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Provocation: Getting Away With Murder?

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Abstract

This paper examines the law of provocation in Queensland, and possible options for law reform. In 2007, the Queensland Attorney-General called for submissions regarding the operation and use of the defence. Victoria, Tasmania, the Northern Territory, the ACT, New Zealand and the United Kingdom have reformed their provocation laws. The paper examines the current law, and statistics on the incidents of homicide. This allows for a focussed analysis of the issues regarding provocation, including analysis of who uses the defence, and whether these uses are consistent with its historical rationale. Possible options for law reform are also presented, including abolition and replacement with sentencing discretion; removing the objective person test; or excluding provocation in certain circumstances, such as following a homosexual advance, or a woman's threat to leave her husband. Any such changes must be accompanied by the removal of Queensland's mandatory life sentence for murder.

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Contents

1. Introduction

Provocation originally emerged as a concession for human frailty in the form of a partial defence to murder. Its primary purpose was to ensure that a less culpable person who killed in hot blood would not face a mandatory death penalty. However, given that the death penalty is no longer administered in Australia and that many jurisdictions have moved away from mandatory sentencing, there have been numerous calls to reform or discard the defence. In recent years, a number of jurisdictions have made moves to enact law reform, with some going so far as to abolish the defence entirely. In late 2007, the Attorney General of Queensland commissioned an audit of the defences of accident and provocation, and called for submissions 'on the operations and use of these defences'.[1] The history[2] and rationale[3] of the defence are well documented. This paper will examine the current law and recent law reforms in Australia and overseas. Statistics on homicide will be presented to allow for a focussed assessment of the shortcomings of the defence, including whether community values have changed and the difficulty of applying the objective test. The circumstances of usage will also be scrutinised. Finally, the paper will make recommendations for law reform.

2. The Law of Provocation

The law of provocation in Queensland, other states of Australia, New Zealand and the United Kingdom differs substantially. Most jurisdictions[4] have reformed provocation law in recent years; however, Queensland, South Australia and Western Australia are yet to alter the defence.

2.1 Queensland

Provocation operates as a partial defence to murder under s 304 of the *Criminal Code* (Qld) ("the Code"). Under s 305, the penalty for murder is a mandatory life sentence; however, when provocation mitigates murder to manslaughter, there is a discretionary sentence, with a maximum sentence of life imprisonment.[5] The defence states that:

> 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.[6]

To establish provocation, the defence bears the evidential onus, and if accepted as a question of law, the prosecution must prove beyond reasonable doubt that the defendant did not kill

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1 Queensland, *Audit on Defences to Homicide: Accident and Provocation*, Department of Justice and Attorney-General, (Oct 2007).

2 See for example: Mirko Bagaric and Keneth J Arenson, *Criminal Laws in Australia: Cases and Commentary* (2nd ed, 2007); Desmond O O'Connor and Paul A Fairall, *Criminal Defences* (3rd ed 1996); William S Holdsworth, *History of English Law* (Vol XVI, 1966), 302; Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (2nd ed, 2005).

3 Peter Alldridge, 'The Coherence of Defences' [1983] *Criminal Law Report* 665; ABC Radio, 'Defences to Homicide', *The Law Report*, 16 August 2005.

4 For example: Victoria, Tasmania, the Northern Territory, the ACT, New Zealand and the United Kingdom.

5 Section 310 *Criminal Code* (Qld).

6 Section 304 *Criminal Code* (Qld).

because of the provocation.[7] To discharge the evidential onus, the defence must satisfy whether, on the version of events most favourable to the accused as suggested by the evidence, the jury acting reasonably might fail to be satisfied beyond reasonable doubt that the killing was unprovoked.[8] The judge must direct the jury to consider provocation, whether the defence raises it or not.[9] This has been held even though defence counsel may tactically choose not to plead provocation, and instead rely on full defences such as self-defence.[10] The Code does not exclude the common law; hence, it is relevant for determining how the defence is to be applied.[11] In *Stingel*,[12] the High Court held that a court must be cautious in withholding the defence from the jury. The defence can be categorised into three elements:

1. Provocative conduct;
2. Subjective element:
    a. The loss of self-control was because of the provocation and not premeditated; and
    b. Loss of self-control was sudden; and
3. Objective element:
    a. Ascertain the gravity of the provocation; and
    b. An ordinary person provoked to the same gravity could have formed an intention to kill or cause grievous bodily harm.

There are large amounts of case law pertaining to what amounts to provocative conduct, and this of itself is a controversial area. The Courts have considered the following to amount to provocative conduct:

- Words alone;[13]
- Wrongful, but lawful conduct;[14]
- Provocation by the victim,[15] or someone closely connected;[16]
- Misdirected retaliation;[17]
- Conduct directed at a third party that directly involves the accused and the victim;[18] and
- An unforeseen result where the accused induces the victim to engage in provocative conduct.[19]

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7 Mark Findlay, *Criminal Law Problems in Context* (2006).

8 Ibid.

9 Bagaric, above n 2.

10 Ibid.

11 *Van Den Hoek* (1986) 161 CLR 158.

12 (1990) 171 CLR 312.

13 *Moffa v R* (1977) 138 CLR 601.

14 *R v R* (1981) 28 SASR 321.

15 *R v Kenney* [1983] 2 VR 470.

16 *R v R* (1981) 28 SASR 321; *R v Voukelatos* [1990] VR 1.

17 *R v Kenney* [1983] 2 VR 470; *R v Pangilinan* [2001] 1 Qd R 56.

18 *R v Terry* [1964] VR 248; *Scriva v R* [no2] [1951] VLR 298.

19 *R v Voukelatos* [1990] VR 1.

