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CURRENT ISSUES WITH REGARDS THE DEFENCES OF PROVOCATION AND SELF-DEFENCE IN THE CRIMINAL LAW CONTEXT

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I INTRODUCTION

In early July 2007 a case involving a 30 year old man who had killed his girlfriend made the headlines in the Brisbane newspapers.[1] According to the accused, he had hit the 16 year old girl because she had taunted him with her infidelity. At trial he pleaded guilty to manslaughter but successfully used provocation as a defence to the murder charge. The victim's mother expressed outrage at the result and felt that her daughter had been on trial and that she had been portrayed as a vixen. As a result of the publicity this case received, there have been renewed calls for a review of the defence of provocation in Queensland. By the end of July 2007, the Queensland Attorney-General announced that the inquiry already being undertaken in respect of the excuse of accident (which had also been brought about as a result of public pressure from press reports of controversial cases where two men had been acquitted of legal responsibility for two deaths during street fights[2]) would include an audit of the defence of provocation.[3] A discussion paper was released on 12 October 2007.[4]

This is similar to what has happened in other jurisdictions. There was a public outcry in Victoria in 2004 after a man successfully used the defence of provocation after killing his former wife who told him that sex with him repulsed her.[5] More than 3000 letters were sent to the government in protest and consequently an inquiry was held

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[1] Leanne Edmistone, 'Verdicts provoke debate', *The Courier Mail* (Brisbane), 3 July 2007, 1.
[2] Ibid.
[3] CCH, 'Qld: Provocation defence to be audited' <http://www.cch.com.au/fe_news> at 19 July 2007.
[4] Queensland Government, *Discussion Paper - Audit on Defences to Homicide: Accident and Provocation* , October 2007.

by the Victorian Law Reform Commission and in 2005 Victoria abolished the defence of provocation. After an outcry when a man used provocation as a defence to killing a male friend who got into bed with him and touched him,[6] New South Wales is currently reviewing its laws.

In a similar way, cases where self-defence is used can also generate publicity. These controversial cases often involve allegations of gender or cultural bias. There are also issues when battered woman's syndrome is used.[7] Is self-defence appropriate in those circumstances and if so what evidence should be used?[8]

The public's perception of a verdict as undesirable comes in part from how the media portrays results in cases before the courts. Politicians sometimes respond by referring the matter to an inquiry and/or reforming the law. How much influence does the press have over law reform?[9] As Cohen argues:

> There is the public perception of the seriousness of the crime problem (crime is increasingly ranked a more important social problem than unemployment, health care, nuclear risk, environmental damage…And…there is the rhetorical manipulation of the crime problem and public anxiety in media and political discourse.[10]

The public only know, to a large extent, what they read in newspapers or hear and see on the radio or television. Should law be reformed because the public demands it, or should law makers make their own agenda and a long term plan with criteria for

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[5] *R v Ramage* [2004] VSC 508.
[6] *Green v The Queen* (1997) 191 CLR 334.
[7] R Bradfield, 'Understanding the Battered Woman Who Kills her Violent Partner – The Admissibility of Expert Evidence of Domestic Violence in Australia' (2002) 9 *Psychiatry, Psychology and the Law* 177, 178.
[8] Ibid.
[9] See for example Stanley Cohen 'Crime and Politics: Spot the Difference' (1996) 47 *The British Journal of Sociology* 1, 8; Reg Graycar and Jenny Morgan 'Law Reform: What's in it for Women?' (2005) 23 *Windsor YB Access Just* 393, 415; Robert Keiter 'Public lands and law reform: putting theory, policy, and practice in perspective' (2005) 4 *Utah Law Review* 1127, 1211; Barry Feld 'Violent youth and public policy: a case study of juvenile justice law reform' (1995) 79 *Minnesota Law Review* 965, 982.
[10] Stanley Cohen 'Crime and Politics: Spot the Difference' (1996) 47 *The British Journal of Sociology* 1, 8.

determining which laws should be targeted for reform?[11] There can also be an issue with the influence lobby groups can have on the law reform process, for example, fathers' rights groups and family law reform.[12] In 2004 the United Kingdom Law Commission considered the role public opinion should play in law reform when considering how to use the results of a public opinion survey:

> Public opinion should not necessarily decide what the law should be, for public opinion may not be carefully thought out and the law may itself help to shape public opinion, but it should be properly taken into account.[13]

This paper will argue that the law in relation to murder and the complete defence of self-defence and the partial defence of provocation is influenced by what the public and the lawmakers consider to be the appropriate position with regards the balance between punishing the behaviour and acknowledging excuses. That is, in what circumstances is taking another human being's life acceptable or excusable, or in what circumstances can it not be allowed. Also the law determines what gender, cultural and sexual orientation factors are to be taken into account in that consideration.

Provocation and self-defence will be considered in this paper as case studies of the role public outrage plays in promoting law reform and change. The defences will be illustrative of how the tension between public expectations about justice and fairness and perceptions about the role of gender and culture on the one hand, and the formal process of law reform to reflect societal evolution on the other hand are resolved. It will be seen that even where there has been public outcry and pressure, the response has not been knee-jerk but rather to refer matters to law reform commissions for a considered response.[14] However it does show that there is a lack of proactive review of cases and that public pressure compels issues being put on the agenda rather than academic and professional priority.

