Select Committee on the Partial Defence of Provocation

The partial defence of provocation

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Terms of reference

1. That the Select Committee on the Partial Defence of Provocation inquire into and report on:

    (a) the retention of the partial defence of provocation including:
        (i) abolishing the defence,
        (ii) amending the elements of the defence in light of proposals in other jurisdictions,
    (b) the adequacy of the defence of self-defence for victims of prolonged domestic and sexual violence, and
    (c) any other related matters.

2. That the Committee report by 2 May 2013.

These terms of reference were referred to the Committee by the Legislative Council: Minutes No. 92, 14 June 2012, Item 10.

Committee membership

Revd the Hon Fred Nile MLC	Christian Democratic Party	*(Chair)*
The Hon Trevor Khan MLC	The Nationals	*(Deputy Chair)*
The Hon David Clarke MLC	Liberal Party	
Mr Scot MacDonald MLC	Liberal Party	
The Hon Adam Searle MLC	Australian Labor Party	
Mr David Shoebridge MLC	The Greens	
The Hon Helen Westwood MLC	Australian Labor Party	

Secretariat

Ms Rachel Callinan, Director
Ms Vanessa Viaggio, Principal Council Officer
Ms Lynn Race, Council Officer Assistant

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Chairman's foreword

I am pleased to present the unanimous Report of the Select Committee on the Partial Defence of Provocation. The Committee was established in June 2012 following the high profile *Singh* case. The motion establishing the Committee received support from across the political spectrum, demonstrating the significance and urgency with which the issue was viewed.

In *Singh,* Mr Singh stood trial for murder after cutting his wife's throat several times with a box-cutter. Mr Singh claimed that his wife, Manpreet Kaur, provoked him by telling him she had never loved him, was in love with someone else and threatened to have him deported and, that as a result, he lost his self-control and killed her. Mr Singh was convicted of manslaughter based on the partial defence of provocation and sentenced to a non-parole term of imprisonment of six years. The community outrage at the killing being described as 'manslaughter' not 'murder', and the sentence length is certainly understandable. It is difficult to comprehend how a man who kills his wife in such circumstances could be entitled to even a partial defence to murder.

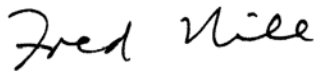
A series of arguments for abolishing the partial defence were presented. In particular, the Committee heard that the defence has tended to favour men and the archetypal male response to 'provocative' circumstances. It was also argued that the defence's historical roots no longer justify retaining it, as NSW no longer has the death penalty or mandatory sentencing provisions for murder. Perhaps the most persuasive argument is that in today's modern society, we expect that citizens will maintain their self-control, even in circumstances that might be 'provocative'. It is unacceptable that the law offers a partial defence to people who kill in response to 'provocative' circumstances which are, in fact, a normal part of human experience, such as being told a relationship is going to end, discovering infidelity, or feeling jealous or betrayed.

However, the Committee was unable to reach a consensus on whether the partial defence of provocation should be abolished. The Committee has been mindful that there are some defendants, particularly women who have been victims of long-term domestic abuse, for whom the partial defence of provocation may appropriately reflect their legal and moral responsibility in circumstances where self-defence would be difficult to establish.

The Committee has therefore developed a reform model, which draws on extensive consultation undertaken by the Committee throughout the Inquiry. The model seeks to restrict the availability of the partial defence in several ways, including by requiring that the conduct relied upon be 'grossly provocative', and by clearly identifying a number of circumstances in which the defence will not be available, or will only be available in extreme and unusual circumstances. An example of the latter includes where the deceased indicates an intention to end the relationship.

I would like to thank those who contributed to this Inquiry. In particular, I would like to extend my sincere thanks to Ms Jaspreet Kaur, sister of Manpreet Kaur, and a number of other individuals who shared their personal and moving stories with us.

I would also like to thank my Committee colleagues for their commitment in working through the complexities of this Inquiry, and the Secretariat for the professional and efficient manner in which they assisted us throughout the process. I commend this Report to the House and to the Government.



Revd the Hon Fred Nile MLC
Chairman

Summary of recommendations

Recommendation 1 **168**

That the Director of Public Prosecutions include a specific guideline in the Prosecution Guidelines of the Office of the Director of Public Prosecutions in relation to homicides occurring in a domestic context. The guideline should provide clear direction to assist prosecutors in determining the appropriate charge to lay against defendants, particularly in circumstances where there is a history of violence toward the defendant.

Recommendation 2 **186**

That the NSW Government introduce an amendment similar to section 9AH of the Victorian *Crimes Act 1958*, to explicitly provide that evidence of family violence may be adduced in homicide matters.

Recommendation 3 **189**

That the Attorney General undertake an examination of the appropriateness or otherwise of existing evidentiary provisions insofar as they enable evidence to be adduced which denigrates the deceased victim in homicide trials, with a view to improving protection for victims and their families while also ensuring that legitimate social framework evidence is able to be admitted.

Recommendation 4 **195**

That the NSW Government introduce an amendment to section 23 of the *Crimes Act 1900* to rename the partial defence 'the partial defence of gross provocation'.

Recommendation 5 **195**

That the NSW Government introduce an amendment to section 23 of the *Crimes Act 1900* to provide that the partial defence is only available in circumstances where the defendant acted in response to 'gross provocation', meaning words or conduct, or a combination of words and conduct, which caused the defendant to have a justifiable sense of being seriously wronged.

Recommendation 6 **200**

That the NSW Government introduce an amendment to section 23 of the *Crimes Act 1900* to ensure that the partial defence is not available to defendants who:

- incite a response to provide an excuse to respond with violence; or
- respond to a non-violent sexual advance by the victim.

Recommendation 7 **203**

That the NSW Government introduce an amendment to section 23 of the *Crimes Act 1900* to ensure that the partial defence is not available to defendants, other than in circumstances of a most extreme and exceptional character, if—:

- a domestic relationship exists between the defendant and another person; and
- the defendant unlawfully kills that person and/or another person (the deceased); and
- the provocation is based on anything done by the deceased or anything the person believes the deceased has done—
  - to end the relationship; or
  - to change the nature of the relationship; or

- to indicate in any way that the relationship may, should or will end, or that there may, should or will be a change to the nature of the relationship, and

that for the purposes of determining the above, the court should have regard to the following circumstances which provide guidance on the types of circumstances where a defendant, (except in some 'extreme and exceptional circumstances') should not be able to avail themselves of the partial defence of gross provocation:

- the deceased indicates to the defendant they wish to end a relationship
- the deceased discloses infidelity to the defendant
- the deceased taunts the defendant about sexual inadequacy
- the defendant discovers their partner or ex-partner in flagrante delicto and kills that person, or the third person
- the defendant kills a third party who they know or believe has been having a relationship with their partner or ex-partner
- the defendant kills a person with whom they are in conflict about parenting arrangements for children.

Recommendation 8 **204**

That the NSW Government introduce an amendment to section 23 of the Crimes *Act 1900* to provide that where a defendant is intoxicated at the time of the act or omission causing death, and the intoxication is self-induced, a justifiable sense of being seriously wronged caused by that intoxication or resulting from a mistaken belief occasioned by that intoxication is to be disregarded.

Recommendation 9 **205**

That the NSW Government introduce an amendment to section 23 of the *Crimes Act 1900* to provide that a judge should not be required to leave the defence to the jury unless there is evidence on which a reasonable jury, properly directed, could conclude that it might apply.

Recommendation 10 **208**

That the NSW Government develop and implement an education package on the nature and dynamics of domestic and family violence targeting the legal sector and the community more broadly.

Recommendation 11 **209**

That the Attorney General issue a reference to the NSW Law Reform Commission, requiring that it undertake a comprehensive review of the law of homicide and homicide defences in NSW, including reforms made in accordance with the recommendations in this report, to commence at the end of five years from the date of this report.

Chapter 1 Introduction

This Chapter provides an overview of the establishment of the Select Committee and its terms of reference. It also describes the way in which the Inquiry was conducted and provides an outline of the structure of the Report.

Establishment of the Committee

1.1 The Select Committee on the Partial Defence of Provocation was established by a resolution of the Legislative Council on 14 June 2012, to inquire into and report on the partial defence of provocation.[1] The Committee was established in the wake of a high profile case involving the killing of a woman by her husband.[2]

1.2 In that case the offender, Chamanjot Singh, was charged with the murder of his wife, Manpreet Kaur. Mr Singh raised the partial defence of provocation on the basis that he lost self-control when his wife told him that she had never loved him and was in love with someone else, and threatened to have him removed from the country. The offender gave evidence that he became 'enraged' and that he held the deceased by the throat while she slapped him, before taking hold of the box cutter that was nearby. He said that he had no recollection of the events that followed. The autopsy indicated that Ms Kaur died following what the judge described as a "ferocious attack"[3] by Mr Singh. The evidence showed that she had been strangled (although strangulation may not have been the cause of death) and that she had had her throat cut at least eight times with the box cutter. The jury acquitted the offender of murder but convicted him of manslaughter on the basis of the partial defence of provocation. He was sentenced to eight years imprisonment, with a six year non-parole period.

1.3 The case received significant media attention throughout the criminal trial and sentencing process. In this context, the partial defence of provocation was highlighted in the media and among commentators as being an issue of significant public interest and concern.

1.4 The Committee is comprised of seven members. The names of the Committee members are set out in on page v. The resolution establishing the Committee identified the Reverend Hon Fred Nile MLC as the Chair of the Committee and the Hon Trevor Khan MLC was elected as Deputy Chair at the Committee's first meeting.

Terms of reference

1.5 The Committee was established to inquire into and report on the retention of the partial defence of provocation, and the adequacy of the defence of self-defence for victims of prolonged domestic and sexual violence.

1 *LC Minutes* (14/06/2012) 92, Item 10.

2 *R v Singh* (2012) NSWSC 637.

3 *R v Singh* (2012) NSWSC 637 at 30.

1.6 The terms of reference require the Committee to consider whether the partial defence should be retained, abolished, or whether the elements of the partial defence should be amended in light of proposals in other jurisdictions.

1.7 The scope of the Committee's terms of reference with respect to the adequacy of self-defence for victims of prolonged domestic and sexual violence is limited to consideration of the adequacy of the defence of self-defence in the event that the partial defence of provocation were to be abolished.

1.8 The full terms of reference are set out on page iv.

Conduct of the Inquiry

Timeframe

1.9 The Committee was originally due to report by 21 November 2012. An extension until 20 February 2013 was approved by the House on 14 November 2012.[4] A subsequent extension was granted on 20 February 2013 until 2 May 2013.[5]

Submissions

1.10 The Committee invited submissions by advertising in *The Sydney Morning Herald,* the *Daily Telegraph*, the *Newcastle Herald*, the *Illawarra Mercury* and *The Land*. The Committee also advertised in Sydney gay press newspapers, the *Sydney Star Observer* and *SX*. A media release announcing the Inquiry was also sent to all New South Wales media outlets. In addition the Committee wrote to key stakeholders inviting them to make a submission to the Inquiry. The closing date for submissions was 10 August 2012, although the Committee continued to accept submissions after this date. The Committee also released a briefing paper to assist submission makers.

1.11 The Committee received a total of 52 submissions. Responses were received from a range of stakeholders including legal groups, victim support and other advocacy organisations, academics and individuals, as well as representatives from government agencies including the Director of Public Prosecutions, the Public Defender's Office, the Department of Family and Community Services, and the Department of Attorney General and Justice. A further 32 supplementary submissions were received in response to an Options Paper (discussed below). A list of submissions is set out in Appendix 1 and the submissions are available on the Committee's website.

1.12 The Committee wishes to thank all the individuals and organisations who contributed, for so rigorously engaging with the Inquiry process and assisting the Committee in its examination of the issues raised.

4 *LC Minutes* (14/11/2012) 118, Item 3.

5 *LC Minutes* (20/02/2013) 124, Item 6.

Hearings

1.13 The Committee held three days of hearings on 28 and 29 August, and on 21 September 2012 at which representatives of 19 organisations and agencies, as well as six academics, shared their views on the partial defence of provocation and its operation. A total of 34 witnesses appeared over the three hearing days. The Committee would particularly like to thank Ms Jaspreet Kaur and Mr Phil Cleary for sharing their personal stories with us.

1.14 A full list of witnesses who appeared at the hearings is set out in Appendix 2 and the transcripts are available on the Committee's website. A list of documents tabled at the hearings is set out in Appendix 3.

1.15 The Committee also had the benefit of receiving written answers to questions taken on notice during the hearing, as well as answers to a number of supplementary questions that were asked of some of the witnesses who gave evidence. A list of those responses is set out in Appendix 4 and the responses are also available on the Committee's website.

Options Paper

1.16 Following receipt of submissions and after hearing from Inquiry participants during the public hearings, the Committee developed an Options Paper canvassing a range of reform options. The Committee invited all stakeholders who had been invited to appear at public hearings to make subsequent submissions on the alternatives outlined in the Options Paper. The Options Paper was simultaneously published on the Committee's website and public submissions were also invited.

Overview of stakeholder views

1.17 There were a diverse range of views expressed in the 52 submissions received by the Committee and during the public hearings, even among Inquiry participants from within particular sectors.

Supporters of abolition

1.18 A significant proportion of Inquiry participants supported abolition of the partial defence of provocation,[6] and some of those argued for abolition alongside reform to improve access to

[6] See, for example, Submission 1, Name suppressed; Submission 2, Mr Peter Butler; Submission 9, Name suppressed; Submission 12, Mr Graeme Coss; Submission 16, Women's Domestic Violence Court Assistance Scheme; Submission 18, Dr Kate Fitz-Gibbon; Submission 20, Ms Jaspreet Kaur; Submission 26, Mr Phil Cleary; Submission 43, Office of the Director of Public Prosecutions; Submission 38, Inner City Legal Centre; Submission 40, Fox, Zheng, Mehta and Bulut; Submission 42, Redfern Legal Centre and Sydney Women's Domestic Violence Court Advocacy Service; Submission 46, Ms Natasha Godwin; Submission 47, Ms Lauren Blumberg; Submission 48, Australian Lawyers Alliance.

self-defence for particular groups of defendants.[7] Several other Inquiry participants supported abolition of the partial defence in principle, but were hesitant to recommend abolition without a comprehensive review of homicide offences and defences being undertaken.[8]

1.19 Various reasons were given in support of abolition, including that the operation of the defence is gender biased, anachronistic and archaic and promotes a culture of 'victim blaming'; that the legal test is conceptually confusing, inappropriately privileges a loss of self-control and is difficult for juries to understand and apply; and that provocation can be adequately dealt with at the sentencing stage, as it is in all other criminal offences. These issues are examined in detail at Chapters 4 and 5.

1.20 Those who argued for abolition alongside reform to the law of self-defence in homicide matters invariably referred to the plight of (usually female) victims of long term domestic or family violence who, after years of abuse, kill their tormentors. The underlying sentiment of these submissions was that the defence of provocation, although used successfully by some defendants in these situations, is inappropriate and inadequate. These arguments are also explored in Chapters 4 and 5.

Supporters of retention without amendment

1.21 A small number of Inquiry participants supported retention of provocation in its current form.[9] Two of these were barristers practicing in criminal law who argued that the partial defence and its application by the jury plays an important role in dealing with ordinary people who find themselves in extreme circumstances. Barrister James Trevallion stated:

> … the law demonstrates a compassionate understanding of human nature consistent with the community's ethical and moral standards… it is that common human experience, with those ethical and moral standards that juries do bring to bear in resolving the issue of provocation when it arises. It is, for that reason that the partial defence of provocation is a quintessential jury issue.[10]

1.22 The argument was also put by barrister Winston Terracini SC QC, who commented that the jury:

> … are quite obviously best placed to determine what is reasonable and just in the circumstances … The notion that a single judge is going to be possessed of the collective and wide ranging bank of commonsense, community values of 12 ordinary members of that community is in my view flawed.[11]

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7 See, for example, Submission 16, Women's Domestic Violence Court Assistance Scheme; Submission 40, Fox, Zheng, Mehta and Bulut; Submission 42, Redfern Legal Centre and Sydney Women's Domestic Violence Court Advocacy Service; Submission 48, Australian Lawyers Alliance.

8 Submission 35, Wirringa Baiya Aboriginal Women's Legal Centre; Submission 37, Women's Legal Services NSW; Submission 44, Hawkesbury Nepean Community Legal Centre; Submission 45, Outer West Domestic Violence Network.

9 Submission 7, Ms Glenda Gartrell; Submission 10, Women's Electoral Lobby; Submission 14, Mr James Trevallion; Submission 33, Mr Winston Terracini SC QC.

10 Submission 14, Mr James Trevallion, p 2.

11 Submission 33, Mr Winston Terracini SC QC, p 3.

1.23 The Women's Electoral Lobby opposed any amendment to section 23 on the basis that, in its current form, it provides a vital option for women defendants who kill, particularly those who kill within the context of violent relationships.[12]

Supporters of retention with amendment

1.24 A number of Inquiry participants indicated their support for retention of provocation, but with significant amendments designed to respond to some of the commonly cited concerns regarding the application of the partial defence.[13] Various reform options were proposed, and these are explored in Chapters 6 and 7.

1.25 A further three Inquiry participants, the Law Society of NSW, the NSW Bar Association and the Public Defender's Office, were supportive of retaining provocation in its current form but indicated that they would not oppose minor amendments to exclude certain types of conduct from being relied upon as the basis of a defence of provocation.[14]

1.26 A number of supporters of abolition indicated that, in the event that repeal of section 23 was rejected, they would support reform of the law to address some of the concerns raised in respect of the partial defence, although the types of reform supported was varied across different Inquiry participants.

Other suggestions

1.27 A number of Inquiry participants indicated that, prior to any consideration of reform (and particularly abolition) of the partial defence of provocation, a wholesale review of the law of homicide should be undertaken by the NSW Law Reform Commission. This is discussed in Chapter 5.

1.28 Various other suggestions were made by Inquiry participants for reform to address procedural and evidentiary issues related to the partial defence of provocation. These included requirements for pre-trial disclosure by defendants seeking to rely on the partial defence of provocation, reforms to address concerns about the process of plea and charge negotiation and prosecution guidelines, and specific legislative provisions designed to ensure that 'social framework evidence' is able to be adduced in homicide matters. These issues are discussed in Chapter 8.

1.29 In addition, some Inquiry participants recommended that reforms to the partial defence be packaged with an education campaign targeting key players in the legal sector, and the community more broadly, to better inform them about the nature and dynamics of domestic and family violence. This is discussed in Chapter 9.

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12 Submissions 10 and 10a, Women's Electoral Lobby.

13 See, for example, Submission 8, FamilyVoice Australia; Submission 24, Justice Action; Submission 29, Associate Professor Thomas Crofts and Dr Arlie Loughnan; Submission 30, Legal Aid NSW; Submission 50, Mr James Moshides.

14 Response to Options Paper, Mr Justin Dowd, President, Law Society of NSW; Answers to Questions on Notice, Supplementary Questions on Notice and response to Options Paper, Mr Bernard Coles QC, President, Bar Association of NSW; Response to Options Paper, Ms Dina Yehia SC, Public Defender, Public Defenders Office.

Structure of report

1.30 This report is comprised of 9 Chapters.

1.31 Chapter 2 provides a broad overview of the law relevant to this Inquiry including the distinction between murder and manslaughter and relevant defences to homicide, with a particular emphasis on the partial defence of provocation including providing an examination of the contexts in which provocation is raised in NSW. Chapter 2 also examines the historical development of the partial defence of provocation and explains the current law in NSW. The Chapter also examines the defence of self-defence, and the partial defences of excessive self-defence and substantial impairment by abnormality of the mind.

1.32 Chapter 3 provides an outline of provocation in other jurisdictions, and discusses recent reform and review of the partial defence across Australia and internationally.

1.33 In Chapter 4 the Committee examines some of the key issues raised in relation to the partial defence of provocation, as well as the converse arguments in relation to each issue.

1.34 Chapter 5 explores the risks associated with abolition of the partial defence of provocation, and includes consideration of the adequacy of self-defence if the partial defence were to be abolished.

1.35 Chapters 6 and 7 provide detail on Inquiry participant feedback on a number of reform models that were the subject of consultation throughout the Inquiry. Chapter 6 examines conduct based reform models and test based reform models. Chapter 7 examines a model combining test and conduct based reform. These are explained in more detail in those Chapters.

1.36 Chapter 8 examines a range of procedural and evidentiary issues that arose throughout the Inquiry, including proposals to: reverse the onus and lower the standard of proof; require pre-trial disclosure of an intention to run provocation; and introduce 'social framework' evidentiary provisions.

1.37 In Chapter 9 the Committee outlines elements of a preferred model for the partial defence of provocation, and supporting reforms.

Chapter 2 Defences to homicide and provocation in the NSW context

This Chapter provides a broad overview of the law relevant to this Inquiry, including the distinction between murder and manslaughter and the relevant defences to homicide, with a particular emphasis on the partial defence of provocation. The Chapter examines the historical development of the partial defence of provocation and explains the current law in NSW, and also describes the defence of self-defence and the partial defences of excessive self-defence and substantial impairment by abnormality of the mind.[15] Finally, the Chapter examines the contexts in which the partial defence of provocation is raised in NSW.

The distinction between murder and manslaughter

2.1 Murder and manslaughter are two forms of unlawful homicide. As stated by the NSW Law Reform Commission which undertook a review of partial defences to murder in 1997, "unlawful homicide" is the killing of a human being in circumstances where the law does not excuse killing."[16] Although in an ideal society the death of a person should never be justified, there are circumstances in which it will be lawful to kill another person, as is discussed at 2.8 – 2.15 in relation to the defence of self-defence.

2.2 The distinction between murder and manslaughter has its roots in 16th century England, during a time when a conviction for murder attracted a mandatory death sentence for the offender. It was considered that the law should contain a degree of flexibility to enable it to better respond to particular types of killings, and to reinforce the principle that capital punishment should be reserved for the most serious killings - those labeled as 'murder'.[17] It was in this context that the partial defence of provocation developed, as discussed at 2.20 – 2.28.

2.3 Although the distinction between murder and manslaughter originated as a mechanism to afford mercy to an offender facing a death sentence, today the distinction is:

> … seen to reflect degrees of seriousness of unlawful killings, based on the everyday understanding that some killings are more blameworthy than others. Liability for murder is reserved for the most serious or reprehensible killings, whereas manslaughter applies to unlawful killings which are recognised by the law as less blameworthy, whether because the offender's mental state was affected by some mitigating influence, or because the offender did not intend to kill or otherwise lacked the requisite guilty mind for murder.[18]

2.4 This distinction is reflected in section 18(1) of the *Crimes Act 1900* which provides that:

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15 There are a range of other defences to homicide which are not examined in this Report. This Report focuses on defences that are commonly raised in cases that refer to 'provocative' circumstances and that are considered in the literature discussing provocation as a partial defence to murder generally.

16 NSW Law Reform Commission, *Report 82 (1997) - Partial Defences to Murder: Diminished Responsibility*, 2.1.

17 NSW Law Reform Commission, *Report 82 (1997) - Partial Defences to Murder: Diminished Responsibility*, 2.1.

18 NSW Law Reform Commission, *Report 82 (1997) - Partial Defences to Murder: Diminished Responsibility*, 2.1.

> (a) Murder shall be taken to have been committed where the act of the accused, or thing by him or her omitted to be done, causing the death charged, was done or omitted with reckless indifference to human life, or with intent to kill or inflict grievous bodily harm upon some person, or done in an attempt to commit, or during or immediately after the commission, by the accused, or some accomplice with him or her, of a crime punishable by imprisonment for life or for 25 years.
>
> (b) Every other punishable homicide shall be taken to be manslaughter.

2.5 Section 19A of the *Crimes Act 1900* provides that the maximum penalty for murder is life imprisonment.[19] The maximum penalty applicable for manslaughter is 25 years.[20]

2.6 Partial defences operate to reduce murder to manslaughter, thereby reflecting the offenders lesser culpability. These partial defences include provocation, substantial impairment by abnormality of the mind,[21] infanticide and excessive self-defence.[22]

Defences to murder

2.7 There are a number of full and partial defences to murder in NSW. Some of these are relevant to the current inquiry and are discussed below.

Self-defence

2.8 Self-defence offers a full defence to a charge of murder.

2.9 In NSW, a person is not held to be criminally responsible for an act resulting in a person's death if the act was committed in self-defence. This reflects a long history in the common law that recognised that there are circumstances in which a person who intentionally kills another will be justified in using lethal force in legitimate self-defence or in the defence of others.

2.10 The defence has a statutory formulation that reflects the common law. Division 3 of Part 11 of the *Crimes Act 1900* provides for the defence of self-defence, which offers a full defence to all offences. Section 418 states:

> (1) A person is not criminally responsible for an offence if the person carries out the conduct constituting the offence in self-defence.
>
> (2) A person carries out conduct in self-defence if and only if the person believes the conduct is necessary:
>
> (a) to defend himself or herself or another person, or

19 Although note that section 19B provides that a mandatory penalty of life imprisonment applies to the murder of police officers in certain circumstances.

20 *Crimes Act 1900*, s 24.

21 Known as 'diminished responsibility' prior to amendments commencing in 1998 (*Crimes Amendment (Diminished Responsibility) Act 1997*).

22 D. Brown *et al*, *Criminal Laws: Materials and commentary on Criminal Law and Process of New South Wales* (2011, 5th ed.), p 533 cited in Submission 10, Women's Electoral Lobby, p 2 (hereafter referred to as 'Brown *et al*, *Criminal Laws*.').

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

2.11 The availability of self-defence in matters where the defensive conduct results in the death of a person is limited by section 420, which provides that the defence is not applicable where the person using lethal force is doing so only to protect property or to prevent criminal trespass.

2.12 Section 419 of the *Crimes Act 1900* provides that the prosecution bears the onus of proving, beyond reasonable doubt, that the defendant did not carry out the conduct in self-defence.

2.13 There are two questions that a court must answer if self-defence is raised.[23] First, is there a reasonable possibility that the accused believed that his or her conduct was necessary in order to defend himself or herself; and second, if there is, is there also a reasonable possibility that what the accused did was a reasonable response to the circumstances as he or she perceived them. An affirmative answer to both of these questions results in a not guilty verdict and the accused will be acquitted.

2.14 To negative self-defence, the Crown must establish beyond reasonable doubt that either the defendant did not at the time of the act believe that it was necessary to do what they did to defend him or herself; or that the act of the defendant was not a reasonable response to the circumstances as he or she perceived them.

2.15 If it is established that the accused used force intentionally, resulting in the victim's death, and that it is reasonably possible that he or she did so with the honest if unreasonable belief that the conduct was necessary in self-defence and the Crown can establish that the conduct was not a reasonable response in the circumstances, the court gives a direction that the appropriate verdict is one of not guilty of murder, but guilty of manslaughter. This is excessive self-defence, as discussed below.

Excessive self-defence

2.16 The common law doctrine of self-defence limits the use of force to situations where it is necessary for the accused to use force, and the degree of force is not excessive in the circumstances.

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23 NSW Legislative Council, Select Committee on the Partial Defence of Provocation – Briefing Paper: Defences and Partial Defences to Homicide July 2012, p 3, citing *R v Katarzynski* (2002) NSWSC 613.

2.17 The partial defence of excessive self-defence existed at common law prior to 1987, when it was abolished by the High Court in *Zecevic v DPP*.[24] Associate Professor Julia Tolmie explained that excessive self-defence applies:

> … where the force used is excessive but the defendant is facing a serious attack and honestly believes that he or she is responding with force reasonably necessary to repel the attack..[25]

2.18 Ms Penny Musgrave, Director, Criminal Law Review in the Department of Attorney General and Justice noted that post-*Zecevic*, NSW introduced amendments that codified the law of self-defence. The amending legislation also reintroduced excessive self-defence in NSW:

> In 2002 NSW introduced a legislative provision regarding self-defence which requires that the accused responded to behaviour which he or she honestly, even if unreasonably, believed constituted a threat to himself, herself or another person and that the manner in which he or she response was proportionate to the threat as perceived (s.418, *Crimes Act 1900*). The partial defence of excessive self-defence was also reintroduced, so that where the accused's response was not proportionate to the threat as he or she perceived it he or she will be guilty of the lesser offence of manslaughter (s.421, *Crimes Act 1900*).[26]

2.19 Section 421 of the *Crimes Act 1900* provides:

> (1) This section applies if:
>
> (a) the person uses force that involves the infliction of death, and
>
> (b) the conduct is not a reasonable response in the circumstances as he or she perceives them, but the person believes the conduct is necessary:
>
> (c) to defend himself or herself or another person, or
>
> (d) to prevent or terminate the unlawful deprivation of his or her liberty or the liberty of another person.
>
> (2) The person is not criminally responsible for murder but, on a trial for murder, the person is to be found guilty of manslaughter if the person is otherwise criminally responsible for manslaughter.

Provocation

Historical development

2.20 The concept of provocation as a partial defence to murder is a product of its historical development, which goes back hundreds of years. A number of inquiry participants identified

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24 Submission 4, Associate Professor Julia Tolmie. (2005) *Is the Partial Defence an Endangered Defence? Recent Proposals to Abolish Provocation*, NZ Law Review 25, p 26.

25 Submission 4, p 26.

26 Answers to questions on notice taken during evidence 28 August 2012, Ms Penny Musgrave, Director of the Criminal Law Review, Department of Attorney General and Justice, pp 6-7.

the historical development of provocation as being important to understanding how and why it operates today.[27]

2.21 As noted above at 2.2, the partial defence of provocation developed during a time when conviction for murder resulted in a mandatory death sentence. The social norms of the period dictated that 'breaches of honour', such as an assault upon a person or the commission of adultery by a man's wife, justified an angry retaliatory response. Indeed, it was considered 'necessary for a man to 'cancel out' the affront by retaliating in some way … the failure to produce such a response would be considered cowardly.'[28]

2.22 The Victorian Law Reform Commission in its 2004 report *Defences to Homicide* explained how, in this context, 'the existence of provocation as a partial justification or excuse is … inextricably linked with the desire to mitigate against the harshness of a mandatory [death] sentence.'[29]

2.23 Lord Hoffman gave a historical overview of the development of provocation in the 2000 United Kingdom case of *R v Smith*, noting that provocation emerged in common law in a "recognisably modern form"[30] in the late 17th and 18th centuries, with Chief Justice Holt setting out four sets of circumstances in which a manslaughter verdict would be available based on provocation in the 1707 decision of *R v Mawgridge*.[31] The circumstances considered sufficient to establish provocation were killing in response to grossly insulting assault, killing a person who is attacking a friend, killing to free a person being unlawfully deprived of liberty, and killing a man who is committing adultery with one's wife.[32]

2.24 By the 19th century, the law had developed further to reflect changing views. Judicial interpretation and application of the law resulted in two major impacts to the operation of the partial defence. First, courts generalised the specific circumstances which were prescribed by Chief Justice Holt as sufficient provocation into a broad rule that whatever the alleged provocation, the response had to be 'reasonable'. Second, the focus of the partial defence shifted from a justificatory, though excessive, response by the accused to consideration of whether the accused lost self-control.[33]

2.25 The shifting focus of the law reflected developing community values of the time, which had come to consider provocation as something which "temporarily deprived the accused of his reason". This represented a move away from the primary consideration of whether the retaliatory response of the defendant was justified, albeit excessive, to a consideration as to whether the defendant was in control of his actions. Chief Justice Tindal described the key issue for the jury as being:

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27 See, for example, Submission 4; Submission 12, Mr Graeme Coss; Submission 18, Dr Kate Fitz-Gibbon; Submission 31, NSW Domestic Violence Coalition Committee.

28 Victorian Law Reform Commission, (2004) *Defences to Homicide: Final Report*, p 22.

29 Victorian Law Reform Commission, (2004) *Defences to Homicide: Final Report*, p 21.

30 *R v Smith (Morgan)* (2000) UKHL 49 per Lord Hoffman, cited in Brown *et al*, *Criminal Laws*, p 583.

31 (1706) Kel 119.

32 Victorian Law Reform Commission, (2004) *Defences to Homicide: Final Report*, p 22. See also *R v Smith (Morgan)* (2000) UKHL 49 per Lord Hoffman, cited in Brown *et al*, *Criminal Laws*, p 583.

33 *R v Smith (Morgan)* (2000) UKHL 49 per Lord Hoffman, cited in Brown *et al*, *Criminal Laws*, pp 583-584.

> … whether the mortal wound was given by the prisoner while smarting under a provocation so recent and so strong, that the prisoner might not be considered at the moment the master of his own understanding; in which case, the law, in compassion to human infirmity, would hold the offence to amount to manslaughter only; or whether there had been time for the blood to cool, and for reason to resume its seat, before the mortal wound was given; in which case the crime would amount to wilful murder.[34]

2.26 The concept of requiring that a defendant's response be 'reasonable' is demonstrated in various cases throughout the 1800s. In 1837 Lord Coleridge stated that:

> … though the law condescends to human frailty, it will not indulge human ferocity. It considers man to be a rational being, and requires that he should exercise a reasonable control over his passions.[35]

2.27 In 1869, Lord Keating referred for the first time to an objective standard, introducing the 'ordinary' or 'reasonable' man as a test of the appropriate response in *R v Welsh*. He stated that the provocative conduct would be sufficient if it was "something which might naturally cause an ordinary and reasonably minded man to lose his self-control and commit such an act."[36]

2.28 In 1883, NSW abolished the common law partial defence of provocation and introduced a statutory regime that reflected the common law of the time.[37] A key feature of the statutory formulation was that it retained an element of 'suddenness' in terms of the defendant's response to provocation. The provision was subsequently imported into the *Crimes Act 1900*, where it remained in the same form until 1982.

1982 amendments

2.29 The 1982 amendments were preceded by a 1981 report by the NSW Task Force on Domestic Violence, which was established in the wake of a number of high profile cases involving women killing their partners after enduring years of domestic violence and subsequently being convicted of murder, which at the time attracted a mandatory life sentence.

2.30 The Task Force recommended a suite of legislative and non-legislative reforms designed to improve outcomes for victims of domestic violence. Recommendations for legislative reform included amending the definitions of unlawful homicide and the defences (including self-defence and provocation) to properly recognise the circumstances of 'battered women' who kill their tormentor; and abolishing the mandatory penalty life imprisonment for murder.[38]

2.31 The Task Force's report recognised the inadequacy of homicide defences in their application to women who kill intimate partners, and the Wran Government subsequently acted in 1982 to amend the *Crimes Act* in several ways. First, the definition of provocation was broadened, to remove the requirement for a 'sudden' response to provocative conduct and thereby account

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34 *R v Hayward* (1833) 6 C & P 157, 159, cited in Brown *et al*, *Criminal Laws*, pp 583-584.

35 *R v Kirkham* (1837) 8 C & P 115, 119, cited in Brown *et al*, *Criminal Laws*, pp 583-584.

36 *R v Welsh* (1869) 11 Cox CC 336, 339, cited in Brown *et al*, *Criminal Laws*, pp 583-584.

37 *Criminal Law Amendment Act 1883*, s 370.

38 *Report of the NSW Task Force on Domestic Violence* (1981), Recommendations 24 and 25.

for cumulative provocation over time. Second, the amending Act removed the mandatory life term that applied to convictions for murder.[39]

2.32 In addition, the 1982 amendments also reversed the onus of establishing the defence of provocation from the defendant onto the prosecution. Although not explicit in either of the pre-1982 statutory formulations, the position in NSW was that the onus of establishing provocation lay with the defence.[40]

2.33 The law of provocation in NSW has not been amended since the 1982 reforms which were designed to "give effect to widespread community demand for a modification of the law of homicide, particularly the law affecting what may be called crimes of domestic violence…[including] to reform the law relating to provocation…"[41]

The current law

2.34 Section 23 of the *Crimes Act 1900* provides:

> (1) Where, on the trial of a person for murder, it appears that the act or omission causing death was an act done or omitted under provocation and, but for this subsection and the provocation, the jury would have found the accused guilty of murder, the jury shall acquit the accused of murder and find the accused guilty of manslaughter.
>
> (2) For the purposes of subsection (1), an act or omission causing death is an act done or omitted under provocation where:
>
> > (a) the act or omission is the result of a loss of self-control on the part of the accused that was induced by any conduct of the deceased (including grossly insulting words or gestures) towards or affecting the accused, and
> >
> > (b) that conduct of the deceased was such as could have induced an ordinary person in the position of the accused to have so far lost self-control as to have formed an intent to kill, or to inflict grievous bodily harm upon, the deceased,
> >
> > whether that conduct of the deceased occurred immediately before the act or omission causing death or at any previous time.
>
> (3) For the purpose of determining whether an act or omission causing death was an act done or omitted under provocation as provided by subsection (2), there is no rule of law that provocation is negatived if:
>
> > (a) there was not a reasonable proportion between the act or omission causing death and the conduct of the deceased that induced the act or omission,

39 *Crimes (Homicide) Amendment Act 1982*.

40 *Johnson v R* (1976) HCA 44 at 36. This issue is discussed at 8.63.

41 *LA Debates* (11/3/1982) 2842-43.

> (b) the act or omission causing death was not an act done or omitted suddenly, or
>
> (c) the act or omission causing death was an act done or omitted with any intent to take life or inflict grievous bodily harm.
>
> (4) Where, on the trial of a person for murder, there is any evidence that the act causing death was an act done or omitted under provocation as provided by subsection (2), the onus is on the prosecution to prove beyond reasonable doubt that the act or omission causing death was not an act done or omitted under provocation.
>
> (5) This section does not exclude or limit any defence to a charge of murder.

2.35 This means that the partial defence will be established where an act (or omission) is the result of a loss of self-control by the defendant that was induced by any conduct of the deceased toward or affecting the defendant; and the conduct of the deceased was such that it could have induced an ordinary person to have so far lost self-control as to have formed intent to kill or inflict grievous bodily harm.

2.36 The 'ordinary person' test has two limbs. Each limb has a different test to determine the 'ordinary person'. The limbs are:

- the ordinary person's perception of the gravity of the provocation. In this context, 'the ordinary person is regarded as having any relevant personal characteristics of the accused.'
- the ordinary person's power to exercise self-control in response to that provocation. In this context, the 'ordinary person' is a person of the same age and maturity as the accused. Considerations of sexual preference, racial background, physical disability and the like, while relevant to the assessment of the gravity of the conduct said to constitute provocation (i.e. the first component), are not to be imputed to the ordinary person.[42]

2.37 As noted by the NSW Bar Association, there is also judicial 'control' in place in cases where a defendant intends to rely on provocation, which requires that before the defence of provocation is left to the jury, the judge must decide whether or not there is sufficient evidence for the defence to be left to the jury.[43]

Substantial impairment by abnormality of the mind

2.38 Section 23A of the *Crimes Act 1900* provides for the partial defence of substantial impairment by abnormality of the mind (hereafter referred to as 'substantial impairment') that applies in respect of defendants who would otherwise be liable to conviction for murder.

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42 Select Committee on the Partial Defence of Provocation, *Inquiry into the partial defence of provocation - Defences and Partial Defences to Homicide*, 2012, p 4-5. Note that there is a third component or limb has been considered less significant as a result of the High Court decision which have determined that "it is the formation of an intention to kill rather than the precise form or means adopted which is the jury's primary consideration in assessing the ordinary person's response" (*Masciantonio v The Queen* (1995) 183 CLR 58 at 69).

43 Submission 15, NSW Bar Association, p 6.

2.39 The partial defence of substantial impairment provides that a defendant may have their criminal liability reduced from murder to manslaughter if they can establish, on the balance of probabilities, 'a substantially impaired mental capacity to understand or control their actions at the time of the killing by reason of some 'abnormality of mind.'[44] The NSW Law Reform Commission referred to this as being "the essence of the defence of substantial impairment, previously known as diminished responsibility."

2.40 The rationale for the partial defence of substantial impairment reflects the view that there should be recognition of reduced levels of culpability for some defendants who would otherwise be guilty of murder, based on the fact that their state of mind was impaired at the time of the killing. The Model Criminal Code Officers' Committee, a group comprised of a senior officer from each Australian jurisdiction with expertise in criminal law and criminal justice matters, explained in a 1988 report that the rationale for this defence is:

> … the desire for increased flexibility in dealing with defendants who display some kind of mental dysfunction, albeit not serious enough to establish the complete defence of insanity. As its name suggests, diminished responsibility partially excuses such persons on the basis that the fault element necessary to found a murder conviction, although present, is of diminished quality.[45]

2.41 Substantial impairment is different to other defences that have elements of mental impairment, disorder or illness as part of their construction. These include the defences of mental illness and automatism which, unlike substantial impairment, apply to criminal offences generally and which have different criteria under law.

2.42 Section 23A of the *Crimes Act 1900* provides:

> (1) A person who would otherwise be guilty of murder is not to be convicted of murder if:
>
> > (a) at the time of the acts or omissions causing the death concerned, the person's capacity to understand events, or to judge whether the person's actions were right or wrong, or to control himself or herself, was substantially impaired by an abnormality of mind arising from an underlying condition, and
> >
> > (b) the impairment was so substantial as to warrant liability for murder being reduced to manslaughter.
>
> (2) For the purposes of subsection (1)(b), evidence of an opinion that an impairment was so substantial as to warrant liability for murder being reduced to manslaughter is not admissible.

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44 NSW Law Reform Commission, *Consultation Paper 6 (2010) - People with cognitive and mental health impairments in the criminal justice system: criminal responsibility and consequences*, 4.1.

45 Model Criminal Code Officers' Committee, *Report of the Model Criminal Code Officers' Committee*, 1998, Attorney General's Department (Cth), ACT, "Chapter 5: Offences Against the Person," 113, cited in Judicial Commission of NSW *Partial Defences to Murder in NSW 1990-2004*, p 11. Note that the Model Criminal Code Officers' Committee still exists but has since been renamed the 'National Criminal Law Reform Committee'.

> (3) If a person was intoxicated at the time of the acts or omissions causing the death concerned, and the intoxication was self-induced intoxication (within the meaning of section 428A), the effects of that self-induced intoxication are to be disregarded for the purpose of determining whether the person is not liable to be convicted of murder by virtue of this section.
>
> (4) The onus is on the person accused to prove that he or she is not liable to be convicted of murder by virtue of this section.
>
> (5) A person who but for this section would be liable, whether as principal or accessory, to be convicted of murder is to be convicted of manslaughter instead.
>
> (6) The fact that a person is not liable to be convicted of murder in respect of a death by virtue of this section does not affect the question of whether any other person is liable to be convicted of murder in respect of that death.
>
> (7) If, on the trial of a person for murder, the person contends:
>
> > (a) that the person is entitled to be acquitted on the ground that the person was mentally ill at the time of the acts or omissions causing the death concerned, or
> >
> > (b) that the person is not liable to be convicted of murder by virtue of this section,
>
> evidence may be offered by the prosecution tending to prove the other of those contentions, and the Court may give directions as to the stage of the proceedings at which that evidence may be offered.
>
> (8) In this section:
>
> *underlying condition* means a pre-existing mental or physiological condition, other than a condition of a transitory kind.

2.43 Section 23A makes it clear that the issue for the jury is not simply whether a defendant was suffering from a substantial impairment when the offence occurred, but also requires that they make a moral judgment about whether the defendant's 'capacity to understand events, or to judge whether the person's actions were right or wrong, or to control himself or herself' was so substantially impaired that a reduction in criminal liability is warranted.

2.44 Establishing the partial defence of substantial impairment requires the defence to show that there is an 'underlying condition' that is not transitory (section 23A(1)(a)). The NSW Bar Association and Dr Arlie Loughnan advised that it was usual for psychiatric or psychological evidence to be put before the court to demonstrate the existence of such a condition.[46] This is important in the context of some of the criticisms of provocation, specifically that the element of 'loss of self-control' has no foundation in medicine or science (refer to 4.103).

2.45 As noted at 2.39 and set out in section 23A(4) of the *Crimes Act 1900*, the defence bears the burden of establishing the defence of substantial impairment on the balance of probabilities.

46 Mr Stephen Odgers SC, Chair of the Criminal Law Committee, NSW Bar Association, Evidence, 29 August 2012, p 42; Dr Arlie Loughnan, Associate Dean, University of Sydney Law School, Evidence, 29 August 2012, p 82.

This means that they must prove that "all elements of the defence have been satisfied in order to avoid a conviction of murder" to that standard of proof.[47]

Provocation being run with other defences and partial defences

2.46 Partial defences to murder are occasionally run alongside each other depending on the facts of each case. In relation to provocation, there is data that indicates that where the partial defence of provocation is run with another defence it is most commonly the partial defence of substantial impairment by abnormality of the mind.

2.47 The Judicial Commission report *Partial Defences to Murder in NSW* indicates that between the period 1 January 1990 and 21 September 2004, of the 75 offenders convicted of manslaughter on the basis of provocation, ten were convicted and sentenced on the basis of both provocation *and* substantial impairment (or its predecessor, diminished responsibility).[48]

2.48 The Honourable James Wood AO QC also noted that substantial impairment and provocation often run together in cases involving 'battered wives':

> … In these cases, almost always, there is both substantial impairment and provocation. Particularly in the battered wife situation, very often the accumulative abuse and so on has produced what can be an abnormality of mind or a substantial impairment. The two things run together …[49]

2.49 Professor Stubbs informed the Committee that, over recent years, there has been a trend away from running substantial impairment in 'battered women' cases. She contended that this is a positive change, on the basis that running substantial impairment tends to portray the 'battered woman' defendant as 'less rational rather than less culpable' for using lethal force:

> There has been a welcome shift away from relying on the partial defence of substantial impairment … possibly in recognition that it is not consistent with the circumstances of most battered women who resort to homicide. It has been subject to trenchant criticism for psychologising domestic violence and seeing the women involved as less rational rather than as less culpable for resorting to lethal violence when faced with desperate circumstances. It would be a retrograde step to revert to battered women having to rely on substantial impairment as a basis for offering a partial defence to murder.[50]

2.50 The Committee did not receive much information indicating how frequently provocation is run alongside self-defence, although there was some evidence that suggested that cases involving 'defensive elements' (usually involving 'battered defendants') were being dealt with

47 NSW Law Reform Commission, *Consultation Paper 6 (2010) - People with cognitive and mental health impairments in the criminal justice system: criminal responsibility and consequences*, 4.4.

