

# PROVOCATION: A TOTALLY FLAWED DEFENCE THAT HAS NO PLACE IN AUSTRALIAN CRIMINAL LAW IRRESPECTIVE OF SENTENCING REGIME

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## ABSTRACT

Why another article on provocation when this partial defence to murder is already the subject of widespread criticism in the literature? The answer is because the defence is still available in five Australian jurisdictions. Furthermore, there is no consistency across the jurisdictions that have reviewed the defence. Recently, Western Australia elected to abolish the defence, but Queensland has decided to retain it. Internationally, New Zealand has removed the defence from its statute book, but the United Kingdom, Canada and the United States continue to allow the defence. This article identifies the heart of the problem as being mandatory life sentencing for murder, and seeks to argue that the partial defence of provocation is so flawed and gender biased that it is the sentencing regime that needs to be adjusted, especially as 'life' rarely actually means 'for the term of his natural life'. Nevertheless, given vested interests and the difficulty of introducing legal reform, the fallback position taken in this article is that if the defence of provocation is to be retained then it is necessary to make the defence much more difficult to run by reversing the onus of proof and by narrowing the scope of the defence. It is contended that the Western Australian Government took the correct path by abolishing the partial defence of provocation and amending the mandatory life penalty for murder. The complementary contention is that the Queensland Government in retaining an amended partial defence of provocation and the mandatory life penalty for murder has opted for a second best solution.

## I. INTRODUCTION

*The Moving Finger writes; and, having writ,  
Moves on: nor all thy Piety nor Wit*

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*Shall lure it back to cancel half a Line,  
Nor all thy Tears wash out a Word of it.<sup>1</sup>*

This article critically examines the partial defence to murder of provocation, which if not negated beyond reasonable doubt by the prosecution, reduces murder to manslaughter. Provocation can be traced back to the 17<sup>th</sup> century, when the criminal law distinguished between a killing where there was proof of malice aforethought, and an unpremeditated killing on the spur of the moment following a provocative act.<sup>2</sup> The distinction was significant at a time when capital punishment was the penalty for murder and could only be avoided if the defendant lacked malice aforethought.<sup>3</sup> ‘Manslaughter was only available where the killing had occurred “suddenly” and in “hot blood” in response to an act of provocation by the deceased.’<sup>4</sup>

Three Australian jurisdictions (Tasmania, Victoria and Western Australia), and New Zealand, have in recent times abolished the partial defence of provocation. This article contends that provocation is a totally flawed defence that has no place at all in any Australian jurisdiction irrespective of the particular sentencing regime. Over the years, numerous Law Reform Commissions have closely studied the partial defence of provocation and have universally concluded that where the sentence for murder is mandatory life imprisonment, the defence should be retained.<sup>5</sup> Such an approach can be likened to the days when capital punishment existed and juries were reluctant to convict for murder lest the defendant be executed. This argument, that

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<sup>1</sup> Rubaiyat of Omar Khayyam, Rendered into English Verse by Edward Fitzgerald, Collins, 1971, 78.

<sup>2</sup> See Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (2010) 293.

<sup>3</sup> *Ibid*, 295, citing *Royley’s case* (1612) Cro Jac 296; *Nugget* (1666) 18 Car 2; *R v Mawgridge* (1707) 84 ER 1107.

<sup>4</sup> *Ibid*, 294.

<sup>5</sup> See, for example, Queensland Law Reform Commission, ‘*A Review of the Excuse of Accident and the Defence of Provocation*’, Report No 64 (2008) 10. The Commission was advised as part of its terms of reference that the Queensland Government did not intend to change the mandatory life sentence for murder (see page 3). As a result, the Commission recommended (see page 10 and 21.1) provocation be retained. ‘Given the *constraint* of the Government’s stated intention to make no change to the existing penalty of mandatory life imprisonment for murder, the Commission recommends that the partial defence of provocation to murder contained in s 304 *Criminal Code* (Qld) remain, but recommends changes to it.’ (Emphasis added.) Other examples of Law Reform Commissions treating the presence or absence of mandatory life imprisonment for murder as the touchstone of the retention of the partial defence of provocation include The Law Commission of England and Wales, *Partial Defences to Murder*, Law Com No 290 (2004); Victorian Law Reform Commission, *Defences to Homicide: Final Report* (2004); and the Law Reform Commission of Western Australia, *Review of the Law of Homicide*, Final Report, Project No 97 (2007).

a mandatory life sentence for murder justifies the retention of the partial defence of provocation, is met head on and found wanting because the defence has no merit. The two part test most commonly adopted is both confusing and irrelevant to sheeting home criminal responsibility for an intentional killing. This article is therefore at odds with proponents of the partial defence of provocation who argue that provoked killers should be allowed to carry the lesser stigma of manslaughter because it labels such killers accurately, and to whom society is sympathetic because the killing was not premeditated.<sup>6</sup>

The vehicle used in this article for the analysis of the partial defence of provocation is the *Criminal Code* 1983 (NT). The Northern Territory has been selected for two main reasons. Firstly, because the Northern Territory has, along with South Australia, the toughest sentencing regime in Australia for murder with a mandatory minimum twenty year sentence before a person is even eligible for parole. Secondly, whilst the Northern Territory is in the process of applying Chapter 2 of the *Criminal Code* 1995 (Cth) in stages to all offences (which contains no defence of provocation), the Northern Territory Government specifically retained the partial defence of provocation in 2006 for the stated reason of its mandatory life sentence for murder. It is contended that this is a classic case of the sentencing tail wagging the criminal responsibility dog.

Any analysis of the partial defence of provocation also needs to take place in the context of other available defences such as the partial defence to murder of diminished responsibility, and whether, if provocation is abolished, excessive self defence should be available, particularly to women who kill abusive husbands, as was the case in

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<sup>6</sup> See, for example, the New South Wales Law Reform Commission, *'Partial Defences to Murder: Provocation and Infanticide'*, Report 83 (1997) 2.23. 'In the Commission's view, there are circumstances in which a person's power to reason and control his or her actions accordingly is impaired by a loss of self-control to such an extent as markedly to reduce that person's culpability for killing. Through the defence of provocation, the law offers a degree of compassion to those whose will to act rationally is overcome by a loss of self-control in circumstances where the community generally can understand or sympathise with their reaction. While there may be other extenuating circumstances in which a person kills and which ought to be recognised as mitigating that person's punishment, it is appropriate that loss of self-control be expressly recognised by way of a defence of provocation because it is a condition which significantly impairs the accused's mental state and reduces his or her blameworthiness. Given that, in our criminal justice system, culpability for serious offences is assessed according to an accused's mental state in committing that offence, factors which significantly affect that mental state should be recognised as reducing the accused's responsibility for his or her actions.' (2.28 and original emphasis.)

Victoria when that State abolished provocation in 2005. The partial defence of diminished responsibility (which is available in four Australian jurisdictions, including the Northern Territory, although not in Victoria), like provocation, reduces murder to manslaughter, but unlike provocation, the onus of proof is placed on the defence on the balance of probabilities. There have been some recommendations that rather than abolish the partial defence of provocation completely, it should be amended such that the onus of proof is on the defence. One justification for the reversal of the onus of proof for provocation is that it would then be consistent with the onus of proof for diminished responsibility. Other suggestions have included excluding a provocation based on words alone or the deceased's choice about a relationship.

It is contended that these proposed amendments are unsatisfactory in isolation. It will be argued that provocation is an historical anachronism; an unacceptable legal concession to male weakness and frailty, that allows anger and loss of self-control to be a mitigating factor when the reverse should be the case, especially as no such mitigation is shown to 'compassionate killings'. Killing someone in response to a provocation, no matter how severe, is never the response of an ordinary person. Today, there is no place for the law to send a misguided message that draws a distinction between provoked and unprovoked killings, based on killing someone in the heat of passion as opposed to a premeditated killing.<sup>7</sup> The partial defence of provocation is both open-ended as to the emotions allegedly driving the defendant, biased in favour of heterosexual men who are the main beneficiaries of the defence,<sup>8</sup> and promotes a culture of blaming the victim who is not present in court to give her (or less frequently his) version of events.<sup>9</sup>

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<sup>7</sup> Ibid, 2.2. 'In the 16th century, "murder" was defined as killing with "malice aforethought", at that time interpreted as meaning killing with cold-blooded premeditation. Malice aforethought was implied by law unless it could be shown that the killer acted upon provocation, in sudden anger or "hot blood", in which case he or she would be convicted of manslaughter instead of murder. The distinction between murder and manslaughter was based on different underlying degrees of blameworthiness, reflected in differences in the punishment imposed.'

<sup>8</sup> The Victorian Law Reform Commission examined a sample of 182 people charged with homicide offences. Of the 109 who chose to proceed to trial, at least 27 raised provocation as a defence of whom 24 were male and only 3 were female. See Victorian Law Reform Commission, 'Defences to Homicide: Options Paper' (2003) 51. This is unsurprising as in Australia in 2005-06, a total of 88% of homicide offenders were male. Megan Davies and Jenny Mouzos, *Homicide in Australia: 2005-06 National Homicide Monitoring Program (NHMP) Annual Report* (2007) Australian Institute of Criminology, 60. Given the different circumstances that men and women charged with murder raise the defence of provocation, with men killing out of jealousy or to maintain control and women killing out of fear, see also Jenny Morgan, 'Provocation

Given that the prosecution is rarely in a position to contest the defendant's version of events, as the only other witness has been killed by the defendant, this is a strong justification for reversing the onus of proof upon a defendant raising the partial defence of provocation.<sup>10</sup> Where the defendant has to prove provocation on the balance of probabilities, the claim of provocation will likely need to be articulated more clearly, with the trial judge having a greater capacity to prevent weak claims going to the jury. This article supports the reversal of the onus of proof in the absence of the abolition of the defence.

In line with present community standards, this article calls for the complete abolition of the partial defence of provocation across Australia. As a second best solution, the price to abolish provocation in the Northern Territory may require a legislative package amending the *Sentencing Act 1995* (NT) to widen the 'exceptional circumstances' provision for murder, as well as the introduction of defensive homicide in domestic violence situations similar to legislation introduced in Victoria in 2005 and Queensland in 2010. Finally, the least preferred option is the retention of the partial defence of provocation, but with an objective test only, with a narrowing of the definition of provocation, and with the onus of proof placed on the defence on the balance of probabilities. As Bronitt and McSherry acknowledge 'it may be more realistic to work towards circumscribing the scope of the offence and providing a more workable objective component than to abandon it entirely'.<sup>11</sup>

## II. BACKGROUND

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Law and Facts: Dead Women Tell No Tales, Tales are Told about Them' (1997) 21 *Melbourne University Law Review* 237.

<sup>9</sup> Research conducted by Barry Mitchell and Sally Cunningham for the Law Reform Commission of England and Wales showed that provocation was the second most popular plea in the sample of murder cases examined (22.3%) after denial of intent (39.4%). See Law Reform Commission of England and Wales, *Murder, Manslaughter and Infanticide*, Law Com No 304 (2006), 5.5 and Appendix C. In a recent review in Queensland of 80 murder trials, provocation was raised in 25 of those trials out of which five defendants were convicted of manslaughter and three were acquitted. The outcome is complicated because in only two of the 25 cases was provocation the only defence left to the jury. See Queensland Department of Justice and Attorney-General, *Discussion Paper Audit on Defences to Homicide: Accident and Provocation* (2007) 39.

<sup>10</sup> See above Queensland Law Reform Commission, n 5, 20.225 and footnote 1491.

<sup>11</sup> See above Bronitt and McSherry, n 2, 327.

*I had all the provocation in the world to kill ... I had no malice or spleen against him ... It was not designedly done, but in my passion, for which I am heartily sorry.*<sup>12</sup>

Although the leading case on provocation, *Stingel v The Queen* (1995) 183 CLR 58 (“*Stingel*”) concerned the now repealed provisions of the *Criminal Code* (Tas), ‘the High Court has observed that there is a large degree of conformity in the law of provocation, whether it be common law or statutory [and] the High Court subsequently affirmed that the test in *Stingel* equally applied to the common law’.<sup>13</sup> In Queensland, where s 304 *Criminal Code* (Qld) is the relevant section, Kenny states that ‘in the absence of a statutory definition of provocation for murder, reliance is placed upon the principles pertaining to provocation as they develop at common law’.<sup>14</sup>

A man named Stingel, aged nineteen, killed a man named Taylor by stabbing him in the chest with a butcher’s knife. For some time Stingel had stalked his ex-girlfriend, who had obtained a court order restraining Stingel from approaching her or talking to her. The facts leading up to the killing of Taylor were disputed. On the version of events most favourable to Stingel, he had come upon Taylor and his ex-girlfriend engaging in sexual activity in a car, opened the car door, was verbally abused by Taylor, then went to his own car where he collected a butcher’s knife, and returned to stab Taylor. Stingel was convicted of murder. Stingel’s appeal to the High Court concerned the trial judge’s refusal to leave provocation with the jury, and the case afforded the High Court the opportunity to reassess the test for provocation.

The central issue in *Stingel* was the interpretation of the test in the now repealed s. 160(2) of the *Criminal Code* 1924 (Tas) that required the wrongful act or insult to be ‘of such a nature as to be sufficient to

<sup>12</sup> William Kidd (1645 – 1701), executed for piracy. One of the reasons for the development of the defence of provocation was to spare ‘hot blooded’ killers from the death penalty. See Graeme Coss, ‘“God is a righteous judge, strong and patient: and God is provoked every day”. A Brief History of Provocation in England’ (1991) 13 *Sydney Law Review* 570, 601.