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[11] Ibid.
[12] R Graycar 'Law Reform by Frozen Chook: Family Law Reform for the New Millennium' (2000) 24 *Melb U L Rev* 737, 746.
[13] Law Commission, *Partial Defences to Murder Final Report* (2004) at [3.146].
[14] See for example Victoria, New South Wales, Queensland, New Zealand.

II PROVOCATION

Provocation is a defence which reduces the offence of murder to manslaughter. Even though there may be an intent to kill it can be deemed that, in some circumstances, it is not appropriate to be classified as murder. It is not saying the killing is justified or excused. What it is saying is that in the circumstances, the response (which resulted in the killing) is within the normal range of behaviour of what can be expected of the ordinary person and that it represents an acknowledgment of human frailty. This is the traditional view of the law.[15] The origins of the defence of provocation lie in seeking to mitigate the punishment and to alleviate the harshness of the penalty of the offence of murder. When the penalty for murder was death, often provocation was a way of reducing the punishment from the death penalty to life imprisonment. In jurisdictions where there was a mandatory life sentence, there was also an argument for this defence to be in existence. All the jurisdictions considered in this paper have abolished the death penalty and some have removed the mandatory life sentence. In Australia, there is a mandatory life sentence for murder in the jurisdictions of Queensland, Western Australia, South Australia and the Northern Territory.

For there to be provocation the acts or words of the victim must:

1. be done or said by the deceased to or in the presence of the killer;
2. have caused in the killer a sudden and temporary loss of self-control; and
3. be of such character as might cause an ordinary person to lose self-control.[16]

There are two aspects to the third element, the objective test, being:

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[15] Mirko Bagaric and Kenneth Arenson, *Criminal Laws in Australia* (2nd ed, 2007), 134.
[16] *R v R* (1981) 28 SASR 321, 322.

a. the gravity of the provocation; and
b. whether the provocation was of such gravity that it could cause an ordinary person to lose self-control and act like the accused.[17]

When considering whether there has been a loss of self-control it has been said that:

> Traditionally the onset of sudden passion involving loss of self-control characteristic of provocation has been associated with acts or actions which provoke the accused to uncontrollable anger or resentment…a notion that may be traced back as far as Aristotle…These days, however, judicial discussion of the doctrine places emphasis on the accused's sudden and temporary loss of self-control, without necessarily attributing that loss of self-control to anger or resentment, except in so far as it is asserted that the act which causes death was done as a result of passion or, as it is colourfully expressed, 'in the heat of passion'.[18]

With regards to the objective test, referred to above, there are two limbs. The first limb involves assessing the gravity of the provocation. The accused's characteristics can be taken into account in this consideration. Might an ordinary person in the same circumstances be provoked? The High Court has held:

> Conduct which might be insulting or hurtful to one person, might be extremely so to another because of that person's age, sex, race, ethnicity, physical features, personal attributes, personal relationships or past history. The provocation must be put into context and it is only by having regards to the attributes or characteristics of the accused that this can be done.[19]

Secondly, it is questioned whether an ordinary person might have lost self-control to the same extent as the accused. The only characteristic that can be taken into account in Australia is the accused's age.[20]

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[17] *Stingel v R* (1990) 171 CLR 312, 325-7.
[18] *Van Den Hoek* (1986) 161 CLR 158, 166-7.
[19] *Masciantonio v R* (1995) 129 ALR 575, 581.
[20] *Stingel v R* (1990) 171 CLR 312.

Whether the accused has lost self-control is a subjective test. However whether an ordinary person would have acted in a similar way is an objective test. It has been argued[21] that it is difficult for a jury to switch from a subjective to an objective test and that this requires 'mental gymnastics' which may result in the wrong verdict being reached. It is also problematic when deciding what should be taken into account in the objective test. Should that include gender, religion, culture, sexual orientation, illness or addictions? The ordinary person for the purposes of the objective test in the defence of provocation is not the same as the reasonable person for the purposes of the law of negligence.[22] The ordinary person needs to have reasonable powers of self control.[23] Characteristics such as age, sex, race, physical features, personal attributes, personal relationships and past history may be relevant to assessing the seriousness of the provocation or the gravity of a wrongful act or insult.[24] However the personal characteristics of the accused do not affect the extent of the power of self control of the ordinary person. An exception to that is the age of the accused.[25] The High Court has held that the attributes or characteristics of the accused must be assessed to consider the gravity of the conduct.[26]

The element of suddenness has been held to not require that the killing immediately follow the provocative act.[27] This is particularly relevant when considering cases involving battered woman's syndrome. The High Court has considered this.[28] It is possible for the loss of self control to come after a long period of abuse and without any particular incident.[29]

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[21] Justice Mark Weinberg, 'Moral blameworthiness- The "objective test" dilemma' (2003) 24 *Australian Bar Review* 173.
[22] *R v Stingel* (1990) 171 CLR 312, 328.
[23] *Moffa v R* (1977) 138 CLR 601, 613.
[24] *R v Stingel* (1990) 171 CLR 312, 326.
[25] *R v Stingel* (1990) 171 CLR 312 at 327.
[26] *Masciantonio v R* (1995) 183 CLR 58.
[27] *R v Chhay* (1994) 72 A Crim R 1.
[28] *Osland v R* (1998) 197 CLR 316.
[29] *R v Secretary* (1996) 107 NTR 1.

