, the longer the time that passes between the provocation and the killing, the more likely that the killing is due to an emotion of the accused rather than to the provocation.\textsuperscript{44}

In \textit{Parker v R}, Windeyer J said that if there was any material upon which a reasonable jury might find that there was such provocation as could reduce murder to manslaughter, the question should be left to the jury with directions about the conditions or elements that must exist. The question of provocation ought not to be withdrawn from the jury if there is evidence which could create a reasonable doubt.\textsuperscript{45} The question whether provocation should be left to the jury falls to be resolved by reference to the version of events most favourable to the accused. The test is ‘whether, on the version of events most favourable to the accused which is suggested by material in the evidence, a jury acting reasonably might fail to be satisfied beyond reasonable doubt that the killing was unprovoked in the relevant sense’.\textsuperscript{46}

Once it is open to a jury to consider provocation, the onus is on the Crown to establish beyond reasonable doubt that the killing was unprovoked for a murder verdict to be returned.\textsuperscript{47}

\section*{2.4 Observations About the ‘Ordinary Person’ Test}

The majority of the High Court in \textit{Stingel} indicated that while there were people who had higher or lower capacities for self control, equality principles required that differences such as gender and ethnicity be ignored so that all people are held to the same standard – the minimum degree of self control that one can expect from citizens (see above). The characteristics of the accused are ignored when applying the ordinary person test although they are relevant in assessing the seriousness of the provocation. This can be confusing for juries. It more or less implies, argues

\begin{itemize}
\item \textsuperscript{43} See \textit{Osland v R} (1998) 197 CLR 316; 159 ALR 170. The ‘battered woman syndrome’ is briefly discussed later in this Research Brief.
\item \textsuperscript{44} RG Kenny, para 12.62, citing \textit{R v Chhay} (1994) 72 A Crim R 1, 10.
\item \textsuperscript{45} \textit{Parker v R} [1963] HCA 14, para 26.
\item \textsuperscript{46} \textit{Masciantonio v R}, para 30.
\end{itemize}
one commentator, that anything can be provocative but only retaliation which comes within the parameters tolerated by the community will be allowed.48

The jury is required to consider the gravity of the provoking conduct from the point of view of the accused (taking into account the characteristics of the accused) and then to consider the ordinary person (devoid of these characteristics) when looking at the issue of powers of self control.

The two ‘tests’ are difficult for juries to understand and apply. In a recent paper by the Chair of the NSW Law Reform Commission, the Hon James Wood AO QC. said:

[T]here is a considerable degree of concern, and frustration, expressed by trial judges in relation to the difficulty which they experience in summing up a case to a jury, by reason of the ever-increasing number and complexity of the directions, warnings and comments that are required, the existence of which multiply the potential for appealable error. Secondly, there is concern that, no matter how well-crafted a summing up may be, there is still a risk that it will not be understood and correctly applied by the jury.49

A perusal of past cases, including those which have reached the High Court, show that it is difficult to provide any clear principles about how provocation operates. The opinions of the justices vary considerably as to what may or may not amount to provocation. Even, as has been attempted above, trying to provide a summary or ‘snapshot’ of a case can still leave a false or incomplete impression because of the necessity to be present in the court and to hear all of the evidence in its totality. There may be minor points raised that end up being important in their context.50 There is also some danger in trying to draw analogies with cases decided in different eras with different social conditions rather than taking each situation on its own facts and applying principles to those facts.

It is with these caveats in mind that the Research Brief turns to the Sebo case, briefly outlined earlier, which highlights the controversy that the successful use of the provocation defence can cause.

48 S Bronitt.


50 A similar point is made by Eames J in R v Kumar [2002] VSCA 139, paras 88, 99.
3 THE SEBO CASE

In his sentencing remarks, Justice Byrne said that Damien Sebo was 28 years old when he killed Taryn Hunt. She was 16. His Honour continued:

Responding to the taunts of this alcohol affected 16 year old girl, in a jealous rage, you attacked her with a steering wheel lock, striking her head several times with great force. She died from the severe injuries you inflicted in this frenzy.

In a brief episode, you attacked with an intention to kill or, at least, to cause grievous bodily harm.

The accused and the victim had been in a relationship for around 20 months, despite the age disparity. The victim’s mother, Jennifer Tierney, told the media that Sebo had never shown any aggression. Ms Tierney was concerned about the age gap and decided that Sebo should move in with her and Taryn so she could observe the relationship. She gave evidence that the couple had argued regularly and they eventually split up about one month before Taryn’s death. However, Sebo continued to live in the same household although he moved out of Taryn’s room and into the garage. On Ms Tierney’s evidence, during the month before her death, Taryn formed a new relationship but Sebo still drove Taryn to places. The couple did argue often about Taryn seeing other men. Friends of Taryn believed Sebo to be a ‘bit of a no-hoper’ who struggled to keep a job.

During the trial, a police interview with Sebo was played to the court (but there is only Sebo’s account of the attack and immediate events leading up to it). On Sebo’s version of events, on the night of the incident, Taryn and Sebo had met friends at Jupiters Casino. They had been drinking. After leaving the casino, it is claimed that Taryn and Sebo began arguing while travelling in the car. It seems that Sebo pulled over on the side of a Pacific Motorway overpass. Sebo said that Taryn continued to taunt him and said she would continue to sleep with other men. At some point, he grabbed the steering wheel lock with which he bashed Taryn.

51 Sitting in the Supreme Court’s criminal jurisdiction.
52 R v Damien Karl Sebo, Sentencing Remarks, p 2.
54 Paul Weston, “‘Provoked’ lover in murder acquittal’, Sunday Mail, 1 July 2007, p 3.
55 Paul Weston, ‘Shackled by a “no-hoper” – how Taryn’s killer was determined to keep her by his side’, Sunday Mail, 8 July 2007, p 23.
It appears that Sebo told the police that the victim had ‘put me in a situation where I felt betrayed... Everything we’d planned ... she just diminished it ... and tore me down and I didn’t want to lose it. It made me explode ... do something I didn’t want to do’. He described knocking Taryn to the ground and trying to drag her semi-conscious body to the car to drive her to hospital. He told police that he ‘tried waking her up.... There was heaps of blood ... that’s when I started freaking. [The steering lock] was just meant to scare her... I wasn’t meant to hit her with it or anything. I didn’t mean to do it’.\(^{57}\) At the trial, the prosecution reportedly told the jury that the police interview showed that he had denied killing Taryn for over three hours before finally confessing.\(^{58}\) It appears that Sebo originally maintained that he had dropped Taryn off at a Pacific Motorway overpass after their argument and had then felt guilty so he had driven back to pick her up.\(^{59}\)

As tends to be the situation with homicides of this type, the words and actions of the victim are known only to the attacker and it is only Sebo’s version of events that are recorded. The fact that the victim cannot ‘speak for himself or herself’ is also an issue in provocation cases given that it is open to an accused to fabricate the provoking incident.\(^{60}\) Here, the prosecution is reported to have told the court that Taryn had been ‘painted as a ... jezebel ... who’ll say what she wants to say to get her way’.

Sebo was convicted of manslaughter. In passing sentence, Justice Byrne noted the considerable grief the death had caused to the victim’s family and other ‘terrible consequences’, as outlined in the victim impact statements. He also noted that a weapon had been used in the attack and ‘[t]he attack was so ferocious that its consequences were inevitably lethal’.\(^{61}\) However, His Honour said, the accused had no prior convictions and there was no evidence of any previous episodes of violence between the accused and the victim. The accused had taken the victim to the hospital very soon after the attack but withheld information from the hospital staff about how she met her death. Upon conviction, Sebo was declared to have been convicted of a ‘serious violent offence’ which means that he must serve 80% of his prison term.\(^{62}\)

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\(^{57}\) Christine Flatley, ‘Murder accused “didn’t mean to kill”’, *Australian Online*, 26 June 2007.

\(^{58}\) ‘Jury retires in Qld murder trial’, *Age Online*, 28 June 2007.

\(^{59}\) Christine Flatley.


\(^{62}\) Part 9A of the *Penalties and Sentences Act 1992* (Qld).
In this case, the jury found that Sebo was provoked, such as to reduce the verdict to one of manslaughter. The jury’s actual discussions cannot be ascertained because of the confidentiality attaching to jury deliberations.  