<sup>13</sup> See above, Bronitt and McSherry, n 2, 297, citing *Stingel v The Queen* (1990) 171 CLR 312, 320 and *Masciantonio v The Queen* (1995) 183 CLR 58, 66.

<sup>14</sup> R. G. Kenny, *An Introduction to Criminal Law in Queensland and Western Australia* (2008) 250, citing inter alia *Johnson* [1964] Qd R 1, 4-6; *Callope* [1965] Qd R 456, 465; *Pangilinan* [2001] 1 Qd R 56, 64; *Vidler* (2000) 110 A Crim R 77, 84. South Australia relies on the common law (*The Queen v R* (1981) 28 SASR 321). The other jurisdictions that retain the partial defence of provocation adopt a version of the two part test in *Stingel v R* (1990) 171 CLR 312: *Crimes Act* 1900 (NSW) s 23; *Crimes Act* 1900 (ACT) s 13; *Criminal Code* 1983 (NT) s 158.

deprive an ordinary person of the power of self-control', which involved an objective threshold test. The High Court held that such an objective test could not be answered without an objective assessment of the gravity in the circumstances of the particular case of the wrongful act or insult:

*[T]he fact that the particular accused lacks the power of self-control of an ordinary person by reason of some attribute or characteristic which must be taken into account in identifying the content or gravity of the particular wrongful act or insult will not affect the reference point of the objective test, namely, the power of self-control of a hypothetical 'ordinary person'.<sup>15</sup>*

Six years before *Stingel* was decided, the *Criminal Code* 1983 (NT) came into law, on 1 January 1984. Section 34(2), which was operative until 20 December 2006 and which was based on s 304 *Criminal Code* (Qld),<sup>16</sup> dealt with the partial defence to murder of provocation as follows:

(2) *When a person who has unlawfully<sup>17</sup> killed another under circumstances that, but for this subsection, would have constituted murder,<sup>18</sup> did the act that caused death because of provocation<sup>19</sup> and to the person who gave him that provocation,<sup>20</sup> he is excused from criminal responsibility for murder and is guilty of manslaughter only provided –*

<sup>15</sup> *Stingel v R* (1990) 171 CLR 312, 332. The only qualification made by the High Court was to allow on grounds of fairness and common sense that 'at least in some circumstances, the age of the accused should be attributed to the ordinary person of the objective test' (329). While the High Court referred to an objective assessment of the gravity of the provocation, the assessment of the content and extent of the provocative conduct from the viewpoint of the defendant is generally understood to be the subjective element of the defence. See above, Bronitt and McSherry, n 2, 297.

<sup>16</sup> *Criminal Code* 1899 (Qld) Section 304 Killing on Provocation states: '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.'

<sup>17</sup> 'Unlawfully' is defined in s 1 as 'without authorisation, justification or excuse'.

<sup>18</sup> Manslaughter committed under circumstances of provocation is a species of 'voluntary' manslaughter which arises where the defendant possesses both the external and fault elements of murder and thus would otherwise be guilty of murder.

<sup>19</sup> 'Provocation' was defined under the now repealed definition in s 1 as: 'Any wrongful act [an act that is wrong by the ordinary standards of the community] or insult of such a nature as to be likely, when done to an ordinary person, or in the presence of an ordinary person, to deprive him of the power of self-control.'

<sup>20</sup> The provocation must have come from the victim but the provocation need not be aimed at the defendant provided it is someone with whom the defendant has a close relationship. In *R v Terry* [1964] VR 248 the provocation was aimed at the defendant's sister.

- (a) *he had not incited the provocation;*
- (b) *he was deprived by the provocation of the power of self-control;*
- (c) *he acted on the sudden and before there was time for his passion to cool; and*
- (d) *an ordinary person similarly circumstanced would have acted in the same or a similar way.*

Section 34(2) above reflects the historical common law defence of provocation,<sup>21</sup> and the then definition of provocation in s. 1 allowed the provocation to be either an act or an insult. This wide definition of provocation is retained in the new s. 158 of the *Criminal Code* (NT) and will be critically discussed in the following section where it will be contended that an insult or gesture should be excluded from the legal definition of provocation in order to narrow the scope of the partial defence should it be retained.

Section 34(2)(a) was designed to ensure that the accused cannot have incited or set up the situation where the victim acts in a provocative way. Thus, an accused could not rely on the predictable results of his or her own conduct unless the hostile reaction of the victim was extreme.<sup>22</sup>

Section 34(2)(b) dealt with the subjective test of the defendant being deprived by the provocation of the power of self-control, which was and remains under s 158(2)(a) a difficult task for the prosecution to negative beyond reasonable doubt. Effectively, the prosecution, in order to knock out the partial defence of provocation at the deprivation of self-control stage, has to prove beyond reasonable doubt that the conduct was premeditated. Here, subjective refers to the actual mental state of the accused, whereas objective refers to the 'supposed mental state of a hypothetical reasonable person acting in the way in which the accused acted'.<sup>23</sup> The difficulties in explaining such a subjective test to

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<sup>21</sup> For a classic statement of the tests for provocation at common law, see King CJ in *The Queen v R* (1981) 28 SASR 321, 322. 'To amount in law to provocation the acts or words must satisfy the following tests: (1) they must be done or said by the deceased to or in the presence of the killer; (2) they must have caused in the killer a sudden and temporary loss of self-control rendering the killer so subject to passion as to make him for the moment not master of his mind; (3) they must be of such a character as might cause an ordinary person to lose his self-control to such an extent as to act as the killer has acted.'

<sup>22</sup> *R v Allwood* (1975) 18 A Crim R 120. Ian Leader-Elliott has likened enraged men who engineer a confrontation, lose all self-control and then kill to being 'morally speaking, murderers'. Ian Leader-Elliott, 'Sex, Race and Provocation: In Defence of *Stingel*' (1996) 20 *Criminal Law Journal* 72, 85.

<sup>23</sup> Jonathan Clough and Carmel Mulhern, *Criminal Law* (2004) 17.



a jury are magnified where the full test for provocation comprises both a subjective and an objective component. The objective limb is to be found in s 34(2)(d) above as to whether an ordinary person similarly circumstanced would have acted in the same or a similar way. The Supreme Court of the Northern Territory developed its own jurisprudence in relation to ‘an ordinary person similarly circumstanced’ (as compared with ‘ordinary person’ in s 160(2) *Criminal Code* 1924 (Tas) in *Stingel*) as Kearney J explained in *Jabarula v Poore*:<sup>24</sup>

*The Territory has developed its own jurisprudence in relation to the ‘ordinary person’, who constitutes the objective standard which an accused must meet, both for loss of self-control in the definition of ‘provocation’ in s.1, and for the nature and degree of retaliation in s.34(1)(d). It stems from the path-breaking judgments of Kriewaldt J, as his Honour gradually adapted the common law of provocation, which then applied in the Territory, to the cultural patterns of Aboriginal life in the Territory.*<sup>25</sup>

Kearney J in *Jabarula v Poore* followed Kriewaldt J in considering that an ‘ordinary person’ for the purposes of s.34(1)(d) of the *Criminal Code* (NT) meant ‘an ordinary Aboriginal male person living today in the environment and culture of a fairly remote Aboriginal settlement, such as Ali Curung’.<sup>26</sup> *Jabarula v Poore* was decided a year before the High Court decision in *Stingel v R*,<sup>27</sup> but *Mungatopi v The Queen*<sup>28</sup> was decided just after *Stingel v R* (only age can be imported into the objective test) where the Northern Territory Court of Criminal Appeal confirmed previous Northern Territory jurisprudence that the ordinary person test was not to be applied in a vacuum and without regard to the accused’s personal characteristics, which was justified on the

<sup>24</sup> *Jabarula v Poore* NTSC 24 (9 June 1989).

<sup>25</sup> *Jabarula v Poore* NTSC 24 (9 June 1989) [33]. Kearney J referred to a string of judgments of Kriewaldt J in the 1950’s. These included the 1951 judgment of *R v Patipatu* (1951 – 1976) NTJ 18, 20 in terms of the reaction to a provocation of ‘an ordinary reasonable (Aboriginal) person in that vicinity and of that description’; the 1953 judgment in *R v MacDonald* (1951 – 1976) NTJ 186, 190 where the test of ‘the average reasonable (Aboriginal) native of Australia’ was used; in 1956 in *R v Muddarubba* (1951 – 1976) NTJ 317, 322 Kriewaldt J spoke of ‘a standard which would be observed by the average person in the community in which the accused person lives’; and in both the 1959 case of *R v Jimmy Blair* (1951 – 1976) NTJ 633, 637, and the 1956 case of *R v Nelson* (1951 – 1976) NTJ 327, 335, Kriewaldt J clearly stated that it was open to the jury to take the view that an ordinary Aboriginal might take longer to cool down and might retaliate in a different way after being provoked.

<sup>26</sup> *Jabarula v Poore* NTSC 24 (9 June 1989) [38].

<sup>27</sup> *Stingel v R* (1990) 171 CLR 312.

<sup>28</sup> *Mungatopi v The Queen* (1992) 2 NTLR 1 (Court of Criminal Appeal).

grounds of differences between the *Criminal Code* (NT) and the *Criminal Code* (Tas).<sup>29</sup>

As will be discussed in the next part, the new s. 158(2)(b) uses the words 'ordinary person' rather than 'ordinary person similarly circumstanced' in an attempt to confine the objective test to age only as per *Stingel v R*. However, it took the Northern Territory legislature some 16 years post *Stingel v R* to counter judicial expansion of the partial defence of provocation through the dilution of the objective person test in s. 34(2)(d). This article contends such judicial expansion is a function of the open-ended nature of the partial defence of provocation.

Section 34(2)(c), which required the accused to have acted on the sudden and before there was time for his passion to cool, reflected the essence of the anger defence of provocation. In *Parker v The Queen*, Dixon CJ considered the history of the defence of provocation through an examination of classic legal texts, citing East's *Pleas of the Crown* as authority for the law presuming a provocation might 'heat the blood to a proportionable degree of resentment, and keep it boiling to the moment of the fact: so that the party may rather be considered as having acted under a temporary suspension of reason, than from any deliberate malicious motive'.<sup>30</sup> His Honour continued by noting that the manner of life and moral relations were remote from those of today, citing Holdsworth's observation as to 'the readiness with which all classes resorted to lethal weapons to assert their rights'.<sup>31</sup>

Dixon CJ was writing in 1963 and in the context of a killing that occurred some 20 minutes after the initial provocation when the appellant chased after his wife and her lover such that his Honour was

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<sup>29</sup> Yeo criticised this line of cases on the basis that 'their decisions had the effect of promoting a greater evil, namely, a negative stereotype of Aborigines being at a lower order of evolutionary scale than other ethnic groups'. Stanley Yeo, 'Sex, Ethnicity, Power of Self-Control and Provocation Revisited' (1996) 18 *Sydney Law Review* 304, 316. De Pasquale has also attacked the *Mungatopi* view of the ordinary person test as sexist because the Court used the standard of an ordinary Aboriginal male and did not question whether what was presented as 'culture' was contested within indigenous communities. Santo De Pasquale, 'Provocation and the Homosexual Advance Defence: The Deployment of Culture as a Defence Strategy' (2002) 26 *Melbourne University Law Review* 110.

<sup>30</sup> *Parker v The Queen* (1963) 111 CLR 610, 627, citing East's *Pleas of the Crown* (1803) Vol 1, 238.

<sup>31</sup> *Parker v The Queen* (1963) 111 CLR 610, 627, citing Sir W. S. Holdsworth, *History of English Law*, Vol. 8, 302. Failure to retaliate to an affront to a man's honour was seen as cowardly. See G.R. Sullivan, 'Anger and Excuse: Reassessing Provocation' (1993) 13 *Oxford Journal of Legal Studies* 421, 422-423.

of the view that 'a provocation [was] still in actual operation when Parker [the appellant] came upon Dan Kelly [the deceased] with his wife'.<sup>32</sup> However, the above extract bears close scrutiny because it is illuminating in support of the argument that provocation is an historical anachronism that should be abolished.

Firstly, there is the comment that the blood has been heated to a 'proportionable degree of resentment', which clearly indicates that the provocation had to be severe. As will be discussed in the following section, this historical criterion of proportionality has been explicitly excluded under s. 158(6)(a) *Criminal Code* (NT). Secondly, there is the intriguing observation, more reminiscent of the defence of diminished responsibility than the defence of provocation, that the defendant was acting 'under a temporary suspension of reason than from any deliberate malicious motive'. By contrast, the modern day defence of provocation is explicitly based on the defendant possessing the fault element of intention for murder and is quite separate from the defences of mental impairment or diminished responsibility. Thirdly, there is the reference to duelling and the community's acceptance of the use of lethal weapons to defend one's honour<sup>33</sup> in a bygone age.