The retaliation must have some reasonable relationship to the provocation.[30] The High Court has held that the degree of retaliation is just one of the matters to be taken into consideration when considering whether or not there has been a loss of self control by the accused.[31]

There are problems with the defence of provocation. The test involves a subjective element, with regards the gravity of the provocation, and an objective element. There is an issue with what can be taken into account when deciding whether an ordinary person would lose control and kill. Should gender, culture or religion be taken into account? As the High Court has said:[32]

> No doubt there are classes or groups within the community whose average powers of self-control may be higher or lower than the community average. Indeed it may be that the average power of self-control of the members of one sex is higher or lower than the average power of self-control of members of the other sex. The principle of equality before the law requires, however, that the differences between different classes or groups be reflected only in the limits within which a particular level of self-control can be characterized as ordinary. The lowest level of self-control which falls within those limits or that range is required of all members of the community.

Is there something wrong with the general idea that an ordinary person can lose control and kill another human being? All human beings are capable of self-control and in a liberal democratic society the rights of the individual are important and self-control is encouraged. However not everyone exercises self-control.[33] If we allow loss of self-control to be an excuse, will that encourage people to frame their justification to fit within the excuse? Dalrymple suggests the more rage is a diagnosis, the more rage there will be.[34] It can be argued that the idea of the loss of self-control is a fallacy:

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[30] *Mancini v DPP* [1942] AC 1.
[31] *Johnson v R* (1977) 136 CLR 619.
[32] *Stingel v R* (1990) 171 CLR 312, 329.
[33] Graeme Coss 'The Defence of Provocation: An Acrimonious Divorce from Reality' (2007) 18 *Current Issues Crim Just* 51, 52.
[34] T Dalrymple, 'Rages of the Age' (2002) 2/54 *National Review* 22.

> Angry impulses do not so overwhelm us to the point that we become enslaved by them. We are endowed with a high level of choice concerning how we act, even in relation to the most provocative forms of conduct. Those who lash out when confronted with a distasteful experience do not respond in this manner because of an absence of a meaningful choice. They do so because they elect to do so[35]

Consider for example that far more women are killed by their partners than kill their partners.[36] There is also a 'growing tendency to blame others for one's own failures and unwillingness to accept responsibility for one's own insufficiencies'.[37] In an old case from the nineteenth century, there was a view expressed that 'the emotions released as a result of provocation were like an "unruly horse" whose rider - reason - might lose control after such provocation'.[38]

There has been a move in tort law in recent years, with the introduction of civil liability legislation,[39] towards personal responsibility and away from blaming others. This has been done by limiting the circumstances of recovery and quantum of damages when civil remedies are sought. Should this principle also apply in criminal law? There has also been a recent trend in criminal law towards a more punitive system.[40]

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[35] L Neal and M Bagaric 'Provocation: The Ongoing Subservience of Principle to Tradition' (2003) 67 *Journal of Criminal Law* 237, 247.
[36] Reg Graycar and Jenny Morgan 'Law Reform: What's in it for Women?' (2005) 23 *Windsor YB Access Just* 393, 401.
[37] T Dalrymple, 'Rages of the Age' (2002) 2/54 *National Review* 22, 23.
[38] *R v Hayward* (1833) 6 C&P 157, 159, 172 ER 1188, 1189 (Tindal CJ) cited in S Yannoulidis, 'Excusing Fleeting Mental States: Provocation, Involuntariness and Normative Practice' (2005) 12(1) *Psychiatry, Psychology and Law* 23, 32.
[39] For example see *Civil Liability Act 2003* (Qld), *Civil Liability Act 2002* (NSW).
[40] Stanley Cohen 'Crime and Politics: Spot the Difference' (1996) 47 *The British Journal of Sociology* 1, 8; Richard Harding 'Victimization, Moral Panics, and the Distortion of Criminal Justice Policy' (1994) 6 *Current Issues Crim Just* 27, 28 and Sandra Egger 'Victimisation, Moral Panics and the Distortion of Criminal Justice Policy: A Reply to Richard Harding' (1994) 6 *Current Issues Crim Just* 43.

Many cases involve the factual paradigm where a woman leaves a man for another man and the former partner kills the woman and claims he was provoked by her actions. If you consider the divorce rate throughout the jurisdictions, can it be said that an ordinary person could lose control and kill because their former partner has commenced another relationship? If this were so, then there would surely be far more murders than there actually are. Is it also about the power relationship? Is it also about men regarding women as their property? There are some cases where the accused has used the fact that the victim has told them of their new sexual partners as provocative conduct.[41] Infidelity within a relationship should not be a defence for murder. Victims should not be blamed especially considering they are not able to tell their side of the story.