The case was one in which it seems that Taryn’s words that she had been unfaithful to Sebo – albeit recounted by Sebo in his police interview and unable to be contradicted – constituted the provocative act. The question of whether, and in what circumstances, words can amount to a provocative event has been considered in a number of cases.

### 3.1 WORDS AS PROVOCATION

In 1946, the House of Lords in *Holmes v Director of Public Prosecutions* said that a confession of adultery, without more, even if unexpected and sudden, cannot constitute provocation. Viscount Simon, with whom the other Lords agreed, said:

... [A] confession of adultery without more is never sufficient to reduce ... murder to manslaughter, and ... in no case would words alone, save in circumstances of a most extreme and exceptional character so reduce the crime. When words alone are relied upon in extenuation, the duty rests on the judge to consider whether they are of this violently provocative character... .

The remarks echo similar comments made by Blackburn J during summing up to the jury in a case decided in 1871. Both seemed in agreement that ‘special’ or ‘most extreme’ circumstances might, however, amount to provocation.

In considering their Lordships’ decision in *Holmes*, Stephen J in the High Court decision of *Moffa v R* noted that words alone, whether in themselves insulting or obscene or which recount a necessarily provocative event or fact, would have to involve ‘circumstances of a most extreme and exceptional character’ if they were to reduce murder to manslaughter. In the same case, Mason J commented that there was no absolute rule against words founding a case of provocation but noted that violent acts were more likely to induce an ordinary person to lose self control than were violent words. His Honour added that a case of provocation by words may be more easily invented than one by conduct. Thus, ‘*there is, therefore, an*
element of public policy as well as common sense in requiring the close scrutiny of claims of provocation founded in words, rather than conduct'. 68

Justice Mason believed that the comments by Blackburn J and Viscount Simon (above) were ‘salutary warnings against a too ready acceptance of claims of provocation based on words alone. They emphasise the need for compliance with the demanding requirements which underlie the concept of provocation’. 69

In the 1977 case of Moffa v R, the High Court had to decide whether the trial judge should have left a question of provocation to the jury in respect of the applicant who was convicted of murder. The applicant, M, was an Italian immigrant who married the deceased, K, with whom he had three children. About 18 years later, M went to Italy where his mother was dying and upon returning after a month, K was indifferent to him, said she didn’t love M anymore and wanted to leave.

M pleaded with K to stay on many occasions, including the night before M killed her. M continued to plead with K on the morning of the incident. M told the court that K had said that she would scratch his eyes out if M came near her and she did not love M and did not even want to look at him. She then told M that she had been ‘enjoying herself’ having sex with ‘everybody in the street’. K then swore at M using vulgar language, threw some photographs at him saying that M could look at the pictures (many of them showing K in naked poses although some were taken by M) if he wanted to see her. M cried and K laughed at him and then said ‘get out, you black bastard’. She then threw the telephone at M which missed. M said that he ‘lost control’ and went outside to the porch where he retrieved a piece of bent pipe. He went inside with the pipe and asked ‘is this what you want? You force me to do it’. K again used abusive language and M then hit her. M said he lost control and hit her again. M said that he could not recall how many times he struck K. M drove to a friend’s house, talked to the friend and then went to the police.

The High Court, by majority, found that provocation was open on the facts and the conviction of murder was reduced to one of manslaughter. Barwick CJ said that all of the events of the morning (outlined above) taken together showed that there was —

... vituperative and scornful rejection of [M’s] connubial advances, a contemptuous denial of any continuing affection, a proclamation of finality ... coupled with the expression of pleasure in having had intercourse promiscuously with neighbouring men. ... Whilst in themselves small matters, the threat of physical violence to reinforce her rejection ..., the throwing of the telephone ... and the use made of the nude photographs, form part of the whole situation. To describe that situation as consisting merely of words is not, in my opinion, to reflect the reality of the total scene. I am of the opinion that a jury would be entitled to view the situation in its 

68 [1977] HCA 14, para 4, per Mason J.

69 [1977] HCA 14, para 5, per Mason J.
entirety ... including the implied taunt of [M’s] incapacity sexually to satisfy the deceased... If they took that view, it was open to them to conclude that an ordinary man, placed as was [M], would so far lose his self control as to form an intention at least to do grievous bodily harm.... Whether they would or would not take such a view ... would essentially be a matter for them.\textsuperscript{70}

Justice Stephen noted that minds may well differ upon what is sufficient to constitute provocation when what is in question is a combination of words describing past conduct, words of abuse and some physical violence (although the element of physical violence was relatively slight in this case as there was no suggestion that M was hit by the telephone). His Honour said that K had –

... boasted of wholesale promiscuity with men in the suburban street where she and her husband lived and had brought up their family... she combined this boast with abuse and with some show of violence..... ... If the jury were to accept this version of the matter, I cannot for myself say that they might not properly conclude that an ordinary man might be so provoked as to lose self control and act as [M] said he did.\textsuperscript{71}

Justice Mason believed that, on M’s version of events, K’s remarks went far beyond a confession of adultery, even a sudden confession. Her remarks ‘might well so enrage an ordinary man beyond endurance as to goad him into impulsive action of a most drastic kind.... [A] jury could reasonably take the view that the words and conduct were so provocative as to cause an ordinary man to lose his power of self control...’.\textsuperscript{72}

The dissenting justice was Gibbs J. His Honour said that the question had to be decided ‘in the light of contemporary conditions and attitudes, for what may be provocative in one age may be regarded with comparative equanimity in another and a greater measure of self control is expected as society develops’. His Honour found that K’s words, although calculated to disturb or enrage, were not ‘violently provocative’ in the exceptional sense required.\textsuperscript{73}

In essence, the majority decision in Moffa v R confirms that a confession of adultery, even if unexpected and suddenly made, does not, of itself, provide a sufficient ground to allow a case of provocation to go to the jury. However, if the words were of a violently provocative nature, or were accompanied by other circumstances, it might be open for a jury to consider whether an ordinary person, placed as an accused, would so far lose his or her self control as to form an

\textsuperscript{70} [1977] HCA 14, para 5, per Barwick CJ.

\textsuperscript{71} [1977] HCA 14, paras 5-7, per Stephen J.

\textsuperscript{72} [1977] HCA 14, para 9, per Mason J.

\textsuperscript{73} [1977] HCA 14, para 8, per Gibbs J.
intention to at least do grievous bodily harm to the deceased. In the Sebo case, it seems that the jury might have found that the taunts and claims of infidelity by Taryn Hunt were of a violently provocative nature or were accompanied by other circumstances and that an ordinary person, placed as Sebo was, could have lost self control as to form an intention to at least do grievous bodily harm to Taryn.

However, as a number of justices have warned, it is difficult and possibly misleading to attempt to draw analogies with previous cases. The jury is privy to evidence and information that the outside world may not be. There might be some small point or element that is pivotal to the defence. The diverse attributes and characteristics of each accused, the past relationships and circumstances between the victim and accused and other matters may produce a situation where the same words to one accused would not be provocative to another. It is also a matter upon which minds will differ, as illustrated by the dissenting view of Gibbs J in Moffa. Thus, it may not be an easy task to attempt to draw any comparisons between the Sebo case and those such as Moffa or Masciantonio.

3.2 REACTION TO THE SEBO CASE

Friends and family of Taryn Hunt felt that Taryn was put on trial as well as Sebo. Her mother said that Taryn was not the girl that the case had ‘painted her up to be’. Some commentators have argued that successful use of the defence of provocation can suggest that the victim more or less invited his or her own fate and that it seems that the victim is also on trial. One of the points raised by the Victorian Law Reform Commission, when recommending abolition of provocation, was that it constituted victim blaming.

The chief executive of the Queensland Homicide Victims’ Support Group, Jonty Bush, is reported as saying that feedback to the Group following the Sebo case indicated that the average person on the street was uneasy about the laws used in that case. She said that it ‘sets a dangerous precedent when adultery becomes a defence to murder’.

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74 Carter’s Criminal Law of Queensland, para [304.35]. See also Moffa v R and the discussion under the heading ‘Words as Provocation’.