With respect to the subjective element, provocation must occur before there is time for the person to regain self-control.[20] In determining the loss of self-control, all characteristics of the accused are relevant.[21] The gravity of the provocation depends on the personal characteristics of the accused, but these must be of a definite nature and of sufficient significance to make the offender different to the ordinary run of humankind.[22] The objective element involves superimposing the gravity onto an ordinary person who is unaffected by the extraordinary attribute or characteristic of the accused.[23] Hence, none of the characteristics of the accused except age should be taken into account.[24] However, some courts have been reluctant to accept this approach. In the Northern Territory, courts continue to apply the test of 'an ordinary Aboriginal living in an Aboriginal settlement'.[25] Whether the accused's characteristics should be taken into account is the subject of much debate,[26] and will be analysed below.[27]

2.2 Other Jurisdictions

Tasmania was the first to abolish the defence in 2003, and Victoria followed in 2005. The Australian Capital Territory and Northern Territory have both enacted provisions to exclude non-violent sexual advances. Western Australian homicide law is currently being reviewed by the Law Reform Commission, with submissions being called on whether the mandatory sentence for murder should be abolished, and whether provocation should be removed.[28] In New South Wales, Law Reform, Parliamentary and other reports have recommended reformulation or abolition, without substantial reform. However, the defence was altered in 1982 to remove the requirement of suddenness, making it more accessible to battered women. In 1998, the Model Criminal Code Officers Committee recommended uniform abolition of the defence in Australia,[29] while New Zealand recommended abolition in 2001 and again in 2007.[30] In the UK, it has been recommended that the defence be retained, but reformulated.[31] In Australia, there is almost unanimous support for reformulation, and significant support for abolition.[32]

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20 *Masciantonio v R* (1995) 183 CLR 58, 66.

21 *Stingel v R* (1990) 171 CLR 312; *Green v R* (1997) 191 CLR 334.

22 *Green v R* (1997) 191 CLR 334*; Stingel v R* (1990) 171 CLR 312*; Masciantonio v R* (1995) 183 CLR 58*.*

23 *Stingel v R* (1990) 171 CLR 312.

24 Ibid.

25 *R v Mungatopi* (1991) 2 NTLR 1.

26 See, for *Masciantonio* (1995) 183 CLR 58, 73 (McHugh J).

27 See section 4.2 below.

28 Western Australia, *A Review of the Law of Homicide*, Law Reform Commission Project 97, (2005).

29 Commonwealth, *Model Criminal Code Discussion Paper – Chapter 5 – Fatal Offences Against the Person* Model Criminal Code Officers Committee (1998).

30 New Zealand, *Some Criminal Defences with Particular Reference to Battered Defendants*, Law Commission Report 73 (2001); New Zealand, *Criminal Defences: Provocation*, Law Commission Report 98 (2007).

31 United Kingdom, *Murder, Manslaughter and Infanticide,* Law Commission Report 304 (2006).

32 See New South Wales, *Partial Defences to Murder: Provocation and Infanticide*, Law Reform Commission Report 83 (1997), which had unanimous support for reformulation in submissions received.

3. Statistics on Homicide

The common stereotypes of homicide are a psychopath killing a stranger, or a bar-room brawl.[33] However, homicide is an inherently personalised crime.[34] 78% of homicides are one-on-one. Friends or acquaintances make up 31% of homicides, intimate partners 21%, family members 19%, and strangers make up only 26%. Homicide is a male-dominated crime, with 88% of offenders, and 64% of victims, being male. Alcohol is involved in 39% of cases, and in 92% of indigenous homicides.[35]

In recent years, a number of studies have been undertaken to establish categories of homicide to aide analysis.[36] Kenneth Polk establishes a number of meaningful categories:

- Sexual intimacy;
- Family intimacy;
- Confrontational homicides;
- Homicides in the course of other crimes;
- Conflict resolution crimes;
- Unsolved and unclassifiable homicides;
- Special cases; and
- Mercy killings.[37]

Only the first five categories may raise defences; hence, these are the primary focus. The above categorisation of homicides allows analysis of the circumstances leading to the homicide, and direct evaluation of whether defences should be available in such circumstances.

3.1 Confrontational Homicides

Confrontational homicides account for 22% of all homicides. Virtually all offenders are males. Often the homicides result from trivial incidents, such as taking a particular seat on a train.[38] In 90% of cases, one or both parties have been taking drugs or alcohol. Polk argues that fundamentally, it is the confrontation, and not any antecedent relationship that describes confrontational homicide. The dynamics of the altercation play out within a set of mutually recognised expectations. The aim is to defend masculine honour, firstly by words, then by violence. In almost all cases, victims are actively involved. The relevant defences raised are usually provocation and self-defence. However, often responses to such trivial incidents are so grossly disproportionate that provocation is unavailable.[39]

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33 Jenny Morgan, 'Who Kills Whom and Why: Looking Beyond Legal Categories' (2002) *Victorian Law Reform Commission*, 3.

34 Ibid.

35 NHMP, *2005-06 Summary* (2006).

36 Findlay, above n 7.

37 Kenneth Polk, *When Men Kill: Scenarios of Masculine Violence* (1994).

38 Morgan, above n 33.

39 Ibid.

3.2 Homicides Originating in Other Crimes

This represents 16% of all homicides. As is the case with confrontational homicides, it is the dynamic of the altercation that describes the relationship, and not any antecedent dealings. Defences are rarely raised in these cases.[40]

3.3 Conflict Resolution Homicides

The category includes interpersonal disputes regarding issues such as debts and shared resources. Often these pertain to criminal ties; hence, conventional dispute resolution mechanisms cannot be utilised. Nearly all homicides of this nature involve male offenders. Retributive killings such as these rarely attract defences.[41]

3.4 Homicides Originating in Family Intimacy

This category excludes sexually intimate relations, and accounts for 13% of homicides. In the family context, men are equally as likely as women to kill their child; however, the circumstances in which this occurs differs greatly.[42] Provocation is occasionally raised where a wife's provocative conduct spills over onto the children and the husband loses self-control; however, this scenario is so rare that it does not warrant further examination.[43]

3.5 Homicides Originating in Sexual Intimacy

This category accounts for 27% of homicides under Polk's categorisations, but only 20% under the Law Reform Commission of Victoria's report.[44] In Queensland, the rate is significantly higher, in line with the state's higher rate of female victims. 77% of sexually intimate relation homicides are men killing women. 65% of sexual intimacy cases occur between current spouses or de facto partners, whilst 22.6% occur between separated de facto partners or divorced spouses. Women almost never kill partners from whom they are separated. 10% of cases occur between current boyfriend/girlfriend relationships, and 2% occur between same-sex couples.