Jurisdictions which have abolished the mandatory life sentence for murder have been more willing to abolish the defence of provocation.[42] However there is less support for abolishing the defence of provocation in jurisdictions which still have a mandatory life sentence for murder. If the defence of provocation is not to be abolished, should it be framed differently? Rather than asking whether the accused lost self-control, ask 'what were the features of the accused's rage, or fear, reaction that caused their judgment to be overwhelmed with such devastating consequences'.[43] Brookbanks argues, 'the defence should be recast, not as a concession to human frailty, but as a statutory recognition of the disabling effects of uncontrolled rage of the *particular individual'*.[44] Without scientific evidence given by experts establishing a causal connection between the disorder and the behaviour, loss of self-control becomes no more than an abuse excuse.[45]

A *Model Criminal Code*

[41] Leanne Edmistone, 'Verdicts provoke debate', *The Courier Mail* (Brisbane), 3 July 2007, 1.
[42] For example, Tasmania and Victoria.
[43] W Brookbanks, 'I lost it- rage and other excuses' (2006) 31(4) *Alt LJ* 186, 192.
[44] Ibid.
[45] Ibid 191.

The Standing Committee of Attorneys-General established in 1990 the Model Criminal Code Officers Committee to develop a Model Criminal Code with the aim of pursuing uniformity in the different jurisdictions with regards criminal law.

In was recommended in the 1998 Model Criminal Code that the defence of provocation be abolished. The Model Criminal Code Officers Committee found there was not only gender bias in the defence but also that:[46]

> The real issue in deciding whether the partial defence of provocation should be retained is one of culpability - whether the defendant should be culpable for murder, or for the lesser crime of manslaughter.

It was concluded that it was more appropriate to deal with differences in culpability in sentencing rather than by using the defence of provocation which of course assumes the sentence can be varied.

B *Queensland*

In Queensland provocation is a partial defence to murder[47] and a complete defence to assault.[48] There is still a mandatory life sentence for murder in Queensland. The defence of provocation has been used successfully to reduce murder to manslaughter in some recent cases which have caused public concern. The defence has been referred to an inquiry (which had been set up to review the excuse of accident) for an audit.[49] A discussion paper was released on 12 October 2007.[50] The paper considers accident and provocation and looks at law reform in other jurisdictions like other Australian states and the United Kingdom and New Zealand. It also considers the

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[46] Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code- Discussion Paper-Chapter 5-Fatal Offences Against the Person*, June 1998, 103.
[47] *Criminal Code* (Qld) s 304.
[48] *Criminal Code* (Qld) s 269.
[49]CCH, *News Headlines: Qld: Provocation defence to be audited* <http://www.cch.com.au/fe_news.asp?e=1&document_id=91649&topic_code=7&category_code=0> at 19 July 2007.

role of the jury and the nature of the sentencing system in Queensland. It involved an audit of trials for murder and manslaughter between 2002 and 2007. There were 80 murder and 20 manslaughter trials selected. In some cases it is hard to know when there were multiple defences and issues which one swayed the jury because jury deliberations are confidential. So the audit team based their conclusions on the directions given to the jury. The paper asks whether the current law reflects the community's expectations of criminal responsibility. The current law was inherited from the English common law where 'provocation historically arose to express tolerance for human frailty, at a time when men bore arms and retaliated to affronts to their honour'.[51] The application of provocation to modern cases illustrates that its relevance is questionable.[52]

C *Tasmania*

The first Australian State to abolish the defence of provocation was Tasmania in 2003.[53] The Attorney General's reasons for removing the defence included that:[54]

- where there is an intention to kill it should not be called something else just because the accused lost their self control;
- the death penalty and mandatory life imprisonment had already been abolished (which was also pointed out by the Director of Public Prosecutions in the 2000-01 Annual Report);
- it was subject to abuse by becoming increasingly subjective; and
- the defence was unjust and gender-biased.

The Attorney General did not consider it necessary to send the issue to the Law Reform Commission but did note that other jurisdictions, like Victoria, were doing

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[50] Queensland Government, *Discussion Paper - Audit on Defences to Homicide: Accident and Provocation,* October 2007.
[51] Graeme Coss 'The Defence of Provocation: An Acrimonious Divorce from Reality' (2007) 18 *Current Issues Crim Just* 51, 52.
[52] Ibid.
[53] *Criminal Code Amendment (Abolition of Defence of Provocation) Act 2003* (Tas).

so.[55] This fact is relevant to the issue of how the law reform process operates and is interesting when considering what has happened in other jurisdictions. This illustrates a lack of a process of proactive review of laws. It was noted that conduct which in the past would have been relevant to provocation would continue to be relevant but only in relation to sentencing.[56]

D *Victoria*

Victoria abolished the defence of provocation in 2005. A review of the defence of provocation had been called after a case in 2004 which caused public outrage. In *R v Ramage*[57] the defence of provocation was successfully used by a man who bashed and strangled his estranged wife. The accused claimed to have lost self-control when the victim said to him that sex with him repulsed her.