48 Judicial Commission of NSW, *Partial Defences to Murder in NSW*, p 36. For more detail, refer to Judicial Commission of NSW, *Partial Defences to Murder in NSW*, pp 47-48.

49 The Hon. James Wood AO QC, NSW Law Reform Commission, Evidence, 29 August 2012, p 3.

50 Submission 41, Professor Julie Stubbs, p 6.

via the provocation defence, and that this often occurred as part of charge negotiations.[51] The issue of charge negotiation is discussed in the context of self-defence in Chapter 8.

How frequently is the provocation defence raised, and by whom?

2.51 There are two key pieces of research that provide information about the use of the provocation defence in NSW. The first is a research report published by the Judicial Commission of NSW in 2006 which analysed partial defences to murder in the period 1 January 1990 to 21 September 2004.[52] The second is an article published in the Australian and New Zealand Journal of Criminology in 2012, written by Dr Kate Fitz-Gibbon, which examined the successful use of the provocation defence in NSW in the period January 2005 to December 2010.[53]

2.52 The research indicates that the partial defence of provocation is raised in a relatively small number of homicide cases that reach the trial stage and of those, approximately half are successful.

2.53 Men were more likely than women to be victims and offenders in successful provocation cases. In the Judicial Commission study, 77 per cent of offenders and 88 per cent of victims were male.[54]

2.54 The Judicial Commission of NSW in its report *Partial Defences to Murder in NSW 1990-2004* found that in the period studied, 232 of 897 homicide offenders raised a partial defence (26%). Of the 232 defendants that raised a partial defence, 115 raised the partial defence of provocation, with 75 of them being successful. [55]

2.55 A majority of cases (83 out of 115 matters) where provocation was raised were determined at trial, with the Crown rejecting an offer of a plea to manslaughter. Of the 83 matters that proceeded to trial, two were determined by a judge-alone with both resulting in manslaughter convictions. Of the 81 remaining matters that were determined by a jury, just over half (41 matters or 51%) were successful in raising provocation.[56]

2.56 The Crown accepted a plea to manslaughter on the basis of provocation in 30 matters, and a further two matters were finalised after the defendants entered guilty pleas after being indicted for manslaughter.[57]

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51 Submission 41, p 6. Sheehy, E., Stubbs, J., and Tolmie, J. (2012) *Battered women charged with homicide in Australia, Canada and New Zealand: How do they fare?,* Australian & New Zealand Journal of Criminology*,* 45(3), pp 383–399.

52 Judicial Commission of NSW, *Monograph 28, June 2006, Partial Defences to Murder 1990-2004,* pp 36-37 (hereafter 'Judicial Commission, *Monograph 28*).

53 Fitz-Gibbon, K. *Provocation in New South Wales: The need for abolition,* Australian & New Zealand Journal of Criminology*,* 2012, 45(2), pp 194-213 (hereafter 'Fitz-Gibbon, *Provocation in NSW*')

54 Judicial Commission, *Monograph 28*, pp 36-37. See also Fitz-Gibbon, *Provocation in NSW*, pp 201-202.

55 Judicial Commission, *Monograph 28*, pp 36-37.

56 Judicial Commission, *Monograph 28*, p 37.

57 Judicial Commission, *Monograph 28*, p 37.

What circumstances lead to homicides in which provocation is accepted?

2.57 The Judicial Commission's research identified that the context in which the killings occurred in the 75 successful provocation cases fell into seven broad categories. Most commonly, they involved violent physical confrontations. This category was followed by killings occurring in the context of domestic violence between partners. Killings occurring in the context of intimate relationships and in the context of alleged homosexual advances followed, with eleven killings in both categories that resulted in manslaughter on the basis of provocation. These, and the remaining three categories, are discussed below.

2.58 Dr Fitz-Gibbon's study involved a smaller sample, which is reflective of the significantly shorter period it covers (January 2005 to December 2010). The study considered only those provocation manslaughter cases that were successful in the NSW Supreme Court either as a result of a verdict or a guilty plea to manslaughter. In examining only provocation manslaughter matters that were successful at trial, it had a narrower focus than the Judicial Commission's study, which also took into account guilty pleas to manslaughter on the basis of provocation that were accepted by the Crown pre-trial, and considered unsuccessful claims of manslaughter on the basis of provocation. Dr Fitz-Gibbon broke down the data by reference to the nature of the provocative incident (planned confrontation; violent confrontation; and non-violent confrontation) and the relationship between the victim and the defendant (married, de facto, acquaintances, divorced, and relationships where the 'victim was in a sexual relationship with the offender's estranged wife'). The findings from Dr Fitz-Gibbon's research are discussed in 2.70-2.75.

Judicial Commission study – manslaughter on the basis of provocation in the period 1 January 1990 to 21 September 2004

Violent physical confrontations

2.59 Killings occurring in the context of violent physical confrontations accounted for 28 out of 75 matters in which the partial defence of provocation was accepted. Victims and offenders were overwhelmingly male, and intoxication was a factor in 13 out of the 28 matters.[58]

Domestic violence between partners

2.60 Killings occurring in the context of domestic violence between intimate partners where the offender successfully relied upon provocation accounted for thirteen out of the 75 matters. In the majority of these (10 out of 13) "the offender was a woman who killed her husband or de facto following a history of physical abuse."[59] The remaining three matters involved a male killing his de facto female partner, with the offender in each case claiming that the victim had hit him during an argument.

Intimate relationship provocation

2.61 There were eleven cases in the Judicial Commission study where the offender successfully raised provocation "in the factual context of infidelity or the breakdown of an intimate

58 Judicial Commission, *Monograph 28*, p 37.

59 Judicial Commission, *Monograph 28*, p 45.

relationship."[60] All offenders in this group were male. In the majority of cases (7 out of 11) the victim was a third person who the offender thought was involved with an intimate partner. In all seven of these matters, the victim was also male. In two of the eleven matters, the victim was the offender's wife, and in another two matters the victim was the homosexual partner of the offender.[61]

2.62 The gravity of the circumstances in which the provocative conduct occurred were varied among this group. At the 'more serious' end, there were three matters where the offender argued provocation after witnessing their intimate partner engaging in a sexual act with a third person. In a further four matters, the offender had a violent altercation with a victim who was at the time, or had previously been, involved with the offender's intimate partner.

2.63 There were also cases in which the provocative conduct was 'less serious'. In one case, an offender killed his wife after finding a letter she had written to a new lover. There were two other cases that "involved verbal assertions of infidelity or the ending of a relationship in the context of unusual factual circumstances."[62]

Alleged homosexual advance

2.64 There were eleven cases in which a homosexual advance was alleged by the offender and was accepted as grounds for manslaughter on the basis of provocation. The phrase 'homosexual advance defence', which is sometimes referred to as 'gay panic defence', refers to:

> … cases in which an accused person alleges that he or she acted either in self-defence or under provocation in response to a homosexual advance made by another person.[63]

2.65 In the Judicial Commission study, five of the eleven matters involved a finding that the provocative conduct included a sexual assault, and in three further matters there was some evidence that there had been prior aggressive contact between the victim and the offender or a member of the offender's family.[64]

2.66 There were two matters where manslaughter on the basis of provocation resulted from provocative conduct comprising no more than a non-violent homosexual advance.[65]

Family violence

2.67 Family violence not involving an intimate partner provided the contextual background for eight manslaughter on the basis of provocation findings in the Judicial Commission study. Five of these involved abuse by an older relative against the offender; one involved 'inappropriate sexual behaviour' by the victim toward the offender's younger daughter; and in another the victim was physically violent toward his wife who was the offender's daughter.[66]

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60 Judicial Commission, *Monograph 28*, p 42.

61 Judicial Commission, *Monograph 28*, p 42.

62 Judicial Commission, *Monograph 28*, p 42.

63 *Homosexual Advance Defence: Final Report of the Working Party*, 1998, Criminal Law Review Division, Attorney General's Department of NSW, at 2.1 cited in Judicial Commission, *Monograph 28*, p 43.

64 Judicial Commission, *Monograph 28*, pp 43-4.

65 Judicial Commission, *Monograph 28*, p 44.

66 Judicial Commission, *Monograph 28*, pp 46-47.

Non-family sexual assault

2.68 In three matters, the offender killed after an incident of sexual assault by a non-family member. In two of these matters, the offender believed that an acquaintance had assaulted his child and subsequently killed the acquaintance. In the third matter, the female offender had been sexually assaulted by the victim.[67]

Words alone

2.69 There was a single case out of the 75 successful manslaughter on the basis of provocation matters in the Judicial Commission study where words alone were considered to have been sufficient to sustain the defence. In that case, the offender killed his wife after being taunted and verbally abused by his wife.[68]

Fitz-Gibbon study – manslaughter on the basis of provocation in the period January 2005 to December 2010

2.70 Dr Fitz-Gibbon's study found that there were fifteen convictions for manslaughter on the basis of provocation between 2005 and 2010 in NSW.

2.71 In one third of these matters, the provoking conduct was a 'non-violent confrontation' which "often [took] the form of a verbal insult targeted by the eventual victim upon the defendant, in the period immediately prior to the killing."[69] In all five of these matters, the defendant was male and in three cases the victim was a current or estranged female partner of the defendant. In one matter, the victim was a male engaged in a sexual relationship with the defendant's estranged wife.

2.72 In the other ten matters, nine involved provocative conduct occurring in the context of violent confrontations between the defendant and the victim. One matter involved a planned confrontation.

2.73 Within these ten matters, two defendants were females who had killed their spouse or de facto partner. Both of these defendants entered a plea to manslaughter on the basis of provocation. One matter involved a male defendant who killed his wife in the context of a 'violent confrontation', although the judicial determination of the degree of provocation was that it was not high.

2.74 In the matter involving a planned confrontation, the defendant had planned for his wife to bring the victim, the defendant's best friend, to the marital home knowing that the victim and his wife had been engaging in a sexual relationship prior. Fitz-Gibbon commented that:

> … the defendant was sentenced on the basis that he had become provoked upon realising that the victim intended to have sexual intercourse with his wife and that this realisation was further heightened by cultural factors.[70]

67 Judicial Commission, *Monograph 28*, p 45.

68 Judicial Commission, *Monograph 28*, pp 38-39.

69 Fitz-Gibbon, *Provocation in NSW*, p 200.

70 Fitz-Gibbon, *Provocation in NSW*, p 202.

2.75 The remaining six matters involved violent confrontations between male defendants and victims who were or had been acquaintances.

Average sentences for murder and manslaughter in NSW

2.76 The Judicial Commission provided information about sentence lengths in respect of convictions for murder and manslaughter.[71]

2.77 The data shows that in the period October 2004 to September 2011, 148 offenders were convicted of murder. All received a term of imprisonment, and 91% of those received a sentence ranging from 18 years and life imprisonment.

2.78 In the same period, 256 offenders were convicted of manslaughter. Over 90% (233) of those received a term of imprisonment. There was one case where an offender convicted of manslaughter received a section 10 bond, four offenders received a section 9 supervised bond and thirteen received a suspended sentence (some with supervision). A further four offenders received a sentence of periodic detention and one received an Intensive Correction Order.

2.79 Of the 233 offenders who received a term of imprisonment for manslaughter, almost a quarter were sentenced to six years imprisonment (24%), and 70% of offenders received a sentence ranging from five to nine years. Ten offenders in the period received a term of imprisonment greater than 14 years.

2.80 The Judicial Commission does not provide a breakdown of data that indicates the length of sentence imposed specifically for convictions based on manslaughter on the basis of provocation, as opposed to other types of manslaughter.

[71] Judicial Information Research System, Judicial Commission of NSW.

Chapter 3 Provocation in other jurisdictions

This Chapter provides a summary of reforms to the partial defence of provocation that have been considered and implemented in other jurisdictions in Australia and some international jurisdictions over the past decade.

Australian jurisdictions

3.1 As discussed in Chapter 2, provocation began as a partial defence in common law. Over the years, most Australian jurisdictions legislated for the partial defence.[72] In recent decades the law of provocation has been subjected to significant reform and review in several Australian states and territories, as discussed below.

3.2 The momentum to review the partial defence of provocation in Australia and elsewhere has been driven by concerns about the partial defence's operation in cases that have a background of family or intimate partner violence.[73]

Tasmania

3.3 The partial defence of provocation was codified in the *Criminal Code 1924*, and largely based on the common law. The partial defence remained a part of Tasmanian law until 2003, when Tasmania became the first Australian jurisdiction to abolish provocation as a partial defence to murder. As a result, the circumstances of a deceased victim's 'provocative' conduct may be considered as a mitigating factor during sentencing.

3.4 The Tasmanian Director of Public Prosecutions, Mr Timothy Ellis, was a strong advocate for reform of the law that provided for the partial defence of provocation. In his office's 2001 annual report, Mr Ellis wrote:

> One of the hallmarks of [provocation] is a sudden loss of self-control. This is not entirely consistent with the expectations of a civilised society. With the abolition of mandatory life imprisonment for murder, and the ability to impose a sentence reflective of the circumstances, it seems to me questionable that provocation as a defence needs to be retained.[74]

3.5 On 18 March 2003, the *Criminal Code Amendment (Abolition of the Defence of Provocation Bill)* was passed by the Tasmanian House of Assembly repealing section 160 of the *Criminal Code Act 1924*, which provided for the partial defence of provocation. In her second reading speech, the then Minister for Justice Judy Jackson said:

> The main argument for abolishing the defence stems from the fact that people who rely on provocation intend to kill. An intention to kill is murder. Why should the fact

72 In South Australia, the partial defence of provocation is available under the common law.

73 See, for example, United Kingdom Law Commission, (2004) *Partial Defences to Murder Final Report*; Victorian Law Reform Commission, (2004) *Defences to Homicide: Final Report*; Queensland Law Reform Commission, (2008) *A review of the defence of provocation.*

74 Director of Public Prosecutions, Tasmania (2001) *Annual Report 2000-01*, p. 6.

> that the killing occurred when the defendant was acting out of control make a difference? All the ingredients exist for the crime of murder.[75]

Australian Capital Territory

3.6 The law in the ACT provides for provocation as a partial defence to murder under section 13 of the *Crimes Act 1900* and is very similar to the NSW provision.

3.7 The key difference between the NSW and ACT provisions was created by a 2004 amendment to the ACT legislation to explicitly excludes a non-violent sexual advance from being relied upon by a defendant asserting provocation during a trial for murder, but only where the advance occurs in isolation from other objectionable acts.

3.8 The reform was included in the *Sexual Discrimination Legislation Amendment Bill 2003* introduced to the ACT Legislative Assembly on 20 November 2003. In his second reading speech, then Chief Minister and Attorney-General Jon Stanhope stated that the approach taken in the Bill was "non-discriminatory [and] not limited to only a non-violent homosexual advance, but to any non-violent sexual advance."[76]

Victoria

3.9 Victoria abolished provocation as a partial defence in 2005 and introduced a new *offence* of 'defensive homicide' (discussed below at 3.19 – 3.20).

3.10 The abolition of provocation in Victoria, which had existed under common law, followed the Victoria Law Reform Commission's 2004 report *Defences to Homicide*, which reviewed the law of provocation, along with other defences to homicide.

3.11 The Commission recommended that provocation be abolished as a partial defence, commenting that the penalty for intentional killing should only ever be reduced or eliminated where:

> … a person honestly believes that his or her actions [are] necessary to protect himself, herself, or another person from injury.[77]

3.12 The Commission explained its rationale for abolition as follows:

> The continued existence of provocation as a separate partial defence to murder partly legitimates killings committed in anger. It suggests there are circumstances in which we, as a community, do not expect a person to control their impulses to kill or seriously injure a person.[78]

75 *House of Assembly Debates* (TAS) (20/3/2003).

76 *LA Debates* (ACT) (20/11/2003) 4380.

77 Victorian Law Reform Commission (2004), p 55.

78 Victorian Law Reform Commission (2004), p 56.

3.13 The Commission recommended that the relevant circumstances of an offence, including any provocative circumstances, should be taken into account at sentencing. The Commission also recommended the reintroduction of excessive self-defence.

3.14 The demand for the legislative reform recommended by the Commission's report increased following intense media and public pressure in the wake of the decision in Victoria's Supreme Court of *R v Ramage* in December 2004.

3.15 In that case, James Ramage killed his estranged wife, Julie, at their family home in the Melbourne suburb of Balwyn on July 21, 2003. Having invited Julie Ramage to inspect newly-completed renovations, James Ramage claimed that he was confronted by his wife's admission that she was involved in a new relationship. Evidence adduced by defence counsel during the trial included that Julie Ramage had dismissed the renovations as being of no importance, before disclosing that the thought of sex with him, as opposed to with her new partner, "repulsed" her. Flying into a rage, Ramage knocked his wife to the ground and choked her to death. The trial jury agreed with Ramage that he had been provoked by Julie Ramage's disclosures, and found him not guilty of murder but, rather, of manslaughter.[79]

3.16 The Victorian Parliament subsequently acted on some of the Commission's recommendations, passing the *Crimes (Homicide) Act 2005* in November of that year. The Act abolished provocation as a partial defence to murder, strengthened self-defence provisions, clarified the law of evidence to allow for 'social framework' material to be admitted as a way of fostering a more nuanced appreciation of the contexts in which women sometimes kill abusive partners.

3.17 In his second reading speech, then Attorney General Rob Hulls MP, said:

> By reducing murder to manslaughter, the partial defence [of provocation] condones male aggression towards women and is often relied upon by men who kill partners or ex-partners out of jealousy or anger. It has no place in a modern, civilised society.[80]

3.18 The Commission's recommendation to reintroduce excessive self-defence was not adopted, instead a new offence of defensive homicide was created which was designed to reduce the culpability of a person found to have defended themselves with excessive force resulting in death.

3.19 The basis on which a jury reaches a manslaughter verdict is not always clear if a jury returns a manslaughter verdict after considering a number of partial defences. To respond to this, the new offence of 'defensive homicide' was introduced. The new offence was designed to "clearly indicate the basis of the jury's verdict to the sentencing judge … [to enable him/her to] impose a sentence that accurately reflects the crime … committed."[81]

3.20 The new offence of defensive homicide has been criticised since its introduction, and particularly following the matter of *Middendorp*.[82] For example, one commentator has referred to defensive homicide as "provocation in a new guise."[83]

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79 *R v Ramage* (2004) VSC 508.

80 *LA Debates* (VIC) (6/10/2005) 1349.

81 *LA Debates* (VIC) (6/10/2005) 1351.

82 *R v Middendorp* (2010) VSC 147. The details of this matter are briefly outlined at 6.10.

Northern Territory

3.21 Provocation in the Northern Territory was, prior to amendments in 2006, significantly broader than in most other jurisdictions in that in addition to providing a partial defence to murder, it was available as a complete defence for *non-fatal offences* provided that the act was not intended or likely to cause death or grievous bodily harm,.[84] Queensland and Western Australia are the only other jurisdictions that allow provocation as a complete defence to non-fatal offences.[85]

3.22 The call for reform of provocation in the Northern Territory can be traced back to October 2000 when the Law Reform Committee of the Northern Territory (a non-statutory committee established to advise the Attorney-General on the reform of law in the Northern Territory) issued a report recommending that provocation be reformed to reflect the principles adopted in the NSW law in 1982 that were designed to respond to the needs of victims of domestic violence, particularly in removing the requirement for a 'sudden' response.[86]

3.23 Following a consultation facilitated by the Northern Territory Department of Justice in 2006, the Northern Territory amended the *Criminal Code Act* to repeal the provision referred to at 3.21, to provide that provocation applied only as a partial defence to murder. It also removed the suddenness requirement. In addition, the amendments introduced an exclusionary provision to restrict the availability of the partial defence in matters involving non-violent sexual advances. Consequently, a non-violent sexual advance cannot, by itself, sustain a provocation defence in the Northern Territory.

Western Australia

3.24 In Western Australia, provocation as a partial defence to murder was repealed in 2008, following the Western Australian Law Reform Commission review of homicide laws.[87]

3.25 The Commission recommended that provocation as a partial excuse to homicide be abolished and considered only as a sentencing factor. The Commission noted that provoked killings are not uniform, in either their intent or degree of moral culpability, and that "the only lawful purpose for intentional killing is self-preservation or the protection of others."[88]

3.26 In recommending that provocation be considered at sentencing, the Commission also recommended removing the mandatory life sentence applicable for murder, and instead providing that murder carry a presumptive life sentence unless such a sentence would be

83 Hemming, A. (2001)*Reasserting the place of objective tests in criminal responsibility: ending the supremacy of subjective tests,* University of Notre Dame Australia Law Review, 13(1), pp 69-112 cited in NSW Legislative Council, Select Committee on the Partial Defence of Provocation *Inquiry into the partial defence of provocation – Defences and Partial Defences to Homicide*, 2012, p 7.

84 Northern Territory Department of Justice (2006) *Criminal Code Reform Issues Paper*, p 5.

85 *Criminal Code* (Qld), ss 268 and 269; *Criminal Code* (WA), s 24.

86 Northern Territory Law Reform Committee, Department of Justice, (2000) *Self Defence and Provocation*, Report 49.

87 Law Reform Commission of Western Australia (2007) *Review of the Law of Homicide: Final Report,* (hereafter 'LRCWA (2007) *Homicide*').

88 LRCWA (2007) *Homicide*, p 219.

'clearly unjust' in the circumstances. It considered that the removal of a mandatory life sentence "significantly strengthened"[89] the case for abolition of the partial defence, but this was not the only reason it recommended abolition.[90]

3.27 The Western Australian Government subsequently introduced the *Criminal Law Amendment (Homicide) Bill 2008*, which drew on the Commission's recommendations.

3.28 The Bill was passed, and under the reformed *Criminal Code* the partial defence of provocation was repealed and a sentence of life imprisonment for murder is presumed unless the circumstances warrant a reduction, in which case a sentencing judge may impose a penalty of up to 20 years imprisonment.

Queensland

3.29 Queensland retains provocation as a partial defence to homicide, although recent changes have reduced its scope.

3.30 The Queensland Law Reform Commission examined the issue in 2008, resulting in a suite of recommendations including that provocation be retained in an amended form. The Commission noted that the recommendation to retain but amend provocation, as opposed to abolishing it outright, was largely based on the Queensland Government's commitment to mandatory life terms for those convicted of murder.[91]

3.31 The Commission also recommended that the legislation be amended to provide that, but for 'exceptional and extreme' circumstances, 'words alone' and 'the deceased's choice about a relationship' could not constitute provocation.[92] Additionally, the Commission recommended that the Government create a specific defence to respond to 'battered persons' who kill, and shift the burden of satisfying the court that the accused was acting under provocation to the defence on the balance of probabilities.[93]

3.32 The Commission considered whether there should be reform to exclude reliance upon a 'non-violent sexual advance' following similar reforms in the ACT and Northern Territory. It ultimately did not recommend a similar path, on the basis that the term was ill-defined and problematic:

> [D]oes "non-violent" mean gentle touching or is it intended to mean an advance without physical contact at all? What is the boundary between a non-violent sexual advance and a sexual assault?[94]

3.33 A non-violent advance may, at times, seem innocuous, but in the context of long-term violence or sexual abuse, such an advance by the perpetrator of the abuse may be an indicator

89 LRCWA (2007) *Homicide*, p 217.

90 LRCWA (2007) *Homicide*, pp 217-223.

91 Queensland Law Reform Commission (2008) *A review of the excuse of accident and the defence of provocation*, p 500 (Recommendation 21-1) (hereafter 'QLRC (2008) *Provocation*').

92 QLRC (2008) *Provocation*, p 500 (Recommendations 21-2, 21-3).

93 QLRC (2008) *Provocation*, p 501 (Recommendations 21-4, 21-5).

94 QLRC (2008) *Provocation*, p 481.

to the victim that non-compliance can lead to assault. A submission to the Queensland Law Reform Commission urged the Commission to consider this point further, commenting that it could "imagine that a non-violent sexual advance may be the last straw for a battered woman who knows what usually comes next."[95]

3.34 The Queensland Government responded to the Commission's recommendations by passing the *Criminal Code and Other Legislation Bill 2010*, which sought to substantially amend the Criminal Code in line with the recommendations. Former Attorney General Cameron Dick explained that one of the Bill's achievements lay in its protection of 'a person's right to assert their personal or sexual autonomy'. In addition:

> The amendments will reduce the scope of the defence being available to those who kill out of sexual possessiveness or jealousy and will reflect that, in determining what are circumstances of a most extreme and exceptional character, regard may be had to any history of violence that is relevant in all the circumstances—for example, a history of domestic violence between the defendant and the deceased.[96]

3.35 This reflected a desire to respond to concerns about the use of the partial defence in intimate partner homicides, and as a result of the amendments Queensland law now includes specific reference to when provocation is available in such circumstances.[97]

3.36 The former Attorney General explained the problem that it was all but impossible for the prosecution to negate the defendant's claim they were provoked 'because the only other witness is the deceased'.[98] To deal with this issue, the amendments shifted the onus of proof onto the defendant to establish provocation, on the balance of probabilities.

3.37 The amendments also provided for a new partial defence, 'killing for preservation in an abusive domestic relationship' which was designed to respond to the physical and psychological burden borne by women in abusive domestic relationships who subsequently kill their abusers.

International jurisdictions

3.38 In recent years, the partial defence of provocation has been subjected to review and reform not only across Australia but in many other Commonwealth jurisdictions, including New Zealand and the United Kingdom. These are discussed below.

New Zealand

3.39 In 2007, the New Zealand Law Commission considered the partial defence of provocation. The Commission's terms of reference required that it explore the extent to which abolition was at risk of producing unjust outcomes, especially for 'battered' female defendants; and

95 QLRC (2008) *Provocation*, p 482.

96 *LA Debates* (QLD) (24/11/2010) 4251.

97 *Criminal Code* (Qld), s 304(3). This is discussed further in Chapter 6.

98 *LA Debates* (QLD) (24/11/2010) 4251.

consider whether a conviction for murder was appropriate for 'persons who have acted by reason of adverse circumstances' worthy of sympathy.[99]

3.40 In recommending that the defence be abolished, the Commission concluded that it was "irretrievably flawed", arguing that provocation:

> … purports to be a partial excuse, but arguably does not give effect to the spirit of excuse philosophy (recognition of human frailty), because defendants who through no fault of their own are unable to demonstrate an ordinary facility for self-control are excluded from the scope of the defence. Secondly, it envisages a "bifurcation" between a defendant's perceptions of heightened provocation gravity, which may be affected by particular characteristics, and their capacity for ordinary self-control, which must be wholly objectively assessed. Thirdly, it assumes that there is in fact such a phenomenon as a loss of self-control. Fourthly, if the phenomenon of loss of self-control exists, it further assumes that the ordinary person, faced with a severely grave provocation, will in consequence resort to homicidal violence, when in fact it is arguable that only the most extraordinary person does this. And finally, the tensions that can be observed in the legal development of the provocation defence can arguably be seen as a response to liberal motives – that is, a desire to meaningfully recognise increasing social diversity. However, in its practical application … provocation … backfires in this regard, because of the stereotypical effect of requiring defendants to define their characteristics, and the defence's bias in favour of the interests of heterosexual men.[100]

3.41 The New Zealand Government responded to the Report by introducing the *Crimes* (*Provocation Repeal) Amendment Bill* into the House of Representatives on 17 November 2009. The Bill proposed repeal of the partial defence. Parliamentary debate was conducted against the background of two high profile provocation homicides.

3.42 In the 2009 case of *R v Ambach*, Ferdinand Ambach successfully argued that an alleged homosexual advance by Ronald Brown during a drinking session at Brown's home provoked him to violently attack and kill Brown. The attack was so violent that part of a banjo was inserted in Brown's throat.[101]

3.43 The 2008 murder of Sophie Elliott, in which former lover Clayton Weatherston stabbed the student 216 times, and excised her nose and ears, sparked a media sensation.[102] Weatherston raised provocation, claiming that the 22 year-old had insulted his family and lunged at him with a pair of scissors.[103] His defence was unsuccessful, and a jury found him guilty of murder. Weatherston was sentenced to a maximum term of life in prison.[104] Despite the jury's rejection

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99 New Zealand Law Commission (2007), *The Partial Defence of Provocation*, p 8.

100 New Zealand Law Commission (2007), *The Partial Defence of Provocation*, pp 10-11.

101 *R v Ambach* (2009) HC AK CRI-2007-004-027374.

102 Booker J, 'Gruesome details of Sophie Elliott killing revealed in court', *The New Zealand Herald*, 24 June 2009, accessed 16 April 2013, <www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10580426>

103 *Clayton Weatherston v R* (2011) NZCA CA648/2009.

104 Porteus D, 'Weatherston gets life', *Otago Daily Times*, accessed 16 April 2013, <www.odt.co.nz/news/dunedin/74097/weatherston-gets-life>

of provocation the community was, as the Honourable Rodney Hide stated during debate, "… mortified that Clayton Weatherston would attempt the defence of provocation."[105]

3.44 The Bill was examined by the Justice and Electoral Committee, which rejected amending the legislation to expressly allow for provocation to be considered a mitigating factor at sentence by the sentencing judge. The Committee considered that the sentencing judge was already able to exercise their general discretion to:

> … take into account the existence and degree of provocation-related considerations, together with any other relevant aggravating or mitigating factors, to determine whether a sentence of life imprisonment would be "manifestly unjust" for an offender convicted of murder. [106]

3.45 Sponsor of the bill, the then Opposition spokesperson on Justice and Commerce, Lianna Dalziel, said that 'nothing justifies the taking of another life … [h]istorically, this defence has had its time.'[107] The bill repealing the partial defence of provocation passed the House on 24 November 2009.

3.46 As a result, New Zealand has no partial defences to murder. Its sentencing legislation also provides that there is a presumptive sentence of imprisonment for life upon conviction for murder, unless in the circumstances such a penalty would be 'manifestly unjust'.[108]

United Kingdom

3.47 In its 2006 report *Murder, Manslaughter and Infanticide,* the United Kingdom Law Commission recommended that homicide law be significantly reformed. A number of weaknesses and incongruities were identified in the *Homicide Act 1957*, and particular attention was paid to the partial defences, including provocation. The Commission's report criticised the construction of provocation as a 'confusing mixture of judge-made law and legislative provision', in which a defendant (D) is entitled to have their assertion of a loss of self-control tested by a jury, no matter how improbable the claim might be:

> [I]f D claims that he was provoked to lose his self-control by V's failure to cook his steak medium rare as ordered, the defence has to be put to the jury even though it has no merit and ought to be rejected. By way of contrast, if instead of being provoked, D's killing was a fear-driven overreaction to a threat of future serious violence, he or she has no defence to murder at all, however well-founded the fear.'[109]

3.48 The Commission specifically recommended, among other things, that legislative reform eliminate the 'loss of self-control' element in any reconstruction of provocation law. Aside from the term's inherent ambiguity, the Commission noted that the central place occupied by this requirement in any claim of provocation 'privileg[es] men's typical reactions to

105 *House of Representatives Debates* (NZ) (24/11/2009) 8248.

106 *Crimes (Provocation Repeal) Amendment Bill*, Commentary, p 2.

107 *House of Representatives Debates* (NZ) (24/11/2009) 8248.

108 Associate Professor Julia Tolmie, Faculty of Law, University of Auckland, Evidence, 21 September 2012, pp 11-12. See also *Sentencing Act 2002* (NZ), s 102.

109 UK Law Commission (2006) *Murder, Manslaughter and Infanticide,* pp 11-12.

provocation over women's typical reactions.'[110] The Commission's recommendations also proposed significant reform to the ordinary person test, which drew on case law of the time that significantly 'subjectivised' the ordinary person test. The Commission's model is discussed in detail in Chapter 7.

3.49 A consultation paper issued in 2008 by the Ministry for Justice considered how the Law Commission's criticisms might be translated into legislative reform. In accepting the case for abolition, the Ministry identified a number of features necessary for the just construction of any statutory substitution. Chief among these were two concerns: that a disclosure of sexual infidelity on behalf of the victim should not constitute grounds for reducing murder to manslaughter, and that the common law requirement for a *sudden* loss of self-control be extinguished.[111] However, the government argued that a loss of self-control, even of the 'slow burn' variety, was necessary to prevent the reforms being misused in cases of 'cold-blooded, "gang-related", or "honour" killings'.[112]

3.50 The English Government subsequently moved to reform the partial defence of provocation, but did not accept the Commission's recommendations. In 2009, the Government passed the *Coroners and Justice Act 2009* which replaced provocation with a new partial defence, 'loss of control':

> Where a person ('D') kills or is party to the killing of another ('V'), D is not to be convicted of murder if:
>
> (a) D's acts and omissions in doing or being a party to the killing resulted from D's loss of self-control,
>
> (b) the loss of self-control had a qualifying trigger, and
>
> (c) a person of D's sex and age, with a normal degree of tolerance and self-restraint and in the circumstances of D, might have reacted in the same or in a similar way to D.[113]

3.51 The Act goes on to define the meaning of 'qualifying trigger' to include D's fear of serious violence from the victim [V], either against D or another person. A trigger might also be made out if V's conduct is such that it 'constituted circumstances of an extremely grave character' causing D to feel 'justifiably and seriously wronged'. Various kinds of behaviour excluded from contributing to a trigger include violence, or words and actions incited by D for the purpose of employing violence, and facts or things said that constitute sexual infidelity.[114]

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110 UK Law Commission (2006) *Murder, Manslaughter and Infanticide,* p 81. See also UK Law Commission (2004) *Partial Defences to Murder – Final Report*, in which the Commission first detail their recommendations to reform provocation.

111 UK Ministry of Justice (2008) *Murder, manslaughter and infanticide: proposals for reform of the law, Consultation Paper CP19/08*, accessed 16 April 2013, <http://webarchive.nationalarchives.gov.uk/20110218135832/http:/justice.gov.uk/consultations/docs/murder-manslaughter-infanticide-consultation.pdf>, p 2 (hereafter 'UKMJ – *CP 19/08*').

112 UKMJ – *CP 19/08*, p 13.

113 *Coroners and Justice Act 2009* (UK), s 54(1).

114 *Coroners and Justices Act 2009* (UK), s 55.

3.52 Recently, the 2012 case of *R v Clinton*[115] has introduced uncertainty into the operation of the reform provisions. The *Clinton* matter, and concerns resulting from the Court's decision in that case, is discussed in detail at 6.88 – 6.100.

3.53 The United Kingdom does not have a partial defence of excessive self-defence, although there are some nineteenth century cases which suggested such a defence existed. In *Palmer* the Privy Council, having reviewed the case law, rejected the argument that at common law excessive self-defence existed in response to a charge of murder.[116] The House of Lords later held that it would be for the legislature, not the courts, to create such an offence.[117]

115 *R v Clinton* (2012), EWCA Crim 2.

116 *Palmer v The Queen* (1970) UKPC 31.

117 *R v Clegg* (1995) UKHL 1. For more information, see The UK Law Commission, (2003) *Partial Defences to Murder (Consultation Paper)*, (2003) EWLC 173(1), at 1.52 – 1.45.

Chapter 4 Key issues raised in respect of provocation

This chapter explores various concerns about the partial defence of provocation that were identified by Inquiry participants and counter arguments to them that were put by other stakeholders. A number of the concerns interact with each other in various ways, adding to the complexity of this area of law, which itself is a criticism of the partial defence raised by Inquiry participants.

Gender bias

4.1 A number of Inquiry participants criticised the partial defence of provocation on the basis that it has the effect of excusing or legitimising male violence toward women and homosexual men, or men perceived to be homosexual, in various ways. The concern was succinctly put by the Hawkesbury Nepean Community Legal Centre, which argued that provocation 'perpetuates and entrenches violence' against particular groups in the community:

> … the partial defence of provocation does not fulfil its policy purposes and can serve to perpetuate and entrench violence against women and gay men. The defence of provocation is most commonly, and successfully, used by men who kill domestic partners and gay men for reasons of control, jealousy and homophobia.[118]

4.2 The phrase 'gender bias' was used by various Inquiry participants to describe these concerns, specifically that the defence operates to partially excuse extreme forms of violence perpetrated by males responding to threats against their masculinity. This reflects an extreme manifestation of gender norms in which men are heterosexual, powerful and dominant, and women are passive and submissive. In the context of intimate partner homicides, a female exercising sexual autonomy, commenting on a man's sexual inadequacy, or indicating a desire to end a relationship are examples of behavior that might challenge their male partner's masculinity.

4.3 Issues of 'gender bias' also arose in relation to homosexual advances. The threat of being 'hit on' by a man perceived by the defendant to be homosexual (whether they are or not) challenges the male defendant's masculinity because the advance indicates that he is also perceived to be homosexual, or at least open to an offer of male on male intimacy. This is a direct threat to the "masculine heterosexual identity [which] is built around ensuring the integrity of the body, with rigid limits on the circumstances and socially admitted forms of male on male physical contact."[119]

4.4 The partial defence was also criticised for being gender biased on the basis that it fails to respond appropriately to women who kill because, as a defence "developed by men for men,"[120] it fails to recognise women's experiences.

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118 Submission 44, Hawkesbury Nepean Community Legal Centre, p 3.

119 Tomsen, S., and Crofts, T. (2012) *Social and cultural meanings of legal responses to homicide among men: Masculine honour, sexual advances and accidents*, Australian & New Zealand Journal of Criminology, 45(3) pp 423–437, at 427.

120 Submission 35, Wirringa Baiya Aboriginal Women's Legal Centre, p 3.

Gender bias against women

4.5 One of the most significant concerns raised by Inquiry participants in relation to the partial defence is that it is gender biased against women, particularly in the context of its application in intimate partner scenarios. It was suggested that this concern was perhaps the most intractable of all the issues raised in respect of the partial defence.[121]

4.6 The strength of the arguments against the partial defence based on concerns about its gendered application was acknowledged by a number of Inquiry participants. For example, academics from the University of Sydney, Associate Professor Thomas Crofts and Dr Arlie Loughnan, who argued for retention but reform of provocation, commented that the defence:

> … privileges stereotypically male reactions to conflict, legitimates anger as an emotional response in such circumstances, is inherently biased again women and is inappropriate in the modern era.[122]

4.7 In its submission, Women's Legal Services NSW highlighted the defence's historical development as being at the heart its problems in today's society:

> … the current law of the partial defence of provocation is deeply flawed, anachronistic and gender-biased. It developed as a defence that acquiesced in the defending of male honour, reducing the offence to manslaughter, at a time when the mandatory sentence for murder was the death penalty. Accordingly, the gender bias in the law has the effect that "female defendants whose experience ... fall outside the male-inspired defences are confronted with the prospect of either failing to plead them successfully or having to distort their experiences in an effort to fit them into the defence."[123]

4.8 The NSW Domestic Violence Committee Coalition expressed a similar view:

> Historically the law has been prescribed by men, based on men's experiences and men's interpretation of the world and in men's interests. The law is therefore patriarchal in its assumptions and framework. The law by its nature is inherently biased against women … provocation is extremely problematic in its application to killings on a background of domestic violence precisely because it relies on entrenched societal attitudes, values and beliefs concerning gender, male privilege and propriety over female partners.[124]

4.9 Wirringa Baiya Aboriginal Women's Legal Centre also argued that the defence was inherently biased, having been "developed by men, for men":

> It is no accident that the partial defence of provocation is used to reduce the sentence of men who kill their intimate partners. Such a context is deeply entrenched into the origins of the defence. A historical paradigm case of provocation was a man's discovery of his wife's adultery; in one emblematic provocation case, it was written, "jealousy is the rage of a man, and adultery is the highest invasion of property." The

121 Submission 29, Associate Professor Thomas Crofts and Dr Arlie Loughnan, p 5.

122 Submission 29, p 5.

123 Submission 37, Women's Legal Services NSW, pp 2-3.

124 Submission 31, NSW Domestic Violence Committee Coalition, p 12.

> ghost of this outdated notion of proprietary violence is very present in the modern case-law of provocation.[125]

4.10 In their submission, Fox, Zheng, Mehta and Bulut, referred to judicial recognition of the argument that provocation is gender biased in its application. They noted that, in recognition of the development of provocation as a concession to 'human frailty' (see 2.26), Chief Justice Gleeson stated in the NSW case of *Chhay*:

> [T]he law's concession to human frailty was very much, in its practical application, a concession to male frailty… the law's concession seemed to be to the frailty of those whose blood was apt to boil, rather than those whose blood simmered, perhaps over a long period, and in circumstances at least as worthy of compassion.[126]

4.11 Mr Phil Cleary, brother of Vicki Cleary who was fatally stabbed outside her workplace by her ex-boyfriend Peter Keogh in 1987, expressed his view that the defence is inherently patriarchal in its application and, as result, enabled misogyny in modern society:

> [Provocation] is a patriarchal law that would have its place in the 1940s and 1950s in Australia. It probably reflects attitudes prior to the women's movement that are not ancient. Equally, it is in existence today and its narratives continue to be accepted by juries, by judges, and aggravated by defence lawyers. Are those people acting out of ancient law or contemporary misogyny?[127]

4.12 The importance of the 'message' that is sent by the law of provocation was evident in a number of submissions to the Inquiry that referred to its operation in respect of men who are violent toward women. For example, Mr Greg Bloomfield, writing on behalf of FairGO, was cynical of the message sent by recent cases of manslaughter on the basis of provocation in NSW:

> Until recently many voters in NSW did not know that it was moderately okay for a man to kill his wife or his wife's lover if she had stopped loving him.[128]

4.13 Other Inquiry participants, including survivors of domestic violence, also commented on the inappropriate message that is sent to the community as a result of the defence being enshrined in law. One Inquiry participant commented:

> I was quite distraught when the publicity around the recent [*Singh*] case made it clear that 'provocation' was a legitimate defence … [M]y ex-husband used to say that "if you hadn't provoked me I wouldn't have…" after an incident. … What I didn't know at the time was that was a legal defence. He probably knew. Our legal system told him that my ability to annoy him, made it ok for him to put his bands around my throat and strangle me … The law … sends a clear message that a woman may well deserve to be treated violently by someone she trusts and loves. It is important to me that the law says otherwise.[129]

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125 Submission 35, p 3.

126 *R v Muy Ky Chhay* (1994) 72 A Crim R 1, 11, cited in Submission 40, Amy Fox, Wayne Zheng, Tanvi Mehta and Vanja Bulut, p 3.

127 Mr Phil Cleary, Individual, Evidence, 29 August 2012, p 67.

128 Submission 36, Mr Greg Bloomfield, FairGO, p 1.

129 Submission 1, Name suppressed, pp 1-2.

4.14 Another Inquiry participant, Ms Catherine Smith, a self-described "DV Survivor" explained how her violent ex-partner, who she believes was also aware of the partial defence, used to refer to it as a strategy for exercising control over her:

> My abuser often referred to the fact that "men get away with murder calling it a crime of passion" … He also said men get away with murder "because she drove me to it I had a few drinks and just lost it". He would often describe the way he would kill me and be able to get away with it.[130]

4.15 Concerns about the failure of the defence to recognise the different contexts in which men and women kill and its enabling of gendered court narratives that blame the victim were also raised. Sydney University academic, Mr Graeme Coss stated:

> Context is vital, and so it is essential to recognise the very different circumstances in which men kill, and women kill, and thus the very different circumstances in which they may raise the defence of provocation. Men mostly kill other men in confrontational social interactions, as retaliation to an insult to honour; when men kill women, it is usually an intimate, routinely driven by proprietariness, and again as retaliation to an insult to honour. Women mostly kill an intimate male partner, and invariably out of fear and desperation to protect themselves and/or their children … it would be an obscenity to treat as equivalent the case of a jealous man who kills his partner who threatens to leave him, and the case of a battered woman who kills to stay alive. And yet the courts have often done just that - or worse, shown greater compassion to the jealous male.[131]

4.16 Victorian academic, Dr Kate Fitz-Gibbon, also raised concerns about courtroom narratives in provocation cases that allow the victim to be 'blamed' for what happened to them:

> … it is through the narratives that we allow in those cases and in part of its design that you start blaming the victim for the fact that they have been killed for violence. I think through things like the *Singh* case in the wider public it then comes out that this man is not a murderer … that is where the concern is, that through this type of avenue of provocation where you do get discussions of a woman's sexual history, of her reasons for wanting to leave it—essentially exercising her human rights … things like that legitimise the violence that has been acted upon these women. It does not provide a condemnation of that violence; it provides an avenue through which it can be understood … [it] allow[s] those narratives to become privileged by the law.[132]

4.17 Dr Fitz-Gibbon also referred to her research which highlights the concerns around gender bias in the application of the defence and the subsequent legitimisation of male violence:

> An analysis of successful provocation defence cases in NSW, since January 2005, raises serious concern over the viability of a partial defence that arguably acts to excuse the use of lethal male violence. Particularly in the context of intimate homicides, the successful use of provocation in NSW, in cases such as *Singh, Stevens* and *R v Williams* … serves to legitimise the male perpetration of lethal domestic violence … the criminal justice system has an important 'symbolic function', which

130 Submission 49, Ms Catherine Smith, p 2.

131 Submission 12, Mr Graeme Coss, p 6.

132 Dr Kate Fitz-Gibbon, Lecturer in Criminology, Deakin University, Evidence, 28 August 2012, p 49. Refer to 4.75-4.93 for more discussion regarding concerns about 'victim blaming'.