75 See a similar comment made by the court in Masciantonio, para 28.

76 Paul Weston, “‘Provoked’ lover in murder acquittal”.


On the other hand, Queensland Public Defender, Brian Devereaux SC, said that juries were representatives of the public and made their decisions based on a full brief of evidence and explanation of the law that the rest of the public were not privy to.\(^79\) He noted that the community often demanded law reform when the outcome of a murder trial does not seem right but the verdict is – in effect – given by members of the public who form the jury. The jury often reaches decisions that people hearing ‘superficial summaries’ (because jury deliberations are confidential) on the news would not.\(^80\)

On 18 July 2007, the Attorney-General announced that a current audit reviewing the so-called ‘accident’ defence under s 23 of the Criminal Code would be expanded to include a review of recent cases in which provocation had been used as a defence. The outcome, the *Discussion Paper Audit on Defences to Homicide: Accident and Provocation* (discussed later), released in October 2007, comments that the jury – a foundation of the criminal justice system for many centuries – has an enormous responsibility of deciding guilt or innocence based on the evidence and applying the law as directed to the facts of the case. Jurors are not volunteers but are called to perform jury duty.\(^81\) Juries comprise a randomly selected panel of ordinary citizens called upon to try a particular case. Trial by jury is considered to bring important practical benefits to the administration of criminal justice.\(^82\)

On 30 July, the Attorney-General lodged an appeal against the sentence. He explained to the media that jury verdicts could not be appealed but the leniency of a sentence could.\(^83\) It was previously reported that Shadow Attorney-General, Mark McArdle MP, said that the 10 year prison sentence was a cause of concern to parents and the community and called upon the Government to investigate.\(^84\)

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\(^79\) Leanne Edmistone, ‘Dial M for manslaughter’, referring to comments made by Mr Brian Devereaux SC.

\(^80\) Leanne Edmistone, ‘Murder of a law’, *Courier Mail*, 7 July 2007, p 53, citing comments made by Mr Brian Devereaux SC.

\(^81\) *Discussion Paper Audit on Defences to Homicide: Accident and Provocation*, pp 9-10.


\(^84\) ‘Outrage over 10 year sentence for brutal bashing’, *Gold Coast Bulletin*, 2 July 2007, p 1.
30 November 2007, the Queensland Court of Appeal dismissed the Attorney-General’s appeal against the manslaughter sentence handed to Sebo.85

4 SHOULD THE DEFENCE OF PROVOCATION BE RETAINED?

Apart from the conceptual difficulties that the ‘ordinary person’ test poses when trial judges attempt to direct juries about how the provocation defence applies (as discussed earlier), there have been criticisms of the fundamental basis of the defence itself.

It has been argued that provocation gives rage that leads to the killing of another a privileged status – a partial defence to murder – yet other emotions do not provide an excuse. For example, compassion or pity that prompts euthanasia does not excuse killing somebody.86 The VLRC, in its Defences to Homicide Final Report, could not see how anger and loss of self control can open up the defence of provocation but in other circumstances, such as killing out of compassion, the accused’s culpability is only taken into account at sentencing.87

One legal commentator has argued that no ‘ordinary person’ would respond with lethal violence to an insult.88 Indeed, as has been claimed by some commentators, the present day use of the ‘loss of self control’ excuse points to a wider societal problem of a collective loss of self control. There is a prevailing tendency to blame others and to not accept responsibility for one’s own weaknesses.89 It has also been suggested that the courts’ apparent willingness to find that an accused was provoked indicates that society is increasingly tolerant of abdication of personal responsibility.90


87 VLRC Report, p 31.

88 G Coss, p 52.


90 WJ Brookbanks, p 190.
It has been argued that a key feature of intimate partner violence by men is proprietariness characterised by feelings of ownership, exclusivity, and jealousy.\textsuperscript{91} Coss argues that in the intimate partner homicides that occur each year in Australia, men are the perpetrators in most of them (in 80\% of the 74 incidents during 2005-2006)\textsuperscript{92} and generally in response to insults, actual or threatened separations, or unfaithfulness. Coss points out that the men who do kill are extraordinary. He argues that the courts (both judges and juries) fail to realise that there are many intimate partner breakdowns and hurtful arguments every year without the thwarted man reacting with lethal violence. Why then, Coss argues, does a controlling, proprietary male who kills when challenged ‘warrant sympathy and thus, a significant reduction in sentence’?\textsuperscript{93}

Coss considers that the ‘ordinary person’ test is devoid of credibility because it essentially establishes lethal male violence as the norm.\textsuperscript{94} In other words, is killing one’s partner provoked by her seeking a separation, confession of infidelity, and/or a renunciation of his advances the reaction of an ‘ordinary person’?

An example of a judicial comment that Coss regards as illustrative of the issue is in a case where a Muslim husband murdered a man – by stabbing him 67 times – who was committing adultery with the accused’s wife after coming home early to spy on the couple because he suspected they were having an affair. The trial judge said, after acknowledging the husband’s strict Muslim beliefs –

\begin{quote}
For many men, adultery committed with his wife is an intolerable insult to his manhood and an act of gross betrayal. Violent reaction to adultery is no new phenomenon.\textsuperscript{95}
\end{quote}

On the other hand, there have been judicial statements critical, or in condemnation, of the provocation defence. For example, in \textit{R v Kumar}, O’Bryan AJA said ‘I regard provocation as anachronistic ... since the abolition of capital punishment and would support its abolition as a so-called defence... ’.\textsuperscript{96} Further, some pronouncements appear to acknowledge the fragility of intimate relationships; the reality that very many do break down in circumstances where vicious, hurtful things are said and

\begin{thebibliography}{99}
\bibitem{91} G Coss, pp 53-54 and research cited therein.
\bibitem{93} G Coss, p 53.
\bibitem{94} G Coss, p 55.
\bibitem{95} G Coss, p 64, citing \textit{R v Khan} (1996) A Crim R 552, p 557-558, per Allen J.
\bibitem{96} [2002] VSCA, 139, para 176, per O’Bryan AJA.
\end{thebibliography}
done to cause anger and stress – yet nobody gets killed. Examples of these statements are provided by Coss and include the following extracts –

- **Cultural values inevitably change over time ... persons frequently leave relationships and form new ones.** Whilst this ... may cause a former partner to feel hurt, disappointment and anger, there is nothing abnormal about it. What is abnormal is the reaction to this conduct in those small percentage of instances where the former partner (almost inevitably male) loses self control .... In my view, this will rarely, if ever, be a response which might be induced in an ordinary person in the 21st century.97

- **The violent response to [the wife’s] statement (surely in its substance not uncommon that a wife would leave an unhappy family situation unless a change was made [she had threatened to leave if the accused did not stop drinking]) could never be characterised as the action of an ordinary person.**98

- **It is the paramount purpose of the rule of law in any truly civilised society to protect unflinchingly the sanctity of human life. ... That purpose and duty [of the court to give effect to it] are especially important in such a society as our own, where mutual marital fidelity has been largely supplanted by extra-marital liaisons of various kinds, many of which, as the daily experience of the Court makes plain, are all too apt to break down in circumstances of great bitterness. That entails, in its turn, that there cannot, and must not, be allowed to develop in society any perception that it is in any way permissible for an aggrieved party ... to lash out in self-absorbed frustration to the extent of killing ... either the other party, or any third party ... thought to be ... responsible for the breakdown.**99

There may be many people who remain tolerant of violence sparked by jealousy when love goes wrong.100 Some judges and individual jury members may be uninformed about the nature of intimate partner killings and may well harbour stereotypical attitudes. Coss refers to surveys of community attitudes, including young people’s perceptions, to indicate the various misconceptions. He considers that the use of experts by courts may assist the judge and jury by providing empirical evidence about the millions of relationships in which insults and hurts are commonplace and how few men resort to actually killing their partners. This might go some way, he argues, to show that the killing of a partner is rarely the reaction of an ‘ordinary person’. It might also reduce the instances of indulgence or tolerance of the lethal reaction.101

97 G Coss, p 62, citing R v Yasso [2002] VSC 469, paras 31-33, per Coldrey J.

98 G Coss, p 66, citing R v Tuncay [1998] 2 VR 19, 30, per Hedigan AJA.


100 G Coss, pp 69-70, citing a number of studies.

101 G Coss, pp 68-69.
A 2006 *Survey of Community Attitudes to Violence against Women* conducted on behalf of the Victorian Department of Health of 2,800 randomly selected persons in the community,\(^{102}\) found that negative myths and stereotypes about violence against women prevail, despite increased awareness and education.\(^{103}\) A large proportion of both men and women believed that domestic violence could be excused if it results from temporary anger or there is genuine regret afterwards.\(^{104}\) On a more positive note, when presented with various scenarios and asked to indicate the degree to which a man would be justified in using force against his current or ex-partner, the vast majority of respondents disagreed that force was justifiable in any of the scenarios presented. However, 4% of respondents thought that force by a man might be justifiable if the woman admitted to being unfaithful and 3% were unsure.\(^{105}\) Younger respondents were less likely than older respondents to say that physical force against a partner was justifiable.\(^{106}\) Thus, it is quite possible that public attitudes about violence against women are changing.