Men primarily kill women for two reasons: jealousy and control, and depression. Men kill other men who are sexual rivals, or during homosexual advance situations, which will be examined below.[45] The primary reason why women kill men is in response to physical violence, which amounts to 53% of cases. In cases where a man kills their female partner, violence is prevalent in 40% of cases, whilst 70% of husband killings involve domestic violence. In 46% of wife

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40 Ibid.

41 Ibid.

42 Killings where the victim is not a child (for example a child killing a parent) are extremely rare, comprising only 2% of cases within the category. Neonaticide, where a parent kills their child within the first 24 hours of life, accounts for 12% of cases, all of which are female offenders. When men kill children in a family context, half the time it is likely to be their de facto's children, whereas women only kill their biological children. Typically, men kill out of sexual jealousy, and a craving for attention, whilst women kill out of desperation. The most commonly raised defence is infanticide; however, the defence falls outside the scope of this paper. Self-defence is never raised, since parties are not on equal footing.

43 Morgan, above n 33.

44 Victoria, *Defences to Homicide*, Victorian Law Reform Commission Report 94 (2004). This data does not account for murder/suicide scenarios – it looks at prosecutions only.

45 See section 4.6 below.

killings, women either were in the process of, or had left the marriage. The abovementioned varying circumstances of homicide between males and females holds true in the international context.[46] With respect to defences, women killing men rely on self-defence and provocation, whilst men killing women rely only on provocation.

3.6 Homophobic Killings: Another Category?

Polk's categorical analysis is superior to the typical legal classifications. However, it does not account for homophobic killings. These could fit into sexual intimacy or confrontational killings. Because there is not a history of intimacy, these are more apt to be placed in the latter. However, homophobic killings are not over trivial instances, and they are typically categorised by a prior relationship between the parties. Thus, the best option is to place these killings in a separate category. Defences are usually raised in cases of homosexual advance, including self-defence, provocation and diminished responsibility. This may be due to prejudices held by juries that increase the likelihood of them being accepted, or from prejudices held by perpetrators that increases their propensity to react in a violent way in the first place.

3.7 The Defence of Provocation and Categories of Homicide

The 2007 Queensland Audit of murder trials from July 2002-March 2007 revealed that of the 80 cases analysed, provocation was raised as a defence 25 times.[47] Eight of the 25 were found not guilty of murder. Of these, four defendants were found guilty of manslaughter by the jury, and one pleaded guilty to manslaughter. In only two of the 25 cases was it the only defence left to the jury. In one, the accused was acquitted,[48] and in the other, the accused was convicted of murder. This meant that the audit team was often unable to draw firm conclusions as to whether the defendant was acquitted of murder on the basis of provocation, or another defence.

From 1990-93 in New South Wales, provocation was raised in 7.8% of cases. It was successful in 70% of the cases raised, with sentences ranging from 4-10.5 years. In this time, 47 men killed their sexual partner. Of those, 15 raised the defence, and 9 were successful.[49] Of the 9 females who killed their sexual partner, 8 had killed in response to physical abuse or threats. Provocation was successfully raised on 5 occasions, and the remaining 4 raised other defences. Between 1997-2001 in Victoria, there were 38 intimate partner homicides, and provocation was raised by 12 male offenders, 4 of whom were successful, and 2 females, both of whom were unsuccessful.[50] Sentences ranged from 1.33-15 years for males and 3-10.5 years for females.[51] However, in 14 out of 16 cases where women killed their male partners, the plea of manslaughter was accepted. In 14 of the 16, there was a history of domestic violence. In New

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46 Jenny Mouzos and Catherine Rushforth, 'Family Homicide in Australia' (2003) *Australian Institute of Criminology*, 3.

47 *Audit on Defences to Homicide: Accident and Provocation*, above n 1, 39. During the period, 131 people came before the courts on charges of murder. Of these, 101 were tried by a jury, and 30 pleaded guilty to murder. The audit team analysed 80 of the 101 trials where the defendant pleaded not guilty (79%).

48 *R v Sebo* [2007] Supreme Court of Queensland (Unreported, Byrne J, 30 June 2007).

49 *Partial Defences to Murder: Provocation and Infanticide*, above n 32.

50 New South Wales, *Provocation and Self-defence in Intimate Partner and Homophobic Homicides*, Parl Library Paper No 3/07 (2007).

51 Ibid.

South Wales, there were 13 identified cases between 1993-96, where all but one resulted in homicide. Of the 7 defendants indicted for murder, 2 were acquitted, 2 were convicted, and 3 were convicted of manslaughter (presumably because of provocation). There were 4 defendants who pleaded guilty to manslaughter, and another who pleaded guilty to murder.[52]

Sexually intimate relationships comprise a large number of cases where provocation is raised successfully. 'The overriding theme that runs through these killings is masculine control, where women become viewed as possessions of men'.[53] By killing their partner, men are effectively trying to gain control over them. When women kill their partner, it is typically to escape this control, when they have exhausted all other options. On its face, the killing of one's significant other does not appear to be justified or excused in today's society. Homicides originating in sexual intimacy generally fall into two categories: men killing female partners out of jealousy; and women killing male partners because of sustained domestic violence. The primary case of confrontational killing where provocation is raised is men killing men who make a homosexual advance.

4. Issues Affecting the Provocation Defence

Numerous arguments have been put forward for abolition and retention of the defence. Many of these are applicable to Queensland. However, it is important to consider the effect of proposed reforms from other jurisdictions in light of Queensland's mandatory life sentence to murder.