> serves to set the 'limits of acceptable and unacceptable behaviour' … when the law is seen to legitimise the use of male violence in an intimate context, a standard of acceptable violence against women is further enforced.[133]

4.18 However, some Inquiry participants argued that the defence is not inherently biased against women, including several from the legal sector who, in response to this claim, asserted that the defence protected women.

4.19 For example, Barrister and Chair of the Criminal Law Committee of the NSW Bar Association, Mr Stephen Odgers SC stated in evidence:

> … it is said that there is an inherent gender bias in the defence. Nothing in the formulation of the defence involves gender bias.[134]

4.20 Ms Chrissa Loukas SC, also representing the Bar Association, similarly stated "provocation is not a male defence or a female defence—it is a human defence."[135]

4.21 Mr Odgers argued that the history of the defence is irrelevant in light of legislative amendments to make it more available to (particularly female) defendants who kill in 'slow burn' situations:

> Whatever the reasons for the creation of the defence some centuries ago, those are irrelevant given changes that have been made to the defence over the years, and the fact that a significant number of women rely on it. One of the changes, of course, was to take away the requirement of a close temporal nexus between the provocation and the loss of control. That was designed to make it easier for women to take advantage of it. The fact is that a lot do.[136]

4.22 The Law Society of NSW also argued that the 1982 amendments to remove the 'suddenness' requirement has improved the availability of the defence to women who kill, and indeed its abolition would detrimentally impact on these defendants:

> Some argue that the defence is gender biased in favour of males. However, amendments to the legislation in 1982 removed the temporal nexus requirement between the provocative act and the killing and 'paved the way for acceptance of cumulative provocation over a long period of time, often in the cases of domestic violence or family violence against women'... Abolishing provocation would be detrimental to women who have killed partners after long periods of domestic violence.[137]

4.23 The Law Society's Mr David Giddy argued that the statistical data demonstrates that women benefit from the defence:

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133 Submission 18, Dr Kate Fitz-Gibbon, p 5.

134 Mr Stephen Odgers SC, Chair of the Criminal Law Committee, NSW Bar Association, Evidence, 29 August 2012, p 34.

135 Ms Chrissa Loukas SC, Barrister, Public Defender and Member of the Bar Council, Evidence, 29 August 2012, p 37.

136 Mr Odgers SC, Evidence, 29 August 2012, p 34.

137 Submission 5, Law Society of NSW, p 2.

> Your own stats point out that far more women are availing themselves of this defence than are men; and far more men are charged with murder than are women… And far more men murder men than murder women.[138]

4.24 It is noted, however, that the first point in Mr Giddy's assertion is not borne out by the evidence (refer to 2.53 and 2.70 – 2.75).

4.25 Barrister Winston Terracini SC QC referred to the Judicial Commission study in similarly arguing that the statistics do not indicate inherent gender bias and further, that when women successfully rely on provocation they receive lower penalties than male offenders:

> It was also established with considerable interest in my submission that cases involving family or domestic violence or intimate relationship confrontation accounted for only 32 of the 75 successful pleas of Provocation and the largest single category of 28 cases involved physical violent confrontations. It should also be noted that where statistics have been kept and anecdotal evidence is relied upon, it becomes obvious that the victim is more likely to be male … [and further] where a female invokes the partial defence of Provocation successfully, the sentences are significantly lower than for a male.[139]

4.26 However, other Inquiry participants argued that the issue of gender bias is not about statistics, emphasising that it is the context in which homicides involving men and women is played out in court that is problematic. In this regard, Mr Coss, stated:

> Gender bias is not established by statistical proof that more men successfully raise provocation than women … gender bias is proved the moment a man successfully claims provocation when he kills a woman who has rejected him. The success for women who kill (protecting themselves) becomes irrelevant.[140]

4.27 There were some Inquiry participants who, while supporting retention of the defence in some form, acknowledged that the concerns related to gender bias were considerable. For example, Crofts and Loughnan accepted that the application of the defence in particular contexts has a disproportionate impact on women, but considered it capable of further improvement:

> We acknowledge that the gendered dimensions of the use of provocation represents the most serious of the problems with provocation as it is currently formulated …[and] that the problematic use of the defence arises predominantly in certain types of cases but we note that provocation is not a static defence. As we state in our submission, while the defence stems from a time when male honour was important and thus, it has been argued that the defence perpetuates male forms of behaviour, it is important to take seriously the degree to which the present form of the defence has been adapted – and can be further adapted – to take into account criticisms about its gendered past.[141]

4.28 Associate Professor Crofts and Dr Loughnan went on to describe how the 1982 amendments were designed to improve access to the defence for women who killed after experiencing

138 Mr David Giddy, Solicitor, Law Society of NSW, Evidence, 29 August 2012, p 33.

139 Submission 33, Mr Winston Terracini SC QC, p 2.

140 Submission 12, p 6.

141 Answers to questions on notice taken during evidence 29 August 2012, Associate Professor Thomas Crofts and Dr Arlie Loughnan, University of Sydney Law School, p 3.

long-term domestic abuse. They note that the amendments have had a positive impact which, in their view, supports the argument for retention notwithstanding the defence's imperfections and concerns about its gendered application:

> Traditionally, provocation required a clear provocative incident of sufficient gravity to warrant an immediate reaction; it has now been expanded to accommodate so-called 'slow burn' cases. We note that, in addition to relaxing the conditions that have been thought to mean that the defence worked mainly for stereotypically male patterns of behaviour, examination of the case law shows that changes have also been made to reduce the scope of the defence in the traditional paradigm cases of male behaviour (such as killing an adulterous partner). We submit that these attempts to accommodate diversity of types of responses to provocative conduct represent positive developments in the law, even if it is acknowledged that, as it is currently formulated, provocation remains imperfect.[142]

4.29 In her submission, Associate Professor Julia Tolmie also acknowledged concerns about the application of the provocation defence in circumstances where it is used to justify male violence against women and noted that these concerns support the case for reform:

> The problem … is that [provocation] has being regularly applied to justify male violence against women in life circumstances that are unexceptional - instances where relationships break down or do not progress as one partner would wish. These are experiences that happen to almost everyone at some point and cannot be judged to be exceptional. Even if the defence has not been successful it has been argued, almost without exception, in these kinds of circumstances as though they are appropriate circumstances in which to raise it. There is therefore a very strong case for the reform of provocation.[143]

4.30 However, Associate Professor Tolmie argued that despite concerns about the gendered use of the provocation defence, it continues to have an important role in the criminal justice system, including for women, particularly when self-defence is not available:

> … the defence still serves a useful function for some defendants, however, who are caught up in exceptional circumstances and for whom the use of the defence is appropriate [including in cases involving teenagers who kill of violent parents; and by battered woman defendants]. It is fallacious to assume that every battered defendant is necessarily acting from a position of self-defence when she retaliates against her violent partner … [W]omen who are trapped in extremely violent relationships and unable to obtain protection in spite of their help seeking behaviours, and unable to escape, deserve a defence when they retaliate against the person who has oppressed them in this manner.[144]

4.31 Further discussion about the adequacy of the defence of self-defence for defendants who kill after prolonged abuse is included in Chapter 5.

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142 Answers to questions on notice taken during evidence 29 August 2012, Associate Professor Crofts and Dr Loughnan, p 3.

143 Submission 4, Associate Professor Julia Tolmie, p 1.

144 Submission 4, pp 1-2.

Gender bias against homosexual men, or against men perceived to be homosexual

4.32 In addition to concerns about bias against women, a significant number of Inquiry participants raised concerns that the partial defence of provocation also disadvantages homosexual men or men perceived to be homosexual, in its application in 'homosexual advance defence' matters.[145]

4.33 The so-called 'homosexual advance defence' essentially involves a male defendant relying on 'provocative' conduct comprising of a sexual advance made toward them from another male to reduce their culpability from murder to manslaughter. The homosexual advance as seen as a challenge to the defendant's masculinity and heterosexual identity. There is no evidence of the provocation defence being successfully run based on a non-violent sexual advance made by a male or female toward a member of the opposite sex.[146]

4.34 In their paper, Stephen Tomsen and Thomas Crofts explained the way that male defendants are portrayed (when they seek to rely on a homosexual advance as the basis for a provocation defence) as being 'ordinary' and 'regular' men who find themselves in a situation in which they are 'vulnerable' or 'humiliated':

> Unlike the arguments of homosexual panic, this plea requires an image of perpetrators as 'regularly masculine' and even sexually naïve or vulnerable men and boys with goodwill pushed to the limit in being physically humiliated by homosexual desire. In these circumstances, an aggressive response defending the vulnerability of heterosexual identity by reacting against both sexual advances on a masculine body and the dishonour of objectification is conceived as likely among ordinary men.[147]

4.35 A number of submissions to the Inquiry addressed the terms of reference only in relation to homosexual advance defence. All of them advocated for reform that would preclude a defendant being able to rely on provocation based on this type of conduct.[148]

4.36 These submissions were concerned about the use of provocation in such circumstances, on the basis that it justified fatal violence arising from homophobia. For example, the NSW Anti-Discrimination Board submitted that:

> Whilst the partial defences still have a role to play in cases of domestic violence, their availability in response to non-violent homosexual advances is inappropriate and outdated. The *Anti-Discrimination Act 1977* (NSW) was enacted to protect minority groups from discrimination, harassment and abuse; New South Wales should no

145 See, for example, Submission 12; Submission 31; Submission 35; Submission 37; Submission 38, Inner City Legal Centre; Submission 41, Professor Julie Stubbs; Submission 48, Australian Lawyers Alliance; Submission 50, Mr James Moshides.

146 Dr Justin Koonin, Co-Convenor, Gay and Lesbian Rights Lobby, Evidence, 28 August 2012, p 26.

147 Tomsen, S., and Crofts, T. (2012) *Social and cultural meanings of legal responses to homicide among men: Masculine honour, sexual advances and accidents*, Australian & New Zealand Journal of Criminology, 45(3) pp 423–437, at 426.

148 Submission 3, Name suppressed; Submission 6, Anti-Discrimination Board of NSW; Submission 21, Mr Alastair Lawrie; Submission 22, NSW Gay and Lesbian Rights Lobby; Submission 27, Sydney Beat Project; Submission 28, Clover Moore; Submission 43, ACON.

> longer allow excessive violence fuelled by homophobic beliefs to be condoned or excused under its laws.[149]

4.37 Similarly, the Inner City Legal Centre commented:

> The gay panic defence is problematic because it legitimizes murder that is informed by bigotry. It is a gender biased application of the law. It is unheard of for women killing men who make sexual advances upon them to raise this defence.[150]

4.38 Mr Peter Butler in his submission asserted that the acceptance of the homosexual advance defence is 'medieval' and inappropriate:

> I can't believe [provocation] is still accepted as a defense for murder in the 21st century. I am a heterosexual man, if a woman I don't find attractive "makes a pass at me", am I allowed to kill her and claim provocation? All you have to do is say no, politely, firmly if necessary, and get on with your life. This is medieval and it needs to be removed from the legislation.[151]

4.39 Dr Justin Koonin, Co-Convenor of the NSW Gay and Lesbian Rights Lobby expressed the view that:

> … a non-violent sexual advance should never by itself form the basis for a partial defence against murder, regardless of the sex or gender or sexuality of the people involved. In practice, the defence has only ever applied in the case of a non-violent advance from a male to another male. As we know, it has been applied 11 times between 1990 and 2004. It has never been applied to an advance from a male to a female or from a female to a male, and nor should it be. What we are seeking is an end to the differential treatment to gay males in the legal system which has otherwise delivered inequality.[152]

4.40 Several other Inquiry participants also raised concerns about the use of the partial defence of provocation in circumstances involving non-violent sexual advances or, specifically, in relation to non-violent homosexual advances. These stakeholders included NSW Young Lawyers, Hawkesbury Nepean Community Legal Centre, the NSW Domestic Violence Committee Coalition, Wirringa Baiya Aboriginal Women's Legal Centre, Mr Graeme Coss, Associate Professor Thomas Crofts and Dr Arlie Loughnan.

4.41 Most supported reforms that would remove the ability for a defendant to rely on non-violent sexual advances as the basis for a provocation defence,[153] while some specifically recommended that reform should be introduced in NSW similar to the reforms recently adopted in the ACT and in the Northern Territory. The ACT and Northern Territory provisions provide that a non-violent sexual advance cannot, of itself, found a defence of provocation but may be considered in the context of other conduct by the deceased.[154]

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149 Submission 6, p 2.

150 Submission 38, p 5.

151 Submission 2, Mr Peter Butler, p 1.

152 Dr Koonin, Evidence, 28 August 2012, p 26.

153 See, for example, Submission 6; Submission 27; Submission 31.

154 Submission 19, NSW Young Lawyers; Submission 29, Associate Professor Thomas Crofts and Dr Arlie Loughnan.

4.42 However, some Inquiry participants expressed the view that reform was unnecessary because a provocation defence based on a non-violent homosexual advance would be unlikely to succeed today. For example, Mr Odgers for the Bar Association stated that attitudes have changed so much that a jury would not accept a non-violent homosexual advance as the basis for a defence of provocation:

> In my view, non-violent homosexual advance is very unlikely to succeed in New South Wales in 2012. Why? Because community attitudes have changed. They have changed from 200 years ago when calling a man a rogue would have been a justification for the defence of provocation … I suspect strongly that they would not acquit of murder in the case of non-violent homosexual advances. Juries reflect changes in community attitudes. That is why we have them and we should continue to trust them to do that.[155]

4.43 Mr Giddy of the Law Society of NSW expressed a similar view:

> … one would like to think that community values had reached a stage where [defences based on non-violent sexual advances] are not practicably runable … I know we keep saying it but your classic guardsman's [non-violent homosexual advance] defence—it is a long time since I have seen one…[156]

4.44 Although both the Law Society and the Bar Association suggested that under the existing test for provocation they would expect a jury to reject a defence of provocation based on a non-violent sexual advance, both organisations subsequently indicated that they would not oppose an amendment to explicitly exclude non-violent sexual advances from forming the basis of a defence of provocation.[157]

4.45 A number of submissions that raised concerns about the use of provocation in matters involving non-violent sexual advances referred to the 1997 High Court decision in *Green v The Queen* and, in particular, to Justice Kirby's dissenting statement where he questioned whether the 'ordinary person' would react with lethal force to such an advance, and whether the defence would be successful if it were run by a woman who had been the subject of such an advance:

> In my view, the "ordinary person" in Australian society today is not so homophobic as to respond to a non-violent sexual advance by a homosexual person as to form an intent to kill or to inflict grievous bodily harm. He or she might, depending on the circumstances, be embarrassed; treat it at first as a bad joke; be hurt; insulted. He or she might react with the strong language of protest; might use as much physical force as was necessary to effect an escape; and where absolutely necessary assault the persistent perpetrator to secure escape. But the notion that the ordinary 22 year-old male (the age of the accused) in Australia today would so lose self-control as to form an intent to kill or grievously injure the deceased because of a non-violent sexual advance by a homosexual person is unconvincing. It should not be accepted by this Court as an objective standard applicable in contemporary Australia.

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155 Mr Odgers SC, Evidence, 29 August 2012, p 36.

156 Mr Giddy, Evidence, 29 August 2012, p 30.

157 Responses to options paper, Law Society of NSW, p 1; Answers to questions on notice taken during evidence, supplementary questions on notice, and responses to options paper, 29 August 2012, Mr Bernard Coles QC, President, Bar Association of NSW, pp 3-4. This is discussed further in Chapter 6.

> If every woman who was the subject of a "gentle", "non-aggressive" although persistent sexual advance, in a comparable situation to that described in the evidence in this case could respond with brutal violence rising to an intention to kill or inflict grievous bodily harm on the male importuning her, and then claim provocation after a homicide, the law of provocation would be sorely tested and undesirably extended.[158]

4.46 The High Court's decision in *Green* preceded a 1998 report of the Homosexual Advance Defence Working Party, a group which was established by then Attorney General, the Honourable Jeff Shaw QC MLC, in 1995 to examine homicides where defendants charged with murder argued either provocation or self-defence on the basis of an alleged 'homosexual advance defence' by the deceased.

4.47 The Working Party comprised representatives of various NSW government and non-government organisations including the Criminal Law Review Division of the (then) NSW Attorney General's Department, NSW Police Service, Public Defender's Office, (then) NSW Police Service, Judicial Commission, Office of the Director of Public Prosecutions, the Lesbian and Gay Anti-Violence Project, the Gay and Lesbian Rights Lobby and an academic from the Faculty of Law at the University of New South Wales.

4.48 The Working Party examined NSW Supreme Court data for the period from 1993 to 1998, finding that "there were at least 13 homicide cases in which an allegation of a homosexual advance was made."[159]

4.49 The Working Party considered that the reliance on the partial defence of provocation by defendants who kill following a non-violent homosexual advance was inappropriate, and recommended legislative reform to expressly provide that such advances could not be the foundation for a provocation defence. In doing so, it noted with approval the responsiveness of the Parliament to reform section 23 in 1982 to respond to concerns about the defence's application in respect of abused women who kill:

> The retention of a partial defence based on a homicidal response to a non- violent homosexual advance cannot, in the opinion of the Working Party, be countenanced any longer. If the High Court, by a narrow majority, is not prepared to interpret the legislation in question as excluding such a possibility, then the legislation itself should be changed by the NSW Parliament … it is worth noting that that is precisely what happened in 1982: the statute as interpreted by the courts was seen to be unsatisfactory; in response, Parliament took the initiative and very substantially amended it.[160]

4.50 The Working Party made several other recommendations,[161] but did not recommend any changes to the law of self-defence on the basis that it considered that the law of self-defence

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158 *Green v The Queen* (1997) 191 CLR 334, per Kirby J extracted from D. Brown et al, *Criminal Laws: Materials and commentary on Criminal Law and Process of New South Wales* (2011, 5th ed.), p 533, cited in Submission 10, Women's Electoral Lobby, p 2. See also Submission 6; Submission 48; Submission 50; Submission 21.

159 NSW Attorney General's Department, Criminal Law Review Division (1998) *Homosexual Advance Defence: Final Report of the Working Party* (3.4) (hereafter 'HAD Working Party Report').

160 HAD Working Party Report (6.5).

161 HAD Working Party Report (6.1 – 6.37).

(then set out in *Zecevic*) appropriately limited the likelihood of non-violent homosexual advances forming the basis of an argument of self-defence:

> In light of the test in *Zecevic* … one would expect that in murder cases, only the infliction of very serious violence (or the threat of it) would justify an accused killing in self-defence . Otherwise, one would expect the jury to be satisfied beyond reasonable doubt that, at the least, any belief held by the accused was not based upon reasonable grounds.[162]

4.51 The common law test for self-defence was explained by the High Court in *Zecevic* as having a subjective and an objective element:

> It is **whether the accused believed upon reasonable grounds** that it was necessary in self-defence to do what he did. If he had the belief and there were reasonable grounds for it, or if the jury is left in reasonable doubt as to the matter, then he is entitled to an acquittal [emphasis added].[163]

4.52 The Working Party's report stated their position regarding self-defence as follows:

> … so long as [the defence of self-defence] retains the requirement of reasonable grounds for the belief of the accused, the content of the law of self-defence is appropriate. The law of self-defence is capable of applying in HAD cases, and is capable of producing a just result. The Working Party does not suggest any action should be taken in relation to the defence of self-defence in HAD cases, because of the objective element of the defence.[164]

4.53 The law of self-defence was amended in 2002 to remove the 'objective brake' which applied as a result of *Zecevic*.[165] The result of the amendment is that the defendant's belief that their conduct was necessary does not have to be reasonable. It is enough if the defendant held the belief, and that their response was a reasonable response to the perceived threat.[166]

4.54 The 2002 changes to the law of self-defence means that the rationale underpinning the Working Party's position that the applicable law in 1998 was appropriate to guard against self-defence arguments based on 'homosexual advance defence' no longer applies, and consequently that a person could rely on a homosexual advance to form the basis of an argument of self-defence.

4.55 All of the recommendations of the Working Party were subsequently implemented, with the exception of the first recommendation to 'exclude non-violent homosexual advance from

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162 HAD Working Party Report (4.8).

163 *Zecevic v DPP* (Vic) (1987) 162 CLR 645, 661, cited in Submission 42, Redfern Legal Centre, p 8.

164 HAD Working Party Report (4.9).

165 Self-defence is discussed in Chapter 2.

166 Answers to questions on notice taken during evidence and supplementary questions on notice, 29 August 2012, Ms Penny Musgrave, Director of the Criminal Law Review, Department of Attorney General and Justice, p 6.

forming the basis of the defence of provocation, by way of legislative reform of section 23 of the NSW *Crimes Act.*'[167]

Committee comment

4.56 Concerns about gender bias were undoubtedly one of the most significant issues raised by Inquiry participants who were critical of the partial defence of provocation.

4.57 The concerns raised by Inquiry participants about gender bias are understandable in light of the outcomes in some cases. Specifically the Committee notes the concerns of some Inquiry participants that the defence enables biased courtroom narratives that allow the focus of the trial to be shifted onto the conduct of the deceased victim.

4.58 The Committee acknowledges concerns that the partial defence, while it is sometimes used successfully by women who kill intimate partners, is not designed to recognise the experiences of women who kill in the context of domestic violence and therefore may not be appropriately responding to those experiences. Conversely, the Committee notes the concerns about the inappropriateness of the defence being available to male defendants who kill intimate female partners in the response to circumstances that are a part of common human experience. In this regard, the Committee refers to the comments of Associate Professor Tolmie that provocation is being "regularly applied to justify male violence against women in life circumstances that are unexceptional" and that, even in cases where it is unsuccessful, the partial defence is being argued in these types of circumstances "as though they are appropriate circumstances in which to raise it" (at 4.29).

4.59 The Committee also notes the concerns of a significant number of Inquiry participants about the operation of the partial defence in response to non-violent homosexual advances. The Committee acknowledges the comments of representatives of the Law Society and the Bar Association that it would be difficult to run a provocation defence based on a non-violent homosexual advance today, and that that reflects changing social attitudes. The Committee notes that while it is suggested that it would be difficult for a case based on a non-violent homosexual advance to be successfully run, it is nonetheless possible. The Committee agrees with the concerns of many Inquiry participants that successful manslaughter on the basis of provocation cases based on non-violent homosexual advances sends an inappropriate message to the community and legitimises discrimination against members of the homosexual and lesbian community, particularly when there is no evidence of non-violent heterosexual advances being considered sufficient, on their own, to establish the defence (at 4.32 – 4.41).

4.60 The Committee acknowledges the concerns raised about gender bias in the operation of the partial defence and agrees that they provide a case that provocation should be abolished. However, the Committee also notes that there are certain limited circumstances where the partial defence has a legitimate purpose.

4.61 Concerns about gender bias also pervaded a number of other criticisms of the defence, including some of those that are discussed below.

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167 HAD Working Party Report (6.7). See also Ms Penny Musgrave, Director of the Criminal Law Review, Department of Attorney General and Justice, Evidence, 29 August 2012, p 11.

Anachronistic and archaic

4.62 A number of Inquiry participants referred to the history behind the partial defence of provocation in asserting that it is archaic and anachronistic.[168] The Oxford Dictionary defines 'anachronism' as being "a thing belonging or appropriate to a period other than that in which it exists, especially a thing that is conspicuously old-fashioned."

4.63 These assertions were based on two arguments. First, these stakeholders noted that the defence is anachronistic because it developed in a time when women were considered chattels, men carried arms and fought duels, and it was understood that slights to male honour could, understandably, cause the offended male to respond swiftly and with lethal force. In the context of today's modern society none of these circumstances apply. Second, it was argued that as there is judicial discretion in sentencing for murder that there is no mandatory or presumptive penalty for the offence, the rationale underpinning the creation of the defence is redundant.

4.64 The historical context in which violence was normalized and women were chattels is discussed in Chapter 2. Some Inquiry participants referred to the partial defence as being archaic because its origins are in an age that simply does not exist anymore. For example, Mr Graeme Coss described the partial defence as carrying historical 'baggage' which impacted on its legitimacy in today's society in which violence is not 'the norm':

> With so many things in the criminal law we are talking about centuries of baggage, and provocation carries with it centuries of baggage. It was a defence constructed by men for men, in an age when violence was tolerated—it was a norm …[169]

4.65 Wirringa Baiya Aboriginal Women's Legal Centre expressed concerns about the historical context of provocation, suggesting that the conceptual basis of the defence pervades its use today:

> A historical paradigm case of provocation was a man's discovery of his wife's adultery; in one emblematic provocation case, it was written, "jealousy is the rage of a man, and adultery is the highest invasion of property."[170] The ghost of this outdated notion of proprietary violence is very present in the modern case law of provocation.[171]

4.66 Related to this argument was the contention that the partial defence developed as a means to mitigate a mandatory death penalty for murder in times when such sentences were swiftly and routinely carried out. It was suggested that the defence was anachronistic because the times have clearly changed since then. For example, the Office of the Director of Public Prosecutions stated in its submission that "the defence is an anachronism as there is no longer

168 See, for example, Office of the Director of Public Prosecutions; Outer West Domestic Violence Network; Australian Lawyers Alliance; Mr Graeme Coss; Dr Kate Fitz-Gibbon; Homicide Victim's Support Group; Women's Legal Services NSW; Inner City Legal Centre.

169 Mr Graeme Coss, Senior Lecturer, University of Sydney Law School, Evidence, 28 August 2012, p 64.

170 *R v Mawgridge* (1707) Kel. 119 per Lord Holt.

171 Submission 35, p 3.

a mandatory sentence for murder, which we understand was the main reason for the development of the defence at common law."[172]

4.67 The Outer West Domestic Violence Network also submitted that the defence is no longer necessary given the abolition of mandatory sentencing for murder:

> As NSW has long since abolished the death penalty, there is no need to hold on to the archaic law that allows juries to apply the partial defence of provocation as it no longer serves its primary purpose of preventing the defendant receiving the death penalty.[173]

4.68 The Network went on to argue that retaining the defence in these circumstances is inappropriate because it fails to recognise community values which generally hold that killing is not acceptable whether in 'hot' blood or 'cold' blood:

> As a society we have deemed that no crime warrants the death penalty but this does not mean we believe that someone charged with murder is more or less culpable because they killed in 'hot blood' as opposed to cold. The law allowing for the partial defence of provocation is no longer needed; it does not align with the wider community's views and should no longer be applied to cases involving intimate partner homicide ...[174]

4.69 The Australian Lawyers Alliance, referring to the 1997 NSW Law Reform Commission report *Partial Defences to Murder: Provocation and Infanticide*, similarly stated that "provocation arguably 'should be abolished as a legal anachronism which perpetuates excuses for violence, especially in the domestic setting.'"[175]

4.70 However, some Inquiry participants rejected the view that the defence was anachronistic. The Bar Association argued that the distinction between murder and manslaughter allows the law to appropriately reflect an offender's culpability, and the fact that murder no longer attracts a mandatory death sentence was irrelevant. For example, Mr Odgers told the Committee:

> [It has been argued that] we do not need this defence anymore because murder is no longer the subject of a mandatory sentence. But, on that basis, we would not have manslaughter; we would simply have murder, and we would say we can appropriately sentence from zero to life imprisonment. We certainly would not have partial defences of excessive self-defence or diminished responsibility. The real question is a policy question: Do we believe that there is an appropriate distinction between manslaughter and murder? Do we believe that there are circumstances in which it should be manslaughter, not murder, even though there was an intention to kill or an intention to cause grievous bodily harm? Do we believe that it is a significantly less culpable situation where the defender has, one, lost control, significantly lost control, and an ordinary person in that situation could have formed an intention to kill or cause grievous bodily harm? … [Our] position is that there is a significantly reduced culpability in that latter situation…[176]

172 Submission 34, Office of the Director of Public Prosecutions, p 2.

173 Submission 45, Outer West Domestic Violence Network, p 2.

174 Submission 45, pp 2-3.

175 Submission 48, p 8.

176 Mr Odgers SC, Evidence, 29 August 2012, p 35.

4.71 Public Defender Ms Dina Yehia SC expressed a similar view, noting the 'irrelevance' of the absence of mandatory sentencing for murder and pointing to the defence as being about a distinction in culpability:

> Although murder no longer attracts a mandatory life sentence, in New South Wales it attracts a maximum life sentence with a standard minimum non-parole period of either 20 or 25 years. The sentences for murder are significantly higher than sentences imposed for manslaughter. The fact that murder no longer attracts a mandatory life sentence is an irrelevant consideration in this debate … Instead we must consider the policy question of whether there should be a distinction between murder and manslaughter in circumstances where an accused is so provoked as to significantly lose self-control. We are of the view that where an accused has significantly lost self-control and an ordinary person in that situation could have so far lost self-control as to form an intention to kill or cause grievous bodily harm, the culpability is significantly less. That significantly reduced culpability is properly reflected in the reduction of murder to manslaughter.[177]

Committee comment

4.72 The Committee notes the comments of Inquiry participants who raised concerns about the defence being anachronistic, and the historical origins of the defence, in particular, the different societal norms and community expectations and standards of those times. Times have indeed changed since the early days of the defence, and the Committee acknowledges the view expressed by some Inquiry participants that reform is needed to bring the law of provocation into line with today's societal norms and community expectations.

4.73 However, the Committee also notes that assertions that the partial defence is anachronistic and archaic were rejected by some Inquiry participants. In this regard, the Committee acknowledges that the partial defence has developed significantly over the years and that this has altered its design and potential application. The Committee also acknowledges that legislative reform has made provocation more readily available to women who kill, including those who kill after long term family violence (refer to 2.29 – 2.33). Nonetheless, the Committee recognises that valid concerns remain about the appropriateness and applicability of the defence to such defendants. The echoes of days gone by can still be heard in some of the provocation cases that have attracted community outrage, where men have killed in response to insults, infidelity and women exercising their independence.

4.74 The Committee accepts that there is an important distinction between the offence labels of 'murder' and 'manslaughter' that appropriately reflects a defendant's culpability and is a penalty in and of itself. Provocation plays a role in respect of mitigating a defendant's culpability in appropriate circumstances and there is a strong policy argument to distinguish between defendants who kill in response to some forms of provocation, as opposed to those who do not. In particular, the Committee notes the comments made by the Bar Association and the Public Defender's Office that there is a need to appropriately delineate between levels of culpability of defendants who commit unlawful homicide.

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[177] Answers to questions on notice taken during evidence 28 August 2012, Ms Dina Yehia SC, Public Defender, Public Defenders Office, p 10.

Promotes a culture of victim blaming

4.75 Some Inquiry participants raised concerns about the tendency of the provocation defence to result in courtroom narratives that focus blame on the victim, as an argument for reform or abolition of the partial defence. However, other Inquiry participants did not accept this criticism of the defence, on the basis that an examination of the conduct of the victim is necessary in many cases that come before criminal courts.

4.76 As discussed at 4.15 – 4.16, academics Mr Graeme Coss and Dr Kate Fitz-Gibbon both commented that the operation of the partial defence in practice resulted in courtroom narratives that were designed to denigrate and traduce the victim, blaming them (at least in part) for their demise.

4.77 This concern was evident in other submissions to the Committee which also suggested that the provocation defence, by its nature, enabled the focus of the trial and blame for the offence to be placed on the deceased victim. It was suggested that this had contributed toward a 'culture' of victim blaming. For example, the Director of Public Prosecutions stated:

> … the defence, in my view … creates a culture of blaming the victim and I think there is a real perception that sometimes the blame is manufactured because there is no-one there to refute it.[178]

4.78 The Honourable James Wood QC expressed his view that the defence did have a tendency to 'blame the victim', noting that 'provocation' by its nature, necessarily although unfortunately, involved an analysis of the victim's conduct and how it contributed to the circumstances in which they were attacked:

> … the current offence tends to place the blame on the victim. That in itself is not a terribly happy situation; however, it is almost inevitable. If you are going to rely on provocation, either as a defence or as a mitigating circumstance, you are going to have to look at what actually caused the problem, and whether it really did cause a loss of self-control.[179]

4.79 Dr Kate Fitz-Gibbon also argued that provocation inherently involves a narrative that will question the conduct of the victim:

> [B]y its very design, provocation encourages the mobilisation and creation of a narrative that blames the victim. In the way it is designed, that is almost unavoidable in a contested trial. It is highly problematic and it leaves people wondering whether it is the victim or the offender that is on trial. Also there is obviously an inability in these cases for the victims to defend themselves, so it does prioritise the events put forward by the offender.[180]

4.80 Dr Fitz-Gibbon contended that the gendered narratives enabled by the design of the defence become inappropriately privileged in law:

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178 Mr Lloyd Babb SC, Director of Public Prosecutions, Office of the Director of Public Prosecutions, Evidence, 29 August 2012, p 46.

179 The Hon. James Wood QC, Evidence, 29 August 2012, p 9.

180 Dr Fitz-Gibbon, Evidence, 28 August 2012, p 40.

> … it is through the narratives that we allow in those cases and in part of its design that you start blaming the victim for the fact that they have been killed for violence…[181]

4.81 Dr Fitz-Gibbon gave two high profile examples that demonstrated this assertion:

> … it is through [matters] like the *Singh* case in the wider public it then comes out that this man is not a murderer—our courts have said that this man is not a murderer … that is where the concern is, that through this type of avenue of provocation where you do get discussions of a woman's sexual history, of her reasons for wanting to leave it—essentially exercising her human rights—and in things like the well-publicised *Ramage* case where you had a discussion about whether the victim had her period at the time or not, things like that legitimise the violence that has been acted upon these women. It does not provide a condemnation of that violence; it provides an avenue through which it can be understood. One of the biggest problems I have with provocation is that it does allow those narratives to become privileged by the law.[182]

4.82 Most Inquiry participants who raised concerns that the defence 'blames the victim' referred to it specifically in the context of men who kill women in domestic or intimate settings.[183]

4.83 For example, Wirringa Baiya Aboriginal Women's Legal Centre submitted that the defence offers an opportunity for defendants to make allegations about the victim that are difficult to refute:

> Provocation provides an opportunity for defence counsel to focus on the victim's own conduct as the triggering factor in her death. This approach necessitates a 'he-said, she-said', scenario, when the victim, no longer present to give a different version of events, is painted – through her alleged promiscuity, sexual rejection or cruelty – as being responsible for her own killing.[184]

4.84 Ms Jaspreet Kaur, sister of Manpreet Singh who was killed by her husband Chamanjot Singh, echoed concerns that the evidence of the defendant is not truly tested:

> The jury believed everything [the offender] said, the judge believed everything [the offender] said in the court … because the deceased is not alive and you do not know what happened in the room. Just two of them were at that time in the room, no other person was there, and [the jury] just believe what [the offender] said.[185]

4.85 Wirringa Baiya referred to Chief Justice Barwick's judgment in the High Court decision of *Moffa v The Queen* to emphasise this point:

> The totality of the deceased's conduct on that occasion, according to that account, was that there was vituperative and scornful rejection of the applicant's connubial advances, a contemptuous denial of any continuing affection, a proclamation of finality in the termination of their relationship coupled with an expression of pleasure

181 Dr Fitz-Gibbon, Evidence, 28 August 2012, p 49.

182 Dr Fitz-Gibbon, Evidence, 28 August 2012, p 49.

183 Submission 42; Submission 35; Submission 48; Submission 12; Submission 18; Submission 31; Submission 45.

184 Submission 35, pp 4-5.

185 Ms Jaspreet Kaur, Sister of Manpreet Kaur, Evidence, 29 August 2012, p 60.

> in having had intercourse promiscuously with neighbouring men. This statement of enjoyment in that course of conduct might reasonably be thought, particularly if coupled with the manner of her rejection of the applicant, to contain an assertion, contemptuously expressed by the deceased, of sexual inadequacy on the part of the applicant.[186]

4.86 The NSW Domestic Violence Committee Coalition submitted that the critical problem is that the trial becomes less about the offender's actions, and allows the focus to be shifted to the deceased (female) victim:

> … [in] criminal trials, where men seek to rely on this defence in the context of infidelity and/or separation, [it] invariably becomes a trial about the victim – shifting blame on the victim's behaviour (rather than on the person who committed the act of killing) and effectively using the trial as a vehicle to defame her…[187]

4.87 Mr Cleary also referred to the defence 'enabling' juries to consider the 'blameworthiness' of the deceased victim, particularly in relation to intimate partner homicides where a woman is killed:

> [Provocation] is flawed because of the misogynist narratives that are allowed in the courtroom and the misogynist narratives enable juries to consider the woman as being blameworthy and having brought about her own murder.[188]

4.88 However, some Inquiry participants did not accept arguments for reform based on concerns about the defence resulting in or contributing to a culture of victim blaming. The reasons for this were twofold.

4.89 First, it was suggested that such arguments were not limited to circumstances involving substantive provocation and therefore they did not, of themselves, demonstrate the need for reform. Associate Professor Thomas Crofts argued that concerns about victim blaming are not talked about in respect of self-defence:

> We do not talk about this [focus on the victim's conduct] in self-defence as victim-blaming, but in self-defence scenarios often there will only be two people as well and you have got nothing to go on other than they said "that person attacked me". So in a sense it is not just provocation where this could happen…[189]

4.90 Public Defender Ms Dina Yehia SC expressed a similar view:

> There has been a criticism made that in circumstances where a person is dead and then the accused raises allegations or accusations about that person, how can they refute it, because they are dead? … [T]hat is certainly not unique to provocation. There are many cases of self-defence where the only people present at the time that the person is killed are the accused and the deceased, and the version of events comes from the accused. In those circumstances, a deceased also cannot refute it, so it is not

186 *Moffa v The Queen* (1977) 138 CLR 601, per Barwick CJ at 5, cited in Submission 35, Wirringa Baiya Aboriginal Women's Legal Centre, pp 5-6.

187 Submission 31, p 16.

188 Mr Cleary, Evidence, 29 August 2012, p 68.

189 Associate Professor Crofts, University of Sydney Law School, Evidence, 29 August 2012, p 78.

> unique to provocation and therefore I cannot see that it is necessarily a basis on its own for abolition.[190]

4.91 Ms Yehia expressed the view that the concerns raised about the defence being used to blame the victim are not accurate as they draw on individual cases that inform a 'blanket criticism' of the defence. She argued that, contrary to assertions that the defendant's version of events is taken as fact, the version of events given by the defendant is generally tested in court through cross-examination and other evidence:

> If an account has to be given and an accused has not made a record of interview, he has to get into the witness box. He cannot give a dock statement. In those circumstances, he is cross-examined: he is tested. The version that is put is tested and the jury has the opportunity to assess the credibility of that person. That is one way in which an account of what occurred can be tested. Another way is that in a lot of cases there may be some sort of supporting evidence that is raised on behalf of the accused, so the blanket criticism that in cases of provocation it is really the word of the accused and the deceased is not in a position to be able to refute it is not unique to provocation, and that version is tested if these days an account has to be put by an accused and has not been put in a record of interview. [191]

4.92 The Committee notes that consideration of the victim's conduct may be considered a mitigating factor in the sentencing of any offender convicted of a criminal offence.[192]

4.93 The Committee notes the strength of Ms Yehia's submission, however, does observe that in the case of *Ramage*, the accused James Ramage did not enter the witness box during his trial.

Committee comment

4.94 The partial defence of provocation, by its nature, requires an investigation of the evidence relating to the conduct of the deceased victim, including the version of events presented by the defendant. Through that process, the trial necessarily at times focuses on the victim and his or her conduct, as opposed to the conduct of the defendant who is on trial. The Committee acknowledges concerns that this can result in a perception that the victim is to blame, at least in part, for the conduct of the defendant that resulted in the victim's death. The key concern raised is that, although there is always going to be a need to focus on the conduct of the victim, there are times where the evidence raised by the defence at trial arguably goes beyond what is necessary to draw out the facts as to the provocative conduct. It was argued that in these situations a strategic opportunity arises for the defence to inappropriately portray the victim in a particular way so as to create antipathy toward them and sympathy for the defendant.

4.95 The Committee shares these concerns, however we also accept that provocation is not unique in this regard, and acknowledge the testimony of Public Defender, Ms Dina Yehia SC, that any evidence given by the defendant is tested in court.

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190 Ms Dina Yehia SC, Public Defender, Public Defenders Office, Evidence, Tuesday 28 August 2012, p 83.

191 Ms Yehia SC, Evidence, 28 August 2012, p 83.

192 *Crimes (Sentencing Procedure) Act 1987*, s 21A(3)(c).

Concerns about the legal test for provocation

4.96 Several Inquiry participants raised concerns about the complexity of the legal test applicable under section 23 of the *Crimes Act 1900*, which must be satisfied to establish provocation. Several issues were raised in relation to different aspects of the test, including the inappropriateness and ambiguity of the element of 'loss of self-control'; the complexity of the 'ordinary person' test; and the ability of juries to comprehend the test. Counter arguments were also put in respect of each of these concerns, with some Inquiry participants rejecting some or all of the criticisms referred to above. These issues are discussed below.

Loss of self-control

4.97 The element of 'loss of self-control' is central to the current partial defence provided by section 23(2) of the *Crimes Act 1900*. There is a subjective requirement that the defendant actually lose their self-control (provided by section 23(2)(a)). There is also a requirement that the loss of self-control be induced or 'caused' by the provocative conduct of the deceased and that the loss of self-control resulted in the formation of an intention to kill or inflict grievous bodily harm.

4.98 Section 23(2)(b) is the objective test. This requires that the deceased's provocative conduct was such as could have induced an ordinary person in the position of the accused to have so far lost self-control as to have formed an intent to kill, or to inflict grievous bodily harm upon, the deceased. The ordinary person test is discussed in detail at 4.119 – 4.134.

4.99 The historical development of provocation is discussed at 2.20 – 2.33. Since the 19th century, part of the test for provocation has required that the defendant lose their self-control in response to provocative conduct by the deceased. This is a question of fact for the jury to determine based on the evidence.

4.100 The 'loss of self-control' element has been described as the 'essence'[193] or 'central pillar'[194] of the partial defence of provocation.

4.101 This part of the defence was criticised by some Inquiry participants for various reasons, including that it lacks clarity, has no scientific or medical basis, inappropriately privileges a loss of self-control over other responses, and tends to favour male responses to conflict notwithstanding amendments designed to better cater for 'slow burn' cases, usually those involving long term family violence.

4.102 Mr James Moshides, an individual submission maker who completed a Master of Laws dissertation on the partial defence of provocation, commented on the lack of clarity of the phrase 'loss of self-control', citing various authorities which had also confronted the issue:

> There is no satisfactory definition of loss of self-control and one academic likened it to the 'fight or flight reaction' caused by an emotional response to danger. However, [academic and law professor] Alex Reilly argues that a survey of behavioural science literature on emotion does not offer a precise meaning for loss of self-control. The

193 Submission 29, p 4.

194 Reilly, A. (1997) *Self-Control in Provocation,* Criminal Law Journal, 21, p 320 cited in Submission 29, Associate Professor Thomas Crofts and Dr Arlie Loughnan p 4.