Disturbingly, however, Amnesty International recently reported that a 2006 survey of young people (aged 16-20) across the United Kingdom found that a significant minority of young people still held views condoning sexual violence although a large majority rejected physical violence.\(^{107}\)

### 4.1 BATTERED WOMAN/SPOUSE SYNDROME

This Research Brief does not focus on ‘battered woman/spouse syndrome’ as it is, indeed, a topic on its own.\(^{108}\) However, various comments have been made throughout this Brief indicating research that women tend to kill after a history of domestic violence and/or prolonged abuse from a partner or family member – and

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\(^{102}\) Including 800 from four selected culturally and linguistically diverse backgrounds (Chinese, Vietnamese, Italian, Greek).


\(^{104}\) N Taylor & J Mouzos, p xii.

\(^{105}\) N Taylor & J Mouzos, pp xiv-xv.

\(^{106}\) N Taylor & J Mouzos, pp xiv-xv.

\(^{107}\) ‘UK: 42% of young people know girls whose boyfriends have hit them – new survey’, *Amnesty International Media Release*, 20 November 2006, [http://www.amnesty.org.uk](http://www.amnesty.org.uk). The survey was commissioned by the End Violence Against Women Campaign.

\(^{108}\) While men as well as women can be subject to domestic violence or abuse, it is probably still more commonly associated with women and will be considered on that basis under this heading.
often not in immediate response to any one provocative act. Due to the very fact of being unable to fight back, they may wait for a chance when the victim is ‘off their guard’ and then inflict the lethal harm. Thus, the killing is technically premeditated. However, it is essentially driven by psychological stress.\(^\text{109}\)

Three phases in the battering cycle are posited: tension building, an acute battering episode, then loving contrition.\(^\text{110}\) A battered woman is one who has been through this cycle at least twice. The ‘battered woman syndrome’ is said to be characterised by features such as physical and psychological abuse, including: social isolation, physical exhaustion, threats to hurt or kill, control, debasing or humiliating conduct, forcing drug or alcohol use, and sexual abuse. The woman learns to become passive and powerless and may become depressed and anxious. She may believe that the man will carry out his threats and may kill her. But, despite all, she hopes that things will improve.\(^\text{111}\) Research is said to show that battered women who kill can pinpoint what made the final episode of violence different from the others such as to know that the episode would result in life threatening action.\(^\text{112}\)

The problem facing a women charged with murder in this situation is whether she can plead provocation when she has killed her abuser while he was not actually being an immediate threat to her, such as while he was asleep.

The law has not required an immediate reaction, despite the words of s 304 requiring that the killing occur before there is time for passion to cool. The fact that immediacy is not crucial does give some scope for partners who rely on the ‘battered spouse syndrome’ where the killing may occur some time after the last act of provocation.\(^\text{113}\) Legislation such as s 23 of the NSW \textit{Crimes Act 1900} does not require ‘suddeness’.

\(^{109}\) MCCOC, \textit{Discussion Paper}, p 91, citing various research. It also notes research that criticises the ‘battered woman’ theory.


\(^{113}\) R G Kenny para 12.62.
A leading common law case regarding the ‘battered woman syndrome’ is Osland v R. This was a case, however, in which the accused was unsuccessful in her quest to rely on provocation. Mrs Osland had been in a relationship with a man to whom she had had four children before moving in with Frank Osland. The relationship with Osland was one of constant physical and sexual abuse, often leaving her with bruises and black eyes. Mrs Osland gave evidence that Mr Osland threatened her on one occasion with a rifle for which he was convicted of possession. He apparently threatened that he would kill the child she loved the most and cut the body into pieces.

Apparently, Mrs Osland and her son – the co-accused – had at some time before the killing, dug a hole in the bush and, on the night in question, she had put sleeping pills into Mr Osland’s food. The two struck Mr Osland over the head with an iron bar and then put a plastic bag over his head to contain the blood. They took the body in a car to the hole and buried it. After a few days, Mrs Osland went to the police to report Mr Osland missing. Around five years later, her son gave information to the police which led to Mrs Osland’s arrest. She told the court that they did not want to kill but they wanted the problem out of their lives. Mrs Osland pleaded not guilty and used the battered woman ‘defence’. Mrs Osland was convicted of murder and her appeals to the Supreme Court and High Court were dismissed. While it appears that the battered woman syndrome was accepted and seen as a proper matter for expert evidence, Mrs Osland’s actions were regarded as unreasonable and unjustified on the particular facts of the case. There was evidence that for some time before his death, Osland had not engaged in any violence or threatening conduct.

Some researchers argue that the law in Queensland should be altered to incorporate a history of violence as sufficient provocation into the current Criminal Code provision.

4.1.1 Recent Data About Intimate Partner Homicides

The 2005-2006 Annual Report by the National Homicide Monitoring Program (NHMP), established by the Australian Institute of Criminology, analyses the type


115 The son was acquitted, probably accepting his evidence of his belief that his life was in danger: A Hale et al, p 60.

and nature of homicide in Australia over the 2005-2006 financial year. The main reason or motive for involvement in a homicide was found to be a dispute or argument so that, in the heat of the moment when tempers are raised, disputes can reach a point where one party produces a weapon they have either brought to the scene or found nearby, or they use their feet or fists to inflict harm. For many years, disputes or arguments have been the most common trigger for killing another person.

The NHMP Report noted that research had found that the relationship between the victim and the offender in a homicide was one of the most important factors in understanding the ‘contextual dynamics’ of the homicide event and how both persons are linked to the context within which the homicide occurs. From July 2005 to June 2006, there were 283 recorded homicide incidents throughout Australia and the number of victims increased to 301 from the 267 victims in the previous year. Yet, we are more likely (around 74%) to be killed by a person we know rather than a stranger; male intimate partners are said to pose the greatest risk to females; and most homicides take place in residential premises.

It was found that, in 2005-2006, intimate partner homicides (defined by the NHMP to include spouses, separated/divorced spouses, defactos and ex-defactos, extra-marital lovers and former lovers, boyfriends, girlfriends, homosexual couples and former homosexual couples) throughout the country, increased from the previous year to stand at 74 deaths. In Queensland, 29% of victim/offender relationships were reported as intimate partners, compared with the national average of 21%.

During this period, 80% of intimate partner homicides in Australia involved a male killing his female partner and 43% of these occurred between current or separated defacto partners. Private homes were the setting for around 78% of the homicides, with only around 18% occurring in a more public area. Revelations from the data concerning the 74 intimate partner homicides during 2005-2006 include –

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117 M Davies & J Mouzos, ‘Homicide in Australia: 2005-06 National Homicide Monitoring Program Annual Report’. The NHMP has monitored the factors regarded to be consistent predictors of risk of involvement in homicide over its 17 years of operation and its research assists law enforcement agencies, policy makers and others.

118 M Davies & J Mouzos, p 2.

119 M Davies & J Mouzos, p 2.

120 M Davies & J Mouzos, p 3.


122 M Davies & J Mouzos, p 23.

123 M Davies & J Mouzos, pp 24-25.
that the homicide event is the end result of a culmination of prior incidents of domestic violence and much research has shown that a history of domestic violence is common in intimate partner homicides. In 2005-2006, a prior history of such was found in 53% of the intimate partner homicides and 12% of intimate partner homicides involved a current or expired intervention order;

that female victims were most likely to be killed with (in descending order) a knife or sharp instrument (27%), hands/feet (22%), or firearm (19%) by their male partners. Males were more likely to be killed with a knife or sharp instrument (80%) by their female partners. In one case, a woman who was jealous of the victim’s relationship with another woman stabbed him in a drunken rage;

the apparent motive for 58% of intimate partner homicides related to a domestic argument while 14% appeared to be due to jealousy and 14% were motivated by the ending of the relationship;

24% involved an Indigenous victim and offender and, in 92% of incidents, either or both were under the influence of alcohol. In intimate partner homicides involving non-Indigenous partners, 39% involved alcohol.