4.1 Is There Still a Need for Partial Defences?

When first established, provocation was a justification for murder, designed to avoid the death penalty. Since the death penalty has been abolished in every state, the question begs: is there a need for provocation? Many argue that there is a need to avoid mandatory sentences, as these do not reflect the culpability of offenders. Such arguments have led to calls for the mandatory life sentences imposed in states such as Queensland and Western Australia to be abolished in favour of sentencing discretion, such as in New South Wales.[54] If sentencing discretion is allowed, is there any point in retaining the defence? Those who support retention espouse arguments such as reserving the stigma of being a 'murderer' to the most serious offenders, the benefit of jury participation and community acceptance of sentences.

Stigma

Andrew Ashworth states that 'the label "murderer" should be reserved for the most heinous of killings, and most people would accept that provoked killings are not in this group'.[55] The argument of stigma assumes that the community unquestionably agrees with any decision of a jury. However, such a belief is flawed for a number of reasons. Firstly, if the community does not agree with the jury's acceptance of a provocation plea, the accused will not escape the stigma: they will be seen as a murderer who 'got off'.[56] Secondly, sentencing discretion allows the

52 New South Wales, *Review of the 'Homosexual Advance Defence',* Attorney General's Department (1998).

53 Morgan, above n 33.

54 *Some Criminal Defences with Particular Reference to Battered Defendants*, above n 30.

55 Andrew Ashworth, *Principles of Crim Law* (4th ed, 2003).

56 *Some Criminal Defences with Particular Reference to Battered Defendants*, above n 30.

culpability of an accused to be graded. The word 'murder' on its own is not a stigma: it is the severity of the punishment associated with murder that attaches a stigma. Hence, if sentencing discretion is allowed, the stigma of being highly culpable will not attach to a person who has been provoked, as in all likelihood, they will receive a lesser sentence.

Jury Participation in Sentencing

Remmy Van de Wiel QC of the Victorian criminal bar, states that 'by removing provocation you are removing community involvement in terms of a situation where they shouldn't be removed'.[57] This argument suggests that juries, as opposed to judges, should be the ones to decide whether an accused was provoked to ensure 'public confidence' and 'community acceptance of sentences'.[58] Firstly, it must be noted that provocation was a question of law until 1837.[59] Critics argue that such an approach undermines the role of the jury, whose role is to bring community values to the table. However, it is submitted that judges taking account of provocation in sentencing may take better account of all the salient facts of the case, and ensure that the law is applied consistently and without prejudice. Furthermore, the worth of juries is disputed, and it is commonly accepted that jury involvement in the law should be limited. Moreover, there is almost no support for the reintroduction of juries into all criminal defences; thus, any argument of jury involvement in criminal matters is simply a question of degree.

Van de Wiel's second argument in favour of juries is the concession that prejudices exist in societies. However, there is no group of people who come from a more restricted background with cultural values and structures than the judiciary, and juries are likely to partially ameliorate this.[60] However, as will be examined below, juries have allowed their prejudices to show in cases such as *Green*,[61] and there is no evidence to suggest that juries can better distance themselves from these prejudices than judges who do so on a daily basis.

Community Acceptance of Sentences

A further argument is that communities are more likely to accept a jury verdict than a judge-made verdict. However, by observing the public reaction to the cases of *Ramage*[62] and *Sebo*[63] in Victoria and Queensland, respectively, the reality is quite the opposite. Following the decision in *Ramage*,[64] the Attorney-General of Victoria received over 2500 letters from the community

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57 ABC Radio, 'Provocation – Is It Past Its Use-By-Date?', *The Law Report*, 17 September 2002.

58 *Partial Defences to Murder: Provocation and Infanticide*, above n 32.

59 Bernard Brown. '"The Ordinary Man" in Provocation' (1964) 18 *International and Comparative Law Quarterly* 203.

60 'Provocation – Is It Past Its Use-By-Date?', above n 57.

61 (1997) 191 CLR 334.

62 [2004] VSC 508.

63 [2007] Supreme Court of Queensland (Unreported, Byrne J, 30 June 2007). Sebo was charged with murdering his 16 year-old ex-girlfriend Taryn Hunt. Taryn had been drinking at the casino. Upon driving home, Taryn and Sebo argued about the fact that Taryn was seeing other men. Sebo's account is that he pulled the car over to the side of the road, and they continued to argue. He got out of the car and threatened her with a steering wheel lock. He hit her four times to the head, crushing her skull. He dialled for an ambulance, and drove her to the hospital. He disposed of the steering lock, then returned to the hospital, originally fabricating a story, and later admitting to killing her. He was charged with murder, but pleaded not guilty and offered to plead guilty to manslaughter on the basis that he was acting under provocation. The jury acquitted him of murder, and found him guilty of manslaughter.

64 [2004] VSC 508.

expressing their concern at the use of the provocation defence. Communities will be more likely to accept judicial decisions that weigh up provocation as one factor in sentencing, as judges have more experience in balancing considerations and applying complex tests.[65] Furthermore, judges are more likely to separate law and morality, and ensure that the law is applied equally to all offenders. Finally, since judges are required to justify their decisions and juries are not, the public can be fully informed as to why provocation was a mitigating factor, which will inevitably lead to more acceptance of the judicial process.

It has also been argued that 'a conviction of manslaughter ensures a greater likelihood that the community will understand and accept a reduced sentence which reflects a lesser degree of culpability'.[66] As already mentioned, the community has not been accepting of sentences in recent times. Moreover, a conviction of manslaughter on the grounds of provocation confuses and angers the community, as manslaughter is seen as killing without intent, and provocation cases are killings with intent that are mitigated.[67] The public does not make the distinction between voluntary and involuntary manslaughter, and nor does the *Criminal Code* (Qld). Hence, a reduction in sentence more aptly reflects the lesser degree of culpability, which will enhance the likelihood of community acceptance.[68]

Contemporary Community Values

It is beyond argument that community values have changed greatly since the 16th Century. Killing has become far less common, and far less accepted by society. However, over this time-period, provocation has become more available.[69] Given that the original reason for its introduction has been removed, unless provocation fits with contemporary community values, it should be repealed. The New South Wales Parliamentary Paper suggested that 'there are circumstances in which we as a community do not expect a person to control their impulses to kill … this is of particular concern when this behaviour is in response to a person who is exercising his or her personal rights, for instance to leave a relationship or to start a new relationship with another person'.[70] It is argued that in today's society, killing is *never* justified as a reaction to provocative conduct.[71] In *R v Kumar*,[72] O'Bryan J opined: 'I regard provocation as anachronistic in the law of murder since the abolition of capital punishment'.[73]

Culpability is determined by two factors: the harm done, and the mental state of the accused.[74] The first is constant in homicide cases. The latter in provocation cases is always constant: an intention to kill or cause grievous bodily harm.[75] However, the law excuses a person's inability to

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65 See section 4.2 below for the complexities of the provocation defence.