The Victorian Law Reform Commission in its final report, *Defences to Homicide*, identified a number of criticisms of the defence of provocation, including:

- provocation and a loss of self-control is an inappropriate basis for a partial defence - people should be able to control their impulses, even when angry;
- provocation is gender biased;
- provocation promotes a culture of blaming the victim;
- the test for provocation is conceptually confused, complex and difficult for juries to understand and apply;
- provocation is an anachronism – it is no longer necessary since abolishing mandatory sentence for murder.[58]

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[54]Hansard, House of Assembly (Tas), Thursday 20 March 2003 Pt 2, 30-108, <http://www.hansard.parliament.tas.gov.au>.
[55] Ibid.
[56]R Bradfield, 'The Demise of Provocation in Tasmania' (2003) 27 *Crim LJ* 322, 323.
[57] [2004] VSC 508.
[58] Victorian Law Reform Commission, *Defences to Homicide: Final Report*, October 2004, 26.

E *New South Wales*

New South Wales is currently reviewing the defence of provocation. The New South Wales Law Reform Commission recommended in 1997 that the defence should be retained but reformulated. That review had been in response to the case of *Green v The Queen*[59]*,* where the High Court upheld an appeal (3:2) from a conviction of murder. The accused was originally sentenced to 15 years imprisonment for murder but received 10.5 years for manslaughter at the second trial after the appeal. The provocation in that case was being touched by a same sex friend who had got into bed with him.

It was recommended that the defence of provocation should be available if the jury found that 'the accused, taking into account all of his or her characteristics and circumstances, should be excused for having so far lost self-control as to have formed an intent to kill or to inflict grievous bodily harm…as to warrant the reduction from murder to manslaughter'.[60] The recommended reformulation of provocation 'represents an attempt to retain a subjective element, while taking community standards into account, without reference to an ordinary person standard'.[61] This would be similar to the test used by the House of Lords in *Smith.*[62]

F *New Zealand*

There have been cases in New Zealand where the defence of provocation has been successfully used which have caused public concern. For example, in *R v Nepia*[63] the provocation was the statement made by the estranged wife that the husband would not be seeing the children again. There has also been the use of Intermittent

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[59] (1997) 191 CLR 334.
[60] NSW Law Reform Commission, *Partial Defences to Murder: Provocation and Infanticide,* Report 83, October 1997, 76.
[61] Victorian Law Reform Commission, *Defences to Homicide: Final Report*, October 2004, 47.
[62] *R v Smith (Morgan)* [2001] 1 AC 146.
[63] [1983] NZLR 754 (CA).

Explosive Disorder[64] as a factor in causing the loss of self-control in which 'typically, they blame the victim'.[65]

The New Zealand Law Commission recommended in 2001 that the defence of provocation be abolished.[66] The Commission considered that 'the defence diverges from modern values in some significant respects'.[67] In 2002 the mandatory life imprisonment for murder was replaced with a discretionary sentence. There is a presumption of life imprisonment unless it can be proven there are circumstances that would make it manifestly unjust.[68]

The government referred the defence of provocation to the Commission again in 2004. However despite the matter being referred to the NZLC twice, the defence of provocation still exists despite academic support for its abolition. Tolmie argues that the defence of provocation should not be abolished in New Zealand but rather:

> The defence should be unavailable in circumstances where the act of the victim is provocative because it challenges the power and control that the offender believes he is justified in exercising over another person. This includes behaviours that women, as independent and autonomous actors, are entitled to do, such as leaving their relationship with the offender, partnering or re-partnering, making access arrangements in relation to their children, or reporting acts of violence against them to the police.[69]

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[64] *Murray v R* CA 391/96, 27 February 1997.
[65] Brookbanks, above n 14, 191.
[66] New Zealand Law Commission, *Some Criminal Defences with Particular Reference to Battered Defendants* (R73:2001), 42.
[67] Ibid.
[68] *Sentencing Act 2002* (NZ) s102.
[69] J Tolmie, 'Is the Partial Defence an Endangered Defence? Recent Proposals to Abolish Provocation' [2005] *NZ Law Review* 25, 45.

On 26 October 2007 the NZLC report was tabled in Parliament and it recommended repealing provocation.[70] The commission looked at murder cases in Auckland and Wellington from 2001 to 2005. The government will now consider the report.

G *United Kingdom*

The defence of provocation has been under scrutiny in the United Kingdom over the last few years. The House of Lords in 2000 in *R v Smith*[71] stated that when considering whether an ordinary person would have lost self control it was relevant to take into account the personal characteristics of the accused as well as age and sex. Lord Hoffman held:

> The general principle is that the same standards of behaviour are expected of everyone, regardless of their individual psychological make-up. In most cases, nothing more will need to be said. But the jury should in an appropriate case be told, in whatever language will best convey the distinction, that this is a principle and not a rigid rule. It may sometimes have to yield to a more important principle, which is to do justice in the particular case. So the jury may think that there was some characteristic of the accused, whether temporary or permanent, which affected the degree of control which society could reasonably have expected of *him* and which it would be unjust not to take into account. If the jury take this view, they are at liberty to give effect to it.[72]

In 2005 the Privy Council in *Attorney General for Jersey v Holley*[73] decided not to follow the House of Lords and held that only the accused's age and sex should be taken into account in the ordinary person test. Lord Nicholls held:

> Taking into account the age and sex of a defendant … is not an exception to this uniform approach. The powers of self-control possessed by ordinary

[70] New Zealand Law Commission, *The Partial Defence of Provocation,* October 2007.
[71] *R v Smith (Morgan)* [2001] 1 AC 146.
[72] *R v Smith (Morgan)* [2001] 1 AC 146, 173.
[73] *Attorney General for Jersey v Holley* [2005] 2 AC 580.