In 2005, an estimated 1.3 million Australian women aged 18 years and over (i.e. 17%) had experienced partner violence (actual, attempted or threatened physical or sexual) at some stage since turning 15 years of age. In the year leading up to the 2005 survey, 1% had experienced partner violence, down on the 5% who had done so prior to the 1996 survey. The women who appeared more likely to experience partner violence were those aged 25-34, with no higher levels of education, from lower socioeconomic groups, living in areas of greatest socioeconomic disadvantage, and having a past history of being abused as a child. In a large majority of cases (50%) of women reported that their partner’s consumption of alcohol or drugs had contributed to the violent incident.

Women who have violent partners can have a range of reactions. Some blame themselves and understate what is happening while others report the violence to the police and/or leave the partner. The two most cited reasons given by women who said in 2005 that they did not go to the police about a physical assault were that they thought they could deal with it themselves (40%) or fear of their partner

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124 S Linacre, Australian Bureaus of Statistics (ABS), ‘Women’s experience of partner violence’, Australian Social Trends 2007, ABS, 7 August 2007, Cat 4102.0, p 2. Data are from 1996 and 2005 surveys that collected information from women aged 18 and over. Respondents were asked questions about their experience of violence.

125 ABS, Australian Social Trends, pp 2-3.

126 ABS, Australian Social Trends, p 4.

127 ABS, Australian Social Trends, p 4.
(14%). Around two-thirds (63%) said that after reporting the assault to police, the partner was not charged.\textsuperscript{128}

4.2 OVERVIEW OF ARGUMENTS FOR AND AGAINST REFORMING PROVOCATION

The proponents for abolishing the partial defence of provocation raise the following arguments, a few of which have been discussed in some detail earlier in this Brief.

- That provocation condones violence – a sentiment apparently particularly felt by women who have suffered violence from partners whenever they hear media reports of a case where a man has received a generous verdict. There is a feeling that the law fails to hold men accountable for violence.\textsuperscript{129}

- That the defence is gender-biased – as extensively considered earlier – due to the difference in circumstances in which men and women kill. Leading up to the publication of its \textit{Defences to Homicide Final Report}, the VLRC conducted a homicide prosecutions study which confirmed that provocation is most often raised by men in the context of an intimate partner relationship in situations involving jealousy or need to retain control. Of the 27 cases studied, 24 men and 3 women raised the defence. Of the males, 12 of the incidents were in relation to intimate partners and, of these, 4 pleaded the defence successfully and were found guilty of manslaughter while 8 were convicted of murder. None of the 3 women who pleaded provocation in their defence succeeded.\textsuperscript{130}

- That loss of self control is no excuse for murder and does not provide a sufficient reason, moral or legal, to distinguish those people from cold-blooded killers. The community should be able to expect that people can control their impulses regardless of what provocation is offered.\textsuperscript{131}

- That matters going to provocation could be put to the court in mitigation of sentence, enabling the judge to exercise discretion at sentencing, rather than provoking behaviour being a question going to criminal responsibility at trial. The VLRC commented that it could be argued that the ‘ordinary person’ test is essentially a moral question for the jury – the jury makes a moral judgment.

\textsuperscript{128} ABS, \textit{Australian Social Trends}, p 5.

\textsuperscript{129} Taskforce on Women Report, p 187, citing a Canadian Department of Justice Consultation Paper on reforming defences, p 5.

\textsuperscript{130} VLRC Report, p 30. However, the sample size was very small.

about the degree of blameworthiness of the accused through applying the
ordinary person standard and whether, in the circumstances, a verdict of
manslaughter rather than murder is justified.\(^\text{132}\)

- That the defence of provocation has become confusing and uncertain in
application and is difficult for juries to understand.\(^\text{133}\)

- That the defence promotes a culture of victim blaming.\(^\text{134}\)

Arguments for retaining the defence of provocation (again, some have been
discussed earlier) include –

- That taking away the provocation defence eliminates the jury’s role in
homicide cases.\(^\text{135}\) Some submissions to the VLRC during the *Defences to
Homicide* reference supporting the retention of provocation argued that this
defence has the flexibility to reflect community standards (applied by the jury)
according to the circumstances of the time and the situation in which the
homicide occurs.\(^\text{136}\) A similar view presented was that leaving the question of
provocation to a jury of 12 people drawn from the community was preferable to
leaving it to one person – the judge.\(^\text{137}\)

- That the defence remains important in terms of gaining community acceptance
of reduced sentences for manslaughter rather than murder.\(^\text{138}\) There may be
issues about the community becoming unhappy if (in jurisdictions where a
mandatory life sentence does not apply) judges are seen to be giving ‘lenient’
sentences for murder by taking provocative behaviour into account.\(^\text{139}\)

- That, if it is not open to a jury to return a manslaughter verdict in a provocation
situation, when faced with the alternative of a murder verdict, the jury might

\(^{132}\) VLRC Report, p 47, citing I Leader-Elliot, ‘Sex, Race and Provocation: In Defence of Stingel’

\(^{133}\) *Taskforce on Women Report*, pp 187ff; VLRC, pp 34-35.

\(^{134}\) VLRC Report, p 26.

\(^{135}\) *Taskforce on Women Report*, p 189, citing an earlier Law Reform Commission of Victoria,

\(^{136}\) VLRC Report, p 38.

\(^{137}\) VLRC Report, p 38.


\(^{139}\) VLRC Report p 40.
completely acquit the accused out of sympathy to him or her.\textsuperscript{140} The comment has been made that ‘the law of provocation is just that every person has got a homicide in them if the right trigger is used, and that is the law of pushing people too far’\textsuperscript{141}

- On a similar vein, if a murder conviction was given because provocation was no longer able to be raised in defence, there may be public outrage about the unfairness of that verdict in certain cases.\textsuperscript{142}

- That there would be an irony if the very defence that is beginning to help women was to now be abolished. Women who kill abusive partners may be disadvantaged unless a reformed ‘provocation’ defence is developed or an alternative partial defence is formulated.\textsuperscript{143} In its Defences to Homicide: Final Report, the VLRC supported a broader scope for self-defence to operate.\textsuperscript{144}

## 5 REFORM OF THE DEFENCE OF PROVOCATION IN OTHER JURISDICTIONS

Some jurisdictions have reviewed, or are reviewing, the partial defence of provocation with a view to possible reform or, as has been the case in some jurisdictions, its abolition. Provocation has been abolished in Tasmania and Victoria.

### 5.1 VICTORIA

Impetus for the abolition of the provocation defence in Victoria appears to be the community reaction to the high profile case of James Ramage who was acquitted of murdering his estranged wife, relying on this partial defence. The verdict came

\textsuperscript{140} VLRC Report, p 38; see also comments by John Smallwood QC to Suzanna Lobez, ‘Manslaughter/provocation’, Law Matters, ABC TV, 9 July 2001, \url{http://www.abc.net.au}.

\textsuperscript{141} Comments by John Smallwood QC to Suzanna Lobez.

\textsuperscript{142} Comments by former Victoria Law Reform Commissioner David Neal to Damien Carrick, ‘Defences to Homicide’, The Law Report on ABC Radio National, 16 August 2005, \url{http://www.abc.net.au}.

\textsuperscript{143} Taskforce on Women Report, p 189, citing MCCOC, Discussion Paper, p 76.

\textsuperscript{144} VLRC Report, p 39.
close upon the release of the Victorian Law Reform Commission’s (VLRC) *Defences to Homicide: Final Report* in October 2004.145

Julie Ramage had left her husband and moved into a flat. She had apparently been unhappy in the marriage for some time. She had found that Ramage’s behaviour was controlling and oppressive and there were incidents of violence early on in the marriage. It seems that Ramage was anxious to reunite.146 The couple attended some counselling sessions and went out socially, although they were living apart. During this time, Julie had met another man and formed a relationship. However, the couple continued to seek counselling and Ramage tried to make changes to help save the marriage, such as renovating the family home and attending mediation therapy. Ramage did not know of Julie’s new romance until some time later but seemed to believe that it was not serious.

On the day the incident occurred, Julie came to the home, at Ramage’s invitation, to see the renovations. There is no direct evidence of what happened next apart from Ramage’s account in his interview record. The court accepted that the circumstantial evidence described a ‘spiralling confrontation in a manner which would not easily be invented’.147 Ramage claimed that Julie dismissed the renovations as being of no significance and he then pleaded with her to return. Julie had then said that she was ‘over’ him and that she should have left 10 years ago. When Ramage brought up Julie’s new male friend, she had replied that it was none of his business and had said how much nicer the new man was, that they shared interests and he cared for her. She also told Ramage that sex with Ramage ‘repulsed’ her and either said or implied that her new lover was much better. Ramage said, in his interview record, that at that point he had lost control and attacked Julie.