The High Court in *Pollock v The Queen*<sup>34</sup> discussed the related concepts of 'suddenness' and there being time 'for passion to cool' and noted 'they can be traced to the emergence of the doctrine [of provocation] as the conceptual basis for reducing murder to voluntary manslaughter in the 17<sup>th</sup> century ... at a time when duelling was commonplace'.<sup>35</sup> The High Court cited the 1666 trial of Lord Morley where it was decided that if two parties 'suddenly fight' and one is killed this is manslaughter because 'it is combat betwixt two upon a sudden heat',<sup>36</sup>

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<sup>32</sup> *Parker v The Queen* (1963) 111 CLR 610, 628. Ian Leader-Elliott has suggested that prior to the nineteenth century it was necessary for the defendant to literally catch the adulterers in the act. Ian Leader-Elliott, 'Passion and Insurrection in the Law of Sexual Provocation' in Rosemary Owens and Ngaire Naffine (eds), *Sexing the Subject of Law* (1997) 153.

<sup>33</sup> See above New South Wales Law Reform Commission, n 6, 2.3 and footnote 3. 'These categories [of conduct which the courts regarded as sufficiently grave to constitute provocation] consisted of: gross insult accompanied by an assault; an attack upon one's friend, relative, or kinsman; unlawful deprivation of liberty; and witnessing a man in the act of adultery with one's wife. This last category was later expanded to include witnessing a man committing sodomy on one's son.'

<sup>34</sup> *Pollock v The Queen* [2010] HCA 35 [48] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

<sup>35</sup> *Pollock v The Queen* [2010] HCA 35 [48] (French CJ, Hayne, Crennan, Kiefel and Bell JJ), citing *Parker v The Queen* (1963) 111 CLR 610, 625 - 628 (Dixon CJ); 650 - 652 (Windeyer J).

<sup>36</sup> *The Trial of Lord Morley* (1666) 6 St Tr 770, 771.

whereas if two men argue and then after a time when 'their heat might be cooled' they fight and one dies this is murder because it was presumed 'to be a premeditated revenge upon the first quarrel'.<sup>37</sup>

Thus, while 'suddenness' and time 'for passion to cool' have both 'undergone development in the modern law',<sup>38</sup> they are rooted in the 17<sup>th</sup> century and came to Australia from the outset with the adoption of English common law. The common law doctrine of provocation was then adopted in the Griffith Codes. As the High Court noted in *Pollock v The Queen*,<sup>39</sup> '[t]he use of the expression "sudden provocation" [in s 304 of the *Criminal Code 1899* (Qld)] was intended to import well-established principles of the common law concerning the partial defence in the law of homicide'.

It is not without significance that the least satisfactory section dealing with the partial defence to murder of provocation is s. 304 of the *Criminal Code* (Qld)<sup>40</sup> minted circa 1899, and, at the time of writing, unchanged since then. Presently, s. 304 is more reflective, compared to any other equivalent provocation section in Australian criminal law jurisdictions, of a nineteenth century that condoned the use of weapons (or a greater tolerance of physical violence)<sup>41</sup> than a twenty-first century that embraces equality of women and respect for human rights. At least the now repealed s. 34(2) of the *Criminal Code 1983* (NT) attempted to put some limited boundaries around the partial defence

<sup>37</sup> *The Trial of Lord Morley* (1666) 6 St Tr 770, 771 – 772.

<sup>38</sup> *Pollock v The Queen* [2010] HCA 35 [48] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

<sup>39</sup> *Pollock v The Queen* [2010] HCA 35 [47] (French CJ, Hayne, Crennan, Kiefel and Bell JJ). The High Court observed in footnote 15 that: 'Sir Samuel Griffith considered c312 of his draft (s 304) to embody the common law: Griffith, *Draft of a Code of Criminal Law*, (1897) at xii.'

<sup>40</sup> See above S 304 *Criminal Code 1899* (Qld), n 16. S 304 is being interpreted as relying upon the principles pertaining to provocation as they develop at common law (see above Kenny, n 14). See also *R v Rae* [2006] QCA 207 (9 June 2006) [58] (Fryberg JJ). 'It is now settled in Queensland that "provocation" in s 304 of the Code is defined ... by the common law ... the focus of the word is upon the conduct of the deceased and the qualities which that conduct must possess to permit the defence at common law.' The language of s 304 *Criminal Code* (Qld) is unhelpful to battered women when 'the underlying emotion of fear may explain the choice of weapons by women, the timing of the homicidal act, the stealth in carrying out and the apparent calmness and deliberation displayed by these women before and after the killing'. S Yeo 'Sex, Ethnicity, Power of Self-Control and Provocation Revisited' (1996) 18 *Sydney Law Review* 304, 315.

<sup>41</sup> For example, Judith Allen has noted: 'Sampling police charge and summons books from Newtown Bench (a suburb of Sydney) in the 1890s suggested that approximately half of the assaults listed concerned cohabiting couples.' Judith Allen, 'Policing Since 1880: Some Questions of Sex', in Mark Finnane ed., *Policing in Australia: Historical Perspectives* (1987) 208.

of provocation.<sup>42</sup> This article contends that of the two Griffith Codes, the *Criminal Code 1899* (Qld) and the *Criminal Code 1902* (WA), the Western Australian Government has made the correct decision in abolishing the partial defence of provocation and amending its mandatory life sentence for murder. As will be discussed in a later section, the Queensland Government has introduced legislation to amend s. 304 rather than to abolish the partial defence of provocation.<sup>43</sup>

Section 304 of the *Criminal Code* (Qld) has been the subject of very recent High Court consideration in *Pollock v The Queen*,<sup>44</sup> and in particular the Queensland Court of Appeal's seven-part test,<sup>45</sup> any element of which it was said would, if proved beyond reasonable doubt, exclude the defence of provocation. The seven propositions set out by McMurdo P are as follows:

1. The potentially provocative conduct of the deceased did not occur; or
2. An ordinary person in the circumstances could not have lost control and acted like the appellant acted with intent to cause death or grievous bodily harm; or
3. The appellant did not lose self-control; or
4. The loss of self-control was not caused by the provocative conduct; or
5. The loss of self-control was not sudden (for example, the killing was premeditated); or
6. The appellant did not kill while his self-control was lost; or
7. When the appellant killed there had been time for his loss of self-control to abate.

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<sup>42</sup> Similarly, the new s 158 removes the requirement for the defendant to have acted on the sudden and before there was time for his passion to cool which denied the defence to victims of domestic violence, and restricts the defence where the conduct of the deceased consisted of a non-violent sexual advance.

<sup>43</sup> On 24 November 2010, the Queensland Attorney-General introduced the Criminal Code and Other Legislation Amendment Bill 2010 (Qld).

<sup>44</sup> [2010] HCA 35.

<sup>45</sup> *The Queen v Pollock* [2008] QCA 205 [7] (McMurdo P).

The focus of the appeal in *Pollock v The Queen* was on the fifth and seventh propositions. The High Court reviewed the history of the law of provocation as detailed above in *Parker v The Queen*<sup>46</sup> and noted that ‘East’s use of the expression “sudden provocation” [used in s. 304] was to connote the absence of premeditation’.<sup>47</sup> The High Court then observed that the language of s. 304 was reflective of ‘the way provocation was explained to the jury in *R v Hayward*’,<sup>48</sup> and that when Sir Samuel Griffith was writing s. 304, the current edition of Russell’s *Crimes and Misdemeanours* ‘stated the law of provocation in terms that were drawn from East’.<sup>49</sup> The High Court then examined the fifth proposition above (the loss of self-control was not sudden) in the context of the trial judge’s directions to the jury:

*The difficulty with the fifth proposition is that it is susceptible of being understood as requiring that the loss of self-control immediately follow the provocation. The directions given in answer to the jury’s question referred to meanings of the word ‘sudden’ which included ‘unpremeditated’. However, other meanings of ‘sudden’ including ‘immediate’ were given. It was left to the jury to decide what ‘sudden’ meant when applied to the appellant’s loss of self control.*

*The law requires the killing to occur while the accused was in a state of loss of self-control that was caused by the provocative conduct, but this does not necessitate that provocation is excluded in the event that there is any interval between the provocative conduct and the accused’s emotional response to it.<sup>50</sup> The fifth proposition is misleading in the absence of further explanation.<sup>51</sup>*

The High Court then addressed proposition seven which ‘assumes the loss of self-control and directs attention, objectively, to whether there had been time for the loss to abate’<sup>52</sup> noting that s. 304 pre-dated ‘the

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<sup>46</sup> *Parker v The Queen* (1963) 111 CLR 610.

<sup>47</sup> *Pollock v The Queen* [2010] HCA 35 [49] (French CJ, Hayne, Crennan, Kiefel and Bell JJ), citing East, *Pleas of the Crown* (1803) Vol 1, 241.

<sup>48</sup> *Pollock v The Queen* [2010] HCA 35 [50] (French CJ, Hayne, Crennan, Kiefel and Bell JJ), citing *R v Hayward* (1833) 6 Car & P 157, 159 (Tindal CJ). Chief Justice Tindal directed the jury to consider ‘whether there had been time for the blood to cool, and for reason to resume its seat, before the mortal wound was given’.

<sup>49</sup> *Pollock v The Queen* [2010] HCA 35 [50] (French CJ, Hayne, Crennan, Kiefel and Bell JJ), citing Russell, *A Treatise on Crimes and Misdemeanours*, 6<sup>th</sup> ed (1896) Vol 3, 54.

<sup>50</sup> *Parker v The Queen* (1964) 111 CLR 665, 679.

<sup>51</sup> *Pollock v The Queen* [2010] HCA 35 [56] (French CJ, Hayne, Crennan, Kiefel and Bell JJ). (Emphasis in the original.)

<sup>52</sup> *Pollock v The Queen* [2010] HCA 35 [53 – 54] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

emergence of the "ordinary person" objective test [which] was not part of the law at the time Tindal CJ formulated his classic direction in *Hayward*.<sup>53</sup> The High Court then explained how an objective requirement was to be read into the language of s. 304.

*The words of s 304 that require that the act causing death is done 'in the heat of passion caused by sudden provocation, and before there is time for the person's passion to cool' are the expression of a composite concept incorporating that the provocation is such as could cause an ordinary person to lose self-control and to act in a manner which encompasses the accused's actions. It is the last-mentioned objective requirement that keeps provocation within bounds. The concluding words beginning 'and before' are not the statement of a discrete element of the partial defence.*<sup>54</sup>

It then followed that if the jury was not satisfied that the prosecution had negated beyond reasonable doubt that the appellant did not kill in a state of loss of self-control in response to conduct that had the capacity to cause an ordinary person to lose self-control 'and to act as the appellant acted ... it was not open to proceed to proposition seven and to exclude provocation upon a view that, objectively, there had been time for the appellant's loss of self-control to abate'.<sup>55</sup> Essentially, in keeping with the 'slow boil' in *Parker v The Queen*, the jury was wrongly invited in *Pollock v The Queen* to exclude provocation if they found there had been any interval between the provocative conduct and the act causing death.

For the purposes of this article, there are two matters of significance. The first is the language of s. 304 of the *Criminal Code* (Qld), which the High Court considered to be rooted in the 1833 case of *R v Hayward*. The High Court has implied an objective test by virtue of the two words 'and before' in s. 304. With respect, importing the common law into s. 304 in such a strained manner is impermissible<sup>56</sup> given s. 304 is clearly drafted not to reflect an objective test, but the law of murder

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<sup>53</sup> *Pollock v The Queen* [2010] HCA 35 [58] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

<sup>54</sup> *Pollock v The Queen* [2010] HCA 35 [65] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

<sup>55</sup> *Pollock v The Queen* [2010] HCA 35 [66] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

<sup>56</sup> Cf *Pollock v The Queen* [2010] HCA 35 [47] (French CJ, Hayne, Crennan, Kiefel and Bell JJ). 'In interpreting the language of s 304 it is permissible to have regard to decisions expounding the concept of "sudden provocation" subsequent to the Code's enactment', citing as authority *Boughey v The Queen* (1986) 161 CLR 10, 30 (Brennan J); *R v LK* (2010) 84 ALJR 395, 422 (Gummow, Hayne, Kiefel, Crennan and Bell JJ).

and manslaughter in the 19<sup>th</sup> century. When Sir Samuel Griffith drafted s. 304, murder was defined as malice aforethought, and hence, absent premeditation and present passion, then manslaughter is the result.

The second matter of significance is the limitation of a section of a Code some three lines in length. The author has previously written<sup>57</sup> on the subject of criminal codes being too sparsely written, and, due to inadequate definitional detail or statement of the appropriate tests to be applied, judges being required to have recourse to the common law to 'fill in the blanks'<sup>58</sup> left by the code. Judicial examination of s. 304 of the *Criminal Code* (Qld) discussed above reinforces such a view, and points to the overdue need for the Queensland Government to amend this section, especially the gender bias reflected in the language of 'in the heat of passion caused by sudden provocation, and before there is time for the person's passion to cool'.

However, the last word in this part should be left to the architect of the *Criminal Code* 1983 (NT), Mr Sturgess, who was also the first Queensland Director of Public Prosecutions, who acknowledged in his preface that too many years had passed since 1899 when the *Criminal Code* (Qld) had come into operation and that 'time and cases, as must be expected, have both revealed and created problems, and moral values, which the criminal law must reflect, have much changed'.<sup>59</sup>

### III. SECTION 158 OF THE CRIMINAL CODE (NT)

*All anger is not sinful, because some degree of it, and on some occasions, is inevitable. But it becomes sinful and contradicts the rule of Scripture when it is conceived upon slight and inadequate provocation, and when it continues long.*<sup>60</sup>

#### A. Retention of Provocation

As mentioned in the Introduction, while the Northern Territory is in the process of adopting Chapter 2 of the *Criminal Code* 1995 (Cth) in stages and which contains no defence of provocation, the Northern Territory Government specifically retained the partial defence of provocation in 2006 for the stated reason of the Northern Territory's mandatory life sentence for murder. In introducing the legislation, Dr Peter Toyne, the Attorney-General, gave the following justification for

<sup>57</sup> Andrew Hemming, 'When is a Code a Code?' *Deakin Law Review* (2010) 15(1) 65.