> people vary according to their age, and, more doubtfully, their sex. These features are to be contrasted with abnormalities, that is, features not found in a person having ordinary powers of self-control. The former are relevant when identifying and applying the objective standard of self-control, the latter are not.[74]

In *R v James* the Court of Appeal in 2006[75] decided to follow the Privy Council's decision rather than the House of Lords and to only consider age and sex.

The United Kingdom Law Commission recommended that the defence of provocation be reformulated suggesting:[76]

> that the partial defence of provocation should remain for those who, with out acting out of a considered desire for revenge: (1) killed only in response to gross provocation; and/or (2) killed only in response to a fear of serious violence in circumstances where someone of the defendant's age and of an ordinary temperament might have reacted in the same or in a similar way'.[77]

This recommendation would result (among other things) in the accused's sex not being taken into consideration in the objective test.[78]

Another consideration is the mandatory penalty for murder. The United Kingdom still has a mandatory life sentence for murder. It has been argued[79] that it is more difficult for a jurisdiction with a mandatory penalty to abolish the defence of provocation than for one that does not.

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[74] *Attorney General for Jersey v Holley* [2005] 2 AC 580, [13].
[75] *R v James* [2006] 1 All ER 759.
[76] Law Commission Consultation Paper No 177, *A New Homicide Act for England and Wales?* (2005), 187.
[77] Ibid 171.
[78] J Elvin, 'The Doctrine of Precedent and the Provocation Defence: A Comment on *R v James*' (2006) 69(5) *MLR* 819, 829.

H *Summary*

Provocation has recently been the subject of reviews and amendments. Tasmania and Victoria have abolished provocation as recommended in the Model Criminal Code. New South Wales, New Zealand, Canada and the United Kingdom are all in the process of reviewing it. Queensland has conducted an audit of cases where provocation has been used as a defence. Only jurisdictions without a mandatory life sentence for murder have abolished provocation.

III SELF- DEFENCE

Self-defence is a complete defence to murder. The successful use of this excuse results in a complete acquittal. It is also a defence to other offences that require the use or threat of force as an element. There is a subjective element (what the accused believed at the time of the killing) as well as an objective element (whether the belief was based on reasonable grounds). Cases have interpreted the elements which constitute self-defence.[80] There has been criticism of the defence in that it has been interpreted and applied in a way which is gender biased against women.[81] Self-defence has traditionally been associated with a one-off spontaneous encounter such as the pub brawl scenario between two men of relatively equal strength.[82] However this interpretation has been developed over time by the courts.[83]

Self-defence was defined by the common law as being established if the defendant believed on reasonable grounds that it was necessary to do what was done:

> The question to be asked in the end is quite simple. It is whether the accused believed upon reasonable grounds that it was necessary in self-defence to do what he [or she] did. If he [or she] had that belief and there were reasonable

[79] G Coss, 'Provocative Reforms: A comparative critique' (2006) 30 *Crim LJ* 138, 144.
[80] For example *Zecevic v DPP* (1987) 162 CLR 645; *R v Muratovic* [1967] Qd R 15.
[81] Victorian Law Reform Commission, *Defences to Homicide: Final Report*, October 2004, 59.
[82] Ibid 61.
[83] *Osland v R* [1998] 73 ALJR 173.

> grounds for it, or if the jury is left in reasonable doubt about the matter, then he [or she] is entitled to an acquittal.[84]

In all the Australian jurisdictions, self-defence is now regulated by statute.[85] New South Wales, Victoria, ACT, the Northern Territory and the Commonwealth have all adopted the Model Criminal Code provision with regards self-defence.[86]

There are a number of problems with women trying to argue self-defence. One is that usually women have to wait until their partner is asleep or is not expecting an attack which impacts on the immediacy of the threat. Another is the proportionality of their response to the threat. Thirdly there is a problem with the necessity of their response in contrast to other possibilities like just leaving the relationship or asking for help. These problems have the potential to influence the jury's assessment of what the accused believed and whether the belief was based on reasonable grounds.[87]

If the accused is able to satisfy the subjective element of the defence but not the objective element, some jurisdictions recognise what is termed excessive self-defence. That is, in circumstances where the court finds that the accused was entitled to use some force in self-defence but used an excessive amount of force that resulted in the death of the attacker, murder will be reduced to manslaughter.[88] The doctrine of excessive self-defence was rejected by the Privy Council,[89] accepted by the High Court[90] and then rejected by the High Court.[91] Therefore, currently at common law, and in the Code states,[92] there is no excessive self-defence. However some common law jurisdictions have reintroduced excessive self-defence.[93]