> NSW Law Reform Commission also commented on the uncertainty in the definition of loss of self-control.[195]

4.103 Mr Moshides went on to state that the "UK Law Commission recommended provocation defence provisions not requiring the element of loss of self-control."[196]

4.104 In its 2004 report the United Kingdom Law Commission, which was specifically tasked to consider the impact of the defence in the context of domestic violence, commented that the term loss of self-control"is itself ambiguous because it could denote either a failure to exercise self-control or an inability to exercise self-control."[197]

4.105 In analysing the requirement of 'loss of self-control', the Commission concluded that judicial attempts to ensure justice for defendants who killed in 'slow burn' cases had resulted in less clarity about the phrase:

> The courts have responded to the criticism that the law of provocation treats an angry strong person more favourably than a frightened weak person by extending the concept of loss of self-control to include "slow-burn" cases but in so doing they have made the concept of loss of self-control still more unclear … The requirement of loss of self-control was a judicially invented concept, lacking sharpness or a clear foundation in psychology. It was a valiant but flawed attempt to encapsulate a key limitation to the defence - that it should not be available to those who kill in considered revenge.[198]

4.106 Sydney University academic, Mr Graeme Coss, raised concerns about the legitimacy of 'loss of self-control' as a response to provocative conduct, reflecting on the fact that there is little or no scientific or medical evidence to support its existence, which only exacerbates concerns about what it actually means:

> … [T]he extent of loss of self-control required [to establish provocation] is mired in uncertainty. Many commentators, noting the psychological literature, have poured scorn on this concept of loss of control, concluding either that there is insufficient evidence for its existence, or else that the evidence in fact supports the notion that there is always choice, an election to act in a certain way. The law has continued to ignore the science, preferring instead to rely on 'common sense'.[199]

4.107 Coss also raised a conceptual argument that, in the classic intimate partner provocation involving a male killing his female partner, the real 'loss of control' involved is about the male losing control of the female:

> [When] men kill their intimate partner and claim loss of self-control due to provocation … in truth what has happened is that these men have lost control of their wife/partner/girlfriend and have responded with lethal violence to an insult or a

195 Submission 50, p 19.

196 Submission 50, p 1.

197 UK Law Commission (2004) *Partial Defences to Murder – Final Report,* (3.28).

198 UK Law Commission (2004) *Partial Defences to Murder – Final Report,* (3.30).

199 Submission 12, p 4.

> rejection, which is a challenge to their honour and their proprietariness - their feelings of ownership, exclusivity and jealousy.[200]

4.108 This concern about 'male proprietariness' was evident in other submissions. Wirringa Baiya Aboriginal Women's Legal Centre argued that:

> Proprietariness is a distinctive feature of intimate partner violence, which is invariably characterized by feelings of ownership, exclusivity and jealousy. The threat of actual separation, suspicion or confession of infidelity and a failure to maintain control of their partners have been identified as key determinants of the killing by men of their female partners.[201]

4.109 Wirringa Baiya went on to assert it was inappropriate to frame the lethal act as a 'loss of self-control' when it was preceded by a pattern of deliberate behaviour designed to obtain compliance:

> Conceptualising such behaviour as a loss of 'self-control', and therefore deserving of lenience is wrong-headed. The use of anger and violence by men in these circumstances is often instrumental – a deliberate and conscious process with the intent of regaining control over their partners.[202]

4.110 Women's Legal Services NSW was critical about the phrase of 'loss of self-control' on the basis that it fails to recognise the reality of domestic and family violence perpetrated by men against women. The reality is, they argue, that the actions of male perpetrators are not appropriately characterised of a 'loss of self-control', but rather are intentional and deliberate acts designed to silence, punish and frighten the (usually female) victim into behaving in a particular way. [203]

4.111 The Women's Domestic Violence Court Assistance Service expressed a similar view, stating that in its experience "it is grossly unsatisfactory to attempt to distort the complex nature of domestic violence into quite simply a "loss of self-control'."[204]

4.112 Women's Legal Services NSW also expressed concern that men who kill with extreme brutality utilise this element of the defence to reduce their culpability:

> … it is often when the killing is most vicious and extreme that this fact is used to exemplify the alleged "loss of control" on the part of the (often male) defendant. This is seen … in the … matter of *R v Singh* where the offender first strangled his wife and then cut her throat at least eight times with a box-cutter. Rather than this extreme act of violence being considered to increase the defendant's culpability, it was held to exemplify or reinforce the circumstances in which provocation is applicable as a partial defence to murder.[205]

200 Submission 12, pp 4-5.

201 Submission 35, p 3.

202 Submission 35, pp 3-4.

203 Submission 37, pp 14-15.

204 Submission 16, Women's Domestic Violence Court Assistance Service NSW, p 5.

205 Submission 37, p 15.

4.113 Ms Helen Campbell, Executive Officer of Women's Legal Services NSW went further, noting that the phrase 'loss of self-control' flies in the face of modern society's expectations of its citizens:

> It is almost an insult to an adult male in full possession of his faculties, is it not, to suggest that there is inherent in his nature something which, in some sort of circumstances, means he cannot control himself. I would have thought it a hallmark of our civilisation that we all regard ourselves as being able to control ourselves. We need to advance both the legal reform and the culture in which such things take place, to where we should be proud of being people who do not lose control.[206]

4.114 The NSW Domestic Violence Coalition had a similar view. Convenor of the Coalition, Ms Betty Green, gave evidence that there is a body of research that demonstrates that men's use of violence toward their intimate partners is often part of a pattern of intentional behaviour, which contrasts sharply with subsequent descriptions of the violent conduct that results in death as a 'loss of self-control':

> [There is] a great body of evidence, that the behaviour [within an abusive relationship] is both deliberate and intentional in terms of gaining control over another person. By its very operation of using tactics that maintain control, to then leap to a point where we are saying this person has lost control to kill just does not gel, it does not come together …[207]

4.115 Ms Green went on to explain that the research undertaken with men who have killed their intimate partner indicates that their actions are not a loss of control, but rather a manifestation of revenge and anger:

> … that these acts were actually characteristic of men who had used violence and continued to use violence in the relationship until the killing. That is why they are not out of the blue and they are not a loss of control. It is about revenge, it is about anger, it is about rage, and in some respects it makes the community and the rest of us feel comfortable to think that such brutal acts could be out of the blue when in fact they are not.[208]

4.116 The Coalition cited Mr Coss' work in its submission, agreeing with his position that the law empathises with and inappropriately privileges typically male responses to violence in its application.[209]

4.117 Mr Coss explained it in his submission, drawing on the work of Deakin University law school academics, Luke Neal and Dr Mirko Bagaric, as follows:

> Why should the law continue to have special sympathy for angry killings? As Neal & Bagaric have argued: The desire to ensure that a loved one does not die in pain (resulting in an act of mercy killing) might be just as powerful as the anger stemming

206 Ms Helen Campbell, Executive Officer, Women's Legal Services NSW, Evidence, 28 August 2012, p 14.

207 Ms Betty Green, Convenor, NSW Domestic Violence Coalition, Evidence, 28 August 2012, p 4.

208 Ms Green, Evidence, 28 August 2012, p 4.

209 Submission 31, p 24.

> from a confession of adultery. The latter should enjoy no special privilege in the law.[210]

4.118 The concerns raised about the 'loss of self-control' element in provocation were not accepted by some Inquiry participants. In most cases these comments were made by stakeholders responding generally to the adequacy of the test provided by section 23. These views are discussed at (4.143 – 4.151).

The 'ordinary person' test – the objective test

4.119 The objective part of the test is referred to as the 'ordinary person' test.

4.120 Section 23(2)(b) of the *Crimes Act 1900* provides that the partial defence will only apply where "an ordinary person, faced with the same provocation which the accused faced, could have lost self-control so as to form an intention to kill or cause grievous bodily harm."[211]

4.121 It is important to note that the objective test contains subjective elements. The purpose of the objective test is to restrict the scope of the defence in a way that reflects community expectations. This is balanced against the need for some subjective element that allows for consideration of the circumstances and traits of the defendant, which reflects the desire to have a partial defence that offers a 'concession to human frailty'.

4.122 As discussed in Chapter 2, the ordinary person test has two key limbs (refer to 2.36).

4.123 The first limb relates to the ordinary person's perception of the gravity of the provocation. In this context, 'the ordinary person is regarded as having any relevant personal characteristics of the accused.'[212] Therefore the test captures the subjective elements of the defendant.

4.124 However, a different 'ordinary person' applies in the second arm of the objective test. In assessing the ordinary person's power to exercise self-control in response to the provocation, the 'ordinary person' is a person of the same age and maturity as the accused. Considerations of sexual preference, racial background, physical disability and the like, while relevant to the assessment of the gravity of the conduct said to constitute provocation (i.e. the first limb), are not to be imputed to the ordinary person.[213]

4.125 The objective test was clarified in this way following the decision of the High Court in *Stingel v the Queen*[214] in 1990, but prior to that there had been "a great deal of judicial and

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210 Submission 12, p 4.

211 NSW Law Reform Commission (1997) *Partial Defences to Murder — Provocation and Infanticide*, Report No 83 (2.42).

212 NSW Law Reform Commission (1997) *Partial Defences to Murder — Provocation and Infanticide*, Report No 83 (2.45) cited in NSW Legislative Council, Select Committee on the Partial Defence of Provocation, *Inquiry into the partial defence of provocation - Defences and Partial Defences to Homicide*, 2012, p 4.

213 *Stingel v The Queen* (1990) 171 CLR 334, cited in Select Committee on the Partial Defence of Provocation, *Inquiry into the partial defence of provocation - Defences and Partial Defences to Homicide*, p 4.

214 (1990) 171 CLR 312.

academic comment on the need for and the nature of the objective test, in particular the extent to which it may be "subjectivised" by incorporating characteristics of the particular defendant."[215] Indeed at one point, the 'ordinary person' test was purely objective (i.e. none of the defendant's characteristics were attributed to the 'ordinary person').[216]

4.126 The Model Criminal Code Officers Committee, a group comprised of a senior officers from each Australian jurisdiction with expertise in criminal law and criminal justice matters, commented in 1998 on the difficulties of striking an appropriate balance:

> [A] fully objective test operates harshly; a fully subjective test produces unacceptable results; a hybrid test incorporating both subjective and objective elements is internally incoherent and unacceptably complex.[217]

4.127 It was argued by several Inquiry participants that the complexity of the ordinary person test was one of the most significant problems with the partial defence, on the basis that it was confusing and artificial to apply.[218] For example, Tolmie argues:

> In its current manifestation, the main reason why the defence of provocation is conceptually unworkable is because of the manner in which the ordinary person test is constructed. Specifically, the difficulty involves the division of the test into two limbs. … This makes the test highly complex and artificial to apply.[219]

4.128 Concerns about the ordinary person test were borne out in consultations undertaken by the Victorian Law Reform Commission in 2004 in its examination of the provocation defence. The Commission's final report suggests that the test requires jurors to "perform a kind of mental gymnastics."[220]

4.129 The Commission referred to the observation of the Model Criminal Code Officers Committee, that the ordinary person in the law of provocation has a "split personality in that his or her character [is] suddenly changing depending on which part of the test is being addressed."[221]

4.130 Legal Aid NSW commented that members of the judiciary had recognised that jurors were challenged by the two step 'ordinary person' test, referring to comments made by Justice Smart in the NSW Court of Criminal Appeal in 2001:

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215 NSW Law Reform Commission, *Discussion Paper 31 (1993) - Provocation, Diminished Responsibility and Infanticide.*

216 *Bedder v DPP* (1954) 1 WLR 1119.

217 Model Criminal Code Officers Committee of the Standing Committee of the Attorneys-General, Model Criminal Code, *Chapter 5, Fatal Offences Against the Person Discussion Paper* (1998), 103.

218 See, for example, Submission 12; Submission 30, Legal Aid NSW; Submission 34; Submission 48.

219 Tolmie, J. (2005) *Is the Partial Defence an Endangered Defence? Recent Proposals to Abolish Provocation,* NZ Law Review 25, p 50, cited in Submission 4, Professor Julia Tolmie.

220 Victorian Law Reform Commission (2004) *Defences to Homicide Final Report*, p 35.

221 Model Criminal Code Officers Committee of the Standing Committee of the Attorneys-General, Model Criminal Code, *Chapter 5, Fatal Offences Against the Person Discussion Paper* (1998), 79, cited in Victorian Law Reform Commission (2004) *Defences to Homicide Final Report*, p 35.

> In practice the gravity of provocation/self-control distinction has proved hard to explain to a jury in terms which are intelligible to them … Juries struggle with the distinction and find it hard to grasp. Many do not do so.[222]

4.131 NSW Young Lawyers also commented that the "existing test is relatively complicated and may be hard for juries to understand."[223] Young Lawyers went on to refer to the judgment of Justice Thomas in the New Zealand matter of *Rongonui* in which he recalled:

> … the glazed look in the jurors' eyes as, immediately after instructing them that it is open to them to have regard to the accused's alleged characteristic in assessing the gravity of the provocation, they are then advised that they must revert to the test of the ordinary person and disregard that characteristic when determining the sufficiency of the accused's loss of self-control.[224]

4.132 As well as being overly complex, the ordinary person test was criticised on other grounds. For example, Sydney University academic Mr Graeme Coss, submitted that the 'ordinary person' test was a nonsensical concept in the context of the number of homicides that actually occur:

> [O]rdinary people do not kill when provoked. Only the most extraordinary people do. On average, there are 77 intimate partner homicides each year in Australia, 60 involving men killing women. In the vast majority of these, the killing is the result of male proprietariness, often at the time of relationship breakdown or separation. Let's assume that 50 men kill each year in such circumstances. There are between 50,000 to 55,000 divorces each year, but one can only guesstimate the number of de facto breakdowns, to say nothing of relationship breakdowns surely significantly higher again. The combined figure is likely to be huge. And in all of these, there would have been provocative remarks and actions, coupled with the ultimate provocative insult, the actual breakup and separation. And this is not even including the provocative insults that might occur in those relationships that do not break down - very large numbers indeed. And yet only 50 men kill in these provocative circumstances … men who kill when affronted by their partners are truly extraordinary. The test is not: could someone lose control? It is: could an ordinary person lose control? It is simply absurd for defence counsel to suggest and for judges or juries to believe that an ordinary person might lose control when subjected to such provocation. It is nonsense.[225]

4.133 This view was supported by a number of other Inquiry participants, including Women's Legal Services NSW and the NSW Domestic Violence Coalition Committee, which cited Coss' assertion that "[o]rdinary people, when affronted, do not resort to lethal violence … it is clear the ordinary person does not kill. Only the most extraordinary person does."[226]

4.134 Not all Inquiry participants accepted the criticisms of the ordinary person test. In most cases, these stakeholders also rejected concerns about the phrase 'loss of self-control'. As noted at 4.118, these comments are incorporated into the discussion below.

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222 *R v Mankotia* (2001) A Crim R 492 at 18-19, cited in Submission 30, Legal Aid New South Wales, pp 4-5.

223 Submission 19, p 3.

224 *R v Rongonui* (13 April 2000) unreported, Court of Appeal, CA 124/99, cited in Submission 19, NSW Young Lawyers, p 3.

225 Submission 12, p 5.

226 Submission 37, p 18; Submission 31, p 25.

The impact of the legal test and the ability of the jury to understand it

4.135 A significant number of Inquiry participants argued that the legal test for provocation, combining both the subjective (loss of self-control) and objective (ordinary person) tests, is too complex. It was suggested that this complexity impedes the ability of the jury to properly understand the law and apply it to the factual circumstances in provocation matters.[227]

4.136 The Office of the Director of Public Prosecutions submitted that "criteria for particular defences to homicide should be readily understandable by juries".[228]

4.137 The Director of Public Prosecutions, Mr Lloyd Babb SC, tabled a copy of the directions given by judges to juries in provocation matters (Appendix 5) which, he argues, "demonstrates how complex and confusing the ordinary person tests are that are applied to provocation."[229]

4.138 Mr Coss explained the test in the context of the various issues raised in respect of both the subjective and objective elements. He suggested that the ambiguity of the phrase 'loss of self-control', combined with the complex double-limbed objective test, is beyond the comprehension of most juries:

> …[T]he subjective test is: Did the accused lose control—whatever that means? It is only a partial loss of control; it cannot be a complete loss of control. If it is a complete loss of control then that means you are acting as an automaton and therefore you are not criminally responsible. That is the first thing that has to be explained to juries somehow: What loss of control is in this partial state? Secondly, the easy part is the ordinary person test: Could an ordinary person have lost control? In other words, all the characteristics of the accused can somehow be attached to this hypothetical ordinary person to help understand the gravity of the provocation—in other words, to point the insult of the provocation—but those personal characteristics of the accused are not to be attached to the ordinary person in assessing their powers of self-control, they just have the ordinary powers of control. Are you with me so far? Good. It is a nightmare. It is an absolute illogical, nonsensical nightmare, and judges have actually admitted it is a nightmare.[230]

4.139 The Honourable James Wood AO QC, also referred to the difficulties faced by juries trying to understand and apply the law, particularly in relation to the 'hypothetical ordinary person', stating:

> The ordinary person test has its problems because … when the jury looks at the ordinary person it does not look at its own reactions or own thoughts. It has to envisage some ordinary person, which may not be one of them. It is a difficult concept … for a jury to say, "All right, we have to decide what an ordinary person could do, but we cannot look at our own views. We have to envisage some hypothetical ordinary person."[231]

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227 See, for example, Submission 12; Submission 18; Submission 34; Submission 39, Victims of Crime Assistance League; Submission 19; Submission 25, Homicide Victims Support Group; Submission 48.

228 Submission 34, p 3.

229 Mr Babb SC, Evidence, 29 August 2012, p 54.

230 Mr Coss, Evidence, 28 August 2012, p 71.

231 The Hon. Wood AO QC, Evidence, 29 August 2012, p 2.

4.140 The research of Dr Kate Fitz-Gibbon also identified the complexity of the law of provocation as a concern. In evidence, Dr Fitz-Gibbon explained that her research, comprising interviews with NSW judges, prosecutors and defence counsel, suggests that some of the key players in the criminal justice system struggle with this area of law, which arguably puts it well "beyond what members of the jury can be expected to understand:"[232]

> … a lot of legal counsel said that every time they had a provocation case they themselves were having to go back and in their own mind work it out, and they could not understand how a jury was going to be expected to do that. That was something that a lot of prosecutors, defence counsel, and even judges in giving their directions seem to be very aware of.[233]

4.141 Dr Fitz-Gibbon acknowledged that many areas of the law are complex, but that in relation to provocation, the risk is that juries will deliver 'compromised' verdicts as a 'safe' option in circumstances where they may not understand the law:

> Perhaps all areas of law are complex … the reason I find it so concerning in provocation is … that potentially the consequence of that is that juries might just be taking a halfway house and perhaps a compromised verdict. They are being given a range of options. They are told that there is the option of murder, there is the option of manslaughter, there is also the option of manslaughter by reason of provocation and then, if you do not find that, there is the option of self-defence, and perhaps juries are going, "We're getting so much here, let's just go in the midway with provocation."[234]

4.142 The Victims of Crime Assistance League expressed similar concerns:

> … it was clear that the jurors in both cases [*Singh* and *Won*] could have had no idea as to what was meant by the "ordinary" person test and as a result returned verdicts of Manslaughter on the basis of Provocation … [T]he application of the "ordinary" person test is complex and one which should be decided in an analytical not emotional manner. It is our view that the response by Jurors in both [cases] were emotional responses, resulting in jury decisions that must be seen to be of a questionable nature, and therefore not what the legislation or courts intended.[235]

4.143 However, not all Inquiry participants accepted that the legal test for provocation was problematic or beyond the comprehension of jurors. Most of those who disputed concerns about this issue were from the legal fraternity. A common theme emerged among this group in that all of them strongly advocated the strengths of the jury system, particularly highlighting its role in ensuring that a community standard was brought to each case.[236]

4.144 Mr Stephen Odgers SC, representing the NSW Bar Association, rejected the assertion that the law of provocation was so complex as to exceed the capacity of jurors to understand it, arguing that conceptually, the test was relatively straight-forward and could be presented to

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232 Submission 18, p 1.

233 Dr Fitz-Gibbon, Evidence, 28 August 2012, p 41.

234 Dr Fitz-Gibbon, Evidence, 28 August 2012, p 41.

235 Submission 39, pp 4-5.

236 See, for example, Submission 32, NSW Council for Civil Liberties; Submission 14, Mr James Trevallion; Submission 33.

juries in a manner that was comprehensible. He drew on comments by the Privy Council to support this assertion:

> It is said that the law is complicated and that juries find it difficult to understand. We do not accept that that is necessarily the case. The Privy Council in 2005 considered that it was overstated to suggest that juries found it difficult, but concluded that it was a matter of presentation rather than substance … I submit that the defence would be made out if it is reasonably possible that the accused lost control and that an ordinary person in the same situation as that accused could himself or herself have lost control and formed an intention to cause at least grievous bodily harm. That is not a particularly difficult concept to convey and we are not persuaded that juries are unable to understand it.[237]

4.145 Ms Dina Yehia SC, representing the Public Defender's Office, similarly disputed the suggestion that juries do not understand the test, and referred to other areas of law in which juries are subjected to complicated directions. In doing so Ms Yehia reflected on the fact that juries reject most provocation defences, and suggested that they bring a considered approach to the application of the law to the facts:

> To suggest that juries do not understand the test is to overlook the fact that in many criminal trials there are very complex directions and complex matters of fact that are presented to juries. Fraud trials are immensely complex. Conspiracy directions are very difficult to grasp. But juries do that. And, after all, it is for judges and for practitioners like me to make sure that directions and evidence is presented in a way that is clear and that is simple … juries do represent community values. The fact that in an overwhelming number of cases where this defence is run it is not successful I think demonstrates that juries do bring a serious and very considered approach to their function.[238]

4.146 Ms Yehia went on to support the Bar Association's contention that judges and advocates are responsible for ensuring that juries are equipped to understand and apply the law:

> I do not accept that the provocation test or the directions are so complex that juries cannot understand it … If it is complex then it is a matter for the judges and for advocates to try to present it as simply and as clearly as they can. I do not accept that juries take up their role in such a prejudiced way that they cannot bring an informed and objective view … by and large, I think juries are well equipped to deal with the issues and if there is a failing then there is a failing on the part of judges and advocates.[239]

4.147 The Hawkesbury Nepean Community Legal Centre acknowledged that the ordinary person was 'problematic' but considered it necessary that the defence have objective and subjective elements:

> While we acknowledge that the ordinary person test can be problematic, we submit that the partial defence of provocation needs a subjective and objective test in order to assess the reasonableness of the accused's actions.[240]

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237 Mr Odgers SC, Evidence, 29 August 2012, p 36.

238 Ms Yehia SC, Evidence, 28 August 2012, p 74.

239 Ms Yehia SC, Evidence, 28 August 2012, p 81.

240 Submission 44a, Hawkesbury Nepean Community Legal Centre, p 4.

4.148 The Law Society of NSW stated in its submission that it is "satisfied with the current test provided in section 23."[241]

4.149 Academics from University of Sydney Law School, Associate Professor Crofts and Dr Loughnan, while acknowledging some lack of clarity, suggested that 'loss of self-control' was, as a result of judicial interpretation, a term that is now understood:

> [Loss of self-control] suffers from a little bit of lack of clarity around what might be meant. Nonetheless, it has been subject to quite a number of high-level judicial treatments now and we can be fairly confident that there is a ground to be struck by what we are calling loss of self-control.[242]

4.150 Barrister Mr James Trevallion drew on his personal experience in asserting that juries were able to understand and apply the law of provocation:

> … it is my experience that juries do understand the direction given to them by a trial judge in respect to the partial defence of provocation. This has been made clear to me by the questions that jurors have asked about provocation in the trials that I have been involved in.[243]

4.151 Fellow barrister, Mr Winston Terracini SC QC, submitted that although outcomes in some cases may be difficult to understand, juries overwhelmingly 'get it right' and referred to the low number of successful appeals from jury verdicts:

> Occasionally, but fortunately very rarely, some cases attract inordinate publicity simply because it is perceived that the jury have made an error … The number of jury verdicts that are overturned by the Court of Criminal Appeal is extremely low and the community still remain very confident of the jury system and its inherent value.[244]

Committee comment

4.152 The Committee agrees with many of the concerns raised regarding the nature and complexity of the legal test for provocation.

4.153 Regarding the 'loss of self-control' element of the law of provocation, the Committee is concerned that the phrase 'loss of self-control' is unclear, notwithstanding suggestions that it has been clarified to some degree (refer to 4.149). The Committee agrees with comments by some Inquiry participants that society expects a level of self-control from its citizens, and considers that if 'loss of self-control' is an element of a partial defence to homicide, it should be clearly defined. The Committee notes the comments of various participants and academics that there is little or no medical or scientific basis for the 'condition' of having lost one's self-control and is concerned that there is ambiguity surrounding whether the phrase refers to one's failure or inability to exercise self-control.

241 Submission 5, p 2.

242 Dr Loughnan, Evidence, 29 August 2012, p 81.

243 Submission 14, p 2.

244 Submission 33, p 3.

4.154 The Committee also acknowledges concerns raised by various stakeholders, including Women's Legal Services NSW, Wirringa Baiya Aboriginal Women's Legal Centre, the NSW Domestic Violence Committee Coalition, and Mr Graeme Coss, that the phrase 'loss of self-control' fails to acknowledge the reality of domestic and family violence. The Committee is of the view that, notwithstanding the 1982 amendments designed to assist defendants who kill in 'slow-burn' cases by removing the 'suddenness' element, the requirement to demonstrate a 'loss of self-control' continues to represent a significant hurdle for such defendants. The Committee acknowledges that there have been matters where courts have accepted that a loss of self-control can result from provocative conduct occurring some time before the fatal incident, including in cases of long term family violence,[245] but considers that the element of 'loss of self-control' fails to adequately acknowledge the reality of the position that such defendants face.

4.155 In addition, the Committee is concerned that the practical effect of the partial defence requiring a loss of self-control inappropriately lends itself to killings in which extreme violence is used to reduce a defendant's culpability and, in relation to intimate partner homicides, this tends to favour male defendants who kill women, further contributing to concerns about gender bias. Conversely, the requirement to show a loss of self-control tends to disadvantage those who kill, usually women, in 'slow burn' cases.

4.156 Regarding the 'ordinary person' or objective limb of the legal test, the Committee acknowledges the concerns of a number of Inquiry participants that the two-limbed nature of the test makes it complex and difficult to understand. This point has also been made by various eminent authorities, including members of the judiciary in provocation matters, as well as by various law reform commissions, including by the NSW Law Reform Commission, and by the Model Criminal Code Officers Committee.

4.157 The Committee acknowledges conflicting views about the ability of jurors to comprehend and apply the law of provocation. The Committee notes that there were some Inquiry participants, including Dr Fitz-Gibbon and the Victims of Crime Assistance League, who suggested that the inability of jurors to fully understand and apply the law may lead to some juries accepting the partial defence of provocation as a 'halfway house' between murder and manslaughter, or alternatively relying on emotion (as opposed to reason) to reach their verdict.

4.158 However, while acknowledging that the two-limbed ordinary person test has been criticised by some participants as being too complex, the Committee is of the view that it is critical to have a test that attempts to balance the subjective circumstances of the defendant, with community expectations. The Committee agrees that a purely objective or purely subjective test would, as suggested in 1988 by the Model Criminal Code Officers Committee, operate too harshly and produce unacceptable results respectively. However, the Committee disagrees with the Model Criminal Code Officers Committee that an ordinary person test comprising subjective and objective elements is fundamentally flawed. The Committee refers to comments made by the Hawkesbury Nepean Community Legal Centre regarding the need for a test balancing objective and subjective elements to ensure a defendant's actions can be appropriately considered and judged.

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245 See, for example, *R v Chhay* (1994) 72 A Crim R 1; *R v Russell* (2006) NSWCCA 722; *R v Hill* (1980) 3 A Crim R 397, cited in Submission 15, NSW Bar Association.

4.159 The Committee notes the views of Mr Odgers and Ms Yehia that juries are able to bring an informed and objective approach to their application of the law in particular factual circumstances. The Committee is of the view that in today's criminal justice system, juries are subjected to complex and detailed instruction and directions in various types of matters and, as noted by Ms Yehia, it is the role of advocates and judges to ensure they are able to make informed decisions about the application of the law.

4.160 Further discussion of the appropriate legal test for the partial defence of provocation is examined in Chapters 6, 7 and 9.

4.161 A number of Inquiry participants, all supporting abolition of the partial defence, argued that provocation should be dealt with purely as a sentencing factor. Many suggested that the fact that provocation is dealt with as a sentencing factor in all other criminal offences meant that its availability as a partial defence was anomalous. This is discussed in detail in the following chapter (Chapter 5). Also discussed in Chapter 5 is the adequacy of self-defence for 'battered defendants' should the partial defence of provocation be abolished.

Chapter 5 Abolition of provocation: sentencing and the adequacy of self-defence

The terms of reference require the Committee to consider abolition of the partial defence of provocation. A number of Inquiry participants argued that provocation could be adequately dealt with at sentencing. The terms of reference also ask the Committee to consider the adequacy of self-defence for victims of prolonged domestic or sexual violence. Some Inquiry participants raised concerns about the adequacy of self-defence and also referred to a need to strengthen self-defence in the event that the Committee recommended abolition of the partial defence. This Chapter explores those issues.

Overview

5.1 Some Inquiry participants warned that abolishing the partial defence altogether would have undesirable consequences. There were three main concerns, with the first two relating to sentencing. First, it was argued that some defendants, including 'battered women' defendants, would receive harsher penalties including convictions for murder and heavier sentences. Second, concerns were raised that if the partial defence were abolished and provocation dealt with as a sentencing factor, the problem may simply 'shift' to sentencing. These issues are discussed at 5.3 – 5.32.

5.2 The third concern raised by some Inquiry participants was whether the defence of self-defence is able to respond adequately to defendants who kill after prolonged abuse and whom now rely on provocation. This is discussed at 5.44 – 5.72.

Risks associated with dealing with provocation as a sentencing factor only

5.3 A number of Inquiry participants, all supporting abolition of the partial defence, argued that provocation should be dealt with purely as a sentencing factor. The argument was based on the fact that provocation is dealt with purely as a sentencing factor in all other criminal offences, and that flexible sentencing practices adequately provide for recognition of culpability. Some stakeholders argued this point in the context of the partial defence originating as a means to offer a 'concession to human frailty' in cases where a mandatory death sentence applied to convictions for murder. In this context it was argued that provocation is an anomaly in today's times.

5.4 Conversely, some stakeholders rejected calls for abolition, contending that provocation is not anomalous, and that dealing with provocation only as a sentencing factor would result in injustice. These stakeholders argued that the partial defence offers an appropriate option for some defendants who intentionally kill in circumstances where they are provoked. Two arguments were put in support of this. First, it was said that these defendants should have their criminal liability recognised as 'manslaughter' as opposed to murder. Second, it was argued that if provocation were abolished as a partial defence and only dealt with as a sentencing factor, these defendants would face much heavier penalties for murder, as opposed to those applicable for manslaughter (for information on sentencing statistics, refer to Chapter 2).

5.5 The Office of the Director of Public Prosecutions, which supported abolition, commented that the partial defence of provocation is an anomaly in the criminal law in NSW "as it only applies to the offence of murder, in respect of other offences it is a matter to be taken into account on sentence."[246]

5.6 The Homicide Victim's Support Group, which also argued strongly for abolition, commented that provocation should be dealt with under existing sentencing law in NSW, noting that the labeling outcome resulting from a conviction for 'murder' would have a positive impact on the families of the deceased:

> Section 21A(3)(c) of the *[Crimes (Sentencing Procedure) Act 1999* (NSW) provides that a mitigating factor in determining the appropriate sentence for an offence is whether the offender was provoked by the victim. By confining consideration of provocation to sentencing, the probability of securing a murder conviction over manslaughter is greater, a result that will likely have a significant impact on victims' families.[247]

5.7 The Homicide Victim's Support Group noted that this approach was also recommended by the Model Criminal Code Officers Committee [248] which stated in its 1998 report:

> In place of the partial defence of provocation, with all its doctrinal defects, the sentencing process offers a flexible means of accommodating differences in culpability between offenders. Some hot blooded killers are morally as culpable as the worst of murderers. Some are far less culpable. The differences can be reflected as they are at present, in the severity of the punishment.[249]

5.8 However, other Inquiry participants, including the Bar Association[250] and the Public Defender's Office,[251] disagreed that the defence was an anomaly. The Bar Association argued that the distinction between different grades of homicide, a distinction uncommon in most criminal offences, necessitates a different approach:

> It is also said that the defence is anomalous because it applies only to the offence of murder. It is not anomalous because the vast majority of offences do not have different grades. We do have different grades of homicide for very good reasons. There is an important distinction between murder and manslaughter. This reduces it from one grade to another and allows juries to decide whether or not a person is appropriately to be characterised as a murderer or someone guilty of manslaughter.[252]

5.9 Mr Babb rejected this argument, which was put to him by Committee member during the hearings:

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246 Submission 34, Office of the Director of Public Prosecutions, p 2.

247 Submission 25, Homicide Victim's Support Group, p 8.

248 Submission 25, p 8.

249 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, 105.

250 Mr Stephen Odgers SC, Chair of the Criminal Law Committee, NSW Bar Association, Evidence, 29 August 2012, p 36.

251 Answers to questions on notice taken during evidence 28 August 2012, ,Ms Dina Yehia SC, Public Defender, Office of the Public Defender, pp 6, 11.

252 Mr Odgers SC, Evidence, 29 August 2012, p 36.

> Mr BABB: … I think it [provocation] is explainable because of the historical background … rather than it being something that distinguishes it from any other offence. Within all types of assaults there are gradations of culpability. That remains with an infliction of grievous bodily harm in the same way that it does with an infliction of death.
>
> Mr DAVID SHOEBRIDGE: But there is no alternative for infliction of grievous bodily harm. If the facts are made out, it is the infliction of grievous bodily harm. However, we have that dichotomy between murder and manslaughter and provocation is one way of differentiating. Do you accept that it is not necessarily anomalous, or that it may be anomalous because the dichotomy between murder and manslaughter is anomalous?
>
> Mr BABB: No, I do not. The reason we have that distinction in relation to partial defence is that where you intend to kill or inflict grievous bodily harm is limited to three categories only. The third category—that is, provocation—in my view is a historical artifact as opposed to a logical and coherent separation.[253]

5.10 A group of Inquiry participants, including the NSW Bar Association, Public Defender's Office, Professor Tolmie, and Associate Professor Crofts and Dr Loughnan, argued that the partial defence allows for appropriate recognition of an offender's lesser culpability. They contended that abolishing the partial defence in favour of dealing with provocation at sentencing fails to acknowledge the importance of offence labels in distinguishing between the culpability of offenders who commit manslaughter as opposed to murder. Crofts and Loughnan commented that:

> … there is a significant difference – measured in terms of legal history, and the role of the jury, among other matters – between recognising provocation as the basis of a defence and thus letting it go to an individual's conviction and culpability, and provocation as one ingredient in a complex facts scenario that the judge is assessing at the point of sentencing …[254]

5.11 Associate Professor Crofts went on to explain the importance of labeling in the criminal law:

> Labels are incredibly important in criminal law. Criminal law is stigmatising. If we think a person deserves some sort of reduced sentence because they are less culpable, that should be reflected in what they are called.[255]

5.12 However, the Director of Public Prosecutions disagreed, arguing that where an offender intentionally kills in circumstances where self-defence is not available, the offence is appropriately dealt with as murder and not manslaughter.[256]

5.13 Mr Babb explained how, in his view, provocation is essentially a factor that may impact upon the culpability of an offender, and such factors are appropriately considered by the sentencing judge:

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253 Mr Lloyd Babb SC, Director of Public Prosecutions, Evidence, 29 August 2012, p 56.

254 Answers to questions on notice taken during evidence 29 August 2012, Associate Professor Thomas Crofts and Dr Arlie Loughnan, University of Sydney Law School, p 5.

255 Associate Professor Thomas Crofts, University of Sydney Law School, Evidence, 29 August 2012, p 80.

256 Mr Babb SC, Evidence, 29 August 2012, pp 52-54.

> ... provocation is really a question that goes to culpability and that factors affecting culpability should be dealt with on sentence rather than reducing a charge of murder to manslaughter.[257]

5.14 He went on to suggest that the sentencing regime in NSW provided the necessary flexibility to deal with murderers with differing levels of culpability:

> Dealing with the issue of provocation on sentence, in my view, provides sufficient flexibility within the sentencing process for the appropriate sentence to be imposed, and it is appropriate in my view that a sentencing judge consider whether or not to take into account provocation in determining what the sentence should be and that they would do so where it was appropriate and they would not do so where it was not appropriate … there is no good reason why people who kill in the heat of passion should not be convicted of murder as opposed to those who approach it in a more premeditated way.[258]

5.15 Several Inquiry participants, including the Bar Association, disagreed on the basis that the average penalties applicable for murder, as opposed to manslaughter, would likely result in unjust outcomes, particularly for 'battered' defendants.[259] In this regard, Professor Stubbs explained that:

> [P]eople who have a well-founded argument that their resort to homicide should be seen as less culpable than murder, such as some women who kill in the context of having been victims of domestic violence, may be deprived of a partial defence and be dealt with more harshly than is currently the case.[260]

5.16 Some of these Inquiry participants also noted that although NSW does not have mandatory or presumptive sentences for murder,[261] there is a standard non-parole period of 18 years, which they argued would lead to higher penalties than would apply in manslaughter cases. For example, Ms Dina Yehia SC, for the Public Defender's Office, commented that Public Defender's shared Professor Stubbs concerns "that in the absence of the partial defence of provocation, substantial injustices will occur in the sentencing of offenders."[262] Ms Yehia explained the impact that abolition would have on 'battered women' in respect of sentencing:

> An argument that the interests of women who kill in the context of domestic violence and are convicted of murder can be adequately addressed at sentencing, fails to acknowledge the substantially different sentences that apply to murder as compared to manslaughter. Sentencing laws in New South Wales cannot adequately deal with the difference in culpability in a case where a battered woman kills her partner or where a

257 Mr Babb SC, Evidence, 29 August 2012, p 46.

258 Mr Babb SC, Evidence, 29 August 2012, p 46.

259 See, for example, Submission 4, Associate Professor Julia Tolmie, pp 8- 9; Submission 41, Professor Julie Stubbs, p 6; Answers to questions on notice taken during evidence, supplementary questions on notice, and responses to options paper, 29 August 2012, Mr Bernard Coles QC, President, Bar Association of NSW, p 2.

260 Submission 41, Professor Julie Stubbs, p 5.

261 With the exception of section 19C of the *Crimes Act 1900*, which provides for mandatory life imprisonment for the murder of police officers.

262 Answers to questions on notice taken during evidence 28 August 2012, Ms Yehia SC, p 7.

> mother kills a perpetrator of child abuse. New South Wales has a regime of standard minimum non-parole periods under the *Crimes (Sentencing Procedure) Act 1999*. For murder the standard minimum non-parole period is 20 years or 25 years, depending on the status of the deceased. While the standard minimum is no longer determinative, it must be taken into account on sentencing in the same way that regard must be had to the maximum penalty.[263]

5.17 Mr Babb disagreed that the standard non-parole period applicable to murder convictions would necessarily result in unjust outcomes for 'battered' defendants.[264]

5.18 The Honourable James Wood AO QC expressed the view that the current sentencing regime offers adequate discretion and that a murder conviction where provocative circumstances existed would result in similar sentences to those currently arising from manslaughter:

> The maximum sentence for manslaughter … is 25 years. That … encompasses the maximum sentence that you normally get for murder. There are not too many cases where murder attracts a head sentence of more than 25 years. So within that area of manslaughter effectively you get pretty much what you get for murder but you have got a full sentencing discretion. I would think if there are significant features of provocation in the case the judge sentencing would be bringing back similar sentences to those which currently arise from manslaughter.[265]

5.19 Dr Fitz-Gibbon argued that the concern that the applicability of a standard non-parole period to murder may lead to heavier penalties and injustice in some matters where provocative circumstances were present, could be addressed in NSW through the development of guideline judgments:

> The consideration of provocation in sentencing for murder could be achieved in NSW through the careful development of specific guideline judgments for what have historically been the common scenarios of provoked lethal violence in NSW. These judgments would then be used … to guide judges on how provocation should best be considered in sentencing for murder.[266]

5.20 Dr Fitz-Gibbon suggested that the work of Stewart and Freiberg for the Victorian Sentencing Advisory Council in 2009 provided a framework that could guide the development of guideline judgments. The framework suggests that:

> … only serious provocation should be found to have given the offender a justifiable sense of having been wronged. For less serious non-fatal offences against the person, a lower degree of provocation may be required to meet this standard. However, trivial conduct by the victim should not be found capable of justifying the offender's sense of aggrievement.[267]

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263 Answers to questions on notice taken during evidence 28 August 2012, Ms Yehia SC, p 6.

264 Mr Babb SC, Evidence, 29 August 2012, p 53.

265 The Hon. James Wood QC, Evidence, 29 August 2012, pp 7-8.

266 Response to options paper, Dr Kate Fitz-Gibbon, Lecturer in Criminology, Deakin University, p 5.

267 Stewart, F. & Freiberg, A. (2009), *Provocation in Sentencing*, 2nd edn, Sentencing Advisory Council, Melbourne., cited in Response to options paper, Dr Kate Fitz-Gibbon, p 5.

5.21 Dr Fitz-Gibbon notes that Stewart and Freiberg "argue that this judgment should be made with consideration of society's common understandings and expectations of human behaviour and personal autonomy."[268] She suggests that from this foundation, guideline judgments could be developed that would ensure that a victim's conduct was only considered a mitigating factor at sentencing when it accorded with community standards.[269]

5.22 Mr Wood also suggested that the development of a guideline judgment, or an amendment to the sentencing legislation to assist in clarifying which provocative conduct, should not be considered a mitigating factor would be beneficial:

> … I would like to see some guidance in the *Sentencing Act* or, alternatively, a guideline judgment by the Court of Criminal Appeal that says qualitatively what kinds of things are to be taken into account when provocation arises in this context … if you either had a guideline judgment or some aspects spelt out in the sentencing law that would exclude [conduct like jealous rage and infidelity]. At the moment the *Sentencing Act* simply says provocation is a mitigating circumstance, but you could qualify that by saying provocation where it arises out of sexual infidelity, jealousy, possessiveness or control *et cetera* is not to be taken into account.[270]

5.23 The Australian Lawyers Alliance and Mr Graeme Coss also referred to the work of Stewart and Freiberg in recommending that provocation be considered during sentencing.[271]

Manslaughter on the basis of provocation and 'double discounting'

5.24 One stakeholder, the Homicide Victim's Support Group, raised concerns that the current framework allows a defendant convicted of manslaughter on the basis of provocation to receive a 'double discount'.

5.25 The Homicide Victim's Support Group submitted that the system is unjust because the provocative conduct is taken into account twice, with both considerations of it mitigating the defendant's sentence. First, establishing the partial defence of provocation 'downgrades' the charge from murder to manslaughter. Second, the provocative conduct of the victim is considered a mitigating sentencing factor under section 21A(3)(c) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) for the purposes of sentencing the defendant for manslaughter.

> HSVG submits that the consideration of provoking circumstances by the courts in both downgrading an offender's crime and during sentencing arguably prevents the proper administration of justice.[272]

5.26 However, the concept that a defendant was receiving a 'double benefit' was rejected by the Law Society of NSW. In responding to the scenario described above, Mr Giddy told the Committee:

> It is indicative of manslaughter so the discount comes off the conviction. I think it is a little disingenuous to say there is a double discount. The jury has heard the matter, the

268 Response to options paper, Dr Fitz-Gibbon, p 7.

269 Response to options paper, Dr Fitz-Gibbon, pp 7 - 9.

270 The Hon. James Wood QC, Evidence, 29 August 2012, pp 7-8.

271 Submission 48, Australian Lawyers Alliance, pp 15-17; Submission 12, Mr Graeme Coss, p 12.

272 Submission 25, p 8.

> defence has been upheld and a person has been acquitted of murder and found guilty of manslaughter.[273]

5.27 It is noted that there is a 'discount' applicable for a defendant who makes an early offer to plead guilty to manslaughter on the basis of provocation. The circumstances are as follows: a defendant charged with murder makes an early offer to plead guilty to provocation manslaughter, which is rejected by the prosecution. A jury subsequently accepts the partial defence of provocation at trial. The defendant will be sentenced for manslaughter, which itself usually results in lesser penalties than those applicable for murder. In addition, the provocative conduct of the victim is considered as a mitigating factor in respect of sentencing the defendant for the manslaughter offence. Finally, the defendant, having made an early offer to plead guilty, will receive a 25% discount on that sentence.

Committee comment

5.28 The Committee has had regard to the average sentences imposed in NSW for manslaughter convictions and murder convictions (refer to Chapter 2). The Committee notes that there is a difference of opinion as to how abolition of provocation would impact upon sentences imposed on offenders, and it is difficult to determine what the outcome might be. The Committee also notes that it did not receive any information explaining the impact that abolishing provocation has had on sentence lengths in jurisdictions where the partial defence has been abolished.

5.29 Notwithstanding that a number of Inquiry participants felt that the sentencing legislation is sufficiently flexible, the Committee is concerned that simply moving consideration of provocation to sentencing may result in injustices, particularly for victims of prolonged domestic violence who kill their abusers.

5.30 The Committee has considered the issue of appropriate labeling and stigma, and accepts the view put by several Inquiry participants that there is an appropriately different level of stigma and moral opprobrium attached to the offence of 'murder', as opposed to manslaughter.

5.31 The Committee is concerned that if the partial defence of provocation were abolished and that provocative conduct was to be considered only as a sentencing factor, there is a risk that some offenders with arguably a 'lesser' level of moral culpability would be convicted of murder and would consequently carry that stigma with them, even in the event that a 'lenient' sentence were imposed. The Committee acknowledges that some high profile cases have involved this issue in the reverse, in that they have elicited community concern as a result of a conviction for manslaughter, rather than murder.

5.32 The Committee only received minimal comment in relation to the issue of manslaughter on the basis of provocation and 'discounting' (as discussed at 5.24 – 5.27). The double discount may be one explanation for the relatively modest sentences seen in some high profile provocation cases, however, the Committee does not make any further comment in respect of the concern raised, but notes that there are sound policy reasons to offer a discount on sentence to defendants who plead early.

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273 Mr David Giddy, Solicitor, Law Society of NSW, Evidence, 29 August 2012, p 24.

Self-defence

5.33 The terms of reference ask the Committee to consider the adequacy of the defence of self-defence for victims of prolonged domestic and sexual violence. This aspect of the Committee's remit refers to the circumstances of victims of such violence who ultimately react to their circumstances by killing the perpetrators of the violence. The key issue to explore is, what impact would abolishing the partial defence of provocation have on defendants in this situation. In other words, would self-defence provide an adequate avenue for the law to appropriately take the circumstances of prolonged violence into consideration when determining the culpability of the defendant. Inquiry participants presented differing views on this matter, as will be examined in this section.

Overview

5.34 One of the main concerns raised by Inquiry participants in relation to abolishing the partial defence of provocation was the impact it would have on a specific category of defendants who currently may be able to argue provocation. In this category are defendants who themselves are the victims of prolonged domestic or sexual violence at the hands of the deceased and who killed in response to being 'provoked' by that violence.

5.35 In terms of victims of 'domestic violence' homicides the typical scenario involves women killing their husbands or partners. In terms of victims of 'sexual violence' the typical scenarios involve a victim of long term sexual abuse killing the perpetrator of the abuse, or the close relative of a child victim of sexual abuse killing the perpetrator.