<sup>58</sup> H. L. A. Hart (ed), Jeremy Bentham, *Of Laws in General* (Athlone Press, 1970) 246.

<sup>59</sup> D.G. Sturgess, Preface to the Criminal Code, 12 August 1983, 1.

<sup>60</sup> Wilson Mizner (1876-1933), US screenwriter.



retaining the partial defence of provocation in his Second Reading Speech.

*Although the existing partial defences of provocation and diminished responsibility are not contained in the Model Criminal Code, it is necessary to retain them in Northern Territory criminal law because of the existence of the mandatory life imprisonment penalty for murder. However, the defences have been redrafted to clarify and, in the case of provocation, to restrict their operation ...*

*The redrafted provocation provision in this bill restricts the application of the defence to cases of murder only and adopts the High Court's recent statement on the appropriate test [a reference to *Stingel v R*]. The revised provision also removes the requirement for the defendant to have acted on the sudden and before there was a time for his passion to cool [a reference to the now repealed s 34(2)(c)]. This requirement has, to date, made the defence unavailable in cases where there has been a history of serious abuse inflicted on the defendant which ultimately leads them into attacking their abuser. This is the situation in what is commonly referred to as 'battered women cases'.<sup>61</sup>*

The above passage from the Second Reading Speech can be reduced to two basic propositions. Firstly, there is the assertion that 'it is necessary' to retain the defence of provocation because of the mandatory life imprisonment penalty for murder. Secondly, there is the claim that the defence of provocation has been restricted in its operation by specifically adopting the High Court's two part test in *Stingel v R*<sup>62</sup> and excluding consideration of the defendant's cultural or ethnic background in the objective limb of the test.<sup>63</sup> Both these propositions will now be critically examined and it is contended will be found lacking in substance because either the lack of merit of the defence of provocation has been ignored, or the technical limitations of the defence have been overlooked.

Turning first to the vexed question of sentencing regimes dictating the availability of defences to reduce criminal responsibility, with respect, in 2006 the question the Attorney-General should have considered at the outset was whether the partial defence of provocation had any

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<sup>61</sup> Northern Territory, *Parliamentary Debates*, Second Reading Speech: *Criminal Reform Amendment Act (No 2) 2006* (NT), Legislative Assembly, 31 August 2006 (Dr Peter Toyne, Attorney-General).

<sup>62</sup> *Stingel v R* (1990) 171 CLR 312.

<sup>63</sup> *Mungatopi v The Queen* (1992) 2 NTLR 1 (Court of Criminal Appeal).

place at all in the criminal responsibility sections of the *Criminal Code* (NT).

On what basis can it be justified that a loss of self-control is a circumstance of mitigation sufficient to reduce murder to manslaughter? Why should the defence of provocation put a premium on homicidally violent anger through the requirement to have lost self-control? Is there in fact a phenomenon as a loss of self-control given the Law Commission of England and Wales found 'there is no satisfactory definition of loss of self-control'?<sup>64</sup> If the central feature of the partial defence defies definition, then on what reasoned basis does the defence exist? Even overlooking this deficiency, why does a person (predominantly male) have to have 'lost it' at 7.5 on a notional Richter Scale<sup>65</sup> of anger before triggering the defence? Faced with all the possible responses to a provocation why should the selection of homicidal violence be partly excused?

The crucial question to be asked in the context of an allegedly provoked killing (the victim is of course a silent witness) is how does a society in the 21<sup>st</sup> century respond to such violence? This article contends the answer is with the full weight of the law for murder, because there is no justification or excuse for an intentional killing being downgraded to manslaughter, as the ordinary person, whatever the gravity of the alleged provocation, does not kill in response to provocative conduct.<sup>66</sup> Such a statement is grounded both in moral principle and public policy.

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<sup>64</sup> The Law Commission of England and Wales, *Partial Defences to Murder*, Law Com No 290 (2004) [3.26].

<sup>65</sup> The Richter magnitude scale assigns a single number to quantify the amount of seismic energy released by an earthquake on a base-10 logarithmic scale. Jeremy Horder has suggested that the doctrine of provocation reinforces male perceptions as natural aggressors and 'in particular women's natural aggressors'. Jeremy Horder, *Provocation and Responsibility* (1992), 192.

<sup>66</sup> As Csefalvai has pointed out there is a paradox in constructing a reasonable person test for people who kill after being provoked, suggesting it is a term of art and a legal fiction. Kristof Csefalvai, 'Taunts, Chapati Pans and the Case of the Reasonable Glue-Sniffer: An Examination of the Normative Test in Provocation After *Smith* and *Holley*', *Cambridge Student Law Review* [2006] 45, 46. 'Who is the reasonable man? It is strange that we come to talk of him in the context of provocation, a defence specifically for murder. Common sense leads to the perception that this is paradoxical: surely "reasonable people" do not kill, even if provoked. This suggests that the "reasonable man" of the law of provocation is a term of art, rather than a manifestation of the common sense perception of "reasonability". This, in turn, raises the necessity of conveying the concept of this legal fiction to a jury of twelve average citizens who find it their duty to measure the conduct of a defendant. This is the *prima facie* discrepancy between the everyday term and the legal term of art that the courts have attempted to bridge.'

In 2006, the Attorney-General for the Northern Territory had the advantage of reading the Victorian Law Reform Commission's 2004 Final Report on Defences to Homicide, which recommended the abolition of provocation and that relevant circumstances of the offence, including provocation, should be taken into account at sentencing.<sup>67</sup> The Commission made some telling points that go to the heart of the inherent flaws contained in the very existence of the partial defence of provocation:

*The partial defence of provocation sends the message that in some situations people (who are not at risk of being killed or seriously injured themselves) are not expected to control their impulses to kill or seriously injure another person. While extreme anger may partly explain a person's actions, in the Commission's view it does not mean such behaviour should be partly excused ... Historically, an angry response to a provocation might have been excusable, but in the 21st century, the Victorian community has a right to expect people will control their behaviour, even when angry or emotionally upset.*<sup>68</sup> [Emphasis in the original text.]

The above passage essentially makes two powerful observations, which the author respectfully endorses. Firstly, the very existence of the partial defence of provocation sends entirely the wrong message to the community about control of violent impulses, both as an expression of the law and as a matter of practical deterrence. Secondly, that angry responses resulting in homicide are completely unacceptable to the community in the 21<sup>st</sup> century. As such, this article rejects the unconvincing argument advanced by the New South Wales Law Reform Commission that 'the defence of provocation should not be regarded as condoning violence in our society'.<sup>69</sup> This then begs the question why have other jurisdictions not followed suit and abolished the partial defence to murder of provocation which flies in the face of common sense questioning as to its availability only for the most serious offence in the criminal calendar? The answer, apart from New

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<sup>67</sup> Victorian Law Reform Commission, *Defences to Homicide: Final Report* (2004) [xlv].

<sup>68</sup> *Ibid* [xxi].

<sup>69</sup> See above New South Wales Law Reform Commission, n 6, 2.36. The New South Wales Law Reform Commission justified this view on the basis that manslaughter carried a possible 25 year term of imprisonment and therefore the partial defence still recognised a provoked killing as wrongful and unjustified. At the same time, the Commission persisted in its view that provoked killings 'committed as a result of a loss of self-control, do not fall within the worst category of unlawful homicide, and therefore should not be classified as "murder" '.

South Wales and the Australian Capital Territory, appears to lie in the mandatory life sentence for murder.

*B. Sentencing Regimes for Murder*

It is now necessary to turn to the respective sentencing regimes for murder in Australia. The table below lists the sentence, non-parole period and availability of partial defences to murder for all Australian State and Territory jurisdictions. The final column ranks each jurisdiction out of a score of 4, with 1 being the most effective and 4 being the least effective. This score is based on a comparison with the absence of either of the partial defences of provocation and diminished responsibility in the Model Criminal Code, which finds expression in Chapter 2 of the *Criminal Code 1995* (Cth), which this article takes as the most desirable and effective regime for murder, and therefore as the appropriate external measure of 'effectiveness'.

The lowest ranking has been allocated to those jurisdictions that have a discretionary sentencing regime for murder, but persist in allowing both defences to operate. This is because, with the singular exception of the New South Wales Law Reform Commission,<sup>70</sup> Law Reform Commissions have considered the primary obstacle to the abolition of the partial defence of provocation to be the existence of a mandatory life sentence for murder. The ranking is open to the criticism that either there should be no difference between the four jurisdictions that retain both partial defences, or that in fact the two with discretionary sentencing regimes (NSW and ACT) should be ranked higher than the two with mandatory sentencing regimes (Qld and NT) because in practical terms the former are more likely to abolish provocation given mandatory life for murder is not an obstacle. This article takes the position that jurisdictions that retain the partial defences within a discretionary sentencing regime for murder have no objective basis for so doing, and warrant especial criticism for being inconsistent with the other discretionary sentencing regimes for murder in Australia and New Zealand.<sup>71</sup> Queensland has been ranked higher than the Northern

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<sup>70</sup> See above New South Wales Law Reform Commission, n 6.

<sup>71</sup> In 2004, MacKay stated: 'As far as is known, unlike diminished responsibility, there are no empirical studies on the operation of the plea of provocation in English law. The reason for this may be to do with the difficulty of identifying such cases.' See R.D. Mackay, 'The Provocation Plea in Operation – An Empirical Study', Law Commission of England and Wales, *Partial Defences to Murder*, Law Com No 291 (2004), Appendix A, 110. MacKay acknowledged that in his five year study between 1997 and 2001 of 71 cases where the defence of provocation had been raised, 'the team was unable to examine all "multiple defence" cases some of which may or may not have used the provocation plea as part of a defence strategy'. However, Marie

Territory because the Queensland Government introduced legislation in November 2010 to place the onus of proof on a defendant who raises the partial defence of provocation.

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Viruda and Jason Pine, 'Homicide in Australia: 2007-08 National Homicide Monitoring Program Annual Report', Monitoring Report 13 (2010) *Australian Institute of Criminology*, Appendix C, 37, have produced Table A2 Most serious charge 2007 - 2008, broken down by Australian criminal jurisdiction. This table, which distinguishes murder and manslaughter charges by jurisdiction for 2007-08, is arguably helpful, if the assumption is made that the respective DPPs have declined to accept a plea of manslaughter based on either provocation or diminished responsibility, as a guide to the potential success of these two partial defences. The figures for the most serious charge in 2007-08 for the four jurisdictions that allow both partial defences were as follows: NSW: 81 Murder Charges and 7 Manslaughter Charges; Qld: 48 Murder Charges and 4 Manslaughter Charges; NT: 16 Murder Charges and 2 Manslaughter Charges; and ACT: 1 Murder Charge and 2 Manslaughter Charges. Comparing the two larger jurisdictions of NSW (discretionary sentencing regime for murder) with Qld (mandatory life sentence for murder): for NSW, the 7 manslaughter charges are 9% of the 81 murder charges; for Qld, the 4 manslaughter charges are 8% of the 48 murder charges. These raw figures of manslaughter to murder charges of 9% for NSW and 8% for Qld, provide limited empirical support for the proposition that the sentencing regime makes no difference to the operation of the two partial defences to murder, and therefore in turn support the argument made in this article that the partial defence of provocation should be abolished irrespective of sentencing regime.

State or Territory	Sentence	Non-Parole Period	Partial Defences to Murder	Similarity to Model Criminal Code <sup>72</sup>
Western Australia	Life Imprisonment	10 years (Mandatory) <sup>73</sup>	Nil	1
Tasmania	Life Imprisonment	Discretionary <sup>74</sup>	Nil	1
Victoria	Life Imprisonment	Discretionary. 10 years (average) <sup>75</sup>	Defensive Homicide (domestic violence)	1
South Australia	Life Imprisonment	20 years (Mandatory) <sup>76</sup>	Provocation	2
Queensland	Life Imprisonment	15 years (Mandatory) <sup>77</sup>	Provocation, Diminished Responsibility, Killing in an abusive domestic relationship	3A
Northern Territory	Life Imprisonment	20 years (Mandatory) <sup>78</sup>	Provocation, Diminished Responsibility	3B
New South Wales	Life Imprisonment	Discretionary. 10 years (sentencing guideline) <sup>79</sup>	Provocation, Diminished Responsibility	4
Australian Capital Territory	Life Imprisonment	Discretionary <sup>80</sup>	Provocation, Diminished Responsibility	4

<sup>72</sup> A score of 1 being most effective, and a score of 4 being least effective.

<sup>73</sup> Section 279(4) *Criminal Code* (WA); s 90 of the *Sentencing Act 1995* (WA).

<sup>74</sup> Section 158 *Criminal Code* (Tas); s 17 *Sentencing Act 1997* (Tas).