Medical evidence revealed blows to the face, indicating that she had fallen and struck her head severely, after which she was strangled to death. Ramage then dumped the body in a bush grave he dug and made phone calls designed to pretend he did not know where his wife was. On his return journey, he stopped in at a business premises and ordered granite bench tops for the kitchen after which he went home and assumed an air of normality with his son. Later that night, Ramage handed himself in to the police.148


Ramage was acquitted of murder and sentenced to 11 years imprisonment for the manslaughter of his wife (less time already served) with a non-parole period of 8 years. In his sentencing remarks the trial judge, Osborn J, said:

... I accept that it is likely that you were provoked to rage and anger by the confrontation with your wife. It is apparent from the evidence of a whole series of witnesses ... that you were extremely anxious, obsessed and emotionally fraught at the disintegration of your marriage.

... I accept that it is likely that at the time of the final confrontation with you and at the climax of an argument in which both parties said a series of hurtful things to each other, that you were unambiguously told what your feared most was true, namely that the marriage was over and that your wife had found a new lover.\footnote{R v Ramage [2004] VSC 508, para 35.}

There was considerable evidence before the court from doctors, psychologists and counsellors about Ramage’s obsessive anxiety and emotionally fraught state. Justice Osborn noted that the evidence supported the view that at the time of the fatal confrontation, Ramage was in ‘a state of extreme obsessive anxiety’. Thus, the jury was ‘entitled to conclude it was reasonably possible that Ramage was provoked to lose self control’.\footnote{R v Ramage [2004] VSC 508, paras 29-34.} His Honour said that, in addition, the jury must be taken to have had a reasonable doubt as to whether the ordinary person confronted with provocation of the gravity which Ramage may have felt in all the circumstances, would not have reacted as Ramage did. While noting that the application of the ordinary person test was pre-eminently a jury matter and that effect had to be given to the jury’s verdict, His Honour said—

... despite the personal vulnerability with which I accept you were afflicted, the gravity of provocation with which you were confronted was objectively far from extreme. It was rather of a character which many members of the community must confront during the course of the breakdown of a relationship. It was not a case of extreme provocation....\footnote{R v Ramage [2004] VSC 508, para 38.}

In imposing sentence, Osborn J took into account various mitigating factors such as prior good character, Ramage’s high achievement, that the killing occurred in circumstances of emotional stress and provocation, and Ramage’s admission of guilt to manslaughter. Against this was the fact that the killing was deliberate and brutal and it was not a case of objectively extreme provocation. Nor had Ramage appeared to have expressed real remorse. Osborne J noted:

\textit{After the fatal assault you made no attempt to ... obtain emergency assistance .... Rather, you embarked immediately on a sequence of careful and calculated actions to try and cover up ... cleaning the scene ... with detergent, removing the deceased’s}

\textit{}}
body and her belongings ... moving the deceased’s car ... taking with you a change of clothes ... and a spade and driving to the Yan Yean area.\textsuperscript{152}

At the conclusion of his sentencing remarks, Osborn J observed that there was a question of needing strong judicial responses to domestic killings that ‘involve the cruel and brutal subjugation of one party ... to the emotional inadequacy and violence of the other’. Later, His Honour said that such killings strike at the foundation of relationships within society and cannot be condoned by the law.\textsuperscript{153}

In the wake of the Ramage case, the Victorian Government received over 2,500 letters wanting reform of the defence of provocation. There was a feeling in the community that the defence was anachronistic and belonged to an era that was favourable to men in abusive relationships.\textsuperscript{154} As with the Sebo case, family and friends of the victim felt that it was Julie Ramage who was put on trial – without her being alive to defend herself\textsuperscript{155} – and painted as ‘duplicitous’ and ‘pleasure-seeking’.\textsuperscript{156}

In its \textit{Defences to Homicide: Final Report}, the VLRC recommended that provocation be abolished as a partial defence to murder. It considered that a person who intentionally kills should be convicted of murder and that provocation should be taken into account during sentencing. The VLRC considered that while extreme anger might partly explain a person’s actions, it did not mean such actions should be partly excused.\textsuperscript{157} Given that Victoria did not have a mandatory sentencing regime for murder, the defence of provocation as a concession to ‘human frailty’ was no longer needed.\textsuperscript{158}

After considering all of the arguments for and against the retention of the partial defence (many of which were discussed earlier) and possible alternative models, the VLRC found there was a compelling case favouring the abolition of provocation.\textsuperscript{159} It considered that intentional killing only justified a defence to murder in circumstances in which the accused honestly believed that his or her

\begin{itemize}
\item \textsuperscript{152} \textit{R v Ramage} [2004] VSC 508, para 34.
\item \textsuperscript{153} \textit{R v Ramage} [2004] VSC 508, paras 49, 53.
\item \textsuperscript{154} WJ Brookbanks, p 186.
\item \textsuperscript{155} G Coss, p 54, citing Phil Cleary, ‘Julie’s judicial betrayal’, \textit{Melbourne Herald Sun}, 29 October 2004, p 20.
\item \textsuperscript{156} Karen Kissane, ‘Honour killing in the suburbs’, \textit{Age}, 8 November 2004, p 8.
\item \textsuperscript{157} VLRC Report, p 52.
\item \textsuperscript{158} VLRC Report, p xx.
\item \textsuperscript{159} VLRC Report, p 55.
\end{itemize}
actions were necessary to protect himself, herself, or another person from harm. Further, the VLRC said that it seemed illogical to single out one scenario – loss of self control caused by provocation – as deserving of a defence as opposed to other factors and circumstances.\textsuperscript{160}

The VLRC said that the continued existence of the defence partly legitimises killings committed in anger and suggests that there are circumstances in which the community does not expect a person to control their impulses to kill or injure a person. It believed that this was particularly concerning when such a reaction is in response to a person exercising his or her rights to leave a relationship or start a new one or some other personal right. Anger or loss of self control, regardless of whether such feelings are understandable, commented the VLRC, is not a legitimate excuse for the use of lethal violence. People should be expected to control their behaviour.\textsuperscript{161}

In addition, the VLRC said that the defence also sends a message that the victim may have somehow contributed to, or must bear some of the blame for, his or her death which can be extremely upsetting for the victim’s friends and family.\textsuperscript{162}

The VLRC also believed that the test has many conceptual problems that are not easily resolved and is very confusing and difficult for juries to apply. It felt that reforming the defence would simply risk creating a new set of problems.

The VLRC acknowledged the strong views expressed during its consultation process that the defence should be retained to preserve jury participation in the determination of levels of culpability. However, it said that while it was ‘sympathetic to these views, if the defence were to remain, it would be logical to extend jury participation to determinations of levels of culpability to all crimes. In the case of most other offences, we as a community trust judges to make these decisions. As judges are required to give reasons for their decisions, they are open to public scrutiny and review through appeal processes’.\textsuperscript{163} To the extent that provocation may reduce an offender’s culpability, the VLRC believed that the victim’s provocative behaviour could be adequately taken into account by the judge at sentencing.\textsuperscript{164}

However, to ensure that women who might have been able to rely on provocation are not disadvantaged, the VLRC proposed reforms in relation to self-defence, including the reintroduction of ‘excessive self-defence’ (which became ‘defensive

\textsuperscript{160} VLRC Report, pp 55-56.
\textsuperscript{161} VLRC Report, p 56.
\textsuperscript{162} VLRC Report, p 56.
\textsuperscript{163} VLRC Report, p 57.
\textsuperscript{164} VLRC Report, pp 56-57.
homicide’ in the amending legislation). The VLRC also put up a proposal for the court to be able to receive evidence and information about family violence. The VLRC considered that the self-defence reforms it was proposing and the introduction of social framework evidence would be likely to result in better outcomes for women than to attempt to reform a conceptually confusing defence. Further, the VLRC did not believe that provocation was ever a very satisfactory defence for women who had experienced prolonged and serious abuse.\(^{165}\)