5.36 It can be readily understood that these scenarios involve 'provocative' and 'defensive' circumstances. For example, if a defendant acts (kills) in response to prolonged violence against them based on a fear that it will happen again and again, it could be said that the person was provoked into taking action to defend him or herself. The question for the justice system is how to take these circumstances into account when determining the legal culpability of the defendant for the homicide.

5.37 Currently, self-defence, excessive self-defence, substantial impairment of the mind and provocation are possible defences or partial defences that could be run, depending on the precise circumstances. Often more than one defence is run together. This section focuses on self-defence, as required by the terms of reference.

5.38 The Committee acknowledges that both men and women can be, and are, victims of domestic and sexual violence. However, the evidence submitted to this Inquiry in relation to self-defence has almost exclusively focused on female defendants killing males in the context of long term family violence or sexual abuse. For that reason, the Committee has used gendered pronouns throughout this section, but reiterates the acknowledgement above that both sexes can be subjected to family violence and sexual violence and that both may find themselves as defendants in circumstances that warrant consideration of self-defence in this regard.

5.39 Depending on the circumstances, a defendant may be able to argue that she killed the deceased in order to defend herself, or others. Self-defence is a complete defence and if successful the defendant will be acquitted of the murder charge. In order to establish that the defendant acted in self-defence it must be shown that the defendant honestly believed his or

her conduct was necessary to defend him or herself against another and that the actions were a reasonable response in the circumstances as she perceived them. If the former is established, but not the latter (i.e., the response was excessive), the defendant will be convicted of manslaughter based on excessive self-defence. Self-defence and excessive self-defence are explained in detail in Chapter 2.[274]

5.40 Alternatively, a defendant may argue that the partial defence of provocation applies, on the basis that they were provoked by the prolonged violence they had suffered. If the Crown is able to negate self-defence and excessive self-defence, for example, by showing that the defendant did not honestly believe their actions were necessary, the partial defence of provocation may still be a viable option for that defendant. A scenario that was referred to in this context was one where there was no immediate threat. Professor Stubbs described it as follows:

> One of the groups of women who have particular difficulty in running self-defence is the women who kill in what are called non-confrontational circumstances. They have to wait for the offender to be drunk or asleep in order to take action. There will still be a group of women who cannot run self-defence … [Consider] the so-called axe murder case [see *R v R* (1981) 28 SASR 321], the woman who, having learned that her partner had been sexually abusing the children, then he assured her that their family would continue in a similar vein, they would be a happier family and would continue on as they were—which she seems to have taken that the sexual abuse would continue—that case is probably a closer fit with provocation than with self-defence, even with the more expanded understanding of self-defence.[275]

5.41 The concern has been raised that, if provocation were abolished, the only options available to defendants in this situation (absent any evidence of mental impairment) is self-defence (or excessive self-defence) and there are difficulties establishing self-defence in these circumstances. In this regard, such killings have been described to be a result of a 'slow burn' response to the prolonged violence, where the killing was not a response to a threat of *immediate* violence, but rather a somewhat calculated response to the prolonged abuse and the knowledge that it would surely continue.

5.42 However, it was also suggested that the availability of provocation, while providing an alternative to such defendants, may in fact result in unjust outcomes for them, on the basis that there is immense pressure to plead guilty to manslaughter on the basis of provocation in circumstances where there are elements of self-defence. The Bar Association made this point by referring to the cases of *Hill*,[276] *Russell*,[277] and *Duncan*[278] all of which involved a female victim of long-term abuse killing their abusive partner. In each of these cases self-defence was unsuccessfully raised, but provocation was accepted. The Bar Association commented:

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274 Self-defence will also apply to circumstances where a person believed the conduct was necessary: to prevent or terminate the unlawful deprivation of his or her liberty or the liberty of another person.

275 Professor Julie Stubbs, Faculty of Law, University of New South Wales, Evidence, 28 August 2012, p 60.

276 *Regina v Hill* (1980) 3 A Crim R 397.

277 *Regina v Russell* (2006) NSWCCA 722.

278 *Regina v Duncan* (2010) NSWSC 1241.

> The difficulty in raising a defence of self-defence in cases like those described above, is that it is difficult to persuade a jury that the defendant honestly believed that resort to a lethal weapon was necessary, let alone that it was a reasonable response in the circumstances. In the absence of a defence of provocation, it is likely that in each of the cases described above there would have been a conviction for murder.[279]

5.43 This issue reflected concerns of a number of Inquiry participants about charge and plea negotiation, which are discussed further in Chapter 8.

Adequacy of self-defence for victims of prolonged violence

5.44 A range of views were expressed by Inquiry participants about the adequacy of self-defence for this category of defendants if provocation were to be abolished. Some argued that if provocation were abolished more of these women would be convicted of murder; i.e those that could not satisfy the criteria to establish self-defence. Others argued that self-defence could in fact capture some women in this situation (and indeed self-defence is the appropriate defence to run rather than provocation) and that steps could be taken to 'strengthen' self-defence to cover even more of them. Some took a broader perspective and argued that while some women may fall through the gap left if provocation were abolished this was not a sufficient argument to warrant retaining provocation which was so seriously flawed, particularly in light of the 'unjust' outcomes that it has led to for women killed by their partners.

5.45 Several Inquiry participants commented in a general sense that the defence of self-defence was inadequate for 'battered women' who kill their partners. For example, the Women's Domestic Violence Court Advisory Service NSW (which supported the abolition of provocation), argued that self-defence does not adequately account for the experiences of victims of domestic violence:

> WDVCAS NSW is concerned that the statutory definition of self-defence does not adequately account for the experiences of victims of domestic violence to be adduced as evidence in court. WDVCAS NSW strongly asserts that the current framework does not contain within it an inherent recognition of the range of gender, social, cultural and economic factors which can compound a victim's experience of violence and her response to the violence.[280]

5.46 A number of Inquiry participants linked their comments about self-defence specifically to the consequences of abolishing provocation. It was argued that if provocation were abolished 'battered women' defendants who could not successfully rely on self-defence would be convicted of murder and therefore the extenuating circumstances of the prolonged violence they suffered at the hands of the deceased would not be adequately taken into account when determining their culpability for the homicide.

5.47 In this regard the Public Defender's Office, referring to a similar view held by the Bar Association, noted the limitations of self-defence for battered women and commented that these women would be 'without a statutory crime' that appropriately reflected their circumstances if provocation were to be abolished:

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279 Submission 15, NSW Bar Association, p 5.

280 Submission 16, Women's Domestic Violence Court Advocacy Service, p 5.

> The Bar Association submission highlights the plight of women who have been brutalised over lengthy periods by their spouses, directly contributing to their loss of self-control so as to inflict a wound that proved fatal, and in the circumstances were the complete defence of self-defence was not accepted. This situation, where the degree of criminality has generally been regarded as significantly lessened and the relationship history to be a proper basis for mercy, has sometimes been referred to previously as 'Battered Wife's Syndrome' and would be without a statutory crime that properly reflected these features (manslaughter), if provocation is removed.[281]

5.48 It was argued that in circumstances that did not amount to self-defence, or where it would be risky to argue self-defence exclusively, provocation offered an alternative to defendants who might otherwise be convicted of murder.

5.49 Similarly, the NSW Domestic Violence Committee Coalition, which argued that provocation should not be abolished, noted that the main reason for their position is "that we have concerns about the way in which simply abolishing it may operate for women who kill in the context of intimate partner violence but may not, for a range of reasons, be able to avail themselves of the defence of self-defence."[282]

5.50 However, other Inquiry participants argued that the concerns about the adequacy of self-defence are not a sufficient reason to justify retaining provocation. Three main points were made in this regard.

5.51 First, it was argued that, some women who kill in this situation (while noting the very difficult circumstances that led to the killing) are not legitimately acting in self-defence (or provocation) as defined by the law and the appropriate offence is murder rather than manslaughter. In this regard the circumstances of prolonged violence should appropriately be taken into account at sentencing.

5.52 Second, it was argued that some women who kill in this situation *are* doing so in legitimate defence of themselves and therefore should run self-defence, which would lead to an acquittal, rather than provocation. As a corollary to this argument it was suggested that self-defence itself needs to be 'strengthened' or 'adapted' to acknowledge this.

5.53 For example, Dr Kate Fitz-Gibbon noted that there are some cases where provocation has been successfully raised where, arguably, self-defence may have been established:

> An analysis of the use of provocation by victims of prolonged domestic and/or sexual violence reveals that since 1 January 2005 in NSW two female defendants were able to successfully raise provocation and be convicted of the manslaughter, not murder, of their abusive male partners. However, from these cases, the question arises as to whether a conviction of manslaughter by reason of provocation was the appropriate categorisation for these killings, or whether these unique types of homicides should be better catered for under the complete defence of self-defence.[283]

281 Submission 17, Public Defender's Office, p 1.

282 Response to options paper, NSW Domestic Violence Committee Coalition, 8 October 2012, p 2.

283 Submission 18, Dr Kate Fitz-Gibbon, p 4.

5.54 Dr Fitz-Gibbon argued that if provocation were abolished self-defence would need to be reformed and that beyond cases of genuine self-defence factors such as provocation can be taken into account at sentencing:

> In light of this, I would argue that alongside the abolition of provocation, it is essential to ensure that the law of self-defence is adequately structured to capture the genuine cases of killing in response to prolonged domestic and sexual violence. Ensuring this may require future reform to the defence of self-defence. Beyond these genuine cases, factors, that are relevant – but not enough as to raise a complete defence – can be considered at sentencing for murder, where relevant mitigation can be accounted for in the discretionary sentence imposed.[284]

5.55 Dr Fitz-Gibbon concluded that provocation should not be retained as a partial defence to murder to 'capture' the cases that are unable to raise a complete defence to self-defence.[285]

5.56 Third, it was argued that the circumstances of this small category of women is not sufficient to justify retaining the partial defence when it has such unfair outcomes for women who are killed.

5.57 The following discussion focuses on the second point referred to above at 5.52. Specifically, the suggestion to 'strengthening' self-defence to better cater for defendants who kill after prolonged abuse.

'Strengthening' self-defence for 'battered women'

5.58 As noted above, a number of Inquiry participants expressed concern that the defence of self-defence does not adequately take account of the circumstances of women who kill in circumstances of prolonged domestic violence. Some highlighted this as a reason why provocation should not be abolished, while others raised it in a more general sense. It was also raised by some Inquiry participants who nonetheless supported provocation.

5.59 All who raised this issue argued that steps should be taken to strengthen self-defence to acknowledge the circumstances of such women. There were some Inquiry participants who suggested that self-defence (and excessive self-defence) more appropriately reflected the circumstances in which 'battered women' kill. For example, Mr Graeme Coss submitted:

> Given the gendered asymmetry of intimate partner killings, it should be obvious that provocation is not really the appropriate defence for an abused woman to claim.[286]

5.60 Fox, Zheng, Mehta and Bulut similarly submitted:

> Self-defence and excessive self-defence are more appropriate vehicles to give effect to community expectation that victims of prior domestic violence who kill their abusers should receive some leniency under the law. But the legislative provisions dealing with

284 Submission 18, p 4.

285 Submission 18, p 4.

286 Submission 12, p 9.

> self-defence and the partial defence of excessive self-defence need to be amended to properly accommodate the circumstances of domestic violence.[287]

5.61 Ms Helen Campbell, Executive Officer of Women's Legal Services NSW made a similar comment during the public hearings hearings.

> I have spent some time considering whether even self-defence is an appropriate one for the woman who is the victim of the years of domestic violence of such an extreme nature as to be akin to being a prisoner who is being tortured and to have to come to a state of mind where one believes that the only way out is to kill the torturer.[288]

5.62 However, some Inquiry participants also acknowledged that there may be some circumstances where a victim of prolonged violence is more accurately described as having been 'provoked' rather than acting to defend themselves, and therefore if provocation were abolished it may be necessary to ensure that self-defence adequately catered for the situation of battered women. NSW Young Lawyers noted:

> … it is to be noted that there may be cases where a victim of prolonged domestic violence would more accurately fall into the category of someone who has been provoked. For example: where such a victim of prolonged domestic or sexual abuse kills while the perpetrator of the violence (the deceased) is asleep, it may be hard to show that the victim of the domestic violence (the accused) felt the need to 'defend' themselves … rather than to show that they were provoked to the point of a loss of control... In other words: it is conceivable that the removal of the partial defence of provocation would be against the interest of a victim of prolonged domestic or sexual violence who kills their partner. Accordingly, it may be that in the event that the provocation defence is abolished, it might be necessary to consider an addition to the self-defence provisions in order to create a particular test for victims.[289]

5.63 Some Inquiry participants commented generally that strengthening self-defence for battered women should be done through increased use of 'social framework' evidence. For example, Women's Domestic Violence Court Advocacy Service stated in its submission:

> WDVCAS NSW recommends the admission of "social framework evidence", or evidence that places a greater emphasis on the context and consequences of domestic violence.[290]

5.64 The NSW Domestic Violence Committee Coalition recommended that "there must also be reform to the law of self-defence to enable it to be better used by women who kill in the context of intimate partner violence."[291] Dr Jane Wangmann representing the Coalition stated that:

> … social framework evidence is critical to changing the way in which we understand self-defence and any of the other partial defences that might be in operation, whether they are excessive self-defence or defensive homicide and so on. Without that social

287 Submission 40, Amy Fox, Wayne Zheng, Tanvi Mehta and Vanja Bulut, p 10.

288 Ms Helen Campbell, Executive Officer, Women's Legal Services NSW, Evidence, 28 August 2012, p 11.

289 Submission 19, NSW Young Lawyers, p 4.

290 Submission 16, p 6.

291 Response to options paper, NSW Domestic Violence Committee Coalition, 8 October 2012, p 1.

> framework evidence, we do not understand either the position of the victim or the defendant, depending on what circumstance you are talking about.[292]

5.65 Some Inquiry participants specifically recommended that this could be achieved through the introduction of specific provisions similar to those introduced in Victoria to provide for such evidence to be adduced.[293] The admission of 'social framework evidence' is discussed in detail in Chapter 8, but is briefly examined here specifically in relation to self-defence. The Committee was informed by some Inquiry participants that the current statutory framework already provides for such evidence to be adduced (refer to 8.121 – 8.126).

5.66 The introduction of legislative provisions that would allow for 'social framework' evidence to be adduced was the *only* specific suggestion made as to how to 'strengthen' self-defence to better respond to circumstances involving family violence. There was limited commentary on the specifics of these suggestions, beyond suggesting that section 9AH of the *Crimes Act 1958* (Vic) offered a framework to follow. [294]

5.67 Those Inquiry participants who felt concerned that self-defence should be strengthened argued that the problem lay in the fact that the existing self-defence provisions do not adequately accommodate women who kill following family violence. There was an acknowledgement, by some at least, that while the existing law of self-defence and evidentiary provision may allow for social framework evidence to be adduced, in practice there is a heavy reliance on individual players in the system. In this regard, Professor Julie Stubbs submitted:

> The statutory framework for self-defence in NSW should be able to accommodate the circumstances facing many of the women who kill in response to prolonged domestic and or sexual abuse. However, this will depend a good deal on the extent to which the lethal violence is presented in its context, and on the range of evidence that is seen as relevant to determining the objective and subjective elements of self-defence … Without legislative guidance there is no reason why such evidence should not be admissible, but the onus is on individual lawyers and judges to recognise its relevance and significance. This level of expertise cannot be guaranteed.[295]

5.68 This reflects the findings and recommendations of the Australian and NSW Law Reform Commissions in their report, *Family Violence: A National Legal Response*. The Australian Law Reform Commission submitted, referring to the joint law reform commission report, that self-defence is doctrinally capable of accommodating circumstances of family violence and argued against having separate offences to cater for the family violence situation. However, in recognition of the importance of being able to adduce evidence of family violence, the Commission recommended that states and territories adopt provisions along the lines of section 9AH.

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292 Dr Jane Wangmann, Member, NSW Domestic Violence Committee Coalition, Evidence, 28 August 2012, p 4.

293 See, for example, Submission 31, NSW Domestic Violence Committee Coalition; Submission 37, Women's Legal Services NSW, p 5.

294 Note that the NSW Domestic Violence Committee Coalition included a draft self-defence provision developed by academic Rebecca Bradfield in their submission. It is broadly similar to s 9AH in that it provides for contextual evidence, including a prior history of violence, to be adduced. See Submission 31, NSW Domestic Violence Committee Coalition, pp 40-41.

295 Submission 41, p 10.

> [T]he Commissions recommended that state and territory criminal legislation should provide express guidance about the potential relevance of family-violence related evidence in the context of homicide defences, in similar terms to s 9AH of the *Crimes Act 1958* (Vic) (Recommendation 14-5) … [and] endorsed the views of the Victorian Law Reform Commission that such a provision would assist in avoiding unnecessary arguments concerning relevance and ensure the range of factors which may be necessary to represent the reality of the accused's situation are readily identified. [296]

5.69 Mr Graeme Coss was one of several Inquiry participants who argued that adopting social framework provisions, like those in Victoria, would be a positive step in strengthening self-defence for 'battered' defendants:

> … New South Wales [has] a well-established defence of self-defence under section 418 and partial defence under section 421 of excessive self-defence. What we are lacking is a provision such as section 9AH in the Victorian *Crimes Act*, the so-called social framework evidence, which actually gives understanding to the position of abused women who are trying to plead self-defence or, at the very least, a partial defence of excessive self-defence. New South Wales has never had that, so again there are centuries of baggage attached to self-defence … Arguably, if we were to adopt a provision like section 9AH in Victoria, that immediately emphasises to the court—and hopefully to the prosecution as well—that there is an entire world of understanding that needs to be addressed about the experiences of abused women, and New South Wales does not have that … [I]t would be a major plus to adopt that sort of provision…[297]

5.70 Similarly, the NSW Domestic Violence Committee Coalition recommended that:

> The "social framework" s9AH(3) (a)-(f) Crimes Act 1958 (Vic) be inserted into New South Wales legislation to ensure the complexity of the history and dynamics of domestic violence experienced by a defendant be included in evidence where the killing of an intimate partner on a background of domestic violence has been indicated.[298]

5.71 Fox *et al*, who argue in their submission that self-defence and excessive self-defence are better suited to the situation of battered women than provocation, also proposed an amendment to specify that evidence of family violence is admissible if needed to address the deficiencies of these defences. Drawing on the Victorian provision, they stated:

> To address this deficiency in the current formulation of the defence NSW should consider adopting a provision similar to s 9AH of the *Crimes Act 1958* (Vic), which specifically provides that the defence of self-defence can be established in a domestic violence situation even where the threat is not immediate and the response is not proportional to the threat. The provisions also allows the evidence of the general social, economic, cultural and psychological features of domestic violence to be admitted when the jury assess whether the accused believed the act was necessary and whether the conduct of the accused was reasonable.[299]

296 Submission 23, Australian Law Reform Commission, p 3.

297 Mr Graeme Coss, Senior Lecturer, University of Sydney Law School, Evidence, 28 August 2012, p 64.

298 Submission 31, NSW Domestic Violence Committee Coalition, p 2.

299 Submission 40, p 10

5.72 In the context of suggestions that self-defence should be reformed to better allow for circumstances of domestic violence to be taken into account several Inquiry participants, including Women's Legal Services NSW, Wirringa Baiya Aboriginal Women's Legal Centre, Hawkesbury Nepean Community Legal Centre and the Inner City Legal Centre, called for a comprehensive review into NSW homicide defences.[300] This is discussed below at 5.79.

Committee comment

5.73 The Committee notes the significant concerns raised during the Inquiry about the impact that abolishing provocation would have on victims of prolonged domestic or sexual violence who kill the perpetrator of the violence. The concerns focused on the adequacy of self-defence as the most likely defence, other than provocation, that could be raised by such women.

5.74 Some Inquiry participants suggested that self-defence should be 'strengthened' so that it could be more readily relied upon by such women and this is an attractive proposition. The only proposal put forward in this regard is an amendment to explicitly provide for 'social framework' evidence to be adduced, with a number of Inquiry participants suggesting that a provision similar to section 9AH of the *Crimes Act 1958* (Vic) would be appropriate.

5.75 Although many Inquiry participants commented on the need to 'strengthen' the defence of self-defence in the event that provocation was to be abolished, the Committee was not provided with strong arguments from participants on what methods could effectively be used to do so. The Committee is therefore unable to make a firm recommendation about this issue. The Committee is also conscious that the defence of self-defence applies more broadly in the criminal law and therefore any reforms should be considered with the broader impacts in mind. Such considerations are outside the Committee's terms of reference.

5.76 It is noted that even if self-defence could be strengthened, it can only be strengthened so far; there will still be 'battered women' who cannot prove self-defence and who, without being able to rely on provocation, may be convicted of murder. For such women if the partial defence of provocation were abolished, the provocative conduct of the deceased could only be taken into account at sentencing.

5.77 The Committee notes that the adequacy of self-defence is but one of a number of factors that has been taken into account by the Committee in its consideration of whether to abolish or reform the partial defence of provocation. On its own it has not been determinative.

5.78 Suggestions made by some Inquiry participants to introduce provisions similar to those provided by section 9AH of the Victorian *Crimes Act 1958* are discussed further in Chapter 8.

Review by the NSW Law Reform Commission

5.79 A number of Inquiry participants, many from organisations and experience working with victims of family violence, noted the complexity of, and interrelationships between, the law of homicide and defences to homicide, including provocation. This was put forward as a reason

300 Submission 37; Submission 35, Wirringa Baiya Aboriginal Women's Legal Centre; Submission 44, Hawkesbury Nepean Community Legal Centre; Responses to options paper, Inner City Legal Centre, 4 October 2013.

to refer the issue of the partial defence of provocation, and the law of homicide and defences to homicide more broadly, to the Law Reform Commission.[301] For example, Professor Julie Stubbs stated:

> The laws of homicide defences, partial defences, sentencing and the rules of evidence intersect and change in one area is likely to have implications for other areas. The issues before the Committee are complex and reforms in other jurisdictions have taken diverse directions, and the emerging evidence suggests that they have not always achieved their objectives. This reinforces the fact that achieving effective law reform in this area is challenging. Because of that complexity, I have recommended … that the matters be referred to the New South Wales Law Reform Commission for a comprehensive review.[302]

5.80 Wirringa Baiya Aboriginal Women's Legal Centre had a similar view, recommending that the matter be referred the NSW Law Reform Commission due to its complexity and noting that such a referral would provide a better opportunity for small organisations to engage in the law reform process:

> Given the complexity of the issues and the possible options for reform, we submit that a parliamentary inquiry is not sufficient and that the issue with respect to the operation of the partial defence of provocation and the full defence of self-defence should be referred to the NSW Law Reform Commission for a comprehensive review. We argue that such a review should give any interested organisations or individuals sufficient time to contribute to the review.[303]

5.81 The NSW Bar Association's Criminal Law Committee, which was unable to reach a view on whether the partial defence should be abolished, recommended that the Committee refer the matter to the Law Reform Commission because of its expertise in undertaking such reviews:

> The primary position of the Association is that the question of whether or not the partial defence of provocation should be retained is a matter which should be referred to the New South Wales Law Reform Commission. The Law Reform Commission has staff with the research skills and resources to make a detailed examination of the evidence on the operation of the partial defence of provocation in practice.[304]

5.82 In making that recommendation, Mr Stephen Odgers SC, Barrister and Chair of the Criminal Law Committee of the NSW Bar Association, explained that the complexity of this area of the law warranted consideration by the Commission:

> This Committee has raised many issues … all in themselves very large issues … The complexities of this issue require a reference to the Law Reform Commission. I understand that the Commissioner has indicated that there may be some resources issues. We would say that the answer to that is to provide more resources to allow the matter to be properly dealt with. With respect, the complexity of the various matters

301 These included the Law Society of NSW, NSW Bar Association, NSW Council for Civil Liberties, Professor Julie Stubbs, the NSW Domestic Violence Committee Coalition, Wirringa Baiya Aboriginal Women's Legal Centre, Women's Legal Services NSW and the Hawkesbury Nepean Community Legal Centre.

302 Professor Stubbs, Evidence, 28 August 2012, p 52.

303 Submission 35, p 11.

304 Submission 15, p 1.

> … are such that we would strongly recommend this Committee not, even with the best of intentions, make changes to the law in those areas without very, very careful consideration.[305]

5.83 Ms Musgrave told the Committee that the polarised views in submissions to the Inquiry was representative of social and technical complexity in this area of the law:

> There are quite divided opinions about what to do in this space. That is a reflection of the social complexity and the technical complexity of the area. Some years have passed since the Law Reform Commission looked at it. It is an area that is deserving of very thorough examination. There has been a fair bit of comparative work done across Australia … It is interesting that the submissions you have got are very divided, possibly more so than in other inquiries that the Committee is usually involved in … [This is a very heavily contested area] because it is covering such a wide variety of human circumstance.[306]

5.84 The Council for Civil Liberties also expressed the view that the Commission is "… best placed and resourced to conduct a thorough review reflecting the evidence base in this area."[307]

5.85 Dr Jane Wangmann, representing the NSW Domestic Violence Coalition Committee, submitted that the NSW Law Reform Commission is well placed to undertake such a review, having recently worked on a report into family violence:

> [T]he Law Reform Commission currently has some wide experience, having had worked on the family violence inquiry so they can build on that experience. The reason why we have suggested it goes to the Law Reform Commission is, first, we think it is wider than simply provocation and, second, change means that we need to be very careful.[308]

5.86 Professor Stubbs agreed, noting that in addition to the family violence reference, the Commission also has a current reference on sentencing and that both references would greatly assist any review of homicide law:

> … the Law Reform Commission in 2010 completed an inquiry on family violence, which has Chapter 14 looking at defences to homicide and that it currently has a reference on sentencing law … I would expect [those reviews to put it] in a position to have a timely consideration of [homicide]. It already has a great deal of expertise. If it could bring together that expertise from the family violence inquiry and its current review of sentencing, I think that would be enormously valuable.[309]

5.87 Various Inquiry participants indicated 'in principle' support for abolition, or for moves toward abolition, but hesitated to recommend abolition outright in favour of recommending a comprehensive review of the law of homicide and defences to homicide in NSW by the Law

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305 Mr Odgers SC, Evidence, 29 August 2012, p 36.

306 Ms Penny Musgrave, Director of the Criminal Law Review, Department of Attorney General and Justice, Evidence, 29 August 2012, p 10.

307 Submission 32, NSW Council for Civil Liberties Inc., p 3.

308 Dr Wangmann, Tuesday 28 August 2012, p 7.

309 Professor Stubbs, Evidence, 28 August 2012, p 58.

Reform Commission. For example, Ms Helen Campbell, Executive Officer of Women's Legal Services NSW, told the Committee:

> [W]e are … recommending … a phased approach to the abolition of the partial defence of provocation. We would like to start with an immediate abolition of the defence of provocation in particular circumstances [including changing relationships, indicating an intention or attempting to leave, sexual jealousy and non-violent homosexual advances] … Significantly, there also needs to be a more comprehensive inquiry into all of the defences to homicide in New South Wales ... There was one here in 1997 but we note that in their more recent submission to this inquiry the New South Wales Law Reform Commission is saying that they no longer have the same views as they had in their 1997 report. Therefore, this is a good time to ask them to go back and do again a comprehensive and holistic inquiry into all the defences to homicide.[310]

5.88 The NSW Domestic Violence Coalition Committee also recommended some interim reforms to the partial defence pending a broad review, noting the impact abolition would have on women defendants in particular:

> [W]hile the DVCC ultimately recommends that there be a comprehensive review of the law of homicide conducted by NSWLRC, we consider that there are a number of amendments that can be made to the partial defence of provocation to address the gendered narrative raised by men and to better suit the circumstances of women who may not satisfy self defence to excessive self defence; the partial defence of provocation should not be available: in circumstances where one of the parties to the relationship seeks to end or change the nature of the relationship; [and] in circumstances involving a non-violent sexual advance.[311]

5.89 Two other stakeholders, the Hawkesbury Nepean Community Legal Centre and the Outer West Domestic Violence Network, also recommended that a comprehensive review of the law of homicide and homicide defences be undertaken by the NSW Law Reform Commission, but nonetheless indicated support for moves toward abolition of the partial defence.[312]

5.90 Women's Legal Services NSW, in recommending the NSW Law Reform Commission 'undertake a comprehensive and holistic review of full and partial homicide defences in NSW … [that is] cognisant of the gender bias in the law and include, but not be limited to examining all aspects of the process,'[313] included a list of issues which they argued should be considered in such a review:

- Police investigations stage.
- Prosecutorial guidelines to help determine the circumstances in which charges should be laid.
- Transparent processes in plea-bargaining including guidelines for when manslaughter rather than murder should be the charge.
- Full and partial defences.
- Reviewing Bench Books and jury directions.

310 Ms Campbell, Evidence, 28 August 2012, p 10.

311 Submission 31, p 4.

312 Submission 44, p 6; Submission 45, Outer West Domestic Violence Network, pp 3-4.

313 Submission 37, p 5.

- Sentencing, including whether the circumstances that may lead to provocation being raised as a defence initially are more properly considered as potential mitigating factors in sentencing (with the view of not transferring the problems inherent in the partial defence of provocation to a sentencing stage).
- Ensuring the admissibility of social framework evidence which can inform the jury and judges about the dynamics and impact of family violence, as has been developed in Victoria, and considering the role of experienced domestic violence workers and other experts in providing such evidence.
- Considering admissibility of other evidence.
- Ongoing education of police, law students, legal practitioners, the judiciary and the wider community about the general nature and dynamics of relationships affected by family violence, including the possible consequences of separation from the abuser and how this should be considered in the context of self-defence.
- Implementation of recommendations 14.1-14.5 in the joint Australian Law Reform and NSW Law Reform Commissions' *Family Violence - A National Legal Response*.[314]

5.91 The Chair of the NSW Law Reform Commission, the Honourable James Wood AO QC, commented that the Commission could undertake a review of the law of provocation, but that it is currently at full capacity reviewing other areas of the law:

> I would be more than happy to do it, but we have at the moment two challenging references, one dealing with mental health and the other dealing with sentencing law generally. I would very much welcome the opportunity to look again at provocation but at the moment we would have to work out our priorities. I do not know that we could give it the first priority because I know there is a pressing demand to have the sentencing laws reviewed … So there is a lot of work to be done [on those references] yet.[315]

Committee comment

5.92 As noted by many participants in this Inquiry, this area of the law is very complex. The Committee agrees that there may be some advantage in having the partial defence of provocation considered within the context of a broad review of homicide and homicide defences.

5.93 The Committee notes, however, that it has been specifically established by the Legislative Council to inquire into and report on the partial defence of provocation. We have been charged with the responsibility of considering the partial defence and responding to the concerns of the community as elected representatives of that community.

5.94 The Committee, while acknowledging the expertise of the NSW Law Reform Commission, considers that there is significant research and knowledge that can be drawn upon, including

314 Submission 37, pp 5-6.

315 The Committee notes however that it has been specifically established by the Legislative Council to inquire into and report on the partial defence of provocation. We have been charged with the responsibility of considering the partial defence and responding to the concerns of the community as elected representatives of that community. The Hon. Wood OA QC, Evidence, 29 August 2012, p 4.

reviews of the law of provocation conducted by law reform commissions in other jurisdictions, academic work, and submissions and hearing evidence given to this Inquiry, to inform the Committee in making recommendations to improve this area of the law. In reaching this conclusion, the Committee has also had regard to the comments of Mr Wood, indicating that any reference of the issue to the Commission would likely take some time before even commencing.

5.95 For these reasons, the Committee is of the view that immediate reform of this specific area of the law (section 23 of the *Crimes Act 1900*) is required, and accordingly the Committee is the appropriate body to make recommendations to the Government in this regard.

Committee conclusion

5.96 The Committee has considered all the concerns raised by Inquiry participants about the operation of the partial defence of provocation, including that it is gender-biased, anachronistic and archaic, promotes a culture of blaming the victim and concerns about the complexity of the legal test.

5.97 The Committee has also had regard to the risks arising if the partial defence were abolished. In particular, this includes the potential impacts on defendants, particularly those who might be described as having killed in circumstances that, in the eyes of the community, are more appropriately described as warranting a label of 'manslaughter' as opposed to 'murder'. The Committee is conscious of the stigma attached to the label of 'murder' and agrees with those Inquiry participants who say that it should be reserved for the most serious killings, which may not always be reflected if provocation were abolished.

5.98 The Committee is also concerned that these defendants may receive much heavier penalties than they might otherwise have received had they relied on the partial defence of provocation.

5.99 The Committee is also concerned about the adequacy of the defence of self-defence for victims of prolonged domestic and sexual violence if provocation were to be abolished.

5.100 However, as noted at 5.73 – 5.78, Inquiry participants did not provide sufficient evidence to enable the Committee to make a clear recommendation on how self-defence could be reformed to accommodate these defendants.

5.101 The Committee accepts that the practical application of the law of provocation occasionally results in outcomes that are inappropriate and undesirable to many in the community. The Committee also accepts that there is a case for abolition, as discussed throughout Chapters 4 and 5, however, the Committee was unable to reach a consensus on abolition of the partial defence of provocation. This reflects the concerns of a number of Committee members that the potential risks to specific types of defendants, including those who kill after prolonged abuse and who are of particular concern to the Committee, are too high.

5.102 Notwithstanding this, the Committee is unanimous in considering that the existing law of provocation requires urgent reform to address some of the concerns.

5.103 Consequently, the Committee has concluded that the partial defence should be retained, but amended to enable it to respond to some of the concerns raised by Inquiry participants. A

number of reform options were the subject of consultation with stakeholders. These options, and the Committee's preferred model, are discussed in the next part of this report.

Chapter 6 Reform options

The Committee sought comment on a number of different provocation reform models in its Options Paper. This Chapter considers responses to the first three models discussed in the Options Paper. The first two can be described as 'conduct based' reform models. These models focused on restricting, limiting or excluding the types of conduct which can be relied upon as the basis for a defence of provocation. The third model (referred to in the Options Paper as the Wood model) primarily focused on reforming the legal test of provocation.

'Positive restriction' model

6.1 The first model proposed restricting the defence of provocation to matters where the provocative conduct seeking to be relied upon by the accused as the basis for the defence is violent criminal conduct.

6.2 The model proposed that the violent criminal behaviour be an element of the provocation, and need not occur immediately prior to the incident resulting in the death of the deceased. The model also proposed that the act resulting in death may be triggered by some other conduct including, for example, insults or verbal abuse, which could be considered in the context of prior criminal assaults upon the defendant.

6.3 A variation of this model, also explored in the Options Paper, proposed expanding the provocative conduct that could form the basis of the defence to include 'acts which constitute domestic or family violence'. The variation was intended to broaden the availability of the defence to circumstances where the provocative conduct comprising 'domestic or family violence' may not be 'violent' or 'criminal' but more subtle. Such conduct may include, for example, emotional, psychological, and economic abuse.

Inquiry participant views on the 'positive restriction' model

6.4 There was limited support for this model among Inquiry participants, with concerns raised by a significant number of stakeholders about various aspects of the model. High among those concerns were that the model overlaps with self-defence and excessive self-defence; that it fails to recognise the true nature of abusive relationships and the terms are ambiguous; and that its policy basis is flawed.

6.5 The Gay and Lesbian Rights Lobby were the strongest supporters of the model, and it received some, albeit qualified, support from Dr Kate Fitz-Gibbon and the Homicide Victims Support Group.

6.6 The Gay and Lesbian Rights Lobby focused their submission and responses during public hearings and to the Options Paper on the issue of the use of provocation in 'homosexual advance' cases.

6.7 The Lobby's support for the 'positive restriction' model was largely based on its view that the model avoided the complications associated with other models, notably the 'exclusionary model' (discussed at 6.36 – 6.125), which it considered gave rise to "procedural and pragmatic

difficulties" associated with a potentially long and unworkable list of exclusions; and problems associated with defining "non-violent sexual advance:"

> The GLRL … believes [the positive restriction model] addresses the two key concerns [referred to at 6.7 and] is stronger than the exclusionary model, in the sense that any conduct excluded under any proposed exclusionary model would most likely be excluded under this model too. By providing a set of positive restrictions to the applicability of the defence, the issue of omissions to the list of exclusions does not arise. Similarly, the ambiguity in what actually characterises a "non-violent sexual advance" is addressed by clearly articulating in the positive sense those violent criminal acts which may make available the defence of provocation.[316]

6.8 The Gay and Lesbian Rights Lobby suggested that the positive restriction model could be improved if the phrase 'violent criminal act' were defined:

> We note that the draft presented in Appendix A of the Options Paper does not actually define what a "violent criminal act" is, and suggest this could be made more explicit. For example, a violent criminal act could be taken to mean an indictable offence, or a strictly indictable offence, under the *Crimes Act 1900* (NSW).[317]

6.9 Dr Fitz-Gibbon, who strongly advocated for abolition of provocation, submitted that the positive restriction model had some merit and was the most viable of all the models in the Options Paper. Dr Fitz-Gibbon also noted however that it too was problematic, because it would not prevent a *Middendorp* type scenario.

6.10 In *Middendorp*, the defendant Luke Middendorp was convicted of 'defensive homicide' in Victoria after stabbing his partner Jade Bownds four times in the back following a verbal altercation during which he claimed she had threatened him with a knife.[318] There was an uncontested history of domestic violence between the couple, including a current domestic violence order in place protecting the deceased from the defendant. Dr Fitz-Gibbon submitted in relation to the 'positive restriction' model that:

> [The positive restriction model] would appear at face value to have merit and for me is certainly the more viable of the proposed options which retain provocation using a restriction or exclusionary model. However, when looking at recent homicide cases in Victoria it is apparent that at least one unmeritorious case, that of Luke Middendorp would fit within the confines of this proposed defence. Given this it is certainly questionable how many other unanticipated cases would also fit within this reformed version of provocation … It is hoped that this is the type of case that the Committee would be looking to exclude from a reformed version of the provocation defence – an exclusion that would not be achieved under the … [p]ositive restriction model or [its variation].[319]

6.11 Ms Martha Jabour, representing the Homicide Victims Support Group, commented that a model restricting conduct to which the partial defence could apply was "worth exploring", but

316 Answers to questions taken on notice, Supplementary questions on notice and Response to options paper, 28 August 2012, NSW Gay and Lesbian Rights Lobby, p 4.

317 Answers to questions taken on notice, Supplementary questions on notice and Response to options paper, 28 August 2012, NSW Gay and Lesbian Rights Lobby, p 4.

318 *R v Middendorp* (2010) VSC 147.

319 Response to options paper, Dr Kate Fitz-Gibbon, pp 10-11.

maintained the Group's strong preference for abolition.[320] The Homicide Victims Support Group recommended that, in the event that abolition were not supported, a positive restriction model, alongside other reforms, might be a way of limiting the scope of the partial defence:

> [If provocation were retained] … HVSG would ask the Committee to recommend that the onus of proof in applying the provocation defence be placed on the defendant and that it should only be used in specific and serious circumstances such as violent criminal conduct that need not occur immediately prior the incident resulting in the death of the deceased.[321]

6.12 However, the positive restriction model was rejected by the majority of Inquiry participants, with a number of them raising concerns about the overlap with self-defence and excessive self-defence.

6.13 Professor Julie Stubbs was critical of the model on this ground, questioning what distinguishes a 'violent criminal act' from the circumstances faced by a person arguing self-defence or excessive self-defence. In this context, Professor Stubbs expressed concern that the model may subvert the operation of self-defence:

> [The model] overlaps with self-defence (or excessive self-defence) and may undermine the use of self-defence (or excessive self-defence) by battered women, including by being seen to suggest that [provocation] is *the* appropriate (partial) defence for domestic violence related homicides.[322]

6.14 This concern was shared by the Women's Electoral Lobby[323] and the NSW Domestic Violence Committee Coalition.[324]

6.15 Mr Graeme Coss, responding to a question about the validity of a positive restriction model based on 'physical criminal conduct' during public hearings, also noted the overlap with self-defence:

> … it would depend on what the physical conduct was because if the physical conduct essentially was an assault, then that immediately in my mind would start raising the idea of self-defence. So why would we not be going down the self-defence path as opposed to provocation?[325]

6.16 Mr Coss subsequently provided a more detailed response to a question on notice as to the viability of a positive restriction model. In doing so, he attempted to understand the rationale behind the model as offering an alternative to defendants who kill in circumstances where the facts may not quite establish self-defence and, drawing on the discussion during public hearings, referred to the 1978 English case of *Camplin*.

320 Ms Martha Jabour, Executive Director, Homicide Victims Support Group, Evidence, 29 August 2012, p 63.

321 Response to options paper, Ms Martha Jabour, Executive Director, Homicide Victims Support Group, p 3.

322 Response to options paper, Professor Julie Stubbs, p 2.

323 Submission 10a, Women's Electoral Lobby, p 1.

324 Response to options paper, NSW Domestic Violence Committee Coalition, p 2.

325 Mr Graeme Coss, Evidence, 28 August 2012, p 65.

6.17 The facts in *Camplin*[326] were described by Mr Coss as follows:

> In *Camplin*, the accused was fifteen years old when, against his resistance, he was buggered and then laughed at by the middle-aged deceased. The accused allegedly lost control and split his tormentor's skull with a chapati pan.[327]

6.18 The jury convicted Camplin of murder, after the trial judge, following the law of the time, directed the jury to disregard the defendant's age or characteristics. However, the verdict was subsequently overturned by the Court of Criminal Appeal on the basis that the 'ordinary person' was a person of the same age and maturity of the defendant. It substituted the original conviction of murder with a verdict of manslaughter, based on provocation. The Director of Public Prosecutions subsequently appealed to the House of Lords, which dismissed the appeal.[328] During public hearings, there was some discussion about the *Camplin* case as one where self-defence was not an option.[329]

6.19 Mr Coss submitted that the facts in *Camplin* would meet the threshold of a 'positive restriction' model but (while maintaining his preference for abolition of provocation) submitted they could also establish self-defence:

> I do not believe it is necessary to retain the partial defence of provocation so as to offer a 'defence' to a Camplin … cogent arguments can be made in favour of self-defence. And that is so whether the lethal response takes place during the rape or immediately after it. If the lethal response is significantly delayed, then I have made suggestions as to how that too might still fall under the 'protection' of self-defence-although obviously such amendments would need carefully considered drafting to be successful. If however my arguments are not seen as persuasive, then I agree with the suggestion forwarded by Committee members during the Hearing that provocation be restricted solely to 'violent criminal behaviour'. And I recommend expressly excluding all non-violent behaviour.[330]

6.20 Like the Gay and Lesbian Rights Lobby, Mr Coss also suggested that if a positive restriction model were recommended by the Committee consideration ought to be given to whether the phrase 'violent criminal behaviour' should be defined:

> The Committee might want to consider the drafting of a definition of 'violent criminal behaviour' - not an exhaustive definition, which would be impossible, but one which merely gives examples. Such a definition can provide useful guidance.[331]

6.21 Another criticism of the model made by Inquiry participants was that it failed to recognise the dynamics and nature of relationships involving family and domestic violence. This concern was premised on the assumption that there are forms of family and domestic violence which are not criminal offences, and therefore are difficult to define. Such conduct could include psychological, emotional abuse and economic abuse.

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326 *Director of Public Prosecutions v Camplin* (1978) AC 705.

327 Answers to questions taken on notice during evidence, 28 August 2012, Mr Graeme Coss, p 1.

328 *Director of Public Prosecutions v Camplin* (1978) AC 705.

329 See comments by The Hon Adam Searle MLC and Mr Graeme Coss, Evidence, 28 August 2012, p 66.

330 Answers to questions taken on notice during evidence, 28 August 2012, Mr Coss, p 4.

331 Answers to questions taken on notice during evidence, 28 August 2012, Mr Coss, p 3.

6.22 The Honourable James Wood AO QC was asked his views on restricting provocation to circumstances where the provocative conduct is limited to serious or violent criminal activity, with part of the rationale being to enable an appropriate response to domestic homicides. In response, Mr Wood noted concerns that such a model may not adequately capture the reality of family violence:

> I understand the force of that submission but the problem I think is that it does not really address the true abusive domestic relationship, which is a combination of many things including belittling the partner, continuing taunts, criticism, accompanied by a degree of physical violence. If you just confine it to serious violent threats and so on and eliminate what is the reality of an abusive domestic relationship with all its other components of taunts, abuse, preventing people from having sufficient means to look after themselves, money pinching, all of those things—[332]

6.23 This concern was shared by the NSW Bar Association, the Public Defender's Office, the NSW Domestic Violence Committee Coalition, Women's Legal Services NSW and the Hawkesbury Nepean Community Legal Centre. All of these organisations argued that the proposal did not adequately capture some matters that, in their view, should be able to give rise to the partial defence. Women's Legal Services NSW explained:

> Behaviour of a 'violent and criminal nature' also seems to imply that there must be physical violence involved. An exclusive focus on physical violence ignores the diverse and complex nature of domestic violence. Domestic violence is not limited to acts of physical violence, and includes emotional, psychological and financial abuse, harassment, intimidation, damage to property and isolating the victim from their family and friends.[333]

6.24 In identical terms, the Bar Association and Public Defender's Office commented that they would oppose a model limiting the availability of the defence to 'circumstances of serious or violent criminal acts or domestic and family violence' because it would have "the unintended consequence of disadvantaging women and vulnerable accused."[334] They went on to provide a list of 'provocative conduct' which would not be covered under the model:

> (i) constant verbal abuse, belittling and humiliation of the accused over the course of a relationship;
>
> (ii) cruel and persistent non-violent harassment of a person on the basis of gender, sexuality, race, intellectual disability;
>
> (iii) telling the accused that the person had sexually assaulted the accused's daughter in the past (where, unknown to the accused, this had not in fact occurred);

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332 The Hon James Wood AO QC, Evidence, 29 August 2012, p 6.