<sup>75</sup> Section 3 *Crimes Act 1958* (Vic). Between 1997/98 to 2001/02, most people convicted of murder in Victoria received a total effective sentence in the range of 15–20 years, with a non-parole period of 10 years or more. See above n 67, [7.18-7.19]. Between 2003-04 and 2007-08, the average sentence for murder ranged between 18 years and 20 years and 5 months. Of the 117 people convicted of murder, two people received a sentence of less than 14 years imprisonment. Sentencing Advisory Council, *Sentencing Trends in the Higher Courts of Victoria, Murder 2003-04 to 2007-08*, cited in Victorian Department of Justice, *Review of the Offence of Defensive Homicide*, Discussion Paper (August 2010), 47, [197].

<sup>76</sup> Section 11 *Criminal Law Consolidation Act 1935* (SA); s 32(5)(ab) of the *Criminal Law (Sentencing) Act 1988* (SA).

<sup>77</sup> Section 305(1) *Criminal Code 1899* (Qld); s 181(3) *Corrective Services Act 2006* (Qld).

<sup>78</sup> Section 157(1) *Criminal Code 1983* (NT); s 53A(6) *Sentencing Act 1995* (NT).

<sup>79</sup> Section 19A *Crimes Act 1900* (NSW); s 21(1) *Crimes (Sentencing Procedure) Act 1999* (NSW).

<sup>80</sup> Section 12 *Crimes Act 1900* (ACT); s. 10 *Crimes (Sentencing) Act 2005* (ACT). For the ten year period between 1998 and 2008 there was no upheld conviction for murder in the ACT. See Victor Violante, 'Suddenly, a City Wakes up to Homicide', *The Canberra Times*, 13 September 2008.

The common sentencing feature for murder in the three States that have abolished the partial defence of provocation, namely Tasmania,<sup>81</sup> Victoria<sup>82</sup> and Western Australia,<sup>83</sup> and for that matter New Zealand,<sup>84</sup> is that while there is provision for a life sentence, this is only imposed in very serious cases. The flexibility of the above four sentencing regimes for murder (and effectiveness in having no partial defences to murder of either provocation or diminished responsibility) yields a joint ranking of 1 for most effective regime for murder.

The sentencing situation in the NT, which is similar to that in South Australia, is governed by s. 157(1) of the *Criminal Code* 1983 (NT), which mandates imprisonment for life for the crime of murder. Under s. 53A(6) of the *Sentencing Act* 1995 (NT), '[t]he sentencing court may fix a non-parole period that is shorter than the standard non-parole period of 20 years referred to in subsection (1)(a) if satisfied there are exceptional circumstances that justify fixing a shorter non-parole period'.<sup>85</sup> Given that exceptional circumstances in s. 53(A)(7) encompass 'the victim's conduct and condition substantially mitigating the conduct of the offender', it is possible that extreme provocations could fall within this provision.

An example of sentencing guidelines that should apply to manslaughter convictions in successful provocation cases can be found in the United Kingdom where the Sentencing Advisory Panel has

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<sup>81</sup> Provocation was abolished by the *Criminal Code Amendment (Abolition of Defence of Provocation) Act 2003* (Tas) which repealed s 160 of the *Criminal Code Act 1924* (Tas). This change came into effect on 9 May 2003.

<sup>82</sup> *Crimes (Homicide) Act 2005* (Vic).

<sup>83</sup> *The Criminal Law Amendment (Homicide) Act 2008* (WA). This followed a report by the Law Reform Commission of Western Australia which believed that the only justification for retaining provocation was the continued existence of mandatory life imprisonment for murder. However, as the Commission also recommended that the mandatory penalty for murder be abolished, the Commission concluded that the partial defence of provocation under s 281 *Criminal Code* (WA) should be repealed. See Law Reform Commission of Western Australia, *Review of the Law of Homicide*, Final Report, Project No 97 (2007) 222.

<sup>84</sup> New Zealand abolished the mandatory life sentence for murder in 2002 and now has a discretionary sentencing regime for murder. Under s 103 *Sentencing Act* (NZ) the minimum term of imprisonment for murder is 10 years. New Zealand abolished the partial defence of provocation in 2009 with the passage of the *Crimes (Provocation Repeal) Amendment Act 2009* (NZ). By contrast, under s 745 of the Canadian Criminal Code murder carries mandatory life imprisonment and under s 231(2) parole eligibility arises after 25 years.

<sup>85</sup> The *Sentencing Act* 1995 (NT) s 53A(7) defines 'exceptional circumstances' as the offender otherwise being of good character and unlikely to reoffend, and the victim's conduct and condition substantially mitigate the conduct of the offender .

given advice to the Sentencing Guidelines Council that sentences should be broadly as follows: Low degree of provocation – sentencing range of 9 to 15 years; Substantial degree of provocation – sentencing range of 4 to 9 years; High degree of provocation – sentencing range of up to 4 years.<sup>86</sup> Similarly, in Victoria, which has abolished the partial defence of provocation, the Victorian Sentencing Advisory Council (VSAC) has identified the central issues in determining to what extent an offender’s culpability should be reduced by provocation as being: the degree of provocation in terms of the offender having a justifiable sense of being wronged taking into consideration the nature, context and duration of the provocation; the degree to which the offender’s response was disproportionate; and whether the provocation was and remained the operative cause of the offence.<sup>87</sup>

The VSAC was concerned to ensure ‘that the problems and flaws of the pre-existing law not be transferred from the substantive criminal law into the law of sentencing’.<sup>88</sup> The author respectfully agrees, but even though ‘life’ rarely means ‘life’, there is a prior hurdle to be overcome which is the apparent nexus between the mandatory life imprisonment for murder and the retention of provocation. Indeed, ‘mandatory’ may also be a misnomer in the Northern Territory given the presence of ‘exceptional circumstances’ in the *Sentencing Act 1995* (NT), and ‘discretionary’ could be a more appropriate description.

In the event that it is considered that ‘exceptional circumstances’ is defined too narrowly to accommodate a serious provocation, the better view for the Northern Territory is rather than retain the partial defence of provocation solely because of the mandatory life sentence for murder, to amend s 53A(7) of the *Sentencing Act 1995* (NT) to specifically allow greater consideration of provocation in mitigation by including language similar to s 21A(3)(c) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) that ‘the offender was provoked by the victim’.

An alternative would be to follow New Zealand and Western Australia, both of which have recently abolished the partial defence of provocation, and adopt a presumptive sentence of life imprisonment unless, given the circumstances of the offence and the offender, such a sentence would be manifestly unjust.

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<sup>86</sup> Law Reform Commission of England and Wales, *Murder, Manslaughter and Infanticide*, Law Com No 304 (2006), 5.4.

<sup>87</sup> Felicity Stewart and Arie Freiberg, *Provocation in Sentencing* (2009) Victorian Sentencing Advisory Council, [10.1.10].

<sup>88</sup> *Ibid*, [1.1.4].



Section 102 of the *Sentencing Act 2002* (NZ) provides:

**102      *Presumption in favour of life imprisonment for murder***

- (1)      *An offender who is convicted of murder must be sentenced to imprisonment for life unless, given the circumstances of the offence and the offender, a sentence of imprisonment for life would be manifestly unjust.*
- (2)      *If a court does not impose a sentence of imprisonment for life on an offender convicted of murder, it must give written reasons for not doing so.*

Section 279(4) of the *Criminal Code* (WA) provides:

- (4)      *A person, other than a child, who is guilty of murder must be sentenced to life imprisonment unless –*
  - (a)      *that sentence would be clearly unjust given the circumstances of the offence and the person; and*
  - (b)      *the person is unlikely to be a threat to the safety of the community when released from imprisonment, in which case the person is liable to imprisonment for 20 years.*

The conclusion to be drawn from the foregoing analysis of the various sentencing regimes for murder in Australia is that the Northern Territory and South Australia can be bracketed together with a minimum non-parole period of 20 years, followed by Queensland where the offender is required to serve 15 years before being eligible for parole.<sup>89</sup> The remaining States can be grouped around a 10 year minimum non-parole period, either as a mandatory minimum (Western Australia), an average sentencing statistic (Victoria), or as a standard non-parole guideline (New South Wales).

If severity of sentencing for murder is the touchstone for the retention of the partial defence of provocation, then New South Wales should be the next State (and the Australian Capital Territory the next Territory) to abolish the defence, followed by Queensland, especially as both States (and the ACT) also allow the partial defence of diminished

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<sup>89</sup> The mandatory 15 years for murder can be compared to 'decided cases demonstrated that a range of sentence upon a plea of guilty in cases of manslaughter of a woman where the killing was not murder by reason of provocation was between nine and twelve years'. See *R v Mills* [2008] QCA 146, [17], (Keane JA) citing as authority Holmes JA in *R v Sebo* [2007] QCA 426.

responsibility. However, this is to miss the point. Whatever the differences in the sentencing regimes for murder in Australia, they do not justify the continued existence of the flawed defence of provocation. This article contends that the partial defence of provocation should have no place in Australian criminal law irrespective of sentencing regime.

As a second best solution to the preferred straight out abolition of provocation as a defence, which is no more than a pragmatic fallback position and is not inconsistent with the primary position of this article that provocation is a totally flawed defence and gender biased, the mandatory sentencing regimes for murder in the Northern Territory, South Australia and Queensland could be readily adjusted to allow extreme provocations to be considered as a mitigating or an 'exceptional circumstance' if this proved to be the price to abolish the partial defence of provocation. This adjustment could be achieved by using a standard non-parole guideline of 15 years for murder. To qualify as an extreme provocation sufficient to trigger an 'exceptional circumstance' for sentencing purposes, the provocation could be defined to exclude an insult or gesture, could exclude non-violent sexual advances, and exclude disproportionate responses to the provocation of the deceased. In this way, the offender would be categorised as a murderer and sentenced according to the proposed standard non-parole guideline of 15 years for murder, with very tight boundaries placed around an 'exceptional circumstance' of extreme provocation.

Legislatures bent on promoting their tough stance on homicide through mandatory life imprisonment for murder need to consider the defences they allow to intentional killings rather than the length of the non-parole period for murder *per se*.<sup>90</sup> The standard against which regimes should be judged is the Model Criminal Code. Jurisdictions like Western Australia, Tasmania and Victoria offer the most cogent and effective regimes for the proper classification of killings as murder since none of these States allows either of the partial defences of provocation or diminished responsibility. Conversely, jurisdictions like the Northern Territory, Queensland, New South Wales and the Australian Capital Territory display the least cogent and most ineffective regimes for murder as they all allow both partial defences

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<sup>90</sup> For example, in 2005-06 in the Northern Territory there were 16 homicides of which 12 (75%) were classified as murder and 4 (25%) were classified as manslaughter. This can be compared to the Australia wide homicide figures of 256 for murder (90%) and 26 (9%) for manslaughter (there was 1 infanticide). See above 2005-06 *National Homicide Monitoring Program (NHMP)*, n 8, 37.

and thereby skew the statistical split between murder and manslaughter. New South Wales and the ACT cannot even rely on mandatory sentencing regimes for murder to justify the retention of these partial defences.

*C. Deconstructing Section 158 of the Criminal Code (NT)*

Thus far, this article has focused its attack on the partial defence of provocation on the flawed nature of the defence and the weakness of the mandatory life sentence for murder argument as a justification for the retention of the defence. This section will focus on the technical side of the defence and will deconstruct s. 158 of the *Criminal Code* (NT), which replaced the now repealed s. 34(2) discussed earlier, and came into operation on 20 December 2006. In the preceding Background section, several issues were flagged for discussion such as the definition of provocation, incited provocations, proportionality, the removal of 'on the sudden', and most importantly the two part subjective and objective test. This article now turns to a detailed discussion of these more technical issues, commencing with setting out s. 158 in full below.

**158**     *Trial for murder – partial defence of provocation*

- (1)     *A person (the defendant) who would, apart from this section, be guilty of murder must not be convicted of murder if the defence of provocation applies.*
- (2)     *The defence of provocation applies if:*
  - (a)     *the conduct causing death was the result of the defendant's loss of self-control induced by conduct of the deceased towards or affecting the defendant; and*
  - (b)     *the conduct of the deceased was such as could have induced an ordinary person to have so far lost self-control as to have formed an intent to kill or cause serious harm to the deceased.*
- (3)     *Grossly insulting words or gestures towards or affecting the defendant can be conduct of a kind that induces the defendant's loss of self-control.*
- (4)     *A defence of provocation may arise regardless of whether the conduct of the deceased occurred immediately before the conduct causing death or at an earlier time.*
- (5)     *However, conduct of the deceased consisting of a non-violent sexual advance or advances towards the defendant:*
  - (a)     *is not, by itself, a sufficient basis for a defence of provocation; but*

- (b) *may be taken into account together with other conduct of the deceased in deciding whether the defence has been established.*
- (6) *For deciding whether the conduct causing death occurred under provocation, there is no rule of law that provocation is negatived if:*
- (a) *there was not a reasonable proportion between the conduct causing death and the conduct of the deceased that induced the conduct causing death; or*
- (b) *the conduct causing death did not occur suddenly;*  
*or*
- (c) *the conduct causing death occurred with an intent to take life or cause serious harm.*
- (7) *The defendant bears an evidential burden in relation to the defence of provocation.*

Note for subsection (7)

Under section 43BR(2), the prosecution bears a legal burden of disproving a matter in relation to which the defendant has discharged an evidential burden of proof. The legal burden of proof on the prosecution must be discharged beyond reasonable doubt - see section 43BS(1).