Provocation was abolished as a defence to murder in Victoria in November 2005.\(^{166}\) The reforms to the *Crimes Act 1958* (Vic) also included a new offence of ‘defensive homicide’ as an alternative to murder. Section 9AC provides for ‘self-defence’ so a person is not guilty of murder if he or she carries out the conduct that would otherwise constitute murder while believing the conduct to be necessary to defend himself, or herself, or another person from the infliction of death or ‘really serious injury’. ‘Defensive homicide’ under s 9AD occurs where the person does not have reasonable grounds for belief that the conduct is necessary to defend himself, or herself, or another person. In such a case a person is guilty of defensive homicide and liable to imprisonment for up to 20 years. This situation would not occur often because the two separate tests would really only matter where there is some reason why the accused would have genuinely believed that the conduct was necessary even though there are no reasonable grounds for such belief.\(^{167}\)

When the VLRC recommended the reintroduction of ‘defensive homicide (which was removed after a 1987 High Court decision),\(^{168}\) it expressed the view that a person who kills another person genuinely believing their life to be in danger but who cannot demonstrate the objective reasonableness of their actions, is deserving of a partial defence. The person intends to do something which is lawful and is, thus, in a different position to someone who intends to kill unlawfully.\(^{169}\)

In addition, s 9AH was inserted to affirm that in cases of murder, defensive homicide, or manslaughter involving family violence, a lack of immediacy will not necessarily mean that the accused did not believe that his or her actions were necessary and based on reasonable grounds to defend himself, herself, or another


\(^{166}\) *Crimes Act 1958* (Vic), s 3B. The amendments were made by the *Crimes (Homicide) Act 2005* (Vic).


\(^{168}\) *Zecevic v Director of Public Prosecutions (Vic)* (1987) 162 CLR 645.

\(^{169}\) VLRC Report, p xxii.
person.\textsuperscript{170} The court may admit evidence of matters such as the history of the relationship between the accused and a family member, including violence by the family member and the psychological effects thereof. Evidence of socioeconomic, cultural and other factors can also be considered. Thus, a jury can take into account evidence relating to ‘battered women’s syndrome’ and the cumulative effect of abuse, including expert evidence from witnesses such as psychologists. This may help juries understand what is reasonable behaviour for a woman subjected to long term abuse.\textsuperscript{171}

5.2 Tasmania

In 2003, Tasmania became the first Australian jurisdiction to abolish the defence of provocation with the passage of the\textit{ Criminal Code Amendment (Abolition of Defence of Provocation) Act 2003 (Tas)} repealing s 160 of the\textit{ Criminal Code Act 1924 (Tas)}.\textsuperscript{172}

When the legislation to abolish the defence was introduced into the Tasmanian House of Assembly, the Minister for Justice stated that provocation was a defence that was ‘gender biased and unjust. The suddenness element of the defence is more reflective of male patterns of aggressive behaviour. The defence was not designed for women and it is argued that it is not an appropriate defence for those who fall into the 'battered women syndrome'. While Australian courts and laws have not been insensitive to this issue, it is better to abolish the defence than to try to make a fictitious attempt to distort its operation to accommodate the gender-behavioural differences’.\textsuperscript{173} The main reason given for abolishing provocation was that ‘people who rely on provocation intend to kill. An intention to kill is murder. Why should the fact that the killing occurred when the defendant was acting out of control make a difference?’\textsuperscript{174}

In Tasmania, like in Victoria, murder no longer carries mandatory life imprisonment and therefore, the Minister pointed out, provocation can be considered as a factor during sentencing.\textsuperscript{174}

\textsuperscript{170} According to the Explanatory Notes to the Bill (p 4), s 9AH(1) affirms cases such as Osland.

\textsuperscript{171} A Hale et al, p 61.


\textsuperscript{173} Hon J Jackson MHA, Second Reading Speech, p 60.

\textsuperscript{174} Hon J Jackson MHA, Second Reading Speech, p 60.
5.3 NEW SOUTH WALES

In 1982, legislative changes were made to remove the requirement for ‘suddenness’ of the provocation and the need for a specific triggering incident. The reforms implemented recommendations made by a government taskforce on domestic violence who found that it was difficult for women suffering a history of abuse in a domestic situation to successfully rely upon the defence of provocation.175

Section 23 of the *Crimes Act 1900 ( NSW)* provides that:

23(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.

As emphasised by s 23, conduct can be sufficient to constitute provocation if it occurred ‘immediately before the act or omission causing death or at any previous time’.

In 1997, the New South Wales Law Reform Commission published *Report 83 – Partial Defences to Murder: Provocation and Infanticide* recommending retention of the defence but a reformulation of the ‘ordinary person’ test to make it simpler for juries to understand.176 The jury would determine whether –

... 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 or to have acted with...


reckless indifference to human life as to warrant the reduction of murder to manslaughter.\textsuperscript{177}

The reformulation retains a subjective element without reference to an ‘ordinary person’ standard. The defence would comprise a subjective test (actual loss of self control) qualified by applying general community standards of blameworthiness. The Commission seemed to think that the community would more likely to accept a lower sentence imposed for a provoked killing where the jury, rather than the judge, is assessing the guilt or innocence of the accused.\textsuperscript{178}

The recommendations of the Commission have yet to be adopted.\textsuperscript{179}

The VLRC, in its \textit{Defences to Homicide: Final Report}, noted that critics of this type of simplified approach argue that the jury has no real guidance on the standards to be applied in deciding whether the accused is guilty of murder.\textsuperscript{180} The VLRC said that it shared such concerns.\textsuperscript{181}

\section*{5.4 Other Jurisdictions}

As noted earlier, in June 1998, the \textbf{Model Criminal Code Officers Committee} (MCCOC) of the Standing Committee of Attorneys-General published its \textit{Discussion Paper, Fatal Offences Against the Person}, which considered provocation among a range of partial defences to murder.\textsuperscript{182} It recommended that provocation should be abolished and that the defence of excessive self-defence should not be reintroduced.\textsuperscript{183} It was considered that provocation was a

\textsuperscript{177} NSWLRC, Recommendation 2 suggesting how an amended s 23 should read.

\textsuperscript{178} NSWLRC, para 2.24.


\textsuperscript{180} VLRC Report, p 49, referring to comments of Lord Hobhouse in the English House of Lords judgment of \textit{R v Smith (Morgan)} [2001] 1 AC 146.

\textsuperscript{181} The Law Reform Commission of Western Australia in its \textit{Review of the Law of Homicide: Final Report}, September 2007, p 209 also agreed about the limits of the jury’s role in this context.


\textsuperscript{183} MCCOC, \textit{Discussion Paper}, pp 107, 113.
conceptually difficult defence and was essentially about moral culpability. Such questions were, thought the MCCOC, best left to the sentencing process.\footnote{MCCOC, \textit{Discussion Paper}, p 105.}

In terms of the availability of the defence to battered women, the MCCOC noted that the ‘suddenness’ requirement tends to reflect male aggressive patterns of behaviour (like duels and drunken pub fights). After noting that the law now made it easier for such women to rely on provocation, it nevertheless concluded that the attempts to modify the law of provocation to ‘fit’ the battered woman experience is to distort the concept of being ‘provoked’. Only abolition of the defence would remove the gender bias that has become entrenched in the law of provocation.\footnote{MCCOC, \textit{Discussion Paper}, p 91. When introducing legislation to abolish provocation into the Tasmanian House of Assembly, the Minister for Justice also noted the artificiality of attempting to fit the partial defence to women falling within the ‘battered woman syndrome’: see Second Reading Speech, p 60.}

Thus, provocation is not part of the Model Criminal Code or the Commonwealth Criminal Code.

The \textbf{Australian Capital Territory} amended s 13 of the \textit{Crimes Act 1900 (ACT)} to exclude non-violent sexual advances. Section 13(1) and (2) are very similar to s 23 of the NSW \textit{Crimes Act 1924} (and do not require a suddenness of response) but s 13(3) provides –

\begin{enumerate}
\item[(3)] However, conduct of the deceased consisting of a non-violent sexual advance (or advances) towards the accused—
\begin{enumerate}
\item[(a)] is taken not to be sufficient, by itself, to be conduct to which subsection (2)(b) applies; but
\item[(b)] may be taken into account together with other conduct of the deceased in deciding whether there has been an act or omission to which subsection (2) applies.
\end{enumerate}
\end{enumerate}

This means that a non-violent sexual advance by the victim towards the accused is, by itself, insufficient to amount to conduct that could have caused an ordinary person in the accused’s position to have so far lost self control as to have formed an intention to kill. It can, however, be taken into account, along with other conduct of the victim, in deciding whether there is provocation.