333 Answers to questions taken on notice, Supplementary questions on notice and Response to options paper, 28 August 2012, Ms Liz Snell, Law Reform and Policy Co-ordinator, Women's Legal Services NSW, p 5.

334 Answers to questions taken on notice, Supplementary questions on notice and Response to options paper, Mr Coles QC, pp 4-5; Response to options paper, Ms Dina Yehia SC, Public Defender, Public Defenders Office, pp 2-3.

(iv) making deliberately false allegations that the accused had sexually abused children;

(v) telling the accused that the person had sexual intercourse with children for the purpose of obtaining sexual gratification.[335]

6.25 The NSW Domestic Violence Committee Coalition similarly stated:

> Many women experience intimate partner violence that would not fall within the term, 'violent criminal act', or indeed the current definition of 'domestic violence' under NSW legislation. As a result, it may be possible that some women who kill in the context of their own victimisation may fall through the gap of self-defence as well as a provision drafted [along a positive restriction model].[336]

6.26 The Director of Public Prosecutions was asked his view about whether a model is restricting the availability of provocation to matters where the provocative act or acts were serious violent criminal acts or acts constituting domestic or family violence would be an improvement on the current law. Mr Babb rejected the model because its policy basis was, in his view, flawed:

> The rationale behind [the] "positive restriction" model is flawed in my view on the basis that it promotes the concept that violent criminal conduct can be met with reprisal by violent criminal conduct.[337]

Committee comment

6.27 The Committee has had regard to the comments made by Inquiry participant in relation to the 'positive restriction' model and agrees with the concerns of the majority of respondents.

6.28 In particular, the Committee is concerned about the potential for overlap with, and undermining of, the defence of self-defence.

6.29 The Committee is also concerned that the terms on which the model relies, that is 'violent criminal acts' and 'acts which constitute domestic and family violence', are difficult to define.

6.30 The phrase 'violent criminal act' could encompass a range of conduct, from assaults and sexual assaults (of varying gravity), to robbery. It could potentially be as broad as to cover behaviours such as harassment, intimidation, and stalking. The inclusion of the term 'criminal' in the proposal necessarily means that any legislative provision would need to explicitly refer to the relevant criminal offence(s) that are captured by the phrase. The Committee considers that doing this would be complex. Consideration of how such a provision would apply in practice demonstrates this. For example, the Committee heard from a number of Inquiry participants that behaviors such as a touch on the leg or pinch on the buttock should not be

335 Answers to questions taken on notice, Supplementary questions on notice and Response to options paper, Mr Coles QC, p 4; Response to options paper, Ms Dina Yehia SC, Public Defender, Public Defenders Office, p 2.

336 Response to options paper, NSW Domestic Violence Committee Coalition, p 2. See also Submission 44a, Hawkesbury Nepean Community Legal Centre, p 4.

337 Response to options paper, Mr Lloyd Babb SC, Director of Public Prosecutions, Office of the Director of Public Prosecutions, p 2.

able to found a defence of provocation. However, such conduct is defined in law as a minor (common) assault. Common assault (s 61 *Crimes Act 1900*) covers a broad range of behaviour including, for example, pushing or shoving a person,[338] a punch[339] or slap/rap to the head,[340] or pointing a gun to someone's head.[341] Clearly, at least some of these behaviours might be considered 'appropriate' bases on which the partial defence may be able to be founded. Therefore although the seriousness or gravity of each act varies, it is likely that the offence charged in respect of each would (or at least could) be the same.

6.31 The gravity of the offences which are intended to be captured is not only relevant to assaults. Similar issues arise in respect of sexual offences for example. Some sexual offences which the phrase 'violent criminal act' arguably should capture (for example, indecent assault) are commonly dealt with as summary offences and finalised in the local court. Summary offences are generally considered 'less serious'. 'Common assault' is also dealt with summarily in most instances, as is the offence of stalking/intimidation under domestic violence legislation.

6.32 The Committee considered whether it would be possible to limit or define classes of offences with reference to how matters are dealt with using the Tables in Schedule 1 of the *Criminal Procedure Act 1986*. However, this method still raises issues as some behaviours which should be included in the definition (for example, indecent and common assaults), are currently dealt with summarily.[342]

6.33 These concerns illustrate the complexity of defining a phrase such as 'violent criminal act'. It is unclear how 'violent criminal act' should be defined if it is the intention to cover at least some of the behaviours which would likely appear in common scenarios in which provocation is raised (for example, during a pub fight involving pushing, shoving, punching; but not in others (for example, in the context of a non-violent homosexual advances). Similar concerns arise with respect to the phrase 'acts which constitute domestic and family violence'.

6.34 The Committee has other concerns about the model, including questions about what evidence of either "violent criminal acts' or 'acts which constitute family violence' is required to be adduced by defendants in order to allow them to run the defence of provocation. In particular, the Committee is concerned that if an 'allegation' of such conduct is adequate, this may assist victims of long term abuse who have not reported, but it will also leave open a window of opportunity for 'less meritorious' claims by defendants who have killed leaving no surviving witness, which is common in domestic homicides. The Committee is concerned that such a model would allow a male defendant charged with killing his wife after subjecting her to years of abuse to argue that the relationship was characterised by mutual violence for a long period. However, if some 'real evidence' of the 'violent criminal acts' or 'acts which constitute family violence' is required (for example, police or doctors reports), this may disadvantage victims of long term abuse who have not reported or disclosed the abuse.

338 See, for example, *R v McLeay* (2009) NSWLC 29.

339 See, for example, *DPP -v- Schaeffer* (2010) NSWLC 29.

340 See, for example, *R v Timbreza* (2012) NSWDC 142.

341 *Attorney General's Application under s37 of the Crimes (Sentencing Procedure) Act 1999 No 2 of 2001* [2002] NSWCCA 515 per Spigelman CJ at 38.

342 The Committee notes that a review of the Tables in Schedule 1 of the *Criminal Procedure Act 1986* is currently underway.

6.35 In light of the various issues raised regarding the model, the Committee does not recommend restricting provocation by way of positively defining the conduct to which it applies.

'Exclusionary conduct' model

6.36 The 'exclusionary conduct' model proposes explicitly excluding a range of particular types of conduct from forming the basis of a defence of provocation. Inquiry participants identified a number of behaviors which, they argued, should be expressly excluded as being able to form, on their own, the basis of a provocation defence, including:

- non-violent sexual (including homosexual) advances;
- anything said or done by the deceased to indicate a change in the nature of the relationship, including infidelity of the victim which is discovered by the defendant, confessions of infidelity by the victim, taunts by the victim about the accused's sexual inadequacy and/or threats by the victim to leave a relationship with the accused, or actual separation; and
- words alone.

6.37 As discussed in Chapter 3, provocation models exist in other jurisdictions that have exclusionary conduct provisions. Such jurisdictions include England and Wales, the Northern Territory and the Australian Capital Territory.[343]

6.38 Some Inquiry participants suggested in their original submissions, and/or in response to the Options Paper, that an exclusionary model offered a way forward.[344] Some of these participants favoured outright abolition of provocation or a comprehensive review of homicide laws, among other things, but all suggested that, in the event their preference was not recommended, one or more of the conducts listed above should be statutorily excluded from being capable of forming the basis of a provocation defence.

6.39 The number of original submissions suggesting that an exclusionary model was worthy of consideration was the impetus for its inclusion in the Options Paper.

General views on the 'exclusionary conduct' model

6.40 There were mixed responses to the option of reforming the partial defence of provocation by specifically excluding certain behaviours or conduct from forming the basis of the defence. Inquiry participants who supported some form of exclusionary model, even if not their 'preferred' option, included the Director of Public Prosecutions, Professor Julie Stubbs, Hawkesbury Nepean Community Legal Centre, NSW Domestic Violence Committee

343 In the NT and ACT, non-violent sexual advances are insufficient, on their own, to sustain a provocation defence. Refer to Chapter 3 (3.6 – 3.8 and 3.21 – 3.23).

344 Submission 25, Homicide Victims Support Group; Submission 27, Sydney Beat Project; Submission 29, Associate Prof Thomas Crofts and Dr Arlie Loughnan; Submission 31, NSW Domestic Violence Committee Coalition; Submission 35, Wirringa Baiya Aboriginal Women's Legal Service; Submission 37, Women's Legal Services NSW; Submission 35, Wirringa Baiya Aboriginal Women's Legal Service; Submission 43, ACON; Submission 44, Hawkesbury Nepean Community Legal Centre.

Coalition, Inner City Legal Centre, NSW Bar Association, Law Society of NSW, Public Defender's Office and the NSW Council for Civil Liberties.

6.41 Some of these stakeholders, while indicting some support, also raised concerns about whether such a model would in practice work, with many citing the 2012 English case of *R v Clinton, Parker and Evans*[345] in this regard. Indeed for some Inquiry participants, the *Clinton* case provided a clear reason why such a model should not be adopted. A summary of the *Clinton* case is set out at 6.88 – 6.100, along with stakeholder responses to the exclusionary model which drew on the *Clinton* experience.

Responses to excluding specific conduct

6.42 Many Inquiry participants were supportive of exclusionary provisions and the Committee received substantial feedback from stakeholders relating to several specific proposed exclusions, which are discussed below.

6.43 In particular, the Committee received a significant number of submissions recommending that non-violent sexual advances be excluded from being able to form the basis of the partial defence of provocation. There were some Inquiry participants who made submissions to the Inquiry in respect of this issue alone, and a number of those focused entirely on homosexual advances.

6.44 There was also strong support from Inquiry participants for exclusions based on anything said or done by the victim in the exercise of personal autonomy about their lives and relationships.

6.45 In addition, some Inquiry participants argued that provocation should not be able to be based upon 'words alone', but this suggestion was criticised by others on the basis that it may have unexpected and undesirable consequences, particularly for defendants who kill after prolonged abuse.

6.46 A small number of stakeholders suggested that the legislation should restrict the availability of the defence so that it was not available to defendants who acted while under self-induced intoxication. This issue is discussed in the context of the third model, which provided the context in which it was raised (at 6.146 – 6.147).

Non-violent sexual advances

6.47 Inquiry participant feedback on the proposal to exclude non-violent sexual advances focused almost exclusively on addressing concerns arising from non-violent *homosexual* advances. This reflects the context in which non-violent sexual advances arise in manslaughter on the basis of provocation. Co-Convenor of the Gay and Lesbian Rights Lobby, Dr Justin Koonin, explained that in their view non-violent sexual advances should never sustain a provocation defence, but that in practice it only ever occurred in relation to non-violent sexual advances made by one male toward another:

> [A] non-violent sexual advance should never by itself form the basis for a partial defence against murder, regardless of the sex or gender or sexuality of the people involved. In practice, the defence has only ever applied in the case of a non-violent

345 *R v Clinton, Parker and Evans* (2012) EWCA Crim 2.

> advance from a male to another male … [I]t has been applied 11 times between 1990 and 2004. It has never been applied to an advance from a male to a female or from a female to a male, and nor should it be. What we are seeking is an end to the differential treatment to gay males in the legal system which has otherwise delivered inequality.[346]

6.48 A number of Inquiry participants commenting in relation to the proposed exclusion of non-violent sexual advances argued that allowing manslaughter on the basis of provocation to be based on such advances, specifically non-violent homosexual advances, validated discrimination toward the gay community and sent an inappropriate message in modern Australian society. For example, the Anti-Discrimination Board of NSW submitted:

> Now, some fifteen years later [after *R v Green*], this so called 'gay panic' defence should no longer be available to those who cannot control their anger and violence. Homophobia has no place in our society and excessive violence perpetrated as a result of such beliefs must no longer be excused or attributed to 'human frailty'.[347]

6.49 The Inner City Legal Centre had a similar view, stating that "the gay panic defence is problematic because it legitimises murder that is informed by bigotry."[348]

6.50 ACON,[349] Australia's largest community-based gay, lesbian, bisexual and transgender health and HIV/AIDS organisation, submitted that "HAD [Homosexual Advance Defence] is a gross overreach of the law that justifies homophobia…"[350]

6.51 Mr Alastair Lawrie was one of several individuals who made a submission to the Inquiry arguing that the availability of provocation in relation to non-violent sexual advances was inappropriate. He argued:

> In contemporary Australia, a man who receives an unwanted sexual advance should exercise the same level of self-control as we expect of any other person. To have a separate legal standard apply to these cases is homophobic because it implies there is something so abhorrent about a non-violent sexual advance by a man to another man that a violent reaction is almost to be expected, and at least somewhat excused. This does not reflect the reality of contemporary Australia, where, with the exception of marriage, gay men enjoy the same rights as other men, and are accepted as equals by the majority of society.[351]

6.52 Although the concerns above related to the use of provocation in relation to non-violent homosexual advances, most of those stakeholders recommended change that would prevent reliance on non-violent sexual advances generally.

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346 Dr Justin Koonin, Co-Convenor, NSW Gay and Lesbian Rights Lobby, Evidence, 28 August 2012, p 26.

347 Submission 6, Anti-Discrimination Board of NSW, p 2.

348 Submission 38, Inner City Legal Centre, p 5. See also Submission 27, Sydney Beat Project; Submission 28, Ms Clover Moore.

349 Formerly known as the 'AIDS Council of NSW'.

350 Submission 43, p 4.

351 Submission 21, Mr Alastair Lawrie, p 4. See also: Submission 2, Mr Peter Butler; Submission 3 Name suppressed.

6.53 Some Inquiry participants recommended excluding non-violent sexual advances (and other specific exclusions) from the partial defence as an interim measure while the area of homicide was reviewed comprehensively by the NSW Law Reform Commission. These included the NSW Domestic Violence Coalition Committee, Wirringa Baiya Aboriginal Women's Legal Centre, Hawkesbury Nepean Community Legal Centre.[352]

6.54 Women's Legal Services NSW, while also recommending comprehensive review by the NSW Law Reform Commission, argued that non-violent *homosexual* advances should be excluded, along with other specified conducts, in the interim period.[353]

6.55 The Director of Public Prosecutions supported abolition of the partial defence, but submitted that if provocation were retained, it should be reformed to expressly exclude certain conduct, including non-violent sexual advances.[354]

6.56 There was some limited discussion about the interpretation of the phrase 'non-violent sexual advance'. It was accepted by the Gay and Lesbian Rights Lobby that there may be some ambiguity about when a sexual advance is 'non-violent':

> The delineation between what constitutes a 'non-violent sexual advance' and what does not is not necessarily clear … a grab on the arm, or on the buttock, may constitute a common assault. It could, therefore, be argued that such an advance is no longer non-violent.[355]

6.57 A similar point was made by Ms Helen Campbell, representing Women's Legal Services NSW. She agreed that some cases involving what might be described as comprising a 'non-violent sexual advance' could actually constitute a common law assault. [356]

6.58 Many Inquiry participants were supportive of reforms to explicitly exclude non-violent sexual advances from forming the basis of a provocation defence. Although nearly all of these stakeholders referred to non-sexual advances in a gender neutral way, it was clear from the feedback that the concern was to prevent reliance on the partial defence of provocation by male defendants who respond to 'provocative' conduct comprising a non-violent *homosexual* advance.

Anything said or done to change the nature of the relationship

6.59 The model proposed that there be an exclusion for 'anything said or done by the deceased to indicate a change in the nature of the relationship' including:

- infidelity of the victim which is discovered by the defendant;
- confessions of infidelity by the victim;

352 Submission 31, Submission 35, Submission 44.

353 Submission 37, p 5.

354 Answers to questions taken on notice and Supplementary questions on notice, Mr Lloyd Babb SC, Director of Public Prosecutions, Office of the Director of Public Prosecutions (NSW) p 1.

355 Answers to questions taken on notice, Supplementary questions on notice and Response to options paper, NSW Gay and Lesbian Rights Lobby, pp 3-4.

356 Ms Helen Campbell, Executive Officer, Women's Legal Services NSW, Evidence, 28 August 2012, p 11.

- taunts by the victim about the defendant's sexual inadequacy; and/or
- threats by the victim to leave a relationship with the accused, or actual separation.

6.60 The Committee received substantial feedback on various elements of this proposal, which draws on the Queensland model. Most Inquiry participants were, in principle, supportive of the idea that the partial defence of provocation should not be available to defendant's who kill in response to another person making choices about their lives, including exercising their sexual and personal autonomy. However, there were some Inquiry participants who were concerned about the capacity of all legislative amendment of this nature to achieve the desired outcome.

6.61 Overwhelmingly Inquiry participants commented that it was completely inappropriate that a partial defence should be available to defendants who kill in circumstances where the 'provocation' involved an intimate partner exercising their right to choose how they live their lives. For example, Women's Legal Centre NSW argued:

> The continued use of the partial defence of provocation where killings have occurred in the context of sexual infidelity or a change in relationship condones and sanctions violence against women. In effect women are being killed for exercising their right to end a relationship.[357]

6.62 The NSW Domestic Violence Coalition Committee, Wirringa Baiya Aboriginal Women's Legal Centre, Hawkesbury Nepean Community Legal Centre and Women's Legal Services NSW were all supportive of a recommendation along the lines of the one proposed, as part of a phased approach to abolition and pending comprehensive review by the NSW Law Reform Commission.[358]

6.63 The Director of Public Prosecutions noted that "[Exclusionary models] would protect against potential prejudices by judges and jurors and would also send a message that the accused's response was contrary to the rights of the deceased and explicitly, unacceptable and inexcusable."[359]

6.64 However, he also noted that, while an exclusionary approach would safeguard against prejudice and send a message about personal autonomy and rights, it would call into question the very basis of the defence as a 'concession to human frailty'. Referring to cases where the deceased was leaving or attempting to leave an intimate sexual relationship, suspected discovered or confessed infidelity, or making a non-violent sexual (including homosexual) advance, the Office of the Director of Public Prosecutions submitted:

> It appears to us that excluding the above types of behaviour would bring into question the whole purpose of the defence of provocation, as the defence is said to be about human frailty and the above circumstances are the circumstances where the defence tends to manifest itself most often.[360]

357 Submission 37, p 3.

358 See Submission 31, Submission 35, Submission 37, Submission 44.

359 Submission 34, Office of the Director of Public Prosecutions, p 3.

360 Submission 34, p 3.

6.65 In response to the Options Paper the Director of Public Prosecutions indicated his support for an exclusion where 'the conduct of the deceased constituted sexual infidelity or a threat to end or change the nature of a relationship.'[361]

6.66 The NSW Domestic Violence Coalition Committee were concerned that the phrase 'sexual infidelity' not be used in any legislative amendment. Instead, they preferred the broader language of 'changing the nature of the relationship':

> The Coalition prefers to adopt the Queensland approach which refers to the 'changing nature of a relationship', rather than sexual infidelity. We note that the experience in England and Wales has been preoccupied by what amounts to 'sexual infidelity', rather than the substantive reasons underpinning its exclusion as a ground for provocation.[362]

6.67 The Queensland approach, referred to by the NSW Domestic Violence Coalition Committee, is contained in the partial defence of 'Killing on provocation', which is provided by section 304 of the *Criminal Code 1899* (Qld):

> (1) 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.
>
> (2) Subsection (1) does not apply if the sudden provocation is based on words alone, other than in circumstances of a most extreme and exceptional character.
>
> (3) Also, subsection (1) does not apply, other than in circumstances of a most extreme and exceptional character, if—
>
> (a) a domestic relationship exists between 2 persons; and
>
> (b) one person unlawfully kills the other person (the deceased); and
>
> (c) the sudden provocation is based on anything done by the deceased or anything the person believes the deceased has done—
>
> (i) to end the relationship; or
> (ii) to change the nature of the relationship; or
> (ii) to indicate in any way that the relationship may, should or will end, or that there may, should or will be a change to the nature of the relationship.
>
> (4) For subsection (3)(a), despite the Domestic and Family Violence Protection Act 2012, section 18(6), a domestic relationship includes a relationship in which 2 persons date or dated each other on a number of occasions.
>
> (5) Subsection (3)(c)(i) applies even if the relationship has ended before the sudden provocation and killing happens.

361 Response to options paper, Mr Lloyd Babb SC, Director of Public Prosecutions, Office of the Director of Public Prosecutions, p 1.

362 Response to options paper, NSW Domestic Violence Coalition Committee, p 3.

> (6) For proof of circumstances of a most extreme and exceptional character mentioned in subsection (2) or (3) regard may be had to any history of violence that is relevant in all the circumstances.
>
> (7) On a charge of murder, it is for the defence to prove that the person charged is, under this section, liable to be convicted of manslaughter only.
>
> (8) When 2 or more persons unlawfully kill another, the fact that 1 of the persons is, under this section, guilty of manslaughter only does not affect the question whether the unlawful killing amounted to murder in the case of the other person or persons.

6.68 A number of other Inquiry participants referred to the Queensland approach, suggesting that it offered a way forward in terms of limiting provocation appropriately by restricting its use in certain relationship contexts. For example, Associate Professor Thomas Crofts submitted that the Queensland model offered an appropriate starting point because it restricts the availability of provocation in 'classic' circumstances involving men 'losing their self-control' in response to women exercising their equality rights, while at the same time opening it up to the circumstances in which women can argue the partial defence:

> [The Queensland model] is not a bad starting point … [It] provides that words or acts which indicate an ending or a changing of the relationship or which are taken to indicate an end or change cannot be used as a basis for provocation. The Queensland model clearly excludes that. Two things have happened with the Queensland model. They have narrowed the cases in which men can claim provocation in traditional situations and widened the situations in which women can argue provocation.[363]

6.69 The Director of Public Prosecutions, Mr Lloyd Babb SC, referred to Queensland when he told the Committee that if provocation were to be retained there were options to 'rein it in':

> We know that other States—for example, Queensland—have limited the type of relationships that can relate to provocation as well. Certainly if you were going to maintain the defence there would be possibilities for reining it in.[364]

6.70 Dr Wangmann, speaking for the NSW Domestic Violence Coalition Committee, agreed that the broad approach of the Queensland provision offered a preferable way to limit the availability of provocation in intimate homicides, as opposed to the English model which emphasizes a sexual infidelity (and a loss of self-control):

> My impression of the English amendments is that they are incredibly complex and they are focused on sexual infidelity rather than the Queensland approach, which is about changing the nature of the relationship, which I think is a broader view of the actions that have been deemed as provocative by women … The English approach, which I tend not to favour, has emphasised loss of control unduly in its approach … You could also investigate further and maybe ask some people in Queensland about the way in which their provision operates, where they limit the extent to which you can rely on things when it is a homicide that operates between two intimate partners. They have attempted to confine that. They are not particularly talking about women

363 Associate Prof Thomas Crofts, Evidence, 29 August 2012, p 76.

364 Mr Babb SC, Evidence, 29 August 2012, p 48.

> and so on but saying that if the homicide takes place within this type of relationship then we need to limit things.[365]

6.71 There was one Inquiry participant who was concerned that an exclusion of this nature was not appropriate. Family Voice Australia argued that it reflected an unrealistic view of marriage and relationships and would have the undesirable effect of removing access to the partial defence in some cases which may be deserving of a 'concession to human frailty':

> [The exclusionary model] seems to imply the extraordinary proposition that no one - including husbands and wives - has any right to expect fidelity or lifelong commitment in a relationship; and that marital betrayal or desertion, even without notice and announced in a way that is viciously cruel or taunting, should never give rise to any reaction other than a cool response of 'I wish you the best in your freely chosen autonomous decision about your personal and sexual life.' It seems perverse to continue to allow the defence for all sudden provocations other than those that touch on intimate relationships including marriage. This is unrealistic and reflects an extreme, ideological, individualistic view of marriage and of personal sexual relationships.[366]

6.72 In conclusion, there was widespread support among Inquiry participants for an exclusion that would make the partial defence unavailable to defendants who kill in response to 'provocation' involving an intimate partner making a personal and autonomous choice about how they live their life. Although there were some concerns expressed about the form of words used to legislate such exclusions, there was a consensus that certain things should never be considered sufficient bases for the defence. These included sexual infidelity, indicating that a relationship should end or actually ending the relationship and taunts about the defendant's sexual inadequacy.

Words alone

6.73 The Committee received comment from a number of stakeholders suggesting that 'words alone' should never be sufficient grounds to argue provocation. However, there were several Inquiry participants who were concerned about the potential impact on defendants who killed after prolonged abuse, where the 'words' formed part of a broader context in which they were used to exercise control and power.

6.74 Assistant Commissioner Mark Murdoch, representing the NSW Police Force, was of the view that words alone should never be able to sustain a partial defence of provocation:

> [W]ords alone should not amount to provocation—no matter the intensity, veracity or malice of the words … Words alone should not be able to constitute or raise the prospect of partial defence being applied; it needs to be something more than that.[367]

6.75 The Homicide Victim's Support Group were of a similar view, arguing that if provocation were retained, insulting words or gestures should never be able to sustain the partial defence:

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365 Dr Jane Wangmann, Member, NSW Domestic Violence Coalition Committee, Evidence, 28 August 2012, pp 3 and 6.

366 Submission 9a, Family Voice Australia, p 2. See also Submission 9, Family Voice Australia.

367 Mr Mark Murdoch, Assistant Commissioner, NSW Police Force, Evidence, 28 August 2012, p 22.

> If the provocation defence is retained … [it] should only be used in specific and serious circumstances. [It should be able to be] … used for circumstances that involve insulting words or gestures.[368]

6.76 Mr Phil Cleary also argued that "insulting words cannot [should not] be a defence for provocation."[369] He submitted that the history of intimate partner homicide involving female victims demonstrates the inappropriateness of allowing provocation defences to run in cases where the 'provocative' conduct is 'words alone':

> If you look at the history of the killing of women, in just about every case of the killing of a woman by an intimate partner it revolves around the notion that the woman might leave the relationship or is expressing a desire to leave the relationship. So when people say it is about words and a person responds and says, "No, it is never about words", I say, "Yes, it is about words." It is words like "I want to leave you", it is words like "I am not happy with the way you are treating me". I will bet that is what was at the bottom of *R v Singh*—that Manpreet Singh would have been saying to her man, "I am not happy with you and I am thinking of leaving you." So the kind of words that would be applicable to men in wife-killing cases can be defined I think, and that would be part of the process.[370]

6.77 There is no doubt that the law allows for provocation based on words alone. Associate Professor Thomas Crofts and Dr Arlie Loughnan explained that the common law has established that the reference in section 23 to 'conduct' does capture 'words alone':

> In *Lees*, the court held that Section 23 reference to 'conduct' is wide enough to include words, as well as physical acts and gestures. The court concluded that the words in brackets are words of inclusion not addition. Thus as the common law currently stands, words can constitute provocation and this part of the defence is not confined to words constituting an insult – words could be violent, distressing or threatening but not form an insult.[371]

6.78 However, because the threshold required to meet the ordinary person test is high it is extremely difficult for 'provocative conduct' comprising 'mere words' to qualify. As explained by the Chief Judge at Common Law, Wood J in *Lees*:

> [P]rovocation is [not] confined, in the case of words, to matters of insult strictly understood. Other kinds of words may qualify as provocative conduct, such as words of threatened violence, blackmail, extortion and so on. They are equally capable of provoking strong feelings, and they may or may not be accompanied by physical acts. They do, however, need to be of a sufficient violent, offensive, or otherwise aggravating character to be *capable* of satisfying the third element [the ordinary person test] of provocation outlined above. Mere words of abuse or insult would not normally qualify.[372]

368 Submission 25, Homicide Victim's Support Group, p 12.

369 Mr Phil Cleary, Evidence, 29 August 2012, p 69.

370 Mr Cleary, Evidence, 29 August 2012, p 70.

371 Submission 29, p 17.

372 *R v Lees* (1999) NSWCCA 301 per Wood CJ at CL at 37, cited in Judicial Commission of NSW, *Partial Defences to Murder in NSW*, pp 33-34.

6.79 Crofts and Loughnan submitted that while it is 'appropriate' that provocation be available in limited cases where the conduct relied upon is 'words alone,' there should be an express exclusion. Noting the common law decision in *Lees*, they submitted that more could be done to ensure that 'words alone' could not be relied upon:

> It is appropriate that words alone should only rarely be held sufficient to amount to provocation … We think this limitation could be stronger and advocate amendment of the defence to include an express prohibition on 'words alone' as a basis for provocation.[373]

6.80 However, there were concerns raised about the impact of an exclusion that removed the availability of the partial defence based on provocative conduct comprising 'words alone'.

6.81 As noted above, although there is no specific legislative exclusion, successful provocation manslaughter based on 'words alone' is rare. This observation is borne out by the available data. As discussed (at 2.69), there was only one case of manslaughter on the basis of provocation in NSW between 1 January 1990 to 21 September 2004 where the provocative conduct comprised of words alone. However, Women's Legal Services NSW referred to Fitz-Gibbon's doctoral thesis which suggests that since 2005, NSW has seen the rate of successful manslaughter on the basis of provocation matters based on 'words alone' increase:

> Fitz-Gibbon, in examining successful provocation defences in NSW from January 2005 to December 2010, notes that of the 15 cases identified, *five were on the basis of words alone*: 3 involving the killing of female intimate partners by their male partner or ex-partner; l a male victim who was in a sexual relationship with the defendant's estranged wife; l a female victim, killed by a male close acquaintance she was living with.[374]

6.82 In this context, Women's Legal Services expressed concern about increasing reliance on 'words alone' provocation and notes that excluding 'words alone' from founding provocation fails to recognise the nature of family violence and the impact that words can have in exercising power and control:

> WLS NSW is concerned by the apparent increasingly successful use of the partial defence of provocation based on words alone. We note the disproportionate use of this defence in situations of intimate partner homicide where the male kills his female intimate partner. However, we also note that words can be used as part of exercising power and control in a violent relationship. We therefore submit this highlights the need for and importance of social framework evidence to determine the context and intention of the claim for the partial defence of provocation on "words alone" and when the partial defence of provocation should be precluded on the basis of "words alone."[375]

6.83 Other Inquiry participants were also cautious about the proposal to exclude words alone on the basis that it may detrimentally impact on 'battered women' defendants. For example, Professor Julie Stubbs commented in relation to proposals to exclude 'words alone' as provocation as follows:

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373 Submission 29, p 17.

374 Submission 37, p 20.

375 Submission 37, p 20.

> [We] need to think very, very carefully about that … absent a good understanding of domestic violence, about what a woman faces, could be construed simply on some occasions as words only … We very readily understand physical violence and its consequences. The broader literature, including some of the empirical work with battered women, suggests that sometimes the violence that they suffer is not physical violence but very, very deeply felt emotional abuse and harassment that can be incredibly damaging. We need to think carefully how we might craft an exclusionary provision. [To legislate so that] 'words only' [could] never constitute provocation … may have an unintended consequence of excluding some other forms of violence that do not necessarily manifest themselves in physical ways.[376]

6.84 The Committee was referred to a specific example by Mr John McKenzie, representing the Aboriginal Legal Service. In that case, the availability of provocation based on 'words alone' offered an appropriate alternative to the defendant charged with murder in circumstances where self-defence was unlikely to be successful:

> [A]n Aboriginal woman … was charged with the murder of the de facto spouse of her mother. She was an adult daughter of the mother. That mother had been the subject of very serious and ongoing physical violence from that male de facto partner. The adult daughter happened to be visiting one time—well aware of the background of what had happened in the past—and was in the kitchen during a verbal argument between the mother and her de facto. There were words given by the de facto. There was not any real physical interaction such as would even bring the self-defence consideration into play. But the adult daughter, being very well aware of the very long history of domestic violence perpetrated upon her own mother, picked up a kitchen knife which was to hand and stabbed and fatally wounded the de facto.
>
> We were able to achieve an outcome of manslaughter in relation to that Aboriginal woman, even though she was charged with murder and stood trial for murder, only on the basis of the availability of the provocation provision as it now stands.[377]

6.85 The matter referred to by Mr McKenzie demonstrates the importance of context, which was the focus of the arguments put by Women's Legal Services NSW and Professor Stubbs.

6.86 There was support from some Inquiry participants for an exclusion that would require that the provocative conduct seeking to be relied upon be more than 'mere words', notwithstanding that there are few successful cases of manslaughter on the basis of provocation based on 'words alone'. However, some Inquiry participants raised concerns that such an exclusion may have undesirable and unintended consequences, particularly for defendants who kill after long term abuse and where the 'mere words' are a part of a cycle of violence and control used by the perpetrator of the abuse.

The *Clinton* case experience and its impact on exclusionary conduct models

6.87 As noted above at 6.41, some stakeholders who were *supportive* of exclusionary models raised concerns about how such models would in practice work, citing the 2012 English case of

376 Professor Stubbs, Evidence, 28 August 2012, p 55.

377 Mr John McKenzie, Chief Legal Officer, Aboriginal Legal Service, Evidence, 28 August 2012, pp 15-16.

R v Clinton, Parker and Evans.[378] Some of these stakeholders suggested that exclusionary provisions would need to provide that the exclusionary conduct could only be restricted when it was the *only* provocation, reflecting the decision in *Clinton*. Indeed for some Inquiry participants, the *Clinton* case provided a clear reason why such a model should not be adopted. The *Clinton* case is discussed below.

The Clinton case

6.88 *Clinton* occurred after the partial defence of provocation was replaced by the partial defence of 'loss of self-control' in the United Kingdom in 2009 (discussed in Chapter 3 at 3.47 – 3.53). To establish that defence, there is a requirement that there is a 'qualifying trigger', which is defined in the legislation. The legislation also expressly excludes certain types of conduct as being able to constitute a 'qualifying trigger', including 'facts or things said that constitute sexual infidelity'.

6.89 The facts in *Clinton* were as follows. In November 2010, Jon Jacques Clinton, 47, killed his 33 year old wife, Dawn, by bashing her with a wooden baton, strangling her with a belt and then tying a rope around the her neck, causing her to die from head injury and asphyxia. The couple had lived together for 16 years and had two school aged children.

6.90 The couple had been experiencing financial pressures, both had been prescribed anti-depressant medication and the children gave evidence of some tensions between the couple, including a 'trial separation' two weeks prior to the killing when Mrs Clinton moved out of the family home.

6.91 It was the evidence of the defendant that on the night of the killing, the victim returned to the family home. He had previously looked at the victim's Facebook page, which confirmed that his wife had "been unfaithful to him." When he confronted her with Facebook page on his laptop, she responded spitefully, saying that she had been intimate with five different men and 'it should have been like that every day of the week.' She went on to taunt the defendant, going into detail about the sexual activity between her and other partners, which hurt the defendant.

6.92 Shortly after the exchange, the defendant alleged that his wife found a website on his laptop that he had previously viewed. It detailed suicide. He "heard her snigger" before she told him 'you haven't got the … bollocks.' The defendant described 'the walls and the ceiling just [seeming] to close in. She was talking but he could not hear what she was saying. He could hear noise, like the distant sea. He wanted everything stop. He wanted everything to slow down.' The defendant testified that he could see his wife speaking but couldn't hear what she was saying and wanted everything to stop. He reached out and grabbed the piece of wood. The subsequent attack killed her. Afterwards the defendant removed most of her clothes, put her body in a number of different positions, took photos of her body and then sent them via text messages to the man with whom she was having a relationship. The appellant was found by police in the loft with a noose around his neck.

6.93 The trial judge withdrew the partial defence of 'loss of self-control' from the jury on the basis that the wife's remarks relating to her sexual infidelity had to be disregarded in accordance with the legislation, and consequently, there was insufficient evidence to raise an issue with

378 *R v Clinton, Parker and Evans* (2012) EWCA Crim 2.

respect to the defence on which a properly directed jury could reasonably conclude that the defence might apply. Clinton was convicted of his wife's murder and subsequently appealed.

6.94 The appeal judges considered that the trial judge's decision on this issue, based on her understanding of the legislation and without the benefit of argument from counsel, was 'unassailable' and 'courageous', but misdirected. Their reasons for this form the basis of the criticisms leveled at exclusionary conduct models by a number of Inquiry participants. These criticisms essentially focus on the point that the excluded conduct cannot be isolated from its context. This is discussed below.

6.95 The appeal judges first noted that sexual infidelity may produce a loss of control in men (and women) and stated that the statutory exclusion "cannot and does not erase the fact that on occasions [the two] are linked…"[379] They went on to state that:

> Indeed on one view if [the law] did not recognise the existence of this link, the policy decision expressly to exclude sexual infidelity as a qualifying trigger would be unnecessary.[380]

6.96 The Court concluded that, notwithstanding the express exclusionary provision, events cannot be isolated from their context and to attempt to do so is both unrealistic and prone to result in injustice:

> Our approach has … been influenced by *the simple reality that in relation to the day to day working of the criminal justice system events cannot be isolated from their context.*
>
> It may not be unduly burdensome to compartmentalise sexual infidelity where it is the only element relied on in support of a qualifying trigger, and, having compartmentalised it in this way, to disregard it. Whether this is so or not, the legislation imposes that exclusionary obligation on the court. *However, to seek to compartmentalise sexual infidelity and exclude it when it is integral to the facts as a whole is not only much more difficult, but is unrealistic and carries with it the potential for injustice.* In the examples we have given earlier in this judgment, we do not see how any sensible evaluation of the gravity of the circumstances or their impact on the defendant could be made if the jury, having, in accordance with the legislation, heard the evidence, were then to be directed to excise from their evaluation of the qualifying trigger the matters said to constitute sexual infidelity, and to put them into distinct compartments to be disregarded. *In our judgment, where sexual infidelity is integral to and forms an essential part of the context in which to make a just evaluation whether a qualifying trigger properly falls within the ambit of subsections 55(3) and (4), the prohibition in section 55(6)(c) does not operate to exclude it*… We have proceeded on the assumption that legislation is not enacted with the intent or purpose that the criminal justice system should operate so as to create injustice [emphasis added].[381]

6.97 The appellate judges drew on the Parliamentary debates to support their argument, which includes statements from Members that clearly show that the intention is to restrict the operation of the partial defence so that it that it is not available where the *only* basis for it is sexual infidelity:

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379 *R v Clinton, Parker and Evans* (2012) EWCA Crim 2, per Lord Chief Justice Henriques at 36.

380 *R v Clinton, Parker and Evans* (2012) EWCA Crim 2, per Lord Chief Justice Henriques at 36.

381 *R v Clinton, Parker and Evans* (2012) EWCA Crim 2, per Lord Chief Justice Henriques at 39.

> … Claire Ward, speaking for the Government, said that the Government did not think it appropriate in this day and age "for a man to be able to say that he killed his wife as a result of sexual infidelity … if other factors come into play, the court will of course have an opportunity to consider them, but it will not be able to make the decision *exclusively* on the ground of sexual infidelity". Answering a later question, she observed that the court would not be able to "take into account a set of circumstances in which the defendant killed someone in an attempt to punish … them or carry out some form of revenge *purely* as a result of sexual infidelity". Later still she said "We are simply saying that sexual infidelity *in itself* cannot and should not be … a defence for murder". Yet later she spoke of how important it was in relation to sexual infidelity "to set out the position precisely and uncompromisingly – namely that sexual infidelity is not the kind of thing done that is ever *sufficient on its own* to found a successful plea of loss of control". Later she observed: "If something else is relied on as the qualifying trigger, any sexual infidelity that *forms part of the background* can be considered, but it cannot be the trigger."[382]

6.98 The Court went on to discuss how, in its view, the legislation should be interpreted to explain how the exclusionary provision dealing with sexual infidelity ought to operate in practice. The result is that unless sexual infidelity is the only qualifying trigger it may be considered by a jury as part of a broader context:

> [I]f the only potential qualifying trigger is sexual infidelity, effect must be given to the legislation. There will then be no qualifying trigger, and the judge must act accordingly. The more problematic situations will arise when the defendant relies on an admissible trigger (or triggers) for which sexual infidelity is said to provide an appropriate context (as explained in this judgment) for evaluating whether the trigger relied on is a qualifying trigger for the purposes of subsection 55(3) and (4). When this situation arises the jury should be directed:
>
> a) as to the statutory ingredients required of the qualifying trigger or triggers;
> b) as to the statutory prohibition against sexual infidelity on its own constituting a qualifying trigger;
> c) as to the features identified by the defence (or which are apparent to the trial judge) which are said to constitute a permissible trigger or triggers;
> d) that, if these are rejected by the jury, in accordance with (b) above sexual infidelity must then be disregarded;
> e) that if, however, an admissible trigger may be present, the evidence relating to sexual infidelity arises for consideration as part of the context in which to evaluate that trigger and whether the statutory ingredients identified in (a) above may be established.[383]

6.99 The Court also considered other problems with the exclusionary provision of 'sexual infidelity' in the new partial defence, including that it is undefined.[384]

6.100 Following the Court of Appeal's judgment, Clinton was ordered to a re-trial in early September 2012, pleading guilty to murder on the opening day.

382 *R v Clinton, Parker and Evans* (2012) EWCA Crim 2, per Lord Chief Justice Henriques at 42.

383 *R v Clinton, Parker and Evans* (2012) EWCA Crim 2, per Lord Chief Justice Henriques at 489.

384 *R v Clinton, Parker and Evans* (2012) EWCA Crim 2, per Lord Chief Justice Henriques at 17-19.

Inquiry participants' views

6.101 Some Inquiry participants urged caution in considering models to reform provocation that sought to exclude specific behaviours, citing the UK experience in *Clinton*. For example, Professor Julia Tolmie commented that notwithstanding explicit legislative statements the law is subject to interpretation and encouraged the Committee to consider *Clinton*:

> I think one case that the Committee would be well served to read as a cautionary tale is *R v Clinton, Parker, Evans*: a recent House of Lords decision this year. England tried to modify its provocation defence … and the House of Lords unpicked it in that particular case … Sexual infidelity was removed as a qualifying trigger … The House of Lords said it was ridiculous and it could not apply it. It effectively read it in such a way that it is a dead letter. I think it is a cautionary case to read and to think about what judges can do with these provisions if they are not very carefully crafted.[385]

6.102 Similarly, Dr Kate Fitz-Gibbon commented that the Court of Appeal's decision in *Clinton* means that the partial defence in the UK will continue to be available in 'crimes of passion' type cases, which were meant to be excluded from the scope of the reformed defence:

> In making this judgment, the Court of Appeal has likely ensured that the sexual infidelity provocation within the new partial defence of loss of control will be largely ineffective in minimising the use of the defence by men who kill a female intimate partner in the context of sexual infidelity. As described by one media commentator at the time, the decision 'restores the defence in so-called crime of passion cases' … and as such raises the fear that in practice this new partial defence will do little to overcome the problems associated with the now abolished provocation defence.[386]

6.103 Dr Fitz-Gibbon went further, arguing that the result in *Clinton* demonstrates the dangers of trying to restrict provocation through exclusionary provisions:

> *Clinton* … provides … a clear example of the ineffectiveness of exclusionary based reform models, and as such, a warning to the Committee to steer clear of implementing this model of reform in NSW. Whilst it is appreciated that the model proposed by the Committee in the Consultation on Reform Options Paper differs to the reforms implemented in England and Wales, the lessons learnt from this largely unsuccessful attempt at reform are still of high relevance to the NSW context.[387]

6.104 Dr Fitz-Gibbon summarised her views by referring to the vulnerabilities of exclusionary models, and highlighted concerns that it may inadvertently open up the defence to unmeritorious cases:

> [The] exclusionary approach to reform is particularly vulnerable to manipulation. This is particularly so given that the model proposed in Appendix C [of the Options Paper] clarifies that several of these exclusions can be considered in the 'most extreme and exceptional' contexts - an inclusion that would be likely to open the defence up to the possibility of wider use and abuse.[388]

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385 Professor Tolmie, Evidence, 21 September 2012, p 14.

386 Response to options paper, Dr Kate Fitz-Gibbon, p 12.

387 Response to options paper, Dr Kate Fitz-Gibbon, pp 12-13.

388 Response to options paper, Dr Kate Fitz-Gibbon, p 14.

6.105 Mr Graeme Coss who, like Dr Fitz-Gibbon, recommended abolition of the partial defence, submitted that exclusionary models were problematic. He also drew on the experience in *Clinton* to demonstrate his point.

> Excluding certain types of conduct might at first appear attractive. But I reiterate the caution voiced by the VLRC [Victorian Law Reform Commission], that attempting to exclude certain conduct deemed problematic is unlikely to succeed because provocative conduct will be redefined in a way that allows it to fall within the scope of the defence … cogent evidence of the failure of the exclusionary model is provided by the English Court of Appeal decision in *Clinton*.[389]

6.106 The Committee notes that many Inquiry participants who supported excluding certain forms of conduct did not refer to the *Clinton* experience.[390] However, some of those who did suggested that there was scope to legislatively exclude certain conduct from forming the basis of a provocation defence and navigate the issues arising in *Clinton* by providing that the partial defence would not be available to defendants who sought to rely on excluded conduct which was the *only* provocative conduct seeking to be relied upon. However, if a defendant sought to rely on excluded conduct which "is integral to and forms an essential part of the context,"[391] which may include other provocative conduct, the partial defence could still be run. This reflects the outcome in *Clinton*, and the legislative exclusions provided by statutes in the Northern Territory and the ACT dealing with non-violent sexual advances.[392]

6.107 Indeed, a number of Inquiry participants supported an exclusion that would mean that non-violent sexual advances were not, on their own, capable of founding a defence of provocation – the same exclusion as already applies in the Northern Territory and the ACT. Some, including Associate Professor Crofts and Dr Loughnan, the Inner City Legal Centre and NSW Young Lawyers, referred to the legislative frameworks in the ACT and Northern Territory.