66 *Partial Defences to Murder: Provocation and Infanticide*, above n 32.

67 *Some Criminal Defences with Particular Reference to Battered Defendants*, above n 30.

68 *Model Criminal Code Discussion Paper – Chapter 5 – Fatal Offences Against the Person,* above n 29.

69 *Partial Defences to Murder: Provocation and Infanticide*, above n 32.

70 *Provocation and Self-defence in Intimate Partner and Homophobic Homicides*, above n 50.

71 *Partial Defences to Murder: Provocation and Infanticide*, above n 32.

72 [2002] VSCA 139.

73 Ibid, 179.

74 Bagaric, above n 2.

75 Ibid.

control their emotions. The question that needs to be asked is whether anger is an exceptional emotion that is harder to control than other emotions? Indeed, emotions may be strong, and may affect people differently. However, anger should not be held to be less controllable than other emotions, such as love, revenge and greed. The law makes no concession for those who end the suffering of a loved one via euthanasia, yet it allows those who are overcome with anger to downgrade their offence.[76] William Lyons, a leading psychologist, examined emotions.[77] He concluded that emotions are not reflexive actions, but have some element of choice: 'while certain people are more *prone* to get angry and act violently than others, people are not *pre-programmed* to act in such a manner'.[78] Hence, if there is an element of choice, the 'excuse' should disappear altogether.[79]

People are required to suppress all other forms of emotional response, and in today's contemporary society, where there is an emphasis on individual rights, there should be a firm statement of law that people must also suppress their anger. It is said that provocation recognises the killing as 'wrongful and unjustified', hence why there is not an acquittal.[80] However, this ignores the fact that law is about behaviour regulation and education regarding the minimum standards of behaviour: any breaches of the law are a partial failure.[81] By making a concession for those who could not control their emotions, the law acquiesces, and permits this type of behaviour. In essence, provocation partially legitimises murder, and this should not be tolerated in today's society.

4.2 Limitations of the Ordinary Person Test

Numerous stakeholders have argued that the defence of provocation is too difficult for juries to comprehend. This is based on the characteristics of the accused being considered at some stages of the defence, and not others. Even if juries can delineate the different elements and apply them correctly, there is no unanimity regarding who the ordinary person is, and whether the characteristics of the accused should be taken into account in the objective test.

Who is the Ordinary Person?

In *Moffa*,[82] Murphy J remarked: 'It is impossible to construct a model of a reasonable and ordinary … Australian'. McHugh J echoed these comments in *Masciantonio*,[83] stating that 'the notion of an ordinary person is pure fiction'.[84] It is often argued that the ordinary person is an 'Anglo-Saxon male of Judeo-Christian background and of heterosexual orientation'.[85] In *Green*,[86]

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76 Ibid.

77 William Lyons, *Emotion* (1980).

78 Bagaric, above n 2.

79 Alex Reilly, 'Loss of Self-Control in Provocation' (1997) 21 *Criminal Law Journal* 320, 325.

80 *Partial Defences to Murder: Provocation and Infanticide*, above n 32.

81 Herbert LA Hart, *The Concept of Law* (2nd ed, 1997); Bagaric, above n 2.

82 (1977) 138 CLR 601.

83 (1995) 183 CLR 58.

84 Ibid, 73.

85 *A Review of the Law of Homicide*, above n 28.

86 (1997) 191 CLR 334.

Brennan CJ used the term 'ordinary man' and was strongly criticised.[87] The fundamental problem of using a gender-neutral ordinary person is that men and women react very differently to provocation.[88] Given that Australia is such a multicultural society, is there such a thing as an ordinary Australian? Inevitably, a juror must speculate about who the ordinary person is, and then consider extraordinary situations outside their life experience, and judge how this archetypal person would react.[89]

Should the Characteristics of the Accused be Taken into Account?

The case law on this issue is varied, and there is no uniform opinion. In New Zealand, the case law has been volatile. In *R v McGregor,*[90] the Court held that a characteristic might be taken into account if it is something definite and sufficient to make the offender a different person from the ordinary run of humankind. This would include attributes such as colour, race and creed; however, it was not sufficient to be mentally deficient or weak-minded. In *R v McCarthy*,[91] the Court of Appeal abandoned this position, noting that this interpretation had caused continual difficulty. The question to be asked was 'whether a person with the ordinary power of self-control would in the circumstances have retained self-control, notwithstanding such characteristics'.[92] In *R v Campbell,*[93] the Court of Appeal held that a characteristic could be taken into account in considering an offender's sensitivity or susceptibility to the provocation, but not in assessing the power of self-control of the hypothetical ordinary person.[94] In *R v Rongonui,*[95] the Court of Appeal divided 3:2 on whether brain damage and a major depressive episode from post-traumatic stress disorder could temper the power of self-control of the ordinary person.

In 2000, the House of Lords split 3:2 in *R v Smith*[96] on whether the defendant's alcoholism and depression should have affected the application of the objective test. In Australia, the High Court decided in *Stingel*[97] that the characteristics of the accused are to be taken into account when assessing the gravity, but not with respect to the ordinary person's reaction. However, this unanimity was short-lived. In *Green*,[98] McHugh J stated that '[a]ll of the accused's attendant circumstances and sensitivities are relevant in determining the effect of the provocation on an ordinary person in the position of the accused'.[99] The Northern Territory continues to take account of whether the offender is an indigenous person,[100] notwithstanding the High Court authorities.

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87 See for example: *Provocation and Self-defence in Intimate Partner and Homophobic Homicides*, above n 50.