- (8) *A defendant who would, apart from this section, be liable to be convicted of murder must be convicted of manslaughter instead.*

Starting with subsection (1) above, this subsection utilises the standard language of the modern day partial defence of provocation such that, but for the defence of provocation, the defendant would be guilty of murder. The fault element for murder is intention under s. 156(1)(c) of the *Criminal Code* (NT). So there is no question that the defendant was acting 'under a temporary suspension of reason than from any deliberate malicious motive'<sup>91</sup> which in any event is the language of the equally flawed partial defence of diminished responsibility.<sup>92</sup>

Given that the defendant had the intention to kill, it is strange that supporters of the retention of the partial defence of provocation stress the need for fair labelling, by which is meant that somehow a provoked killing is less culpable than an unprovoked killing sufficient to avoid the label 'murderer'. The unsatisfactory nature of such an argument is demonstrated by the case that triggered the abolition of the partial

<sup>91</sup> *Parker v The Queen* (1963) 111 CLR 610, 627 (Dixon CJ).

<sup>92</sup> See Andrew Hemming, 'It's Time to Abolish Diminished Responsibility, the Coach and Horses' Defence Through Criminal Responsibility for Murder' (2008) 10 UNDLAR 1.

defence of provocation in New Zealand. Clayton Weatherston, a tutor at Otago University, argued he was provoked into stabbing his girlfriend Sophie Elliott 216 times. Weatherston pleaded guilty to manslaughter but the jury found him guilty of murder.<sup>93</sup> Although Weatherston failed in his attempt to invoke the partial defence of provocation, his use and its very presence on the statute book created such an adverse reaction in the community that it was subsequently abolished.<sup>94</sup> In this sense, the response of the New Zealand government was very similar to that of Victoria's following Ramage's successful use of the defence.

Proponents of the partial defence of provocation respond to this attack by claiming that the abolition of the defence amounts to a lack of trust in the jury system.<sup>95</sup> This argument presupposes that there is a satisfactory and clear test to be put to the jury rather than one designed to bring glazed looks into jurors' eyes as they grapple with the judge's explanation of the widely adopted two part subjective and objective test for provocation which finds expression in s. 158(2) of the *Criminal Code* (NT). In any event, there is 'no reason why provocation as a mitigating factor for murder should be singled out as one issue requiring community input via the jury'.<sup>96</sup>

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<sup>93</sup> Weatherston was sentenced to a non-parole period of 18 years. Sophie Elliott's body was so badly mutilated that the family were advised not to view the body for the funeral.

<sup>94</sup> See, for example, Kerri Ritchie, 'Brutal stabbing case sparks debate on provocation defence', ABC News, 26 July, 2009. <http://www.abc.net.au/news/stories/2009/07/26/2636553.htm> viewed 27 January 2011. See also Edward Gay, 'Partial defence of provocation set to be dumped', New Zealand Herald, 23 July 2009.

[http://www.nzherald.co.nz/nz/news/article.cfm?c\\_id=1&objectid=10586155](http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10586155) viewed 27 January 2011. Gay's article cites Justice Minister Simon Power as saying 'he did not believe the defence of provocation had any place in law' and that the defence 'wrongly enables defendants to besmirch the character of victims, and effectively rewards a lack of self-control'.

<sup>95</sup> See above New South Wales Law Reform Commission, n 6, 2.33. 'While the defence of provocation is no longer necessary for the purpose of providing judges with a discretion in sentencing for unlawful homicide, the defence remains vitally important in terms of gaining community acceptance of reduced sentences for manslaughter rather than murder. The defence of provocation remains necessary as a means of involving the community, as represented by the jury, in the process of determining the degree of an accused's culpability according to his or her loss of self-control in response to provocation. It also means that people who kill with reduced culpability as a result of a loss of self-control under provocation are not misleadingly and unfairly stigmatised by the label "murderer".'

<sup>96</sup> Law Reform Commission of Western Australia, n 83, 217.

In turning to the two part test in s. 158(2), in the earlier extract from the Attorney-General's Second Reading Speech<sup>97</sup> it was mentioned that the revised provision removed the previous requirement for the defendant to have 'acted on the sudden and before there was a time for his passion to cool'. The stated reason for this change was to allow 'battered women cases' to come within the partial defence of provocation. However, the Attorney-General appears to have paid insufficient attention to the position taken by Tasmania, the first jurisdiction in Australia to abolish provocation. In introducing the Bill abolishing provocation as a defence, the Minister for Justice made the highly pertinent comment that it was better to abolish the defence than engage in a fictional attempt to distort the defence's operation to accommodate differences in gender behaviour:

*[T]he defence of provocation is gender biased and unjust. The suddenness element of the defence is more reflective of male patterns of aggressive behaviour.<sup>98</sup> 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 sensitive 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.<sup>99</sup>*

Of course, the Attorney-General also had Victoria's example of introducing excessive self-defence (defensive homicide) in 2005<sup>100</sup> as an alternative to the defence of provocation to protect abused women. In Victoria, defensive homicide is an alternative verdict to murder (20 years maximum imprisonment) where domestic violence is alleged and is available even if the harmful actions to which the defendant is reacting are not immediately harmful and even if the defendant's conduct involves excessive force.<sup>101</sup> It is here contended that the

<sup>97</sup> See above Northern Territory, *Parliamentary Debates*, n 61.

<sup>98</sup> During 2005-06, a total of 74 intimate homicides occurred of which 59 (80%) involved a male offender killing his female partner. See above n 8, NHMP, 24. Arguably, for intimate homicides 'the real "loss of control" is that the men have lost control of their women'. See Graeme Coss, 'The Defence of Provocation: An acrimonious divorce from reality' (2006) 18(1) *Current Issues in Criminal Justice* 51, 52.

<sup>99</sup> Tasmania, *Parliamentary Debates*, House of Assembly, 20 March 2003, 60 (Judy Jackson, Minister for Justice).

<sup>100</sup> *Crimes (Homicide) Act 2005* (Vic).

<sup>101</sup> Section 9AD Defensive Homicide of the *Crimes Act 1958* (Vic) is qualified by s 9AC Murder - self-defence, which requires the person to believe that the conduct was necessary to defend himself or herself or another person from the infliction of death or really serious injury. The Victorian Law Reform Commission had recommended a lower bar in s 322(1)(c) that the person believes the conduct is necessary to defend himself or herself or another person. See above n 67, 319.

Northern Territory could consider introducing similar legislation to that in Victoria or Queensland<sup>102</sup> as part of a legislative package, which includes amending the 'exceptional circumstances' provision of the mandatory life sentence for murder, if both legislative changes are political imperatives to abolish the partial defence of provocation.

However, it is recognised that there are concerns as to the operation of the Victorian legislation. At the time of writing, there have been thirteen defensive homicide cases since the legislation was introduced in 2005, and all the offenders were male. Twelve cases involved a male victim, and one involved a female victim.<sup>103</sup> Ten of the thirteen defensive homicide convictions have been the result of pleas of guilty.<sup>104</sup> The average sentence imposed for the offence of defensive homicide is 8.8 years,<sup>105</sup> with the highest sentence to date being 12 years imprisonment with a non-parole period of 8 years<sup>106</sup> in the case of *R v Middendorp*.<sup>107</sup> There is a danger that defensive homicide is provocation in a new guise.

The two part test contained in s. 158(2) follows the unanimous High Court decision in *Stingel v R*.<sup>108</sup> Section 158(2)(a) requires the defendant to have a loss of self-control induced by conduct of the deceased, but fails to distinguish between which values or beliefs can form the basis of the defence.<sup>109</sup> This section is open-ended for four reasons. Firstly, by virtue of s. 158(3) conduct can encompass grossly insulting words or gestures. Secondly, s. 158(4) provides that the conduct of the deceased may occur at any time before the conduct causing death. Thirdly, there is no specific qualification that the defendant had not incited the

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<sup>102</sup> See the *Criminal Code (Abusive Domestic Relationship Defence and Another Matter) Amendment Act 2010* (Qld) which introduced a new s 304B Killing in an abusive domestic relationship into the *Criminal Code 1899* (Qld). Section 304B allows a partial defence of manslaughter where a person kills in response to family violence. Under s 304B(1) the deceased must have committed acts of serious violence against the person who believes it is necessary for their own preservation to do the act that causes death and who has reasonable grounds for such a belief.

<sup>103</sup> Victorian Department of Justice, *Review of the Offence of Defensive Homicide*, Discussion Paper (August 2010), 33, [120].

<sup>104</sup> Victorian Department of Justice, n 103, 48, [200].

<sup>105</sup> Victorian Department of Justice, n 103, 34, [125].

<sup>106</sup> Victorian Department of Justice, n 103, 34, [126].

<sup>107</sup> [2010] VSC 202. This case raised major concerns as to the operation of the partial defence of defensive homicide. Luke Middendorp who stands 186-centimetres tall and weighs more than 90 kilograms stabbed Jade Bownds, who weighed 50 kilograms, four times in the back.

<sup>108</sup> *Stingel v R* (1990) 171 CLR 312.

<sup>109</sup> 'For instance, by allowing all of the accused's values or beliefs to be taken into account, it can lead to the acceptance of prejudiced views as providing an excuse for lethal force.' See above Victorian Law Reform Commission, n 67, 34.

provocation, which instead has to be implied into the phrase loss of self-control.<sup>110</sup> Fourthly, the High Court has allowed all of the characteristics of the defendant into the subjective test of the gravity of the provocation for the purpose of loss of self-control:

*Even more importantly, the content and extent of the provocative conduct must be assessed from the viewpoint of the particular accused. Were it otherwise, it would be quite impossible to identify the gravity of the particular provocation. In that regard, none of the attributes or characteristics of a particular accused will be necessarily irrelevant to an assessment of the provocation involved in the relevant conduct. For example, any one or more of the accused's age, sex, race, physical features, personal attributes, personal relationships and past history may be relevant to an objective assessment of the gravity of a particular wrongful act or insult. Indeed, even mental instability or weakness of an accused could, in some circumstances, itself be a relevant consideration to be taken into account in the determination of the content and implications of particular conduct.*<sup>111</sup>

Thus, short of unimpeachable evidence of premeditation, the proverbial drover's dog<sup>112</sup> of a defence counsel should have little difficulty in satisfying the subjective first limb of the partial defence of provocation as per s. 158(2)(a), notwithstanding the High Court's

<sup>110</sup> The now repealed s 34(2)(a) expressly excluded self-induced provocation where the accused 'incited' the provocation, but the new s 158 is silent on this question. It would appear the aspect of incitement and provocation, which is related to premeditation, is to be dealt with by implication under s 158(2)(a) and 'loss of self-control' given loss of self control is inconsistent with going around to the victim's house and deliberately picking a quarrel. Nevertheless, by not being explicit, s 158(2)(a) risks importing all the inconsistencies of the common law on inciting the provocation which the repealed s 34(2)(a) expressly excluded. However, one academic textbook in discussing s 23(2)(a) *Crimes Act 1900* (NSW) which is written in similar language to s 158(2)(a) *Criminal Code* (NT) states: 'The former s 23(2)(a) and the common law were clear that the provocation defence was not available where the accused invited or induced the provocation from his or her victim. The new s 23 is silent on this matter, but it is likely that the position remains the same and that the principles laid down in *Edwards* [1973] AC 648 apply.' See David Brown, David Farrier, Sandra Egger, Luke McNamara and Alex Steel, *Criminal Laws: Materials and Commentary on Criminal Law and Process of New South Wales* (2006) 598. In *Edwards* (658) the Privy Council held that a blackmailer cannot rely on the predictable results of his own blackmailing conduct for a provocation defence unless the victim's reaction goes to extreme lengths in which case it is a question of degree for the jury.

<sup>111</sup> *Stingel v R* (1990) 171 CLR 312, 326.

<sup>112</sup> On 3 February 1983, Mr Bill Hayden, then the leader of the Federal Opposition was replaced by Mr Hawke. At a press conference Mr Hayden famously remarked that 'a drover's dog could lead the Labor Party to victory at the present time'.



description of the process as ‘an objective assessment’.<sup>113</sup> Trial judges are reluctant to withhold a defence from the jury given the obvious likelihood of an appeal. A good example is *R v Rae*.<sup>114</sup> The defence was run on the basis of the accused’s intoxication and whether the Crown had established the necessary intention for murder. After the close of evidence and before the addresses to the jury, the defence counsel submitted that provocation should be left to the jury. The trial judge refused to leave provocation to the jury because there was no evidence as to what was said by the victim immediately before the accused killed him.

On appeal, McMurdo P, in dissent,<sup>115</sup> would have allowed the appeal, citing statements in *R v Buttigieg*<sup>116</sup> in support.<sup>117</sup> Her Honour drew attention to various authorities collected in *R v Buttigieg* including ‘whether provocation should be left to the jury falls to be resolved by reference to the version of events most favourable to the accused’;<sup>118</sup> provocation should be withheld if ‘no reasonable jury could hold the evidence sufficient to raise a reasonable doubt’<sup>119</sup> but should be left with the jury if the trial judge is ‘in the least doubt whether the evidence is sufficient’;<sup>120</sup> failure of the accused to testify ‘is not fatal to provocation and a jury is able to infer provocation from evidence’<sup>121</sup> that might suggest the possibility of loss of self-control; and finally, if there is evidence of provocation the judge has a duty ‘to leave the question of provocation to the jury notwithstanding that it has not been raised by the defence and is inconsistent with the defence which is raised’.<sup>122</sup>

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<sup>113</sup> For a different perspective, see above New South Wales Law Reform Commission, n 6, 2.37. ‘With the abolition of unsworn statements, if an accused wishes to give evidence of provocation at trial, that evidence can be properly tested through cross-examination. The jury should therefore be in a better position to assess the genuineness or otherwise of an accused’s claim that he or she was provoked into losing self-control so as to form an intention to kill or cause grievous bodily harm or to act with reckless indifference to human life. This should greatly reduce the risk that a false claim of provocation succeeds.’