6.108 The ACT provision, which is almost identical to the Northern Territory provision, provides:

> However, conduct of the deceased consisting of a non-violent sexual advance (or advances) towards the accused—
>
> (a) is taken not to be sufficient, by itself, to be conduct to which subsection (2) (b) [the provocative conduct] applies; but
> (b) may be taken into account together with other conduct of the deceased in deciding whether there has been an act or omission to which subsection (2) applies.[393]

6.109 For example, Associate Professor Crofts and Dr Loughnan suggested that guidance could be drawn from the exclusionary provisions in the ACT:

> We support the inclusion of a clause that provides that conduct consisting of non-violent sexual advances, is not, by itself, a sufficient basis for a defence of

389 Response to options paper, Mr Graeme Coss, p 3.

390 See, for example, Inner City Legal Centre, ACON, Anti-Discrimination Board of NSW, Women's Legal Services NSW, Hawkesbury Nepean Community Legal Centre.

391 *R v Clinton, Parker and Evans* (2012) EWCA Crim 2, per Lord Chief Justice Henriques at 39 (refer to 6.97).

392 See, for example, NSW Bar Association, Public Defender's Office, Gay and Lesbian Rights Lobby.

393 *Crimes Act 1900* (ACT) s 13(3). See also *Criminal Code Act* (NT) s 158(5).

> provocation. This reform has been implemented in the ACT and the Northern Territory.[394]

6.110 NSW Young Lawyers suggested that if the Committee did not recommend the abolition of provocation it consider the ACT reforms:

> [I]f the provocation defence is retained, the Committee supports consideration of the legislative exclusion of non-violent sexual advance adopted in the Australian Capital Territory.[395]

6.111 Similarly the Inner City Legal Centre, while recommending abolition, made an alternative recommendation that non-violent sexual advances be excluded from founding provocation if abolition were not accepted. They also suggested referring to the reforms in the ACT and Northern Territory.[396]

6.112 The NSW Bar Association and the Public Defender's Office indicated that they would not oppose amendments of this nature, although did not refer to the reforms in the ACT and Northern Territory specifically. Both considered that non-violent sexual advances and infidelity and sexual jealousy could be statutorily excluded from being capable of comprising the partial defence where the advance or infidelity or sexual jealousy was the *only* provocative conduct. Ms Dina Yehia SC for the Public Defender's Office submitted:

> The Public Defenders accept that the partial defence should not be available in cases where the only suggested provocative conduct was sexual jealousy/ infidelity or a non-violent sexual advance … We are of the view that the partial defence be retained largely in its current form with an amendment to provide an exclusionary provision where the only provocative conduct relied upon is sexual jealousy/infidelity or non-violent sexual advance.[397]

6.113 The Bar Association had the same position, commenting that the legislation would need to incorporate the word 'only'. This reflects an acknowledgement of the limitations of exclusionary provisions demonstrated by *Clinton*:

> [T]he [Bar] Association would not oppose amendments to s 23 designed to make it clear that the partial defence is not available in cases where the only suggested provocative conduct was infidelity or a non-violent sexual advance or something similar … Any such amendment would have to use the word "only" in order to make it clear that such conduct would not have to be disregarded where it was combined with provocative conduct of a different kind.[398]

394 Submission 29, p 18.

395 Submission 19, NSW Young Lawyers, p 3.

396 Submission 38, p 2.

397 Response to options paper, Ms Dina Yehia SC, Public Defender's Office, pp 2 and 4.

398 Answers to questions taken on notice, Supplementary questions on notice and Response to options paper, Mr Coles QC, p 8.

Committee comment

6.114 Exclusionary models received support among Inquiry participants across various organisations and sectors, including the legal groups and community organisations working with family violence. The Committee has taken into account that stakeholders who supported a form of exclusionary model were from different ends of the legal spectrum. In particular, the Committee notes the support from the Bar Association, the Public Defender's Office and the Office of the Director of Public Prosecutions in this regard. The Committee is persuaded that there is merit in models to reform the partial defence that exclude certain types of specified conduct.

6.115 The Committee notes strong support from Inquiry participants for the exclusion of conduct comprising a non-violent sexual advance, sexual infidelity and sexual jealousy. The Committee is of the view that a defendant who is 'provoked' by and subsequently kills a person exercising their rights to make decisions about their lives and relationships, including a decision to end a relationship, should be excluded from relying on the partial defence of provocation. The Committee is also of the view that a non-violent sexual advance should also be excluded from forming the basis of the partial defence of provocation. Although the Committee supports a gender neutral approach in this regard, the Committee notes that the particular concern is to address the issue of the partial defence of provocation being used in response to non-violent homosexual advances.

6.116 The Committee is concerned that an exclusionary provision based on 'words alone' may have undesirable and unintended consequences on defendants who kill after long term abuse where the provocative conduct 'triggering' the fatal response was mere words. It is easy to conceive of circumstances in which a person, who has suffered long-term violence and knows the 'cycle' of violence that follows particular words from the abuser, could respond with fatal results to 'mere words' which are themselves part of a strategy of control, manipulation and violence. However, absent such a history it is extremely difficult to see how 'words alone' could reasonably found a partial defence.

6.117 The Committee agrees with Inquiry participants who submitted that context is vital in such circumstances. Conversely, cases that may justify an exclusion based on words alone include cases where the 'provocative' words relied upon are things like "I'm leaving you" and "I don't love you anymore." The Committee does not consider these should ever be able to form the basis of a defence of provocation. The Committee notes that the existing law already makes it difficult for provocation cases based on 'mere words' to succeed and notes that this is supported by the data. The Committee therefore does not consider it necessary to explicitly legislate for the exclusion of 'mere words' from being able to form the basis of the partial defence of provocation. This is one area where social norms as mediated through a jury provides the Committee with some assurance.

6.118 The Committee has also had regard to the Queensland model which has a framework that is designed to respond to concerns about the use of the partial defence in intimate partner homicides. The Committee is persuaded that there is merit in such a model, and notes the comments of Associate Professor Crofts that such a model 'narrows the cases in which men can claim provocation in traditional situations and widen[s] the situations in which women can argue provocation.' While the Committee notes the application of the partial defence of provocation to circumstances outside domestic homicides, the proposal to simultaneously narrow and expand the circumstances in which provocation can be relied upon in a domestic

context, as legislators have done in the Queensland, responds to the central issue that the Inquiry was set up to consider.

6.119 The Committee is of the view that there is merit in creating legislative exclusions that restrict the availability of the partial defence of provocation, and considers that, in respect of homicides occurring in a domestic context, the Queensland model sets out the appropriate framework within which equality rights can be recognised.

6.120 The Committee acknowledges concerns about the capacity of exclusionary provisions to operate in practice, particularly in the context of the English experience and the outcome in *Clinton*. The Committee notes that the appellate judges in *Clinton* were conscious of the *intention* of the legislation, which was designed to "prohibit the misuse of sexual infidelity as a potential trigger for loss of control in circumstances in which it was thought to have been misused in the former defence of provocation."[399] However, the Committee also notes that the Court was aware that there were limits on how far the prohibition (or exclusion) could be applied, noting that it would only be "where there is no other potential trigger [that] the prohibition must … be applied."[400]

6.121 The Committee notes that in interpreting the exclusionary provision in this way, the Court in *Clinton* drew heavily on the parliamentary debates to reinforce their view (refer to 6.97). This demonstrates the importance and significance of parliamentary debate in understanding the intention of particular amendments, and in assisting courts to interpret and apply legislation.

6.122 The Committee notes that the facts in *Clinton* are similar to the types of situations which have generated community outrage in NSW and which gave rise to this Inquiry. The Committee considers that there are valuable lessons that can be taken from the experience in the United Kingdom. In particular, the Committee considers it critically important that any exclusionary provisions are drafted to reflect the policy intention behind them, and further that that policy intention is clearly stated by law-makers when the bill is being considered.

6.123 The Committee notes that some Inquiry participants who were concerned about the *Clinton* experience still expressed support for excluding specific conduct, noting that careful drafting would be required. Specifically, it was suggested that the 'ineffectiveness' of exclusionary provisions in the United Kingdom could be resolved by drafting exclusions in a manner similar to those that apply to non-violent sexual advances in the Northern Territory and the ACT, which provide that the excluded conduct cannot, *in and of itself*, be relied upon as provocative conduct.

6.124 Notwithstanding concerns raised by some stakeholders about the implication of the *Clinton* decision, and issues raised about the clarity of the phrases (for example, 'non-violent sexual advance', the exclusionary model was supported by a significant number of Inquiry participants. The Committee agrees that there is merit in excluding certain conduct from forming the basis of a provocation defence.

6.125 The Committee is of the view however that the partial defence of provocation requires further reform to address some of the concerns arising, particularly in respect of the 'loss of self-control' element. An exclusionary model alone will not achieve this.

399 *R v Clinton, Parker and Evans* (2012) EWCA Crim 2, per Lord Chief Justice Henriques at 35.

400 *R v Clinton, Parker and Evans* (2012) EWCA Crim 2, per Lord Chief Justice Henriques at 35.

Reforming the legal test (the Wood model)

6.126 As previously noted, the Committee sought comment on a number of different provocation reform models in its Options Paper. This section considers responses to the third model discussed in the Options Paper (referred to as the 'Wood model') which primarily focused on reforming the legal test for provocation.

6.127 The model was proposed by the Honourable James Wood AO QC during the Committee's public hearings, and involves amending section 23 of the *Crimes Act 1900* to change the ordinary person test. It was consequently included in the Options Paper and referred to as the 'Wood model'.

6.128 There were four key parts to the Wood model. First, it proposed significant reform to the ordinary person test. Second, it proposed a reversal of the onus and standard of proof. Third, it attempted to clarify particular issues relating to hearsay provision and self-induced intoxication. Finally, it included two exclusions, including a proposal to exclude self-induced provocation.

6.129 This section will focus on the first and third of these. Issues relating to the onus and standard of proof are discussed in Chapter 8 (8.58 – 8.101) There is a brief discussion about self-induced provocation at 6.148 – 6.151.

Reforming the legal test

6.130 The Wood model retains the element of loss of self-control, but proposes reforming section 23(2)(b) of the *Crimes Act 1900* to remove the ordinary person test and instead require that the jury consider *all* the characteristics of the accused and the circumstances in which the provocation occurred when determining whether the provocation, in all of the circumstances, was such as to warrant the liability or the culpability of the accused being reduced from murder to manslaughter.

6.131 The rationale behind the proposed change to the ordinary person test lies in the argument that the test, with its 'two-limbs', is too complex. The existing ordinary person test, provided by section 23(2)(b), requires the conduct of the deceased to be such as could have induced an ordinary person in the position of the accused to have so far lost his self-control as to have formed an intent to kill or to inflict grievous bodily harm upon the deceased. The 'ordinary person' is different depending on whether the gravity of the provocation or the response is being assessed. This means that the jury is required to apply the two limbed objective test to first assess the gravity of the provocation with reference to an 'ordinary person' who has *all* the characteristics of the defendant, before then assessing the degree of self-control exercised by an 'ordinary person' of the same age and maturity of the defendant in response to provocation of equivalent gravity. The two-limbed test is discussed at 2.36.

6.132 Concerns about the test raised by Inquiry participants, which are discussed in detail in Chapter 4 (at 4.119 – 4.151), focussed mostly on the complexity of the test and the ability of key players in the system, including juries in particular, to be able to comprehend and apply it.

6.133 Mr Wood referred to the 'fundamental' issue with the ordinary person test as being that the jury simply cannot understand who the 'ordinary person' is:

> … you can … get rid of the ordinary person test, which I just find problematic. I do not know what a jury envisages the ordinary person is. In real life they are going to say, "Look, we are ordinary people. This is our view." They are not going to find the traditional person on the Clapham omnibus that was a reasonable person test from the civil law. They do not understand that person. They will always put their own values on the case. I think the ordinary person test is fundamentally flawed.[401]

6.134 Mr Wood noted criticism of the test in the House of Lords. He went on to suggest that subsection 2(b) could be reformed to address concerns about the test by providing that the jury consider *all* of the defendant's characteristics and circumstances, and then weigh up those considerations against whether a conviction for manslaughter based on the provocative conduct was warranted in the circumstances. This proposal reflects the manner in which the partial defence of substantial impairment by abnormality of the mind[402] is assessed by a jury:

> [S]ubsection 2 (b) … is problematic because of the "ordinary person" requirement. It is something which has been criticised in the decisions. In one case, for example, the House of Lords said that it thought the provision was beyond redemption for that reason … I would like to see that provision reworded to say that the conduct of the deceased was such that the provocation of the accused, taking into account all of his or her characteristics and circumstances— including those in which the provocation came to his or her attention—was such as to warrant his or her liability being reduced to manslaughter. I like that because it is a similar provision to that which applies in relation to substantial impairment by abnormality of mind, the former diminished responsibility.[403]

6.135 It was submitted by Mr Wood that allowing a jury to consider all of the circumstances of the matter and then make an assessment based on whether a reduction in criminal culpability is warranted would remove the issues associated with the 'ordinary person' test:

> It means that the jury looks at all of the circumstances of the case and it determines whether the provocation, in all of the circumstances, was such as to warrant the liability or the culpability of the accused being reduced from murder to manslaughter. That provision would do a couple of things. First of all, it removes the ordinary person test and places the responsibility with the jury. The ordinary person test has its problems because, as the High Court has made it plain, when the jury looks at the ordinary person it does not look at its own reactions or own thoughts. It has to envisage some ordinary person, which may not be one of them. It is a difficult concept, I think, for a jury to say, "All right, we have to decide what an ordinary person could do, but we cannot look at our own views. We have to envisage some hypothetical ordinary person." I think this would remove that.[404]

6.136 Mr Wood also submitted that altering the ordinary person test in this way would address concerns about hearsay provocation, which is discussed below.

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401 The Hon James Wood AO QC, Evidence, 29 August 2012, p 6.

402 *Crimes Act 1900,* s 23A(1)(b).

403 The Hon James Wood AO QC, Evidence, 29 August 2012, p 2.

404 The Hon James Wood AO QC, Evidence, 29 August 2012, p 2.

Hearsay provocation

6.137 Sometimes cases arise where the provocative conduct occurs outside the presence of the accused person who responds to that provocation. This is referred to as 'hearsay provocation.' It is unclear whether the law of provocation in NSW allows defendants to rely on hearsay provocation.[405] In 1997 the NSW Law Reform Commission noted that the common law position is that hearsay provocation is not captured within the defence, but also noted that there are some who suggest that the 1982 amendments may have left it open for hearsay provocation to be successfully relied upon by defendants:

> Under the defence of provocation at common law, conduct amounting to provocation must occur within the sight or hearing of the accused. This is commonly referred to as the rule against "hearsay provocation" ... Section 23 of the Crimes Act 1900 (NSW) does not contain any specific requirement that the accused be present at the time of the provocative conduct. It has been suggested that the legislature intended to allow for hearsay provocation under the 1982 amendments to s 23(2)(a), which now specifies that provocation may be conduct "towards or affecting the accused". However, the Court of Criminal Appeal held in one case that the 1982 amendments do not alter the common law rule requiring presence. That question was left unanswered in a later case [citations removed].[406]

6.138 Mr Wood explained the 'problematic' area of hearsay provocation by referring to some specific cases:

> There have been a couple of cases of hearsay provocation. I sat on the Court of Appeal in the case of *Quartly*. The accused was informed by a third party that the deceased had raped and supplied heroin to a former girlfriend. This was relayed, as it were, second-hand to the accused. It was held by the Court of Criminal Appeal, consistent with authority, that provocation was not available in those circumstances because it was not something occurring in the presence of the accused. The question of hearsay provocation raised its head again in another case, of *Davis*. The accused was informed of a sexual assault of a former stepdaughter. Again it was held that the hearsay provocation was not available. On the special leave application to the High Court, the High Court expressed some doubt in argument about hearsay provocation but did not decide the point and did not grant special leave to appeal. [407]

6.139 Mr Wood suggested that the model he proposed would clarify concerns about hearsay provocation through reform of the ordinary person test, which would allow the jury to consider *all* of the defendant's characteristics and circumstances in assessing the nature of the 'hearsay provocation.'

6.140 Mr Wood told the Committee that the NSW Law Reform Commission had previously considered the issue in 1997. In that report, the Commission referred to two arguments for specifically excluding hearsay provocation. First, it was argued that hearsay provocation

405 NSW Law Reform Commission *Report 83 (1997) - Partial Defences to Murder: Provocation and Infanticide*, 2.85.

406 NSW Law Reform Commission *Report 83 (1997) - Partial Defences to Murder: Provocation and Infanticide*, 2.86.

407 The Hon James Wood AO QC, Evidence, 29 August 2012, p 3.

"involves an element of belief on the part of the accused and that allegedly there is nothing tangible on which the accused can be said to have acted.[408]

6.141 This argument is countered for "failing to recognise that a person's honest belief that some provocative incident has occurred may affect that person's capacity for self-control to the same extent as if he or she witnessed the conduct personally."[409]

6.142 The second argument for excluding hearsay provocation was that such a restriction would ensure that the partial defence could not be used by defendants who kill 'innocent' victims based on hearsay provocation. However, it was noted that, while this may be a sound rationale for excluding hearsay provocation in such circumstances, a blanket exclusion would have the effect of denying the defence in circumstances where the victim was 'guilty' of the provocation. It was argued that this went too far and therefore hearsay provocation should be allowed if the defendant had *reasonable* grounds for believing the provocation he or she heard about:

> [A] restriction [on hearsay provocation] ensures the defence is not available to people who kill "innocent" victims, that is, victims who did not in fact commit the provocative acts which they are alleged to have committed in the hearsay reports. This argument is based on a construction of the defence of provocation as a (partial) justification for killing, where the victim's own blameworthy conduct has contributed to the accused's actions. However, it has been pointed out that, even if justification is accepted as the primary rationale for the defence of provocation, the rule against hearsay provocation goes too far, because it may also protect those victims who are in fact guilty of the provocative conduct which, when reported to the accused, causes him or her to lose self-control. If there is concern that the defence not be made available to people who kill "innocent" victims, a qualification could be added to the definition of provocation that, if the accused does not witness the provocative conduct personally, then he or she must have reasonable grounds for believing both that the provocation has occurred and that it was committed by the victim.[410]

6.143 The Commission took the view that there should not be an 'automatic' exclusion on the availability of provocation based on hearsay. On the contrary, they considered that the legislation could be clarified to make it clear that the provocative conduct need not apply in the presence of the defendant, with a safeguard requiring that the defendant's belief be reasonable:

> In the Commission's view, the legislation should not automatically exclude from the defence of provocation those people who lose self-control following hearsay reports of provocation, rather than witnessing such conduct personally. This conclusion is consistent with our general approach to the defence of provocation, that it is primarily a partial excuse for killing on the basis of a loss of self-control, and should not therefore be restricted to provocation occurring in the accused's presence. The legislation should be amended to make it clear that the defence of provocation may apply to provocative conduct occurring outside the accused's presence. Where the

408 NSW Law Reform Commission *Report 83 (1997) - Partial Defences to Murder: Provocation and Infanticide*, 2.89.

409 NSW Law Reform Commission *Report 83 (1997) - Partial Defences to Murder: Provocation and Infanticide*, 2.89.

410 NSW Law Reform Commission *Report 83 (1997) - Partial Defences to Murder: Provocation and Infanticide*, 2.90.

> accused loses self-control as a result of a belief in provocative conduct, which provocative conduct the accused does not witness personally, then the accused's belief in the conduct must be based on reasonable grounds.[411]

6.144 However, Mr Wood suggested that the Law Reform Commission's proposal to deal with hearsay provocation was not without issues. He argued that the requirement that the defendant's belief be 'reasonable' could result in the partial defence being open to a defendant who, while intending to kill a person based on a 'reasonable belief', actually kills a third party who is not involved at all:

> The Law Reform Commission's report sought to deal with that by referring to the situation where the accused has a reasonable belief as to the provocation. I think that is problematic … [The Law Reform Commission proposal] picks up that third party or hearsay provocation [but would make] the defence … available if the provoked person kills a third party when attempting to kill or injure the person who was believed on reasonable grounds to have offered, or offered, the provocation. I do not particularly like that. I really do not see why, if you happen to kill a third party who has absolutely nothing to do with the provocation the defence should arise. It is a case where if you do happen to kill a third party then provocation or the reasons for your acting might be taken into account in a sentence but I do not see why it should reduce murder to manslaughter in that situation.[412]

6.145 Mr Wood suggested that his proposal would deal with hearsay provocation without the risk that it could open up the defence to a defendant who, while intending to kill a person based on a 'reasonable belief', actually kills a third party:

> I think this particular reform of mine might deal with hearsay provocation because it would take into account the circumstances in which the provocation came to the person's attention, namely, directly—in their face—or, alternatively, by a third party source. When you look at the third party source you can look at the reliability of it: is it some spurious thing which is said; is it a person who is in a position to know; are they reporting hearsay upon hearsay, or so on? There could be reasons why the person could believe, on reasonable grounds, having regard to the apparent veracity by which the circumstances come to notice. There are other occasions where you might react without being in a position to have a reasonable belief. [413]

Self-induced intoxication

6.146 The Wood model draws on a recommendation made by the NSW Law Reform Commission in 1997 to provide that a "loss of self-control caused by intoxication or resulting from a mistaken belief occasioned by that intoxication is to be disregarded, where the accused is intoxicated at the time of the killing and that intoxication is self-induced."[414]

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411 NSW Law Reform Commission *Report 83 (1997) - Partial Defences to Murder: Provocation and Infanticide*, 2.91.

412 The Hon James Wood AO QC, Evidence, 29 August 2012, p 3.

413 The Hon James Wood AO QC, Evidence, 29 August 2012, p 3.

414 NSW Law Reform Commission *Report 83 (1997) - Partial Defences to Murder: Provocation and Infanticide*, 2.149.

6.147 The rationale behind the recommendation to exclude self-induced intoxication from consideration in relation to provocation reflects the policy position that a person who 'voluntarily' becomes intoxicated should be held accountable for their actions.

> [The Commission's] reason for expressly excluding self-induced intoxication from consideration in relation to the partial defences is, essentially, to be consistent with existing legislative policy on the admissibility of evidence of intoxication in relation to criminal offences … That policy is said to be based on the view that it is unacceptable to excuse otherwise criminal conduct because the accused is suffering from self-induced intoxication, and that people who voluntarily become intoxicated should be held responsible for their actions.[415]

Self-induced provocation

6.148 Another feature of the third model in the Options Paper is the exclusion of 'self-induced provocation.' Set out in subsection 5(a) of the model in the Options Paper, the proposal sought to deny availability of the partial defence to defendants who:

> … provoked the deceased with a premeditated intention to kill or to inflict grievous bodily harm or with foresight of the likelihood of killing the deceased in response to the expected retaliation of the deceased.[416]

6.149 Mr Wood expressed his view that an exclusion on self-induced provocation would be appropriate:

> There clearly are circumstances where a person will incite another person to behave provocatively and then respond to it, and I think that where that arises, as in the case of self-induced intoxication, well, self-induced provocation certainly needs to be excluded.[417]

6.150 Mr Wood explained that this proposal, like self-induced intoxication, also drew on the 1997 report by the NSW Law Reform Commission. In that report, the Commission noted that it is unclear whether the NSW law on provocation "precludes consideration of self-induced provocation."[418] The Commission noted at the time that self-induced provocation is excluded in the Criminal Code jurisdictions (Western Australia, Tasmania and the Northern Territory). However, since then Western Australia and Tasmania have abolished the partial defence altogether. The Northern Territory has reformed the partial defence and it no longer contains the exclusion on self-induced provocation.

6.151 The NSW Law Reform Commission recommended that section 23 of the *Crimes Act 1900* be reformed to clarify the position in NSW. The recommendation made by the Commission forms the basis of the wording contained in Mr Wood's proposal.

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415 NSW Law Reform Commission *Report 83 (1997) - Partial Defences to Murder: Provocation and Infanticide*, 2.153.

416 Select Committee on the Partial Defence of Provocation *Options Paper*, p 5.

417 The Hon James Wood AO QC, Evidence, 29 August 2012, p 3.

418 NSW Law Reform Commission *Report 83 (1997) - Partial Defences to Murder: Provocation and Infanticide*, 2.107.

Inquiry participant comment on the Wood model

6.152 Inquiry participant's views on the proposal focused on the aspect which removed the ordinary person test in favour of a test akin to that which applies in relation to the partial defence of substantial impairment were generally critical.[419] All but one who commented on this aspect of the Wood model raised concerns.

6.153 Only the Aboriginal Legal Service indicated support for the reformed test, although very little commentary about why they supported it was provided.[420]

6.154 Other Inquiry participants, including the NSW Bar Association, Law Society of NSW, Mr Graeme Coss, Associate Professor Crofts and Dr Loughnan, Professor Julie Stubbs, the Hawkesbury Nepean Community Legal Centre, Women's Legal Services NSW, NSW Domestic Violence Committee Coalition and the Inner City Legal Centre, all raised concerns about the reformed test.

6.155 Some Inquiry participants were concerned that the proposed test was 'too open-ended', and did not offer any direction to juries on what are relevant considerations. For example, the Bar Association submitted:

> For a number of reasons, the Association would not support a comparable test for the provocation partial defence in terms of "the loss of control was so substantial as to warrant liability for murder being reduced to manslaughter". The critical question regarding the availability of the provocation partial defence is not so much the factual one as to the degree of loss of self-control but rather the normative one (ie involving a judgment about moral culpability) of whether the provocative conduct supports a significant reduction in the offender's culpability. Even if there has in fact been a high degree of loss of control, the jury might properly conclude that the partial defence is not available given the nature of the provocative conduct. The "ordinary person" test necessarily focuses the attention of the jury on that normative issue. A test expressed in terms of "the circumstances warrant his or her liability being reduced to manslaughter" is too open-ended - it provides no guidance at all to the jury regarding relevant criteria.[421]

6.156 Similarly, Professor Stubbs and the Women's Electoral Lobby asked "in the absence of an objective test, what would be considered sufficient to 'warrant [the defendant's] liability being reduced to manslaughter'?"[422]

6.157 Other stakeholders suggested that the proposed test may strengthen perceptions about victim blaming. For example, Associate Professor Crofts and Dr Loughnan, while noting that the proposed test may address some of the issues associated with the 'ordinary person' test, commented:

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419 Inquiry participant comment on other aspects of the Wood model, specifically the exclusionary provisions including the proposal to exclude sexual infidelity or a threat to end a domestic relationship from consideration in provocation matters are discussed in at 6.59 – 6.72.

420 Response to options paper, Mr John McKenzie, Chief Legal Officer, Aboriginal Legal Service, p 1.

421 Answers to questions taken on notice, Supplementary questions on notice and Response to options paper, Mr Coles QC, p 5.

422 Response to options paper, Professor Julie Stubbs, p 3, Submission 10a, p 2.

> [It] could introduce further problems … [It] is relatively vague and asks whether a person deserves a reduction in liability based on what the accused did. This formulation could unfortunately strengthen the perception that the defence is victim-blaming by focussing attention firmly on whether the conduct of the deceased was such that the accused deserves mitigation – rather than focussing attention on the reaction of the accused and whether a person of ordinary temperament might have so reacted … This victim-blaming dimension of provocation is perceived as a problem with the current provocation defence and it would be unwise to risk replicating the very same problem in a reformulated defence.[423]

6.158 Some Inquiry participants were concerned that removing of the ordinary person test and replacing it with a test that allows for consideration of all of the defendant's characteristics would allow the partial defence to be used to excuse gender based violence. For instance, Women's Legal Services NSW commented:

> We have concerns about Option 3 which would remove the ordinary person test. We believe that to be able to consider … the gender and race of an accused would be used to excuse violence and perpetuate attitudes regarding gender relations and stereotypes.[424]

6.159 The Gay and Lesbian Rights Lobby voiced similar concerns:

> By replacing the 'ordinary person' test with a test which requires the jury to consider all characteristics of the accused and the circumstances in which the provocation occurred, it is perhaps even more likely than under the current law that a court could find that a 'special sensitivity' on the part of the accused to a same-sex sexual advance led to the loss of self-control of the accused.[425]

6.160 The Director of Public Prosecutions, Mr Lloyd Babb SC, commented that the test proposed in the model leaves a jury to make a moral judgment about whether a reduction in liability is warranted. He suggested an alternative which, he argued, would "retain a test that imported a question of community standards, but retain a real rather than speculative question for the jury to answer:"[426]

> Rather than redrafting the section in [the way proposed in the Wood model] … a more effective way of altering the test would be to change the test at section 23(2)(b) from "could" to "would", but otherwise retain the current wording of the section.[427]

6.161 Apart from Mr Wood who proposed the reform to exclude self-induced intoxication from consideration in provocation matters, only two Inquiry participants referred to the proposal. The intention is to ensure that the partial defence of provocation is aligned with the policy

423 Response to options paper, A/Prof Thomas Crofts and Dr Arlie Loughnan, p 3.

424 Answers to questions taken on notice, Supplementary questions on notice and Response to options paper, Women's Legal Services NSW, p 6. See also, Answers to questions taken on notice, Supplementary questions on notice and Response to options paper, Inner City Legal Centre, p 5.

425 Answers to questions taken on notice, Supplementary questions on notice and Response to options paper, NSW Gay and Lesbian Rights Lobby, p 5.

426 Response to options paper, Mr Babb SC, p 2.

427 Response to options paper, Mr Babb SC, p 2.

position that a person who 'voluntarily' becomes intoxicated should be held accountable for their actions. Both of the Inquiry participants who commented were supportive of reform.[428]

6.162 Mr Graeme Coss indicated his support for reform of this type but suggested proceeding with caution, noting the challenge of separating the effects of intoxication from other provocative conduct:

> I support the inclusion of a clause … that expressly excludes self-induced intoxication. Having said that, I submit that caution needs to be exercised in the wording of such an exclusion. If D was intoxicated and also faced with a significant provocative incident, one can imagine the difficulty in divorcing the intoxication from the equation.[429]

6.163 The Director of Public Prosecutions, Mr Lloyd Babb SC, was also supportive of such a provision. He submitted that such a provision would be consistent with Part 11A of the *Crimes Act 1900*, which sets out the relevance of intoxication for the determination of the guilt or non-guilt of a person in criminal matters:

> The Section should be amended to add provision proposed by the Honourable James Wood AO QC in relation to disregarding self-induced intoxication. This would make the test consistent with the policy behind Part 11A of the *Crimes Act*.[430]

6.164 No Inquiry participant specifically referred to the suggestion to exclude self-induced provocation, although Mr Babb made a general comment that he supported the amendments proposed by Mr Wood, with the exception of that noted at 6.160.

Committee comment

6.165 The Committee has considered the comments made by Inquiry participants in relation to the proposal to reform the law by removing the ordinary person test and replacing it with a test that requires the jury consider all the characteristics and circumstances of the defendant in determining whether the provocation was such as to warrant the liability or the culpability of the accused being reduced from murder to manslaughter. The Committee also notes that it was suggested that the reform of the test in this way would address the issue of hearsay provocation.

6.166 The weight of the views expressed by Inquiry participants did not support such a test, with concerns raised by stakeholders that it was vague, would not address concerns about the gendered application of the partial defence and that it may contribute to the victim blaming dimension of the defence.

6.167 For these reasons, the Committee does not support reform of the ordinary person test in the partial defence of provocation along the lines of the Wood proposal. The Committee received no comment from Inquiry participants on the issue of hearsay provocation or the possible impact that this reform proposal may have, and is therefore unable to make any comments about it.

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428 See, for example, Mr Lloyd Babb SC, Director of Public Prosecutions; Mr Graeme Coss.

429 Response to options paper, Mr Graeme Coss, p 4.

430 Response to options paper, Mr Lloyd Babb SC, Director of Public Prosecutions, p 1.

6.168 The Committee notes, however, that there was some support for the proposal to ensure that the partial defence of provocation is not available to defendants' who lose self-control as a result of self-induced intoxication or formed a mistaken belief due to that intoxication and the Committee is sympathetic to that view.

Chapter 7 Reform options continued

As mentioned in the previous Chapter, the Committee, in addition to seeking submissions and hearing evidence, sought the views of key stakeholders in response to various options to reform the partial defence of provocation that were proposed by some Inquiry participants. In this chapter the Committee explores the final model considered in the Options Paper (referred to as 'the gross provocation' model) which involves reform to both the legal test of provocation and the conduct to which the defence can apply.

A 'gross provocation' model

7.1 The Options Paper presented four different models to retain but reform the partial defence of provocation, in addition to the options of abolishing the defence altogether and retaining it without amendment.

7.2 The fourth reform option in the Options Paper, referred to as the 'gross provocation' model, was based on a model developed by the United Kingdom Law Commission (hereafter referred to as 'the Law Commission') in 2004. The model shifts the focus of the partial defence away from the 'loss of self-control' on the part of the defendant, and instead focuses on the nature of the provocative conduct. It also changed the objective test to provide that all of the defendant's characteristics are taken into account, and it included two exclusions.

7.3 As noted in Chapter 3, the legislature in the United Kingdom ultimately adopted a different model to that recommended by the Law Commission. The partial defence which replaced provocation is called 'loss of self-control' and retains that element. This point is relevant to discussion later in this Chapter.

7.4 A variation of the Law Commission's 'gross provocation' model was included in the Options Paper. There were three key points of difference between it and the Law Commission's model. First, it made the objective test harder to satisfy by including a 'reasonableness' requirement. Second, it included a number of additional 'exclusions' which would be precluded from being able to sustain the defence. Third it proposed a placing the onus of proof on the defendant to establish the partial defence on the balance of probabilities.

7.5 The Law Commission's 'gross provocation' model, and the variation of it that was proposed in the Options Paper are both explained below. Inquiry participant feedback focussed predominantly on the model contained in the Options Paper. These views are discussed at 7.71 – 7.150.

The United Kingdom Law Commission's views on provocation

7.6 In August 2004, the Law Commission released its report, *Partial Defences to Murder*. The Commission's terms of reference required that it examine the "law and practice of the partial defences to murder provided for by sections 2 (diminished responsibility) and 3 (provocation) of the *Homicide Act 1957* … [and to have] particular regard to the impact of the partial defences in the context of domestic violence."[431]

431 UK Law Commission (2004) *Partial Defences to Murder – Final Report*, 1.2.

7.7 The Report recommended reform, as opposed to abolition, of the partial defence of provocation, but makes it clear that there was considerable doubt about whether the law of provocation was amenable to reform that would address some of the key criticisms levelled against it:

> For a long time, both during the writing of Consultation Paper No 173 and thereafter, we were pessimistic about the possibility of devising a formulation for the reform of provocation, which would significantly improve the law … [w]e were unconvinced that there was any need for such a partial defence other than as a buffer against the harsh effect of the mandatory life sentence for all cases of murder.[432]

7.8 However the Law Commission was persuaded by the number and quality of stakeholder responses, which ultimately resulted in a shift in thinking and a belief that the partial defence could be reformed successfully:

> We were impressed both by the number of those who expressed the view that there should continue to be such a partial defence, even in the event of the abolition of the mandatory sentence, and by the arguments which they deployed. Ultimately we have concluded that the law of provocation is capable of reform in ways which would significantly improve it. As a result, reform rather than abolition is our recommendation.[433]

7.9 The Law Commission's concerns about provocation included many of those discussed in Chapter 4. These included concerns about the objective test; and about the 'loss of self-control' element, which they considered:

> … has given rise to serious problems, especially in the "slow burn" type of case. … [and is] a judicially invented concept, lacking sharpness or a clear foundation in psychology. It was a valiant but flawed attempt to encapsulate a key limitation to the defence - that it should not be available to those who kill in considered revenge.[434]

7.10 The Law Commission considered that the law of provocation as it existed at the time, and which was similar to the current law of provocation in NSW, needed reshaping because it was operating both too broadly and too narrowly in different senses:

> We think that it is too broad in that it can apply to conduct by the victim which is blameless or trivial. It is too narrow in that it provides no defence to a person who is subjected to serious actual or threatened violence, who acts in genuine fear for his or her safety (but not under sudden and immediate loss of self-control) and who is not entitled to the full defence of self-defence (either because the danger is insufficiently imminent or their response is judged to have been excessive).[435]

7.11 It is important to note that at the time the Law Commission's report was drafted (and indeed today), the law in the United Kingdom imposed a mandatory life sentence upon conviction for murder. Additionally, a defendant seeking to rely on self-defence does not have the 'halfway-house' offered by 'excessive self-defence' or any similar provision. As with the law in NSW, self-defence in the United Kingdom requires that the defendant respond with

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432 UK Law Commission (2004) *Partial Defences to Murder – Final Report*, 1.6.

433 UK Law Commission (2004) *Partial Defences to Murder – Final Report*, 1.8.

434 UK Law Commission (2004) *Partial Defences to Murder – Final Report*, 3.20 and 3.30.

435 UK Law Commission (2004) *Partial Defences to Murder – Final Report*, 3.65.

'reasonable force' to the threat posed. As discussed in Chapter 4, this can create issues where there is a temporal lapse between the threat and the fatal response of the defendant, notwithstanding that the law does not require that the threat be immediate, but merely imminent.[436]

The Law Commission's 'gross provocation' model

7.12 The Law Commission's recommended model sets out a policy framework and principles to guide the development of the partial defence of provocation, and explained the overriding principle underpinning recognition of provocation as a partial defence as being to mitigate the harshness of a conviction and penalty for murder, in circumstances that legitimately warrant it:

> The preferred moral basis for recognising a partial defence of provocation is that the defendant had legitimate ground to feel strongly aggrieved at the conduct of the person at whom his/her response was aimed, to the extent that it would be harsh to regard their moral culpability for reacting as they did in the same way as if it had been an unprovoked killing.[437]

7.13 The Commission's recommended model is as follows:

> 1) Unlawful homicide that would otherwise be murder should instead be manslaughter if the defendant acted in response to
>
> > (a) gross provocation (meaning words or conduct or a combination of words and conduct which caused the defendant to have a justifiable sense of being seriously wronged); or
> > (b) fear of serious violence towards the defendant or another; or
> > (c) a combination of (a) and (b); and
>
> a person of the defendant's age and of ordinary temperament, i.e. ordinary tolerance and self-restraint, in the circumstances of the defendant might have reacted in the same or a similar way.
>
> 2) In deciding whether a person of ordinary temperament in the circumstances of the defendant might have acted in the same or a similar way, the court should take into account the defendant's age and all the circumstances of the defendant other than matters whose only relevance to the defendant's conduct is that they bear simply on his or her general capacity for self-control.
>
> 3) The partial defence should not apply where
>
> > (a) the provocation was incited by the defendant for the purpose of providing an excuse to use violence, or
> > (b) the defendant acted in considered desire for revenge.
>
> 4) A person should not be treated as having acted in considered desire for revenge if he or she acted in fear of serious violence, merely because he or she was also angry towards the deceased for the conduct which engendered that fear.

436 UK Law Commission (2004) *Partial Defences to Murder – Final Report*, 4.6.

437 UK Law Commission (2004) *Partial Defences to Murder – Final Report*, 3.68.

> 5) The partial defence should not apply to a defendant who kills or takes part in the killing of another person under duress of threats by a third person.
>
> 6) A judge should not be required to leave the defence to the jury unless there is evidence on which a reasonable jury, properly directed, could conclude that it might apply.

7.14 The Law Commission explicitly stated that its model is an explanation of principle only, and not a draft provision:

> We stress that our recommendation is not put forward as a statutory formula. We have sought to identify the principles which we consider should govern any legislative reform. If this approach were accepted, the drafting of legislation would be a matter for Parliamentary Counsel.[438]

7.15 The various aspects of the model are discussed below, beginning with the two prerequisites which, in principle, would be required to establish the partial defence of provocation.

The trigger – gross provocation and response to fear

7.16 The first prerequisite, referred to by the Law Commission as 'the trigger', comprises three parts:

> … that the defendant acted in response to (1) *gross provocation* or (2) *fear of serious violence towards himself or herself or another*, or (3) a combination of (1) and (2) (the trigger) [emphasis added].[439]

7.17 The Law Commission describe the *first part of the trigger*, gross provocation, as being "words and/or conduct which caused the defendant to have a justifiable sense of being seriously wronged." There are two main elements to this part of the model. First, the 'gross provocation', that is the words and/or conduct, "*caused* the defendant to have a sense of being wronged and therefore act as he or she did" [emphasis added].[440]

7.18 Second, the "defendant's sense of being seriously wronged should have been justified."[441] The Commission considered that it was the role of the jury to determine whether or not there was gross provocation, and that the test not be purely subjective. This means that a jury assessing whether or not there was gross provocation may, while taking into account all of the characteristics of the defendant and the circumstances in which the defendant found him or herself, reject the argument notwithstanding the defendant considered the words and/or conduct were grossly provocative. The Commission explained that:

> … the jury may conclude that the defendant had no sufficient reason to regard it as gross provocation, or indeed that the defendant's attitude in regarding the conduct as provocation demonstrated an outlook (e.g. religious or racial bigotry) offensive to the standards of a civilised society.[442]

438 UK Law Commission (2004) *Partial Defences to Murder – Final Report*, 1.14.

439 UK Law Commission (2004) *Partial Defences to Murder – Final Report*, 3.66.

440 UK Law Commission (2004) *Partial Defences to Murder – Final Report*, 3.69.

441 UK Law Commission (2004) *Partial Defences to Murder – Final Report*, 3.70.

442 UK Law Commission (2004) *Partial Defences to Murder – Final Report*, 3.70.

7.19 As noted at 7.2, the Law Commission also removed the 'loss of self-control' aspect of the test. This proposal reflected the Commission's concern about the ambiguity of the phrase 'loss of self-control':

> The term loss of self-control is itself ambiguous because it could denote either a failure to exercise self-control or an inability to exercise self-control. To ask whether a person could have exercised self-control is to pose an impossible moral question. It is not a question which a psychiatrist could address as a matter of medical science, although a noteworthy issue which emerged from our discussions with psychiatrists was that those who give vent to anger by "losing self-control" to the point of killing another person generally do so in circumstances in which they can afford to do so. An angry strong man can afford to lose his self-control with someone who provokes him, if that person is physically smaller and weaker. An angry person is much less likely to "lose self-control" and attack another person in circumstances in which he or she is likely to come off worse by doing so. For this reason many successful attacks by an abused woman on a physically stronger abuser take place at a moment when that person is off-guard.[443]

7.20 In removing the 'loss of self-control' aspect of the partial defence, the Commission recommended 'reshaping' provocation to focus instead on the nature of the provocation and the defendant's response to either 'grossly provocative' conduct and/or response to fear.

7.21 Additionally, there are three other important aspects to the 'gross provocation' part of the trigger in the Law Commission's model. First, the model does not require that the provocative words or conduct emanate from the victim. The rationale behind this is that there may be some cases of accident or mistake which should not be precluded from the application of the partial defence. Additionally, the Commission was of the view that the objective test (discussed at 7.35 – 7.44) would preclude the reliance on provocation in matters where the defendant was responding to third party provocation:

> No person of ordinary tolerance and self-restraint would deliberately respond to provocation from one person by using violence to another.[444]

7.22 Second, the Commission felt that the defence should be available to defendants who were not the sole or immediate sufferer from the provocation. This reflects an intention to ensure that the partial defence was broad enough to apply to circumstances in which a defendant killed someone whose provocative conduct had a greater impact on a third party. The Commission gave the example of a parent who kills their child's abuser, stating:

> It would be an absurdly narrow approach to suggest … that [provocation] could not apply to a parent whose child was raped but only to the child.[445]

7.23 Finally, the Law Commission concluded that the nature of the provocative conduct need not involve a risk of physical violence, and further that the law should remain gender neutral. In the context of domestic and family violence, the Commission acknowledged that a common theme from varied stakeholder groups was the view that a person "may feel imprisoned in an

443 UK Law Commission (2004) *Partial Defences to Murder – Final Report*, 3.28.

444 UK Law Commission (2004) *Partial Defences to Murder – Final Report*, 3.72.

445 UK Law Commission (2004) *Partial Defences to Murder – Final Report*, 3.73.

abusive and humiliating relationship without being the victim necessarily of serious physical violence."[446]

7.24 Further to this, the Commission formed the view that there might be some circumstances outside the domestic context where a defendant responded to 'gross provocation' which also did not involve physical violence. The Commission demonstrate this using an example involving a householder's confrontation with a burglar:

> Sometimes burglaries involve the most vile acts of desecration of a person's home and of belongings which may be cherished for highly personal reasons. If … a householder confronted a burglar responsible for such behaviour and immediately attacked him, causing fatal injury, we think that it would be a harsh law which precluded the jury from considering provocation and we doubt whether such a law would command public support or respect.[447]

7.25 Therefore, the Commission's model is designed to be broad enough to capture provocation that involves conduct that does not amount to physical violence.