The \textbf{Northern Territory’s Criminal Code} (s 158) was similarly amended in 2006 to exclude non-violent sexual advances. When introducing legislation to amend the Code’s homicide defence provisions, the Attorney-General noted that it was necessary to retain the partial defence of provocation in Northern Territory criminal law because of the existence of the mandatory life imprisonment penalty for murder.\footnote{Dr P Toyne MLA, Minister for Justice and Attorney-General, Criminal Reform Amendment Bill 2006 (NT), Second Reading Speech, \textit{Parliamentary Record No 9}, 31 August 2006, \url{http://notes.nt.gov.au/lant/hansard/hansard10.nsf/WebFullTextTranscript/A4C8F120239D5489692571FC001FBACD?opendocument}.} Until this time, the accused’s cultural and ethnic characteristics were
considered within the objective ‘reasonable person’ test to cater for an Aboriginal accused so that the standard of self control was that expected of an Aboriginal person from that community. However, the legislative reforms adopted a completely objective test in determining standards of self control so that any characteristics of the accused are irrelevant. In addition, the redrafted provocation defence removed the need for the accused to have acted ‘suddenly’, thus making the defence available in ‘battered woman’ type cases.

Section 281 of the **Western Australian Criminal Code**, containing the partial defence of provocation, mirrors s 304 of the Queensland Criminal Code. Like Queensland, Western Australia has a mandatory life sentence for murder. The Law Reform Commission of Western Australia (LRCWA) released the *Review of the Law of Homicide: Final Report* in September 2007 which considers provocation and self-defence, among other defences to homicide. The LRCWA recommended that provocation be abolished as a partial defence but only if the LRCWA’s recommendation to replace mandatory life sentences for murder with a presumptive sentence of life imprisonment is implemented. The LRCWA believed that the only justification for retaining the defence in WA was the existence of mandatory life sentences for murder. To accommodate the situation where women kill in response to domestic abuse, the LRCWA made recommendations regarding reforming the law of self-defence and reintroducing ‘excessive self-defence’.

In the **United Kingdom**, the Law Commission (England and Wales) recommended reforms to the law of provocation in s 3 of the *Homicide Act 1957* in its *Murder, Manslaughter and Infanticide Report*, released in November 2006. The Report responded to a request to review the law of murder and recommended a restructuring of the offences of murder and manslaughter so that there would be a

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188 Dr P Toyne MLA, Second Reading Speech.


three-tiered structure. It recommended a reformulation of the provocation defence which would operate to reduce a proposed ‘first degree murder’ to ‘second degree murder’. Currently, provocation reduces murder to manslaughter. First degree murder would, as is currently the case with murder, attract a mandatory life sentence whereas second degree murder would have a maximum life sentence. It was recommended that the defence be reformulated in various ways, including removing the need for a loss of self control and to also allow the defence to be available where the accused kills in response to 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 and/or a fear of serious violence.  

New Zealand’s Law Commission has recommended abolishing provocation, preferring the issue to be dealt with during sentencing.

6 REVIEW OF PROVOCATION IN QUEENSLAND

As part of broad Terms of Reference to report on various legal issues affecting women, with a focus on violence, the 2001 Queensland Government’s Taskforce on Women and the Criminal Code considered the defences of provocation and self defence in the context of women’s experiences. After consultation with women and other stakeholders, the Taskforce recommended that the Department of Justice investigate the operation of the defence with a view to determining whether it needed to be reformulated or abolished. The Taskforce considered that more research was needed into how the defence was used and whether it caused injustice before any big steps were taken. It also recommended that the investigation include whether a new partial defence of ‘excessive self defence’ was a possible alternative.

As noted above, in July 2007, the Queensland Attorney-General announced that an audit would be undertaken by his Department to determine how often the provocation defence has been used in trials over the past five years, the nature of its use, and the outcome of the trial. While the Hon Kerry Shine MP has said that there was no proposal, at this stage, to amend the defence, he would use the results

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of the audit to undertake consultation with stakeholders, including the judiciary, the legal profession, and victims’ groups about the results, and gauge feedback. 197

6.1 Discussion Paper Audit on Defences to Homicide: Accident and Provocation

In October 2007, the Discussion Paper Audit on Defences to Homicide: Accident and Provocation was released. 198 It provides a review of the law, including a comparison of how the partial defence operates in other jurisdictions and reforms introduced to abolish provocation in Tasmania and Victoria. An important aspect of the paper is the presentation of the audit results of murder trials involving the use of the provocation defence. In addition, consideration is given to the role of the jury and the sentencing regime in Queensland in order to indicate the context in which difficult legal questions and factual situations come to be determined.

The overall questions posed by the Discussion Paper were whether the defence of provocation was appropriate when death results from a person’s actions and when should provocation provide a partial excuse to murder when other circumstances that may go to culpability do not. It was also noted that although some jurisdictions have abolished the defence, those places do not have mandatory life sentencing, thus allowing the victim’s provocative behaviour to be taken into account in sentencing the accused. 199

Central to the Discussion Paper was the audit of 80 murder trials occurring between July 2002 and March 2007, based on the availability of enough material to consider the trial properly such as trial transcripts and appeal records. The review team noted that there were limitations on the ability to draw conclusions because it could base its considerations only on the trial judge’s directions. Because of the confidentiality of jury deliberations, it was difficult to know what defence, in cases where more than one defence was raised, actually succeeded. In most cases, more than one excuse or defence was raised and an excuse or defence was sometimes raised in a situation where another issue might be important, such as the identity of the killer. 200

Of the 80 murder trials reviewed, provocation was raised 25 times (provocation is not available as a defence to a manslaughter charge). Eight defendants were found

197 Hon K Shine MP, ‘Audit of Queensland murder trials’.

198 The Discussion Paper and audit also considers the ‘accident’ defence contained in s 23 of the Criminal Code, the subject of the Parliamentary Library Research Brief No 2007/31.

199 Discussion Paper Audit on Defences to Homicide: Accident and Provocation, p 2.

not guilty and, of these, four were found guilty of manslaughter and one pleaded
guilty to manslaughter. However, only in two of the 25 cases was provocation the
only defence left to the jury and in one case the accused (Sebo) was acquitted. The
accused in the other case was convicted of murder.\textsuperscript{201} The audit team said that it
could not draw any firm conclusions about whether, in each of the cases where
provocation was raised, the verdict was due to the provocation defence.\textsuperscript{202}

The \textit{Discussion Paper} points out that Queensland differs from Victoria in imposing
a mandatory life sentence for murder. This means that if the provocation defence
was abolished, the various acts of the victim – that may have amounted to
provocative behaviour – cannot be taken into account by the judge when
sentencing the defendant. In Victoria, although provocation has been abolished,
the actions of the victim are matters that the judge can consider in imposing
sentence.\textsuperscript{203} The \textit{Discussion Paper} notes that if provocation was abolished under
the Queensland Criminal Code, a person who kills in response to a provocation will
be given a mandatory life sentence as would a person who premeditates a murder
or kills during a robbery. Because the current effect of provocation is to reduce
murder to manslaughter, if it were to be abolished, it would not be a consideration
for the jury in deliberating whether or not to convict for murder. It is possible that
the jury might not return a verdict of murder carrying a mandatory life sentence if
it felt that the accused was provoked.\textsuperscript{204}

The LRCWA has recommended the abolition of the provocation partial defence in
Western Australia but only on the basis that mandatory life sentences are removed.

As noted earlier, the issue of provocation as a partial defence under the Queensland
Criminal Code has been referred to the Queensland Law Reform Commission
which has been asked by the Queensland Attorney-General to report by 25
September 2008.\textsuperscript{205}

\begin{footnotesize}
\textsuperscript{201} \textit{Discussion Paper Audit on Defences to Homicide: Accident and Provocation}, p 39.
\textsuperscript{202} \textit{Discussion Paper Audit on Defences to Homicide: Accident and Provocation}, p 40.
\textsuperscript{203} \textit{Discussion Paper Audit on Defences to Homicide: Accident and Provocation}, p 23.
\textsuperscript{204} \textit{Discussion Paper Audit on Defences to Homicide: Accident and Provocation}, p 19.
\textsuperscript{205} Hon K Shine, ‘QLRC to Consider Murder and Manslaughter Trials’.
\end{footnotesize}
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