88 See statistics in section 3 above.

89 *Partial Defences to Murder: Provocation and Infanticide*, above n 32.

90 [1962] NZLR 1069, 1081-1082.

91 [1992] 2 NZLR 550.

92 Ibid, 558.

93 [1997] 1 NZLR 16.

94 Ibid, 25.

95 [2000] 2 NZLR 385.

96 [2000] 3 WLR 654.

97 (1990) 171 CLR 312.

98 (1997) 191 CLR 334.

99 Ibid, 369.

100 See section 2.2 above.

If it is accepted that culture, sex, or race are to be taken into account, this will inevitably lead to stereotyping and a more complex defence. How is one to determine the characteristics of an ordinary Turkish person, as was required in *Dincer v R*.[101] Religions such as Christianity or Islam are extremely broad, and applying uniform Christian values to an ordinary person will be speculative, and may not fit the accused's particular belief.[102] If the religious characteristic is to be defined more narrowly, for example Catholicism, again, this is a broad church, which may not properly describe the accused's situation. The narrower the characteristic becomes, the closer the objective test comes to being a subjective test, and the harder it is to prove what the characteristics of this subset are. Jurors will be forced to speculate about the ordinary characteristics of a person from a given religion, sex or culture. This will lead to stereotyping and unjust outcomes.

Alternatively, expert evidence could be produced. This, by itself, can be extremely subjective, asking a person to speculate on the characteristics of a given race. In Australia's diverse society, this is no easy task. The presentation of such evidence may lead to a tendency for jurors to simply follow the advice, and not examine the merits of the case. The narrower the characteristic prescribed to the accused, the less the jury will know about that group. Furthermore, any speculation that different cultural groups have different capacities of self-control is speculative.[103] Moreover, should concessions be made to those cultures that have a higher propensity towards violence? In a multicultural society such as Australia, there are minimum standards of conduct that should be abided by, regardless of a person's background. Allowing these factors to be taken into account does not address the complexity for a jury applying provocation. It forces jurors to speculate and stereotype, and arguably leads to less certainty. Moreover, allowing such factors to be taken into account in murder and not other offences is without sound rationale. It is also impossible to limit the characteristics that the courts are prepared to recognise.

Removing the Objective Test

If judges cannot agree on whether the characteristics of the accused should be taken into account based on precedent and justice, this presents an ominous task for juries, who are expected to switch between accepting and ignoring these characteristics. Furthermore, taking into account the characteristics of the accused and applying them to an ordinary person may yield to unintended outcomes. Firstly, as stated above, it is impossible to specify whom the ordinary person is. If the ordinary person is a heterosexual male, this comprises less than 45% of the population, before race, religion and age are taken into account. Hence, there is a compelling argument for including a minimum age and gender, which makes it easier to narrow the characteristics of the ordinary person.

However, this will inevitably lead to speculation and stereotyping. Provocation arises in extraordinary situations beyond the experiences of the normal juror. For example, when

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101 [1983] 1 VR 460.

102 Morgan, above n 33.

103 *Partial Defences to Murder: Provocation and Infanticide*, above n 32.

provocation arises in the context of domestic violence, it is unrealistic to suggest that jurors know how an ordinary person reacts to such a situation, as they have not been in the situation themselves. This will also be common in ascertaining the ordinary person from a specific race or religion, or even asking one sex to specify the ordinary characteristics of the other sex.[104] Removing provocation as a defence would allow judges to take into account the various factors of culture, race, and religion, without becoming concerned with their application to ordinary persons. This allows discretion, without complexity, and with written justification for why a decision is reached.

A Purely Subjective Test

The problem with using an ordinary person test is that the accused may have genuinely lost self-control, but may be denied access to the defence.[105] Hence, it is sometimes suggested that the objective test for provocation should be removed, in favour of a purely subjective test.[106] However, there must be a limit to the law's compassion: ultimately, these cases involve the intentional killing of another, and the law must hold these people to account.[107] Following the criticism of the objective person test by Murphy J in *Moffa*,[108] Ireland removed the test in *People v MacEoin.*[109] The subjective belief but must be reasonable and not excessive, having regard to the gravity of the provocation.[110] However, this approach may stop juries having any regard to the culpability of the accused and whether they should be convicted of murder or manslaughter. Thus, this approach may be unduly lenient.

An alternative option is replacing the objective test with a subjective test that combines the application of community standards, such as what is 'fair and just'. This may avoid the complexities of the objective test, and allow for a value judgment, which juries are capable of giving. At the same time, all of the accused's characteristics may be taken into account. However, this may be criticised as too vague: what reduces the accused's culpability to the level of manslaughter, and what is 'fair and just'?[111] Furthermore, it will do nothing to stop prejudices against groups such as religious or ethnic minorities and homosexuals. In fact, by removing the aspect of the defence that does not account for the characteristics of the accused, such as subverted homophobia through a religion or culture, this test may actually increase prejudice. However, the New South Wales Law Reform Commission recommended that this was the best option.[112]

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104 Ibid.

105 Ibid.

106 Ibid.

107 Ibid.

108 (1977) 138 CLR 601.

109 (1978) 112 ILTR 43.

110 *Partial Defences to Murder: Provocation and Infanticide*, above n 32.

111 *Some Criminal Defences with Particular Reference to Battered Defendants*, above n 30.

112 *Partial Defences to Murder: Provocation and Infanticide*, above n 32.

4.3 Is it Just to Apply Uniform Community Standards?

Judicial opinion is again divided on this point. In a homogeneous society, this would not be in contention. However, given Australia's diverse population, moral objectivism may lead to the courts marginalising certain religions or ethnicities. In *Masciantonio*,[113] McHugh J said that '[u]nless the ethnic background of the accused is attributed to the ordinary person, the objective test of self-control results in inequality before the law'.[114] However, in *Moffa*,[115] Murphy J stated that 'the objective test should not be modified by establishing different standards for different groups in society. This would result in unequal treatment'.[116] Ultimately, if McHugh J's argument is to be accepted, a person of Anglo-Australian heritage could receive a different sentence to a person of a different heritage for the same crime. Even if a person of another culture felt justified under their religion or ethnicity and was provoked, Australia does not, and never should, allow people to act as vigilantes and punish as they see fit.