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[84] *Zecevic v DPP* (1987) 162 CLR 645, 661.
[85] Victorian Law Reform Commission, *Defences to Homicide: Final Report*, October 2004, 85.
[86] *Criminal Code Act 1995* (Cth) s 10.4; *Crimes Act 1900* (NSW) s 418; *Criminal Code Act 1983* (NT) s 29; *Criminal Code 2002* (ACT) s 42; *Crimes Act 1958* (Vic) s 9AE.
[87] Victorian Law Reform Commission, *Defences to Homicide: Final Report*, October 2004, 63.
[88] *R v Howe* (1958) 100 CLR 448.
[89] *Palmer v R* [1971] AC 814.
[90] *Viro v R* (1978) 141 CLR 88.
[91] *Zecevic v DPP* (1987) 162 CLR 645.
[92] Queensland, Western Australia and the Northern Territory.
[93] See for example New South Wales, South Australia and Victoria.

A *Model Criminal Code*

In was recommended in the 1998 Model Criminal Code that excessive self-defence not be reintroduced.[94]

It was also recommended that the test for whether a person has acted in self-defence should be whether the accused's conduct has been reasonable rather than the accused's belief.

> Therefore a person who believed he or she was in danger, even if mistaken about that perception, would be able to rely on self-defence, unless his or her conduct was not a reasonable response in the circumstances as he or she perceived them. The reasonableness of the belief is only relevant as a matter to be taken into account by the jury in considering whether the belief was in fact honestly held.[95]

B *Queensland*

In Queensland the *Criminal Code* has provisions for the defending of unprovoked assaults[96] and for defending provoked assaults[97] as well as defending others.[98] Traditionally these provisions have been interpreted by the courts to reflect a male bias in the sense of two men of relatively equal strength or the 'pub brawl' situation.[99]

There are subjective and objective parts to the defence. The accused must believe that they cannot otherwise protect themselves (which is subjective) but this belief

[94] MCCOC Discussion Paper, above n 31, 113.
[95] Victorian Law Reform Commission, *Defences to Homicide: Final Report*, October 2004, 88.
[96] *Criminal Code* (Qld) s271.
[97] *Criminal Code* (Qld) s272.
[98] *Criminal Code* (Qld) s273.

must be based on reasonable grounds (which is objective). Some women have been able to use self-defence and have no problem establishing the subjective element but have problems proving the objective part. This is because often the woman waits until the man is asleep or is not expecting an attack, which does not fit within a belief that they cannot reasonably protect themselves.[100] As Bradfield states:

> The importance placed by the courts on the existence of an imminent threat (limiting both what is necessary and what is reasonable) has most significantly restricted the availability of the defence of self-defence to women who kill their abusive partners after a prolonged period of violence. In non-confrontational situations and in the absence of an identifiable threat (ie I will kill you when you wake up), the courts have had great difficulty accepting the appropriateness of self-defence.[101]

C *New South Wales*

The defence of self-defence was codified in New South Wales in 2001,[102] based on the Model Criminal Code. However excessive self-defence was also reintroduced.[103] The successful defence reduces murder to manslaughter.

D *Victoria*

The Victorian Law Reform Commission recommended codifying self-defence to clarify that:

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[99] S Tarrant, 'Provocation and Self-defence: A Feminist Perspective' (1990) 15 *Legal Service Bulletin* 147, 148.
[100] See for example *Osland v R* [1998] 73 ALJR 173; *R v Babsek* [1998] QCA 116; *R v Secretary* (1996) 197 NTR 1.
[101] R Bradfield, 'Is Near Enough Good Enough? Why Isn't Self-defence Appropriate for the Battered Woman?' (1998) 5 *Psychiatry, Psychology and the Law* 71, 73.
[102] *Crimes Act 1900* (NSW), s 418.
[103] *Crimes Act 1900* (NSW), s 421.

- a person may be acting in self-defence when he or she believes the harm threatened by the deceased is inevitable, although not immediate; and
- a person's response need not be proportionate to the harm threatened to successfully establish they acted in self-defence, so long as it is reasonable in the circumstances.[104]

The Commission also considered whether a new defence should be introduced with regards women who kill abusive partners. However, it was recommended that instead of introducing a new defence the existing self-defence should be reformed to better work for women.[105] This was supported by the Women's Legal Service Victoria who were concerned that creating a new defence would medicalise women's behaviour.[106]

Victoria reintroduced excessive self-defence in 2005,[107] and also modified self-defence.[108] A new section was also introduced, providing that where family violence is involved a person may have reasonable grounds for believing that their conduct is necessary to defend themselves even if responding to harm that is not immediate.[109] The section states some types of evidence which may be relevant including:

- the history of the relationship,
- the cumulative effect of the violence,
- social, cultural or economic factors,
- general nature of relationships which involve violence,
- psychological effort of violence.[110]

[104] Victorian Law Reform Commission, *Defences to Homicide: Final Report*, October 2004, 59.
[105] Ibid 66.
[106] Ibid.
[107] *Crimes Act 1958* (Vic) s 9AD.
[108] *Crimes Act 1958* (Vic) s 9AE.
[109] *Crimes Act 1958* (Vic) s 9AH.
[110] *Crimes Act 1958* (Vic) s 9AH.