<sup>114</sup> [2006] QCA 207 (9 June 2006).

<sup>115</sup> Fryberg J and Douglas J in separate judgments dismissed the appeal because there was no evidence for a jury to rationally and objectively conclude that an ordinary person might have reacted in the same way as the accused.

<sup>116</sup> (1993) 69 A Crim R 21.

<sup>117</sup> *R v Rae* [2006] QCA 207 (9 June 2006) [35].

<sup>118</sup> *Stingel v R* (1990) 171 CLR 312, 318.

<sup>119</sup> *R v Rose* [1967] Qd R 186, 192; *R v Stingel* (1990) 171 CLR 312, 333.

<sup>120</sup> *Van Den Hoek v The Queen* (1986) 161 CLR 158, 161-162, 169; *R v Stingel* (1990) 171 CLR 312, 334.

<sup>121</sup> *Lee Chun-Chuen v The Queen* [1963] AC 220, 233; *Van Den Hoek v The Queen* (1986) 161 CLR 158, 169.

<sup>122</sup> *Stingel v R* (1990) 171 CLR 312, 333, 334.

The above catalogue of cases provides adequate testimony to the very low bar required to satisfy the evidential onus for provocation. Furthermore, leaving provocation to the jury where the trial judge is in the 'least doubt whether the evidence is sufficient' does not accord with the definition of an evidential onus as a 'reasonable possibility'.<sup>123</sup> Rather, the standard appears to be the barest possibility. As such, this article rejects the overly sanguine view of the New South Wales Law Reform Commission that the mere abolition of unsworn statements will greatly reduce the risk that a false claim of provocation will succeed.<sup>124</sup> Instead, it is contended that the very low evidential bar for the admission of the defence of provocation should be substantially raised by reversing the onus of proof.

Having accepted the relevance of the defendant's characteristics for the purpose of assessing the gravity of the deceased's conduct, the High Court then excluded these subjective considerations, except for age, when judging the effect of this conduct on the powers of self-control of the ordinary person, which finds expression in s. 158(2)(b). The question then becomes whether the ordinary person faced by that degree of provocation could (not would) have killed the deceased. The High Court approved the following passage from Wilson J in *R v Hill*:<sup>125</sup>

*The objective standard ... may be said to exist in order to ensure that in the evaluation of the provocation defence there is no fluctuating standard of self-control against which accuseds are measured. The governing principles are those of equality and individual responsibility, so that all persons are held to the same standard notwithstanding their distinctive personality traits and varying capacities to achieve the standard.*

In his Second Reading Speech, the Attorney-General for the Northern Territory described provocation as a 'complex doctrine'.<sup>126</sup> This is an understatement for a test that requires mental gymnastics or as the Model Criminal Code Officers Committee (MCCOC) wryly observed the ordinary person in the law of provocation has 'developed a split personality'.<sup>127</sup> A better view is that the test for provocation is

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<sup>123</sup> See, for example, s 43BT Evidential burden of proof, *Criminal Code 1983* (NT).

<sup>124</sup> See above New South Wales Law Reform Commission, n 6 and n 113.

<sup>125</sup> *R v Hill* (1986) 1 SCR 313, 343.

<sup>126</sup> See above Northern Territory, *Parliamentary Debates*, n 61.

<sup>127</sup> Model Criminal Code Officers Committee (MCCOC), *Fatal Offences Against the Person*, Discussion Paper (1998) 79.

conceptually confused, complex and difficult for juries to understand and apply.<sup>128</sup> Professor Yeo has pointed out why jurors find the distinction between the subjective and objective components of the test so difficult:

*[The test] bears no conceivable relationship with the underlying rationales of the defence of provocation ... The defence has been variously regarded as premised upon the contributory fault of the victim and, alternatively, upon the fact that the accused was not fully in control of his or her behaviour when the homicide was committed. Neither of these premises requires the distinction to be made between the characteristics of the accused affecting the gravity of the provocation from those concerned with the power of self-control.*<sup>129</sup>

While the use of 'ordinary person' in s. 158(2)(b) as opposed to 'ordinary person similarly circumstanced' in the now repealed s. 34(2)(d) is an improvement, s. 158(2) does little to alleviate the potential for judicial expansion of the defence, especially when subsection (2) is considered in the context of the whole of s. 158. Reference has already been made to four reasons why the partial defence of provocation is open ended, to which can be added s. 158(6)(a), which states that there is no rule of law that provocation is negated if there is no reasonable proportion between the provocation and the response.

The overall result under s. 158 is that provocation is widely defined to include insults and gestures; the provocation can occur at an earlier time to the conduct causing death; there is no reference to the defendant not having incited the provocation; 'on the sudden' has been removed; all the characteristics of the defendant can be imported into the subjective test; and the response can be disproportionate to the provocation. All the defence has to do is satisfy an evidential burden under s. 158(7), which under s. 43BT is defined as a reasonable possibility, for the prosecution to then have to negative the defence beyond reasonable doubt.

This article contends that the above situation is most unsatisfactory, and if this flawed defence is to be retained as a third best option, then the above deficiencies in s. 158 need to be addressed. It is further contended that it matters not whether one adopts a loss of self-control

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<sup>128</sup> See above Victorian Law Reform Commission, n 67, 26-35. There is an inherent confusion built into a test that seeks to distinguish between the gravity of the provocation from the perspective of the accused on the one hand, and an objective assessment of the reaction of the accused on the other hand.

<sup>129</sup> Stanley Yeo, *Unrestrained Killings and the Law* (1998), 61.

(excuse) or a reasons (justification) approach.<sup>130</sup> The former is followed here because this approach is consistent with *Stingel v R*, which is the test at common law (South Australia) and is the basis of the statutory defence in all jurisdictions that retain the defence.<sup>131</sup>

The Law Commission of England and Wales focused on the nature and gravity of the provocation and its impact on the defendant. The gross provocation is seen as giving the defendant a 'justified' sense of being seriously wronged.<sup>132</sup> The limitation with the reasons or justification based approach is that it focuses on the gravity (subjective) of the provocation. The loss of self-control requirement would disappear under such a formulation and there is no alternative requirement as to the manner in which the defendant must react to the provocation.

The Government of the United Kingdom was not prepared to abandon loss of control when, by virtue of sections 54 to 56 of the *Coroners and Justice Act 2009* (UK), the defence of provocation was abolished and substituted with a new partial defence entitled 'Loss of Control'. Section 54(1)(a) requires a loss of control, subject to the objective test in s. 54(1)(c) of 'a person of the D's sex and age, with a normal degree of tolerance and self-restraint and in the circumstances of D, might have reacted in the same or in a similar way to D'. In addition, s. 54(1)(b) specifies a qualifying trigger for loss of self-control defined in s. 55 in terms of both fear (fear of serious violence from V against D) and anger (constituted circumstances of an extremely grave character, and caused D to have a justifiable sense of being seriously wronged).

As Alan Norrie has pointed out, the change in the law in the United Kingdom marks a shift from one of excuse to one of justification. 'In sum, if the moral mark of the new Law Commission approach is that conduct is imperfectly rightful, and therefore both condemned and partially vindicated, the mark of the old law was that conduct was partially excused, both wrongful and partially condoned on ground of

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<sup>130</sup> See above New South Wales Law Reform Commission, n 6, 2.15. 'The excuse-based rationale explains the defence of provocation in terms of partially excusing provoked killers because their mental state is impaired by a loss of self-control, and for that reason they are less culpable than killers who act with premeditation. The justification-based rationale explains the defence of provocation in terms of recognising that the victim's own blameworthy conduct has contributed to the killer's actions in circumstances which could have moved an ordinary person to retaliate.'

<sup>131</sup> See above Kenny, n 14.

<sup>132</sup> See above Law Reform Commission of England and Wales, n 86, 5.11. For a similar approach see also Bernadette McSherry 'It's a Man's World: Claims of Provocation and Automatism in "Intimate" Homicides' (2005) 29 *Melbourne University Law Review* 905, 917.

compassion.<sup>133</sup> The view taken here is that both an excuse and justification approach to provocation are similarly flawed, and the new law in the United Kingdom, while attempting to narrow the partial defence of provocation, also opens up both fear and anger qualifying triggers which unnecessarily introduces defensive homicide into provocation.

Professor Yeo has proposed a two-part test by distinguishing capacity from response. Yeo's first part is the capacity for self-control expected of an ordinary person, which excludes gender and ethnic origin, with only age being taken into account. The second part is the response pattern of an ordinary person who is deprived of self-control. 'Within this framework of ordinary capacity for self-control, the law recognises that ordinary people who lose their self-control might behave in different ways.'<sup>134</sup> Thus, under the Yeo formulation, it is the second part that allows different response patterns based on gender or ethnicity to be taken into account. With respect, this is just another way of reformulating the confusing test in *Stingel* and is insufficiently objective.

There are three essential changes required to be made to narrow the defence of provocation and leave it available to only the most serious of provocations. Firstly, provocation should be narrowly defined. Secondly, the test for provocation should be solely objective and all reference to the gravity of the offence should be removed.<sup>135</sup> Thirdly, the defence should bear the legal onus of proof.

What is the rationale for a reversal of the onus of proof and what justification is there for the State placing a legal burden of proof on the defendant? The lurking spectre of *Woolmington v DPP*<sup>136</sup> and the lustre of the famous golden thread speech of Viscount Sankey inevitably appears whenever the onus of proof is raised. In this context, it should be recalled that Viscount Sankey qualified 'one golden thread' as 'subject also to any statutory exception'.<sup>137</sup>

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<sup>133</sup> Alan Norrie, 'The Coroners and Justice Act 2009 - Partial Defences to Murder (1) Loss of Control' (2010) *Criminal Law Review* 275, 279.

<sup>134</sup> See above Yeo, n 29, 310-311.

<sup>135</sup> Ian Leader-Elliott supports the High Court's two part test in *Stingel* on the grounds that 'the distinction between the issues of gravity and self control is essential if the principle of equality is to be realised in practice'. See above n 22, 96. This article rejects the two part test as inherently confusing and contends that female defendants are more appropriately dealt with under a separate defence of excessive self-defence.

<sup>136</sup> *Woolmington v DPP* [1935] AC 462.

<sup>137</sup> *Woolmington v DPP* [1935] AC 462, 481.

However, as has been pointed out in '*A guide to framing Commonwealth offences, civil penalties and enforcement powers*',<sup>138</sup> the Senate Scrutiny of Bills Committee 'usually comments adversely on a bill which places the onus on an accused person to disprove one or more of the elements of the offence with which he or she is charged'.<sup>139</sup> Significantly, for the purposes of this article, whilst the matter being within the defendant's knowledge has not been considered sufficient justification, the Senate Committee 'is most inclined to support reversal where the defence consists of pointing to the defendant's state of belief'.<sup>140</sup> Given that a sudden and temporary loss of self-control is at the heart of the partial defence of provocation, the Committee view appears to be promising. In any event, the Queensland Government recently announced its intention to amend the partial defence of provocation to place the onus of proof on the defendant, in accordance with a recommendation in the Queensland Law Reform Commission's 2008 report by introducing legislation before the end of 2010.<sup>141</sup>

The Queensland Attorney-General, on 24 November 2010, duly introduced the *Criminal Code and Other Legislation Amendment Bill 2010* (Qld). Part 2, Clause 5 deals with the proposed amendment of s 304, and the proposed subsection (7) states: 'On a charge of murder, it is for the defence to prove that the person charged is, under this section, liable to be convicted of manslaughter only.' The proposed subsection (7) of s. 304 of the *Criminal Code 1899* (Qld) is similar to the proposed subsection (10) of s. 158 of the *Criminal Code 1983* (NT) below.

More generally, while the proposed amendments to s. 304 are designed to address the gender bias of provocation,<sup>142</sup> regrettably the Queensland Government has not heeded the perceptive approach of the Tasmanian Minister for Justice who, when introducing the legislation which abolished provocation in Tasmania, observed that 'it is better to abolish the defence than to try to make a fictitious attempt

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<sup>138</sup> *A guide to framing Commonwealth offences, civil penalties and enforcement powers*, Attorney-General's Department, Australian Government, December 2007.

<sup>139</sup> *A guide to framing Commonwealth offences*, n 138, 30.

<sup>140</sup> *A guide to framing Commonwealth offences*, n 138, 31.

<sup>141</sup> The Honourable Cameron Dick, Attorney-General, 'State Government to amend laws relating to accident and provocation', Ministerial Media Statement, 12 September 2010. 'As the report stated, placing the onus upon the defendant strikes the right balance between the rights of the individual and the wider interests of the community.'  
<http://www.cabinet.qld.gov.au/mms/StatementDisplaySingle.aspx?id=71527>  
viewed 27 January 2011.