Equality is a synonym for justice, which is to treat everyone equally under the law.[117] This cannot occur if one group of people are subject to one sanction, and another group to a lesser sanction. However, Van de Wiel states that whilst culture should be taken into account, 'I don't believe that you can justify ritual slaughter on the basis of customs or religious basis, and I don't think juries have ever bought that idea'.[118] However, allowing certain factors of one's culture to be considered and not others is the same as applying those standards deemed acceptable in Australian culture: uniform standards. A rule cannot be just if it is applied only when it suits the sensibilities of those applying it – it must be applied consistently and in full, or not at all. Bagaric and Arenson go further, arguing that 'there are certain universal moral truths that transcend culture and times'; for example, oppression of women is always wrong.[119] Hence, for there to be justice and equality in the law, people 'must meet objective standards of self-control imputed to the ordinary person by society'.[120]

4.4 Men Killing Intimate Female Partners

This represents a large proportion of cases where provocation is raised. Given provocation's status as a 'concession for human frailty', and the patriarchal discourses operating within the law, the defence is often successful. Associate Professor Jenny Morgan states: 'in circumstances where they're killing out of sexual jealousy, I don't want to make a concession to human frailty'.[121] So common is its use, it has been labelled the 'jealous lover's defence'.[122] Cases such as *Ramage*,[123] *Sebo*[124] and *Moffa*[125] have prompted much community outrage. Graeme Coss believed

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113 (1995) 183 CLR 58.

114 Ibid, 74.

115 (1977) 138 CLR 601.

116 Ibid, 626.

117 Hart, above n 81.

118 'Provocation – Is It Past Its Use-By-Date?', above n 57.

119 Bagaric, above n 2.

120 *Green v R* (1997) 191 CLR 334, 407-8 (Kirby J).

121 'Provocation – Is It Past Its Use-By-Date?', above n 57.

122 Ibid.

123 [2004] VSC 508. The accused invited his wife of 22 years, whom he was separated from, to inspect renovations at the matrimonial home. He had been told 6 weeks prior that she was seeing another man. At the meeting, she

Ramage would have received 20 years (as opposed to the 8 he received), had provocation been unavailable.[126] Hearsay evidence in 90 sworn statements of previous domestic violence was deemed inadmissible. Such evidence may have shown that Ramage's loss of self-control was actually the continuation of a pattern of dominion and control over his wife.[127]

The majority of opinion now suggests that a man killing their former or current lovers out of jealousy is inexcusable. In Australia, there are over 200 000 relationship breakdowns and divorces each year, yet only 50 men kill their intimate partners when affronted with this.[128] 'In Australia in the 1900s, it would be entirely out of line with that [community] standard if the mere telling of a partner that the relationship is over, whether accompanied or not by an admission of infidelity, were taken as sufficient to induce an ordinary person to so lose self-control to deliberately or recklessly inflict fatal violence on another'.[129] Coss believes that offenders kill not because they have 'lost self-control', but because they have 'lost control of their women'.[130] Typically, there is a history of domestic violence against the woman: her death is not an isolated incident, but a continuance of a relationship categorised by control and dominance. The use of the defence in this way has been a key reason that critics have called for its abolition.

In dismissing the appeal by the defendant in *Kumar*,[131] a case of a male killing his partner after she refused to allow him into her house and insulted her family, O'Bryan J stated: 'I have experienced, as I believe have other judges who have presided over murder trials, unjustified jury verdicts which could only be explained in terms of provocation'.[132] If the defence is retained, many believe that the defence should be excluded where the victim has left, is leaving or has attempted to leave an intimate relationship, or in the case of suspected, confessed or discovered infidelity.[133] If this scenario is not excluded, the law will enforce the archetypal view that women are the chattels of men, to dispose of as they please.[134]

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allegedly sneered at the renovations, and confessed that 'sex with him repulsed her'. There was no evidence deduced at trial to corroborate this. He punched her several times, and then strangled her to death. He drove her body to a remote area, buried it and concealed it with litter. He washed his car, cleaned the scene, washed his clothes and ordered new bench-tops for the kitchen. Later, he handed himself into the police. He successfully raised provocation, and was sentenced to 11 years gaol, to serve a minimum of 8.

124 [2007] Supreme Court of Queensland (Unreported, Byrne J, 30 June 2007).

125 (1977) 138 CLR 601. The deceased's remarks were held to be 'violently provocative in character'. She called her husband a 'black bastard', told him she had slept with everyone on the street, threw photographs of herself posing naked at him, and then threw a telephone at him.

126 Graeme Coss, 'The Defence of Provocation: An Acrimonious Divorce from Reality' (2006) 18(1) *Current Issues in Criminal Justice* 51.

127 'Defences to Homicide', above n 3.

128 Coss, above n 126.

129 *Arrowsmith v R* (1994) 55 FCR 130, 138.

130 Coss, above n 126.

131 [2002] VSCA 139.

132 Ibid, 179.

133 Helen Brown, 'Provocation as a Defence to Murder: To Abolish or to Reform?' (1999) 12 *Australian Feminist Law Journal* 137, 140.

134 'Defences to Homicide', above n 3.