E *New Zealand*

The New Zealand Law Commission recommended in 2001 that the partial defence of excessive self-defence not be introduced.[111] It also recommended against introducing a separate defence for battered women.[112] Instead it recommended clarifying the law of self-defence so that it was clear that it is not always necessary that the danger be imminent but rather be inevitable.[113]

The Commission also recommended the sort of expert evidence that might be relevant and helpful where a battered defendant is using self-defence.[114] This included expert evidence to help juries understand why women remain in abusive relationships, the danger from the relationship, why the defendant felt she had no other alternative and cultural difficulties.[115]

F *Summary*

The Model Criminal Code and the New Zealand Law Commission both recommended self-defence be reformulated but recommended against reintroducing excessive self-defence and against introducing a separate defence for battered women's syndrome. New South Wales and Victoria have reintroduced excessive self-defence, against the recommendation by the Model Criminal Code, and have modified self-defence in accordance with the recommendation by the Model Criminal Code. Self-defence is not currently under review in Queensland or the United Kingdom.

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[111] NZLC report, above n 45.
[112] Ibid 30.
[113] Ibid 12.
[114] Ibid 16.
[115] Ibid 17-19.

IV CONCLUSIONS

As has been illustrated by considering a number of jurisdictions in Australia and New Zealand and the United Kingdom, there are problems with the defences of provocation and self-defence. Their process of reform to a large extent has been considered and consistent with proper public policy objectives. Most jurisdictions have responded to public pressure by setting up reviews, with Tasmania as the exception.

Provocation should be abolished in those jurisdictions that have not already done so. The test used in the defence of provocation is conceptually difficult for the jury to understand. The jury is told they can take certain characteristics into consideration in one part of a test but not in another part. This has the potential for injustice. The objective test is biased toward the dominant culture. It is also biased towards heterosexual males. Factors including illness, addictions, culture, history, sexual orientation as well as age and sex could be taken into consideration in the sentencing process. There is no longer a good enough reason to show mercy. The death penalty has been abolished and the mandatory life sentence had been abolished in many jurisdictions. There is no longer a need to mitigate against the harshness of a mandatory sentence in those jurisdictions which have abolished it.

Murder should be labelled murder. If there is an intention to kill someone then it should be named murder. Why should the loss of self-control be the basis of a defence? If there are mitigating factors, they can be taken into consideration in the sentencing phase in those jurisdictions which have abolished the mandatory life sentence. Violence should not be condoned. Self-control should be encouraged. It should not be enough to reduce murder to manslaughter to say ‘my former partner slept with another person’ or ‘the victim made homosexual advances towards me’. Victims cannot defend themselves in court. It is usually only the word of the accused as to what was said and done leading up to the killing. It would seem from a review

of cases like *Ramage*[116] that the defence of provocation encourages blaming the victim for the criminal acts of the accused. Society in general would seem to support the concept that a person should be allowed to be promiscuous, or of a different sexual orientation, and not be killed for it. This statement would be supported by the public response to recent cases. It could be argued that it is about power and one person should not have power over another to control what they do or who they sleep with. That message needs to be consistent and clear.

Self-defence needs to be considered and reformed. The partial defence of excessive self-defence should not be re-introduced. If the accused has used too much force then it should be classified as murder and any mitigating factors taken into account in the sentencing phase if there is not a mandatory sentence. Self-defence needs to be defined so as to include those circumstances where the threat is not imminent but still inevitable. If that is the case then there does not need to be a separate defence for battered women. Women can be accommodated by the existing law as long as it is clear that the threat does not need to be imminent and that evidence of family violence is admissible.

Law reform should be driven by an overall perception of the public policy objectives and long term goals with the greater good in mind rather than by knee-jerk reactions to articles in the press and in response to public opinion. There seems to be a trend in recent times for the criminal law to be more punitive which seems to be driven by politicians responding to what the public desires.[117] However there also seems to be a trend towards personal responsibility in the civil law.[118]

Law and public policy can certainly be about taming the unruly horse. Jurisdictions should be careful about why law should be reformed. Whether provocation is abolished or not, whether self-defence should be reformulated or excessive self-defence be reintroduced, should depend upon it being necessary because the current

[116] *R v Ramage* [2004] VSC 508.
[117] Graeme Coss 'The Defence of Provocation: An Acrimonious Divorce from Reality' (2007) 18 *Current Issues Crim Just* 51, 70.
[118] Stuart Clark, Christina Harris, and Ross McInnes 'Tort reform take two: personal responsibility, the Civil Liability Amendment (Personal Responsibility) Act' (2003) 41(1) *Law Society Journal* 54.

law is producing an unjust result, not because the law is difficult, messy, hard or complex to implement.