<sup>142</sup> See *Criminal Code and Other Legislation Amendment Bill 2010* (Qld), below n 148 and n 151.

to distort its operation to accommodate the gender behavioural differences'.<sup>143</sup>

In keeping with the tenor of the analysis of provocation in this article, s. 158 has been rewritten accordingly below (but it should be stressed that it has been rewritten only as a pragmatic fallback position to the total abolition of the fundamentally flawed and gender biased partial defence to murder of provocation):

**158 *Trial for murder – partial defence of provocation***

- (1) *A person (the defendant) who would, apart from this section, be guilty of murder must not be convicted of murder if the defence of provocation applies.*
- (2) *The defence of provocation applies only to a serious wrong, defined as a fear of serious violence towards the defendant or another, and if the conduct of the deceased was such as could have induced an ordinary person of the defendant's age and of ordinary temperament, defined as ordinary tolerance and self-restraint, to have so far lost self-control as to have formed an intent to kill or cause serious harm to the deceased.*
- (3) *To lose self-control is defined as meaning a sudden and temporary loss of self-control, rendering the defendant so subject to passion as to make him or her for the moment not master of his or her mind.<sup>144</sup> The loss of self-control due to resentment, grievance or revenge<sup>145</sup> is specifically excluded.<sup>146</sup>*
- (4) *The defendant must not have incited the provocation.<sup>147</sup>*
- (5) *Grossly insulting words or gestures towards or affecting the defendant are excluded from conduct of a kind that induces the defendant's loss of self-control.<sup>148</sup>*

<sup>143</sup> See Tasmania, *Parliamentary Debates*, above n 99.

<sup>144</sup> Taken from Devlin J's classic definition in *R v Duffy* [1949] 1 All ER 932. See also Tindal CJ in *R v Hayward* (1833) 6 C & P 157, 159 who described the provocation defence as 'while smarting under a provocation so recent and so strong that the prisoner might not be considered at the moment the master of his own understanding'.

<sup>145</sup> See above Law Reform Commission of England and Wales, n 86, 5.11, where the Law Reform Commission of England and Wales recommended that the partial defence should not apply where (a) the provocation was incited for the purpose of providing an excuse to use violence, or (b) the defendant acted in considered desire for revenge.

<sup>146</sup> *Van Den Hoek v The Queen* (1986) 161 CLR 158.

<sup>147</sup> This has the effect of reintroducing the now repealed s 34(2)(a).

- (6) A defence of provocation may only arise if the conduct of the deceased occurred immediately before the conduct causing death and not at an earlier time.<sup>149</sup>
- (7) Conduct of the deceased consisting of a non-violent sexual advance or advances towards the defendant is not a sufficient basis for a defence of provocation.<sup>150</sup>
- (8) Conduct of the deceased consisting of the deceased's choice about a relationship with the defendant is not a sufficient basis for a defence of provocation.<sup>151</sup>
- (9) For deciding whether the conduct causing death occurred under provocation, there is a rule of law that provocation is negatived if:
- (a) there was not a reasonable proportion<sup>152</sup> between the conduct causing death and the conduct of the deceased that induced the conduct causing death; or
  - (b) the conduct causing death did not occur suddenly.
- (10) The burden of establishing a defence of provocation is a legal burden and lies on the defence.<sup>153</sup>

<sup>148</sup> Subsection (2) of the proposed amendment to s 304 *Criminal Code* (Qld) in the Criminal Code and Other Legislation Amendment Bill 2010 (Qld) states: 'Subsection (1) does not apply if the sudden provocation is based on words alone, other than in circumstances of a most extreme and exceptional character.' Subsection (6) states: 'For proof of circumstances of a most extreme and exceptional character mentioned in subsection (2) or (3) regard may be had to any history of violence that is relevant in all the circumstances.'

<sup>149</sup> This subsection specifically ousts authority to the effect that the provocation should be considered in the light of the whole history of the relationship. See for example *Moffa v The Queen* (1977) 138 CLR 601.

<sup>150</sup> 'Homosexual advance' provocation has been criticised for condoning violence against homosexuals. See for example Celia Wells, 'Provocation: The Case for Abolition' in Andrew Ashworth & Barry Mitchell, *Rethinking English Homicide Law* (2000) 85, 101.

<sup>151</sup> The ordinary person does not respond to a relationship breakdown by killing his or her partner. 'Men who kill when affronted by their intimate partners are truly extraordinary.' See Graeme Coss, 'The Defence of Provocation: An acrimonious divorce from reality' (2006) 18(1) *Current Issues in Criminal Justice* 51, 53. Subsection (3) of the proposed amendment to s 304 *Criminal Code* (Qld) in the Criminal Code and Other Legislation Amendment Bill 2010 (Qld) states: 'Also subsection (1) does not apply, other than in circumstances of a most extreme and exceptional character, if - (a) a domestic relationship exists between 2 persons; and (b) one person unlawfully kills the other person (the deceased); and (c) the sudden provocation is based on anything done by the deceased or anything the person believes the deceased has done - (i) to end the relationship; or (ii) to change the nature of the relationship; or (iii) to indicate in any way that the relationship may, should or will end, or that there may, should or will be a change to the nature of the relationship.'

<sup>152</sup> Proportionality was absorbed into the ordinary person test which insisted 'that the mode of retaliation be objectively proportionate to the provocation'. *Masciantonio v The Queen* (1995) 183 CLR 58, 80, 67 (Brennan, Deane, Dawson and Gaudron JJ). See above Stewart and Freiberg, n 87, 8.7.2 and footnote 277.



- (11) *A defendant who would, apart from this section, be liable to be convicted of murder must be convicted of manslaughter instead.*

It is instructive to run some of the high profile provocation cases that have reached the High Court through the proposed s. 158 above, particularly s. 158(2), which places a double hurdle in front of the defendant of being provoked by a serious wrong and the sole objective test of the ordinary person. In *Stingel v R*,<sup>154</sup> the defendant stalked his ex-girlfriend and killed her lover, while in *R v Ramage*<sup>155</sup> (the case that led to the abolition of provocation in Victoria) the defendant killed his wife after she told him she was leaving the marriage. In both cases, s. 158(8) limits the operation of the partial defence of provocation as the deceased's choice about a relationship will not found the defence. If Ramage argued that he was provoked not because of the deceased's choice of relationship but because of other things she said or did, then s. 158(5) excludes grossly insulting words or insults. If Ramage argued that he faced a serious wrong, then he would have to prove it on the balance of probabilities under s. 158(10) which in practice would likely mean showing the deceased had attacked him with a knife or sharp instrument.<sup>156</sup>

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<sup>153</sup> See above Queensland Law Reform Commission, n 5, 11. The Queensland Law Reform Commission recommended that s 304 *Criminal Code* (Qld) should be amended by adding a provision to the effect that the defendant bears the onus of proof of the partial defence of provocation on the balance of probabilities. See also above Law Reform Commission of England and Wales, n 86, 5.11, where the Law Reform Commission of England and Wales recommended that a judge should not be required to leave the defence of provocation to the jury unless there is evidence on which a reasonable jury, properly directed, could conclude that it might apply.

<sup>154</sup> *Stingel v R* (1990) 171 CLR 312. Stingel was convicted of murder and the High Court held that the trial judge was correct in not allowing the defence of provocation to go to the jury. This was scarcely surprising as Stingel, who was restrained by a court order from approaching or talking to his seventeen year old ex-girlfriend (an order he was convicted of breaching), stabbed the deceased with a butcher's knife while he was sitting in a car with Stingel's ex-girlfriend. A clearer case of premeditation would be hard to imagine.

<sup>155</sup> *R v Ramage* [2004] VSC 508. There was a legal sequel to this case when Phil Cleary wrote a book entitled 'Getting Away with Murder' published by Allen and Unwin in 2005 which suggested that Dyson Hore-Lacy SC had provided a fabricated defence of provocation to James Ramage. In 2010, Hore-Lacy was awarded \$630,000 in damages for defamation.

<sup>156</sup> Given the physical strength differences between men and women, it is unsurprising that in 2005-06 the NHMP found that not one female killed an intimate partner by beating with hands or feet, and that 80% of male victims were killed with a knife or sharp instrument. See above 2005-06 *National Homicide Monitoring Program* (NHMP), n 8, 25.

In *Green v The Queen*<sup>157</sup> the defendant killed a friend who had allegedly initially made a non-violent homosexual advance. Without more, this case would have failed under s. 158(7). Green further alleged that the deceased then mounted a determined sexual assault following his clear rejection of the alleged sexual advance. Green would have to overcome s. 158(2) and show on the balance of probabilities that he was in fear of serious violence. Given the age and size difference between the defendant and the deceased, Green would have a monumental task in convincing a jury even if the jury accepted it was not the sexual advance but the history of sexual abuse by his father that caused the death.

In *Masciantonio v The Queen*,<sup>158</sup> the defendant killed his son-in-law in a two stage attack with the second stage occurring while the deceased lay defenceless on the ground and despite the attempted intervention of two bystanders. This defence would have run foul of lack of proportionality under s. 158(9)(a). To the extent that killing is always a disproportionate response to a provocation, then either there is no place at all for the partial defence of provocation or it is a question of degrees of disproportionality.

The whole objective of the proposed s. 158 is to severely limit the defence to extreme provocations that involve physical conduct and not mere words or gestures, such that 'there would not be much left [and] what would remain is violent provocative conduct and other criminal behaviour'.<sup>159</sup> The conduct has to be spontaneous and there can be no suggestion of premeditation. If rewriting the partial defence of provocation to make it harder for men to avail themselves of the defence is seen as leaving women subjected to domestic abuse without an additional defence to self defence, then it is better to follow Victoria's example and introduce excessive self defence than widen the defence to accommodate gender differences.

Finally, as the victim is the silent witness in court with the defendant putting unanswered words into the mouth of the deceased, placing the onus of proof on the defence is entirely appropriate. In this way, provocation will only be available under 'exceptional circumstances', albeit a very poor substitute for the total abolition of the defence with or without the amendment to s. 53(A)(7) of the *Sentencing Act 1995* (NT) to widen 'exceptional circumstances' to allow extreme provocations to be a mitigating factor when sentencing for murder. A

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<sup>157</sup> *Green v The Queen* (1997) 191 CLR 334.

<sup>158</sup> *Masciantonio v The Queen* (1995) 183 CLR 58.

<sup>159</sup> See above Law Reform Commission of Western Australia, n 83, 219.

viable sentencing alternative would be to follow the example set by New Zealand and Western Australia, two jurisdictions that have recently abolished the partial defence to murder of provocation, and adopt a presumptive sentence of life imprisonment unless such a sentence would be manifestly unjust.

#### IV. CONCLUSION

*Trigger-happy: Apt to shoot on slightest provocation.*<sup>160</sup>

This article has reviewed the partial defence of provocation and concluded that loss of self-control is not a sufficient reason to distinguish those who kill under provocation from cold-blooded killers. Andrew Ashworth has championed the principle of fair labeling, which is a reference to fairness in the legal categorisation of an offence, as demanding ‘that offenders be labelled and punished in proportion to their wrongdoing [as] the label is important both for public communication and, within the criminal justice system, for deciding on appropriate maximum penalties’.<sup>161</sup> It is here argued that on the above test, there is no proportionate difference between provoked and unprovoked killings sufficient to distinguish the label ‘murderer’ attaching to both types of killing.

Every major review of the partial defence of provocation, with the exception of the New South Wales Law Reform Commission Report in 1997, has concluded that it is flawed and unacceptable in a modern society. The only identified impediment to the abolition of provocation is mandatory life imprisonment for murder. This article challenges that position at three levels. The first level is to advocate the abolition of provocation irrespective of sentencing regime because it is a totally flawed defence, gender biased, and is devoid of any merit. Intentional killings mean malice aforethought which means murder.<sup>162</sup> Abolition of the partial defence of provocation is the essential position taken in this article, and the remaining two levels are pragmatic fallback positions.

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<sup>160</sup> The Concise Oxford Dictionary, 1980, 1241.

<sup>161</sup> Andrew Ashworth, *Principles of Criminal Law* (2003) 89 – 90.

<sup>162</sup> The abolition of provocation as a defence shifts the burden of proof to the sentencing stage. ‘Provocation is likely to be raised by the defence as a factor in mitigation of the offender’s sentence, in which case the defence will have the onus of proving, on the balance of probabilities, that the offender was provoked.’ See above Stewart and Freiberg, n 87, [5.3.7].

The second level is to recognise that there may be political imperatives that require a legislative package to secure the abolition of the partial defence of provocation in the three jurisdictions that have mandatory life imprisonment for murder, namely, the Northern Territory, South Australia and Queensland. This legislative package could include either a minor adjustment to the mandatory sentencing regime to permit extreme provocations to come within 'exceptional circumstances' as a mitigating factor within a 15 year minimum sentencing guideline for murder or a presumptive sentence of life imprisonment, and possibly the introduction of defensive homicide to protect women in abusive relationships subject to the outcome of the review of the partial defence of defensive homicide in Victoria. There is no excuse for the retention of the partial defence of provocation in New South Wales and the Australian Capital Territory both of whom have discretionary sentencing regimes for murder.

The third level is to amend the partial defence of provocation such that it is narrowly defined, is comprised of a totally objective test, and the onus of proof is on the defence. This article has proposed a new s. 158 of the *Criminal Code* (NT), which while the least preferred option at least removes the most objectionable aspects of this flawed defence.

There is tide of legislative reform running against the partial defence of provocation such that since 2003 four jurisdictions have abolished the defence (Tasmania, Victoria, Western Australia and New Zealand). It is to be earnestly hoped that this impetus will not be lost either through inertia or vested interests preventing the removal of this unacceptable defence from the statute books of all Australian jurisdictions.