4.5 Battered Women

One strong argument in favour of retaining provocation is that its abolition could remove a potential avenue for women to mitigate killing a husband after long periods of domestic violence.[135] Women have two issues when trying to establish provocation: firstly, proving suddenness, and secondly, proving loss of self-control, as in over one third of husband killings, the husband was asleep at the time.[136] Women typically kill husbands after years of abuse. Often, they have tried to leave the relationship, but have been unable to for fear of further violence, financial and emotional dependence, lack of emergency services and concern for their children.[137] Furthermore, at the time of killing, many women appear calm and in control – their act is a rational, calculated one.[138]

In most jurisdictions (but not Queensland), the requirement of 'suddenness' has been removed, which allows all the circumstances leading up to the loss of self-control to be taken into account. However, even after suddenness is removed as a direct requirement, it is still relevant in assessing the evidence of a 'loss of self-control', which still acts as a bar to women, who often appear calm and calculated in their action.[139] The Hon Ms Judy Jackson, who introduced the legislation removing provocation as a defence in Tasmania, stated: 'It is better to abolish the defence than try to make a fictitious attempt to distort its operation to accommodate the gender behavioural differences'.[140] It is far more appropriate to consider gender responses in their entirety in sentencing, rather than within the artificial constraints of a male-orientated defence such as provocation. If appropriate provisions were made to take account of these factors in sentencing, women would not be worse off, despite claims from some critics.[141] Some authors have suggested expanding self-defence to accommodate battered women,[142] reintroducing excessive self-defence[143] or creating a new defence entirely;[144] however, analysis of these concepts is outside the scope of this paper.

4.6 Homosexual Advance Defence

Another common usage of the provocation defence is the situation commonly known as 'homosexual panic' or 'homosexual advance'. The High Court's decision in *Green*[145] has attracted

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135 Van de Wiel suggested that the removal of provocation would disadvantage women in cases such as *R v R* (1981) 28 SASR 321: 'Provocation – Is It Past Its Use-By-Date?', above n 57.

136 New South Wales, *Self Defence and Provocation: Implications for Battered Women who Kill and for Homosexual Victims*, Parl Library Paper No 33/96 (1996).

137 Ibid.

138 *Some Criminal Defences with Particular Reference to Battered Defendants*, above n 30.

139 *Self Defence and Provocation: Implications for Battered Women who Kill and for Homosexual Victims*, above n 136.

140 Tasmania, *Parliamentary Debates,* 20 March 2003, 59.

141 See, for eg, Remy Van de Wiel in ABC Radio, 'Provocation – Is It Past Its Use-By-Date?', above n 57.

142 *Provocation and Self-defence in Intimate Partner and Homophobic Homicides*, above n 50.

143 New South Wales, *Partial Defences to Murder in NSW 1990-2004* Judicial Commission of NSW (2006) 52, cf *Model Criminal Code Discussion Paper – Chapter 5 – Fatal Offences Against the Person,* above n 28.

144 Morgan, above n 3; cf *Some Criminal Defences with Particular Reference to Battered Defendants*, above n 30; *Self Defence and Provocation: Implications for Battered Women who Kill and for Homosexual Victims*, above n 136.

145 (1997) 191 CLR 334. Green, 22, was staying over at a friend's house, when Gillies, 36, a father-like figure climbed into bed with him. He touched Green around the buttocks and penis. Green hit Gillies approximately 35 times, banged his face against the wall and stabbed him 10 times with scissors. He immediately turned himself into police. At the original trial, he was sentenced to 10 years with an additional term of 5 years.

much criticism, as largely being motivated by homophobia. He appealed to the Court of Appeal on the grounds that there had been a miscarriage of justice after the jury was not directed to consider provocation. His appeal was dismissed 2:1. He appealed to the High Court, who unanimously held that there had been a misdirection, and held 3:2 that there had been a miscarriage of justice, and ordered a new trial. At the second trial, Green was found guilty of manslaughter and received 8.5 years gaol, with an additional sentence of 2.5 years. His appeal against the sentence was dismissed.

In the Court of Appeal, Smart J described Gillies' (the deceased's) actions as 'revolting' and amounting to provocation of 'a very grave kind'.[146] However, Kirby J on the High Court stated that 'the "ordinary person" in Australian society today is not so homophobic as to respond to a non-violent sexual advance by a homosexual person as to form an intent to kill'.[147] In 1998, the NSW working party strongly criticised the 1997 New South Wales Law Reform Commission report, after it recommended against excluding certain categories of conduct, stating that it would remove the merit of individual cases.[148] The Working Party recommended an amendment specifically to exclude non-violent homosexual advances. Furthermore, they suggested a direction to the jury that they are not a 'court of morals', and should not hold prejudices against people on the grounds of sexuality, culture or ethnicity.[149] In addition, the jury could be directed that a homosexual *advance* is not the same thing as a homosexual *attack*.[150] These amendments are yet to be adopted in New South Wales. The Australian Capital Territory and Northern Territory have both amended their legislation to exclude a non-violent sexual advance.

5. Law Reform Recommendations

In light of all the issues facing the provocation defence, the optimal solution is to remove the defence and abolish the mandatory life sentence for murder, replacing it with sentencing discretion. This is based on the historical justification of partial defences; viz, ensuring that an accused person would not receive the death penalty, no longer being an issue. Provided that the legislation accurately reflects the new sentencing discretion, no offender who falls short of the highest level of culpability should be worse off. Furthermore, removing the defence means that the difficulties with reforming the ordinary person test are avoided. Legislation should specifically prohibit a reduction of sentence on the grounds of non-violent homosexual advance and attacks based on jealousy in intimate partner situations. Sentencing discretion can also accommodate battered women who kill their abusive husbands.

6. Conclusion

What started out as a concession for human frailty has evolved into a general excuse for hot-blooded killing. As the defence has expanded over time, society's tolerance for violence has

146 *R v Green* [1995] Supreme Court of New South Wales Court of Criminal Appeal (Unreported, Priestly JA, Smart and Ireland JJ, 14 December 1994; 8 November 1995).

147 (1997) 191 CLR 334, 409.

148 *Partial Defences to Murder: Provocation and Infanticide*, above n 32.

149 *Provocation and Self-defence in Intimate Partner and Homophobic Homicides*, above n 50.

150 *Self Defence and Provocation: Implications for Battered Women who Kill and for Homosexual Victims*, above n 136.

moved in an inverse manner. In today's society, killing in response to provocation such as sexual jealousy or non-violent sexual advance is unacceptable. However, it must be conceded that there are some circumstances when killing in response to provocation is justified, such as responding to ongoing domestic violence. Removing the defence of provocation will ensure that accused persons who react excessively will be held fully culpable, whilst those who act in a reasonable fashion will have their circumstances considered in sentencing.