7.26 The *second part of the 'trigger'* is the 'response to fear', which is designed to cater for defendants who kill in response to fear of serious violence to themselves or to another person. The Commission acknowledges that this would develop the partial defence "beyond the traditional limits of provocation."[448]

7.27 This part of the model is designed to better respond to defendants who kill in circumstances where the threat is not 'immediate' and it would be difficult to establish self-defence because their response was disproportionate to the threat posed. The typical example is that of a victim of domestic violence:

> Consider the case of D, who has suffered regular violent assaults by V. D eventually responds to an assault by fatally stabbing V. D has a complete defence if D's conduct was proportionate to the immediate risk. If it was disproportionate, D has a partial defence only if D acted in sudden and immediate loss of self-control.[449]

7.28 The Law Commission recognised that such defendants experienced significant pressure to plead to a lesser offence of manslaughter in order to avoid the mandatory life sentence applicable for conviction for murder in that jurisdiction:

> … sometimes in such cases a defendant may plead guilty to manslaughter, although arguably D's conduct may have been in lawful self-defence, for fear of the risk of conviction of murder with the mandatory sentence.[450]

7.29 The Commission was alive to concerns that the proposed model risked confusion because it combined within the one defence those defendants responding with fatal force to 'gross

446 UK Law Commission (2004) *Partial Defences to Murder – Final Report*, 3.75.
447 UK Law Commission (2004) *Partial Defences to Murder – Final Report*, 3.79.
448 UK Law Commission (2004) *Partial Defences to Murder – Final Report*, 3.85.
449 UK Law Commission (2004) *Partial Defences to Murder – Final Report*, 3.88.
450 UK Law Commission (2004) *Partial Defences to Murder – Final Report*, 3.88.

provocation' and those responding to fear, noting that the situation of the defendant responding to 'provocation' and 'excessive self-defence' are conceptually different:[451]

> … provocation arises in the case of conduct by the defendant which … the actor acknowledges is unlawful but for which there is a sufficient excuse or justification from an external source so as to permit a different label to be attached to the defendant's conduct. By contrast, a partial defence of excessive force in self-defence would apply to a person who thinks that he or she is acting lawfully but who has miscalculated the extent of the action open to him or her and so has fallen into unlawfulness. This is sufficient to prevent the label of murder to be attached to the defendant's conduct.[452]

7.30 However, the Commission concluded that there were several key reasons for supporting such a model. It argued that the 'conceptual confusion' said to arise was unlikely to be a factor for defendants, and "question[ed] how far it corresponds with the likely thought processes of a defendant:"[453]

> It will be seldom that a defendant does more than merely react to an external stimulus.[454]

7.31 Further, the Commission drew on evidence presented by medical experts, which suggested that the physiological and emotional responses to fear and anger are not distinct. For example, the Royal College of Psychiatrists stated:

> In medical reality they are not. Physiologically anger and fear are virtually identical, whilst many mental states that accompany killing also incorporate psychologically both anger and fear.[455]

7.32 The Law Commission also thought that it would be desirable and practical to keep jury directions as broad and simple as possible.[456]

7.33 Finally, the Commission argued that the model supported the overriding moral position underpinning the defence, namely that it provided for "a response to unjust conduct (whether in anger, fear or a combination of the two).[457]

7.34 The *third part of the 'trigger'* is the combination of 'gross provocation' and 'response to fear', designed to encompass matters where an overlap between the two existed.[458]

The objective test

7.35 The Law Commission described its objective test as follows:

451 UK Law Commission (2004) *Partial Defences to Murder – Final Report*, 3.93-3.94.

452 UK Law Commission (2004) *Partial Defences to Murder – Final Report*, 3.95-3.96.

453 UK Law Commission (2004) *Partial Defences to Murder – Final Report*, 3.95-3.96.

454 UK Law Commission (2004) *Partial Defences to Murder – Final Report*, 3.98.

455 UK Law Commission (2004) *Partial Defences to Murder – Final Report*, 3.99.

456 UK Law Commission (2004) *Partial Defences to Murder – Final Report*, 3.100.

457 UK Law Commission (2004) *Partial Defences to Murder – Final Report*, 3.101.

458 See UK Law Commission (2004) *Partial Defences to Murder – Final Report*, 3.104-3.108 for a discussion of the *Maw* case which involved a scenario that may fit within this limb.

> … a person of ordinary temperament, i.e. ordinary tolerance and self-restraint, in the circumstances of the defendant might have reacted in the same or a similar way [as the defendant] ...[459]

7.36 The Law Commission's report indicates that it was acutely aware of the issues with the two limbed objective test (as exists in NSW – discussed at 4.119 – 4.151). Its recommendation adopted the test preferred by the House of Lords in the 2001 case of *R v Smith (Morgan).*[460] Instead of the 'two limbed' objective test,[461] the majority in *Smith (Morgan)* held that a jury should be able to consider all of the offender's characteristics in all circumstances (that is, in assessing both gravity and response).

7.37 As noted above at 7.19, the Law Commission also removed the 'loss of self-control' aspect of the test. In doing so the Commission considered that its removal made "the need for an objective test still greater."[462]

7.38 Drawing on Lord Hoffman's comment in *Smith (Morgan),* the Commission emphasised the need for an objective assessment of the defendant's response and its causes:

> A person who flies into a murderous rage when he is crossed, thwarted or disappointed in the vicissitudes of life should not be able to rely upon his anti-social propensity as even a partial excuse for killing.[463]

7.39 The Law Commission explained the rationale and the test as follows:

> Even if there was gross provocation, it by no means follows that an ordinary person would have reacted in the way that the defendant did. Most people from time to time suffer gross provocation without resorting to lethal violence. **The defence should only be available if a person of ordinary temperament, i.e. ordinary tolerance and self-restraint, in the circumstances of the defendant might have reacted in the same or a similar way** [emphasis in original].[464]

7.40 The Commission considered that the court, in determining the critical question as to whether a 'person of ordinary temperament' might have reacted in the same or similar manner as the defendant, should take account of "all the circumstances of the defendant other than matters whose only relevance to the defendant's conduct is that they bear simply on [his or her] general capacity for self-control,"[465] the only qualification being that age is a relevant consideration in recognition that maturity impacts upon a person's capacity for self-control.

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459 UK Law Commission (2004) *Partial Defences to Murder – Final Report*, 3.67.

460 *R v Smith (Morgan)* (2001) 1 AC 146.

461 The test is outlined at 2.36. In summary, the two limbed objective test requires that a jury first assess the gravity of the provocation with reference to an 'ordinary person' who has *all* the characteristics of the defendant, before then assessing the degree of self-control exercised by an 'ordinary person' of the same age and maturity of the defendant in response to provocation of equivalent gravity.

462 UK Law Commission (2004) *Partial Defences to Murder – Final Report*, 3.115.

463 *R v Smith (Morgan)* (2001) 1 AC 146, cited in UK Law Commission (2004) *Partial Defences to Murder – Final Report*, 3.114.

464 UK Law Commission (2004) *Partial Defences to Murder – Final Report*, 3.109.

465 UK Law Commission (2004) *Partial Defences to Murder – Final Report*, 3.110.

7.41 To this end the Commission was of the view that its model focussed "not [on] whether the defendant's conduct was reasonable, but whether it was conduct which a person of ordinary temperament might have been driven to commit (not a bigot or a person with an unusually short fuse").[466] It considered that the 'ordinary temperament' test would be comprehensible to juries and would enable them to use common-sense in applying the law. [467]

7.42 The Commission considered that while the defence should not be available to defendants 'with an unusually short fuse', its model was designed to ensure that it would be available to defendants whose temperament may have been affected by the provocation. The Commission referred to Lord Millett's comment in *Smith (Morgan)* to explain this:

> The question for the jury is whether a woman with normal powers of self-control, subjected to the treatment which the accused received, would or might finally react as she did … It does not involve an inquiry whether the accused was capable of displaying the powers of self-control of an ordinary person, but whether a person with the power of self-control of an ordinary person would or might have reacted in the same way to the cumulative effect of the treatment which she endured.[468]

7.43 It is important to note that the decision in *Smith (Morgan)*, which formed the basis of the approach to the objective test adopted by the Law Commission in 2004 in its recommendation, was rejected by the Privy Council in 2005 in *Attorney-General for Jersey v Holley,*[469] which preferred the two limbed approach to the ordinary person test. The Privy Council was of the view that the majority in *Smith (Morgan)* were departing from established law in a way not intended by the Parliament. It went on to explain that the resulting approach imposed a far more 'flexible' objective standard which it considered to be inappropriate:

> It involves a significant relaxation of the uniform, objective standard adopted by Parliament. Under the statute the sufficiency of the provocation ("whether the provocation was enough to make a reasonable man do as [the defendant] did") is to be judged by one standard, not a standard which varies from defendant to defendant. Whether the provocative act or words and the defendant's response met the "ordinary person" standard prescribed by the statute is the question the jury must consider, not the altogether looser question of whether, having regard to all the circumstances, the jury consider the loss of self-control was sufficiently excusable. The statute does not leave each jury free to set whatever standard they consider appropriate in the circumstances by which to judge whether the defendant's conduct is "excusable".[470]

7.44 However, the Privy Council were of the view that notwithstanding their decision, the law on provocation was still far from 'satisfactory', and they stated that they agreed with the "widely held view … that the law relating to provocation is flawed to an extent beyond reform by the courts" and should be subjected to a review in the context of a review of the law of homicide.[471]

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466 UK Law Commission (2004) *Partial Defences to Murder – Final Report*, 3.127.

467 UK Law Commission (2004) *Partial Defences to Murder – Final Report*, 3.127.

468 *R v Smith Morgan* [2001] 1 AC 146 per Lord Millet at 213, cited in UK Law Commission (2004) *Partial Defences to Murder – Final Report*, 3.111.

469 [2005] UKPC 23 (PC).

470 *Attorney-General for Jersey v Holley* [2005] UKPC 23 (PC), per Lord Nicholls of Birkenhead at 22.

471 *Attorney-General for Jersey v Holley* [2005] UKPC 23 (PC), per Lord Nicholls at 27.

Exclusions

7.45 The Law Commission's model proposed that there be two circumstances in which a defendant could not rely on the partial defence of provocation. These are where the provocation was 'self-induced'; and where the defendant acted 'in considered desire for revenge'.

7.46 The Commission considered that defendants who incited the provocation 'for the purpose of providing an excuse to use violence' should not have the partial defence or provocation available to them. This exclusion addresses self-induced provocation in the strict sense, in circumstances where "a defendant forms a premeditated intent to kill or cause grievous bodily harm and incites provocation by the victim so as to provide an opportunity to attack…"[472]

7.47 However the Commission agreed with some views expressed to it that the exclusion would not address self-induced provocation in a broader sense, for example, in circumstances where a defendant "exposes him or herself to the likelihood of provocation and then retaliates by killing the provoker". [473]

7.48 The Commission took the view that this 'broader' category of self-induced provocation would not fall within the exclusion and it would be a matter for a jury to determine whether the defendant's conduct met the requirements of the objective test.

7.49 The Law Commission also recommended excluding provocation from being available to defendants who acted in 'considered desire from revenge'. It argued that there is an important distinction between a defendant acting in considered desire for revenge, and a defendant "acting on impulse or in fear or both".[474] The Commission attempted to ensure that there was scope within the model to address 'slow burn' killings[475] and to appropriately distinguish them from 'considered revenge' attacks, concluding that the extension of the defence to cover those killing in fear would be futile without it:

> … a person [defendant] should not be treated as having acted in considered desire for revenge if he or she acted in fear of serious violence, merely because he or she was also angry towards the deceased for the conduct which engendered that fear.[476]

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472 *Partial Defences to Murder (Consultation Paper)* [2003] EWLC 173, 12.59-12.62, Law Commission, cited in UK Law Commission (2004) *Partial Defences to Murder – Final Report*, 3.139.

473 *Partial Defences to Murder (Consultation Paper)* [2003] EWLC 173, 12.59-12.62, Law Commission, cited in UK Law Commission (2004) *Partial Defences to Murder – Final Report*, 3.139.

474 UK Law Commission (2004) *Partial Defences to Murder – Final Report*, 3.136-137.

475 'Slow burn' killings refer to circumstances in which a person who has been victimised and abused over a period 'simmers' until finally lashing out and killing their abuser, sometimes after a seemingly innocuous provocation by the deceased. It is the context of the relationship and the abuse that impacts on the nature of the provocation. Typically, slow burn cases involve female victims of domestic and sexual violence, and sometimes victims of non-intimate partner sexual violence, for example, children killing their sexual abusers.

476 UK Law Commission (2004) *Partial Defences to Murder – Final Report*, 3.137.

Duress

7.50 The Commission's model also recommended that provocation not be available to defendants who kill or participate in killing under duress of threats by a third person. The report notes that the Commission had previously recommended that duress be available as a defence to murder in the United Kingdom, but that those recommendations were yet to be acted upon:

> We have not consulted again on duress as part of this project. We therefore exclude from our proposals a defendant who kills or takes part in the killing of another person under duress of threats by a third person … [T]his does not represent a policy judgement that such a person should not be entitled to a defence or partial defence to murder. On the contrary, we have in the past advocated that duress should be available as a defence to murder.[477]

7.51 It is worth noting that the law in relation to duress and murder in NSW is not an issue that has been investigated by this Committee as it is similarly outside our terms of reference. The Committee acknowledges that there is common law precedent from the NSW Court of Criminal Appeal establishing that the "defence of duress is denied to a person charged with being a principal in the first degree to murder but is available to a principal in the second degree."[478] This generally means that duress will not be available to defendants who were directly involved in a killing, but may be available to defendants who are accessories to murder, although the position is unclear. Therefore, the application of the partial defence of provocation in relation to NSW murder cases where a second defendant seeks to argue that they acted under duress is also unclear. The Committee also notes that there are different views in other Australian and Commonwealth jurisdictions, and that the issue has been subjected to "a large amount of judicial attention".[479] The model consulted upon in the Committee's Options Paper did not include this aspect of the Law Commission's model.

The role of the judge and jury

7.52 At the time the Law Commission was drafting its report, the law on provocation in the United Kingdom required that a judge leave the issue of provocation to the jury for determination. Unlike the law in NSW, where a trial judge can refuse to allow provocation to go to a jury, the law in the United Kingdom did not allow a trial judge to make a determination to refuse to allow the defence to go to the jury.[480]

7.53 The Law Commission considered it important that this power be restored to trial judges, along with supervision of appellate courts, as it would assist in 'setting boundaries in a reasoned, sensitive and nuanced way.'[481] The rationale for the inclusion of this principle in its

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477 UK Law Commission (2004) *Partial Defences to Murder – Final Report*, 3.162.

478 *McConnell v R* (1977) 1 NSWLR 714, extracted from D. Brown et al, *Criminal Laws: Materials and commentary on Criminal Law and Process of New South Wales* (2011, 5th ed.), p 636, cited in Submission 10, Women's Electoral Lobby, p 2.

479 *McConnell v R* (1977) 1 NSWLR 714, extracted from D. Brown et al, *Criminal Laws: Materials and commentary on Criminal Law and Process of New South Wales* (2011, 5th ed.), p 636, cited in Submission 10, Women's Electoral Lobby, p 2.

480 UK Law Commission (2004) *Partial Defences to Murder – Final Report*, 3.142. See also Submission 50 Mr James Moshides, p 18.

481 UK Law Commission (2004) *Partial Defences to Murder – Final Report*, 3.142.

model is that it would minimise the opportunity for jury decisions that may be perceived as 'unusual'. Drawing on the limited empirical evidence relating to the success rates of provocation defences before juries, the Commission stated:

> The evidence … tends to suggest that juries are less prone than is sometimes thought to return verdicts of manslaughter on grounds of provocation where the provocation alleged is simple separation or infidelity, but in our view such cases ought not to be left to the jury. To leave such a case to the jury would imply that a properly directed jury could reasonably conclude that a person of ordinary tolerance and self-restraint might respond to such a situation by killing the other person.[482]

The 'gross provocation' model in the Options Paper

7.54 The 'gross provocation' model in the Committee's Options Paper drew heavily on the Law Commission's model, proposing reform of section 23 of the *Crimes Act 1900* (NSW) to restrict the type of conduct which is capable of forming the basis of a provocation defence:

> … restrict its application to circumstances in which the defendant acted in response to 'gross provocation' which caused the defendant to have 'a justifiable sense of being seriously wronged' or to 'fear serious violence towards the defendant or another', or a combination of both.[483]

7.55 The model appeared as Option 4 in the Committee's Options Paper as follows:

> (1) Where, on the trial of a defendant for murder, it appears that the act or omission causing death was an act done or omitted under gross provocation and, but for this subsection and the gross provocation, the jury would have found the accused guilty of murder, the jury shall acquit the accused of murder and find the accused guilty of manslaughter.
>
> (2) For the purposes of subsection (1), an act or omission causing death is an act done or omitted under gross provocation where:
>
> (a) the defendant acted in response to:
>
> (i) gross provocation (meaning words or conduct or a combination of words and conduct) which caused the defendant to have a justifiable sense of being seriously wronged; or
> (ii) fear of serious violence towards the defendant or another; or
> (iii) a combination of both (i) and (ii); and
>
> (b) a person of the defendant's age and of ordinary temperament, i.e., ordinary tolerance and self restraint, in the circumstances of the defendant might reasonably have reacted in the same or in a similar way.
>
> (3) In deciding whether a person of the defendant's age and of ordinary temperament, i.e. ordinary tolerance and self-restraint, in the circumstances of the defendant, might have reasonably reacted in the same or in a similar way, the court should take into account the defendant's age and all the circumstances of the defendant other than

482 UK Law Commission (2004) *Partial Defences to Murder – Final Report*, 3.145.

483 *Options Paper* Select Committee on the Partial Defence of Provocation, 14 September 2012, p 3.

matters whose only relevance to the defendant's conduct is that they bear simply on his or her general capacity for self-control.

(4) The partial defence should not apply where:

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

(b) the defendant acted in considered desire for revenge; or

(c) other than in circumstances of a most extreme and exceptional character, if—

(i) a domestic relationship exists between the defendant and another person; and

(ii) the defendant unlawfully kills the other person (the deceased); and

(iii) the provocation is based on anything done by the deceased or anything the person believes the deceased has done—

(ai) to end the relationship; or
(aii) to change the nature of the relationship; or
(aii) to indicate in any way that the relationship may, should or will end, or that there may, should or will be a change to the nature of the relationship.

(d) the defendant acted in response to conduct of the deceased consisting of a non-violent sexual advance.

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

(6) A judge should not be required to leave the defence to the jury unless there is evidence on which a reasonable jury, properly directed, could conclude that it might apply.

(7) Where, on the trial of the defendant for murder, there is any evidence that the act causing death was an act done or omitted under gross provocation as provided by subsection (2), the onus is on the defendant accused to prove that he or she is not liable to be convicted of murder by virtue of this section.

(8) This section does not exclude or limit any defence to a charge of murder.

7.56 The Options Paper model adopts the recommendation of the Law Commission to require that provocative conduct seeking to be relied upon by a defendant be 'grossly provocative'. This raises the bar by clearly setting out that it is not enough for words and/or conduct to be merely provocative – they must be 'grossly provocative'. In addition, the 'gross provocation' must cause the defendant to have a justifiable sense of being seriously wronged.

7.57 A concern arising throughout the Inquiry was that the partial defence was being successfully run in response to 'provocative' conduct which is inappropriate, and not beyond the common experience of many people in the community. By requiring that the conduct seeking to be

relied upon by the defendant meet a higher threshold, it was intended that the proposal will prevent, or at least limit, 'misuse' of the partial defence.

7.58 There are a several key points of difference with the Law Commission's model, which are discussed below (7.59 – 7.70).

Raising the requisite standard in the objective test

7.59 First, the proposed model raised the bar to be met by the defendant by requiring that the jury, in assessing the response of the defendant, consider whether a person of the defendant's age and of ordinary temperament, might have *reasonably* reacted in the same or similar way.

7.60 The existing 'two limbed' objective test, and the objective test adopted by the Law Commission's 'gross provocation' model, have both been criticised. The former has, as discussed in Chapter 4, been said to suffer from issues of complexity, be beyond the comprehension of most juries and be illogical. The latter test recommended by the Law Commission, which allows for consideration of *all* of the defendant's characteristics and circumstances in assessing both the gravity of the provocation and the defendant's response, was, arguably, intended to respond to some of these criticisms. However, it has been described as a being "significant relaxation of the uniform, objective standard."[484]

7.61 The variation of the 'gross provocation' model contained in the Options Paper sought to retain the simplicity of the Commission's test, while at the same time lifting the standard required by the test. To do this, the word 'reasonably' was incorporated into the model in the Options Paper. The inclusion of the word 'reasonably' raises the requisite standard to require that the jury be satisfied not simply that a person of the defendant's characteristics and circumstances might have reacted in the same or similar manner to the defendant, but that they might *reasonably* be expected to have so reacted.

Additional exclusions

7.62 Second, the model contained a number of exclusions in addition to those recommended by the Law Commission's model. These expressly identified two of other circumstances in which it would not be possible for the defence to plead provocation beyond those where the provocation was 'self-induced'; and where the defendant acted 'in considered desire for revenge'. These additional circumstances were: where the killing occurred in a domestic context in domestic settings, unless the circumstances were of a 'most extreme and exceptional character'; and where the alleged provocation was a non-violent sexual advance.

Provocation in domestic settings - 'extreme and exceptional circumstances'

7.63 This exclusion would mean that where a domestic relationship exists between the defendant and another person, and the defendant unlawfully kills the other person (the deceased) having been 'provoked' by anything said or done by the deceased, or anything the defendant believes the deceased said or did, to change the nature of the relationship,[485] provocation would only be available in 'extreme and exceptional circumstances'.

484 *Attorney-General for Jersey v Holley* [2005] UKPC 23 (PC) per Lord Nicholls of Birkenhead at 22.

485 See above at 7.55, 4(c)(iii) for full description.

7.64 This additional exclusion is designed to respond to some of the concerns raised about the availability of the provocation defence in domestic settings, typically where men kill their female partners. It draws on the language used in the Queensland legislation which restricts the availability of the defence in such circumstances.[486] The Queensland law was amended following a recommendation from the Queensland Law Reform Commission.[487]

7.65 The Queensland Law Reform Commission also recommended that provocation not be available where the provocative conduct consisted of 'words alone' or 'conduct that consists substantially of words', except 'in circumstances of an extreme and exceptional character'. Its report notes that this reflects the authority of the Queensland Court of Appeal in *Buttigieg*,[488] which is referenced in the Bench Book.[489] The recommendations reflect and attempt to respond to concerns about availability of the defence of provocation to defendants who kill intimate partners in situations where the provocative conduct involved the deceased exercising choice about the relationship.

7.66 This aspect of the gross provocation model proposed in the Options Paper was suggested by Associate Professor Thomas Crofts and Dr Arlie Loughnan who noted that the inclusion of the phrase 'extreme and exceptional circumstances' in the Queensland legislation:

> … further restricts provocation and goes a significant way toward addressing the issues arising from reliance on provocation in the context of domestic violence.[490]

7.67 It was suggested that including the phrase operated to provide a 'check' on the circumstances which it was applied to. In response to a question about the issue of exclusionary provisions negatively impacting on victims of domestic violence who killed in response to a verbal insult, Associate Professor Crofts explained:

> That is why we have the overriding provision, which is the same as the provision in the Queensland model, including the words "except in extreme and unusual circumstances". That could be modified to refer to a pattern of behaviour.[491]

Non-violent sexual advances

7.68 The model included a further exclusion, which would preclude the availability of the defence to defendants who were responding to conduct of the deceased which consisted of a non-violent sexual advance.

7.69 This element of the model was included in response to concerns raised by a number of Inquiry participants about the use of the provocation defence by men responding to non-

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486 *Criminal Code 1889* (Qld), s 304(3).

487 Queensland Law Reform Commission (2008) *A review of the excuse of accident and the defence of provocation*, p 500 (Recommendations 21-3).

488 *R v Buttigieg* (1993) 69 A Crim R 21.

489 Queensland Law Reform Commission (2008) *A review of the excuse of accident and the defence of provocation*, p 500 (Recommendations 21-3).

490 Submission 29, Associate Prof Thomas Crofts and Dr Arlie Loughnan, p 16.

491 Associate Prof Thomas Crofts and Dr Arlie Loughnan, University of Sydney Law School, Evidence, 29 August 2012, p 76.

violent sexual advances from other men,[492] and recommendations from some that such conduct should be precluded from forming the basis of a defence of provocation.

The onus and standard of proof

7.70 The model proposed changing the onus and standard of proof so that a defendant seeking to rely on the partial defence would be required to establish, on the balance of probabilities, its existence in accordance with the reformed provision. The issue of reversing the onus of proof is discussed in detail in Chapter 8 at 8.58 – 8.101.

Stakeholder views on the 'gross provocation' model

7.71 As discussed in Chapter 6, the Options Paper was the subject of consultation with stakeholders. That Chapter explored the responses to the other three models, two of which were conduct based, and one which was (primarily) test based. The next section of this Chapter will explore the responses of Inquiry participants to the 'gross provocation' model explained above.

7.72 Some stakeholders commented on the 'gross provocation' model in a general sense, while others discussed specific aspects of it. The general and specific comments from Inquiry participants were varied and there was support for aspects of the model, although a number of concerns were also raised.

Removal of the requirement of 'loss of self-control'

7.73 One of the most significant reforms proposed by the Law Commission's 'gross provocation' model and the variation of it contained in the Options Paper was that both reshaped the partial defence of provocation by removing the requirement for a loss of self-control.

7.74 As discussed at 7.19, the Law Commission accepted that the element of 'loss of self-control' was fraught with issues. The 'gross provocation' model responds to this concern by abandoning this requirement altogether, and it is perhaps one of the key features distinguishing it from the current partial defence of provocation. Instead, the 'gross provocation' model focuses on the nature of the provocative conduct. Notwithstanding that it is a significant change from current law, the Committee received limited comment from Inquiry participants the removal of the 'loss of self-control' element in the gross provocation model. The removal of the loss of self-control element was also a feature of the 'gross provocation' model in the Options Paper.

7.75 The only stakeholder to comment on the potential removal of the requirement was the Bar Association, which suggested that reform of provocation warranted consideration about whether the 'loss of self-control' requirement should be retained. It suggested that removing this element might open up the partial defence to allow its application in circumstances where 'loss of self-control' is not a factor, using mercy killing as an example:

> [T]he loss of self-control requirement … requires that the accused acted in an emotional state rather than from premeditation but circumstances might well arise

[492] Refer to Chapter 4, paras 4.32 – 4.55.

> where a jury might consider that a premeditated homicide was something that an "ordinary person in the position of the accused" might have done. The obvious example is a "mercy" killing, where the accused acts out of love for a terminally ill parent or partner. Another example is a "battered wife" who, psychologically damaged and unable to think rationally about her predicament, ultimately forms a plan to take revenge and proceeds to do so in a premeditated way.[493]

7.76 The Bar Association did not comment specifically in relation to its removal from the gross provocation model.

Committee comment

7.77 The Committee received little feedback on the removal of the 'loss of self-control' requirement in the gross provocation model contained in the Options Paper. However, the Committee notes the significant concerns about the 'loss of self-control' element of the current law that were raised throughout the Inquiry with stakeholders arguing that the phrase is ambiguous and unclear, and has no basis in medicine or science (see 4.97 – 4.118).

7.78 The Bar Association's comment, although tangential, demonstrates how the phrase 'loss of self-control' can have a limiting effect in respect of the types of circumstances where the partial defence can apply. In this regard, the Committee notes the comments of the United Kingdom Law Commission that provocation, and the element of 'loss of self-control', has developed to accommodate, to some degree, 'slow burn' cases.

Raising the bar to require that provocation be 'grossly provocative'

7.79 As discussed at 7.13 and 7.17, the 'gross provocation' model requires the defendant to have acted in response to gross provocation, meaning words or conduct, or a combination of words and conduct, which caused the defendant to have a justifiable sense of being seriously wronged.

7.80 A number of Inquiry participants were supportive of the proposal to 'raise the bar' by requiring that the provocative conduct or words seeking to be relied upon by the defendant be 'grossly provocative'. Some stakeholders suggested that it would assist in clarifying the law and make it easier to understand, including by clearly framing the defence as being for circumstances outside the usual human experience. However, there were also some Inquiry participants who raised concerns about some of the phrases in the proposal being ambiguous, and therefore whether the model would clarify or confuse the law.

7.81 Professor Julia Tolmie explained that the key issue is that the defence was being 'misused' in its current form and was being applied in circumstances that are not beyond normal human experience:

> … the evidence is overwhelming that [provocation] has been misused. The way I see it is it was originally designed for people caught up in extraordinary circumstances and there is a recognition that every human being caught up in those sorts of

[493] Answers to questions on taken on notice during evidence, Supplementary questions on notice and Response to options paper, 29 August 2012, Mr Bernard Coles QC, President, NSW Bar Association, p 3.

> circumstances could be pushed beyond the bounds of human endurance. But it has been applied to circumstances and cases which are not extraordinary. We all go through unrequited love, we have relationships that break up, we have to deal with sexual advances from people we are not attracted to. These are not extraordinary circumstances. They might be hurtful but they are not extraordinary.[494]

7.82 Professor Tolmie argued that by reforming the defence along the lines of the 'gross provocation' model and raising the requisite standard of provocation to 'gross', the proposal reinforces that the defence is not for those circumstances in which most people find themselves at one time or another:

> … we are raising the normative bar, or we are saying that we do not just expect provocation: we expect gross provocation … [W]hat I like about that is that we are making it very clear that we are keeping the defence for exceptional circumstances, extraordinary circumstances, not ordinary human life experiences. Raising the bar in that way, without being too prescriptive about what kind of conduct can comprise provocation, but at the same time being very clear about what conduct is being withdrawn from the defence of provocation—the list of circumstances which are not considered to be exceptional and extreme circumstances…[495]

7.83 Associate Professor Crofts and Dr Loughnan argued that the model had four main advantages, noting that most of these 'clarified' the law:

> First, the defence is restricted to 'gross provocation', which appropriately limits the scope of the defence. Second, the defence retains an objective test but refers to a person of 'ordinary temperament', which is something a jury is likely to grasp readily. Third, s 23(3) clarifies what matters may be taken into account to determine whether a person of ordinary temperament might have so reacted. Fourth, s23(4) clarifies the situations in which it is considered that the defence of provocation should not be available.[496]

Justifiable sense of being seriously wronged

7.84 Some Inquiry participants argued that the phrase 'justifiable sense of being seriously wronged' was problematic. Concerns raised included that it was unclear to whom the sense of being seriously wronged should be justifiable to,[497] and that this could result in inappropriate (and gendered) application of the defence;[498]and that this phrase appears to overlap with the exclusion of 'considered desire for revenge'.[499]

7.85 It was argued that although the model narrowed provocation to a point, the phrase still left the defence too open to abuse:

494 Professor Julia Tolmie, Faculty of Law, University of Auckland, Evidence, 21 September 2012, p 8.

495 Professor Tolmie, Evidence, 21 September 2012, p 10.

496 Response to options paper, Associate Prof Thomas Crofts and Dr Arlie Loughnan, pp 3-4.

497 Response to options paper, Professor Julie Stubbs, pp 4-5; Submission 10a, Women's Electoral Lobby, p 2.

498 Submission 44a, Hawkesbury Nepean Community Legal Centre, p 4.

499 Response to options paper, Mr Graeme Coss, pp 4-5.

> The limiting phrase, "justifiable sense of being seriously wronged", is left open to the interpretation of the judge or jury.[500]

7.86 The Hawkesbury Nepean Community Legal Centre submitted that the model reflects early provocation law, designed to accommodate men killing in circumstances where their masculinity was threatened. The Centre argued that the phrase 'justifiable sense of being seriously wronged' endorses this:

> …a model of provocation which allows an accused to assert [it] when they have killed as a result of *'being seriously wronged'*, may allow men to use the partial defence where they have killed in response to a perception that their masculinity was challenged or under attack by the deceased … to enable … provocation to be used in this way subverts the policy intention of the partial defence.[501]

7.87 The model explicitly precludes the availability of the defence in circumstances where the defendant was acting in 'considered desire for revenge', however at least one Inquiry participant argued that the inclusion of the phrase "justifiable sense of being seriously wronged" seemed to result in a mixed message and reinforced victim blaming:

> [I]t is not clear how [considered desire for revenge] is to be distinguished from someone who lethally responds when having a 'justifiable sense of being seriously wronged' – that too sounds like revenge. And arguably, the requirement of having a 'justifiable sense of being seriously wronged' may simply re-create an inundation of victim-blaming, as has always happened under the defence…[502]

Committee comment

7.88 Beyond the comments above, there was little other Inquiry participant feedback on the proposal to raise the bar by requiring the provocation be 'gross'. Those stakeholders that did comment on requiring that provocation be 'grossly provocative' did so generally, and suggested the language and the model would clarify the law.

7.89 The Committee notes in particular the comments by academics, Professor Tolmie, Associate Professor Crofts and Dr Loughnan, that the proposal 'clarifies' the law by using language that reinforces that the partial defence is not intended for circumstances within the normal human experience. Further, the Committee notes these comments of these stakeholders that the language in the proposal lifts the standard to be met by defendants by requiring that the provocation be 'gross'.

Overlap with self-defence and excessive self-defence

7.90 As discussed at 7.26 – 7.32, the 'gross provocation' model provides that the partial defence will be available to a defendant who acts in response to 'fear of serious violence toward themselves or another person.'

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500 Answers to questions taken on notice during evidence, Supplementary questions on notice and Response to options paper, 28 August 2012, Inner City Legal Centre, p 6.

501 Submission 44a, p 4.

502 Response to options paper, Mr Graeme Coss, pp 4-5.

7.91 Some Inquiry participants raised concern that the 'response to fear of serious violence' part of the gross provocation model overlapped with self-defence and excessive self-defence. For example, Dr Fitz-Gibbon suggested that this may have unintended consequences resulting in harsher outcomes for victims of family violence who kill in situations where self-defence was, or should have been, a more appropriate defence:

> Whilst the clarification to include the 'extreme' and 'exceptional' cases may on face value appear to capture cases of lethal violence which is provoked by prolonged family violence, it should be hoped – and indeed achievable – that where the circumstances are extreme and exceptional, such women are able to raise a complete defence of self-defence. If this is not the case, then rather than capturing these women and convicting them of manslaughter … a far more satisfactory outcome would be to reform the law of self-defence to ensure that battered women who use lethal violence in cases involving 'extreme' and 'exceptional' circumstances are able to avail themselves of a complete defence of self-defence.[503]

7.92 Similarly, the Women's Electoral Lobby suggested:

> Self-defence or excessive self-defence should be considered more appropriate for a person who kills another out of "fear of serious violence towards" themselves or another.[504]

7.93 Mr Graeme Coss also expressed this concern, and argued that there is no need to include the response to fear element of the model because NSW law, unlike that in England, legislatively provides for self-defence and excessive self-defence:

> … if D responds to a fear of serious violence towards D or another, then that must at least raise the spectre of self-defence and so arguably the provisions of s418 (or possibly 421) should come into play. Including such a provision in a new defence of provocation has the potential to stymie genuine claims of self-defence. The Law Commission included it because England did not have a codified self-defence or excessive self-defence provision. Given NSW has both, there is no reason for NSW to include it.[505]

Committee comment

7.94 The Committee notes comments that the potential for overlap with self-defence (and excessive self-defence) may result in unjust outcomes for categories of defendants that the community expects should, as a result of any reform of provocation, have better outcomes. As discussed in Chapter 5 (5.42) and in Chapter 8, the Committee received comments that there is pressure on defendants who have killed after long term abuse to enter into plea negotiations, for example by pleading guilty to manslaughter on the basis of provocation notwithstanding that, in some case, there may be some indication that self-defence was at play.

7.95 The Committee considers that it is important that any reform of provocation not unnecessarily reduce the options available to these defendants. However, the Committee is also keen to ensure that, in cases where it appears that there are elements of self-defence

503 Response to options paper, Dr Kate Fitz-Gibbon, p 14.

504 Submission 10a, p 2.

505 Response to options paper, Mr Graeme Coss, p 4.

(particularly in the context of domestic and family violence), that the defence of self-defence (and the alternative of excessive self-defence) are fully considered and explored.

Revised test

7.96 Some stakeholders supported the revised test in the gross provocation model which abandons the two-limbed 'ordinary person' test that has been described as problematic and 'artificial'. For example Professor Julia Tolmie, in discussing the issues with the two-limbed test, referred to the preferred approach described by Chief Justice Elias in the leading New Zealand authority *R v Rongonui*.[506] The approach recommended by the minority in *Rongonui*, which included Chief Justice Elias, was later followed by the majority in *Smith (Morgan)*, which forms the basis of the 'objective person' test in the gross provocation model:

> [The difficulties presented by the ordinary person test are] easily rectified. The dissent of Elias CJ in *R v Rongonui* provides a workable solution to the complications of the current provocation defence.[507]

7.97 Professor Tolmie explained that because the test adopted a 'broad and normative standard to determine which personal characteristics may modify the ordinary person test', and 'disallowed those features that people within the community might experience but should be incentivised to keep under control (such as ill-temper, irascibility, impulsiveness, violence, or intoxication)', the approach simplified the test and addressed some of the concerns about its inappropriate application:

> Such an approach avoids the complications … generated by the need to prove that the characteristic marked the offender as different from ordinary people, constituted part of his or her character or personality, and made the provocation more serious to the offender because of such a characteristic. Crucially … it also ensures that a propensity for violence, jealousy, or bigotry is something that will be excluded as a characteristic for the purposes of applying the ordinary person test. The reason is that such characteristics are something that the defendant should have an incentive to keep in check.[508]

7.98 Crofts and Loughnan, who advocated for a 'gross provocation' model in their original submission, suggested that the revised test introduced two of the four main advantages of the model.[509] In their response to the gross provocation model in the Options Paper, Crofts and Loughnan explain these advantages as being, first, that it retains an objective test that is more comprehensible to juries; and second, that it provides guidance to jurors about relevant matters in assessing 'ordinary temperament':

> [Advantages of the model include that it]… retains an objective test but refers to a person of 'ordinary temperament', which is something a jury is likely to grasp readily

506 *R v Rongonui* (2000) 2 NZLR 385.

507 Tolmie, J. (2005) *Is the Partial Defence an Endangered Defence? Recent Proposals to Abolish Provocation* 2005 NZ Law Review 25, at 50, cited in Submission 4, Associate Professor Julia Tolmie.

508 Tolmie, J. (2005) *Is the Partial Defence an Endangered Defence? Recent Proposals to Abolish Provocation* 2005 NZ Law Review 25, at 50-51, cited in Submission 4, Associate Professor Julia Tolmie.

509 Submission 29, p 15.

> … [and it] clarifies what matters may be taken into account to determine whether a person of ordinary temperament might have so reacted.[510]

7.99 The Honourable James Wood AO QC, while not specifically referring to the 'gross provocation' model and the simplified ordinary person test, suggested that an alternate 'ordinary person' test should allow for consideration of all the characteristics and circumstances of the defendant, which is provided by the test in the proposed model. However, in his recommended model, this was balanced by a moral judgement that the defendant's response to the provocative conduct warranted a reduction of his or her liability being reduced to manslaughter.[511]

7.100 However, as discussed in Chapter 4 (at 4.143 – 4.151), not all Inquiry participants considered that the two-limbed objective test was in need of reform, or that it was too complex for juries to comprehend. In addition, there has been significant critique of proposals to revise the ordinary person test to make it more 'subjective', including by the judiciary in the United Kingdom.

7.101 The NSW Bar Association and the Public Defender's Office[512] both rejected suggestions that jurors lack the capacity to fully understand and apply the two-limbed ordinary person test, arguing that such suggestions are 'overstated', and that conceptually the test is not difficult to understand if it is properly explained to juries. Mr Odgers, speaking for the Association, referred to comments of the Privy Council in *Holley*, which supported his point (refer to 4.144). In that case, the Court stated:

> [I]n recent years much play has been made of the "mental gymnastics" required of jurors in having regard to a defendant's "characteristics" for one purpose of the law of provocation but not another. Their Lordships consider that any difficulties in this regard have been exaggerated. The question is largely one of presentation.[513]

7.102 As noted at 7.43, the Privy Council in *Attorney-General for Jersey v Holley*[514] emphasised the need for a clear objective standard against which the conduct of the defendant could be judged, as opposed to an 'objective' standard which varies from defendant to defendant, based on the characteristics and circumstances of that defendant.

7.103 There were no Inquiry participants who supported the inclusion of a 'reasonableness' requirement as part of the test. Those participants who did comment on this element of the model were highly critical on the basis that it would effectively abolish the defence because a reasonable person would not react with fatal force. For example, Ms Dina Yehia SC, Public Defender, in opposing replacing the 'ordinary person' test with a 'reasonable person' test stated:

> … provocation by its very nature refers to circumstances where a person has so far lost self-control as to have formed an intention to kill or cause grievous bodily harm.

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510 Response to options paper, Associate Prof Thomas Crofts and Dr Arlie Loughnan, pp 3-4.

511 Hon. James Wood AO QC, Evidence, 29 August 2012, p 2.

512 Refer to 4.144 – 4.145.

513 *Attorney-General for Jersey v Holley* (2005) UKPC 23 (PC), per Lord Nicholls of Birkenhead at 26.

514 (2005) UKPC 23 (PC).

> To introduce a 'reasonable person' test would be to effectively abolish the partial defence because a reasonable person would not lose control to the requisite degree.[515]

7.104 The Bar Association had a similar view:

> [R]eplacing the "ordinary person" test with a "reasonable person" or similar test … would effectively abolish the partial defence because a reasonable person does not lose control or respond with homicidal violence other than in self-defence.[516]

7.105 Professor Julie Stubbs stated that the proposal failed to 'fit' with the nature of provocation, stating that "the construct of 'reasonably reacted' is out of place in provocation which assumes that the person lost control."[517]

7.106 The Women's Electoral Lobby agreed, and also argued that the test and jury directions would still be too complex:

> The defence of provocation has long employed an "ordinary person" test as opposed to a "reasonable person" test given that the defence is a "concession to human frailty" which recognises that ordinary (not necessarily reasonable) people pushed to extremes can lose self-control and kill … [T]his [proposal] would add to, rather than alleviate, the complexity [of jury directions].[518]

Committee comment

7.107 The Committee notes that a significant number of Inquiry participants raised concerns about the current 'ordinary person' test, and particularly the two-limbed aspect of its application. Those concerns were discussed in detail at 4.119 – 4.133.

7.108 The Committee acknowledges that conflicting opinions were expressed about the ability of jurors to comprehend and apply the law of provocation. In particular, the Committee notes that there were contradictory views expressed specifically regarding the suggestion that jurors in homicide matters may accept manslaughter on the basis of provocation as a 'halfway house' in circumstances where they are unsure or unclear about the legal test and the judicial directions.

7.109 The Committee acknowledges these concerns as being the rationale behind suggestions to reform the test. However, the Committee also notes the comments of the Bar Association and the Public Defender's Office that this rationale is flawed, on the basis that juries are regularly asked to understand and apply complex areas of the law.

7.110 A number of Inquiry participants were supportive of the 'gross provocation' model's simplification of the test which would allow juries to consider *all* the characteristics of the defendant in their assessment of the gravity of the provocation and the nature of the response. These stakeholders considered that the proposed test would remove some of the 'artificiality' of the existing test, and be more comprehensible to juries.

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515 Response to options paper, Ms Dina Yehia SC, Public Defender, Public Defenders Office, p 4.

516 Answers to questions on taken on notice during evidence, Supplementary questions on notice and Response to options paper, 29 August 2012, Mr Coles QC, p 8.

517 Response to options paper, Professor Julie Stubbs, p 5.

518 Submission 10a, p 2.

7.111 However, the Committee also notes the view of other Inquiry participants that commented on the necessity of having a test that balances the subjective circumstances of the defendant, with community expectations. The Committee agrees with the Model Criminal Code Officers Committee that a purely objective test would operate too harshly, and that a purely subjective test would produce unacceptable results. However, the Committee is not persuaded that an ordinary person test comprising subjective and objective elements is fundamentally flawed. The Committee refers to comments made by the Hawkesbury Nepean Community Legal Centre regarding the need for a test balancing objective and subjective elements to ensure a defendant's actions can be appropriately considered and judged.

7.112 The Committee also notes the comments of Mr Odgers and Ms Yehia that juries are able to bring an informed and objective approach to their application of the law in particular factual circumstances. The Committee accepts that in today's criminal justice system, juries are subjected to complex and detailed instruction and directions in various types of matters and, as noted by Ms Yehia, it is the role of advocates and judges to ensure they are able to make informed decisions about the application of the law.

7.113 While there was opposition to the removal of the two-limbed component of the test, there was significant criticism from some key stakeholders of the inclusion of a 'reasonableness' requirement in the test. It was submitted that such a requirement would effectively make the partial defence of provocation redundant because 'reasonable' people do not react to provocative conduct with lethal force, but 'ordinary' people do, or might.

7.114 In summary, there were conflicting views about whether the ordinary person test should be reformed in the manner recommended by the UK Law Commission, which would essentially make it more subjective by allowing juries to consider an 'ordinary person' possessing more of the defendant's characteristics in assessing the gravity of the provocation and the response. While some Inquiry participants were supportive of simplifying the 'ordinary person' test in this way, there was strong opposition to this proposal by some stakeholders, including the Bar Association, Public Defender's Office. The Committee notes that opponents of reform of the test to 'subjectivise' it supported their argument with reference to judicial authority, which emphasised the importance of having an objective standard against which conduct could be judged.

7.115 The Committee also notes strong opposition to the proposal to reform the test by including a reasonableness requirement, on the basis that it would effectively place the bar so high that the partial defence would never succeed.

Exclusionary conduct provisions

7.116 As discussed earlier in this Chapter, the 'gross provocation' model restricts the circumstances in which the partial defence can apply by expressly excluding certain types of conduct from being capable of forming the basis of a provocation defence.

7.117 The Committee received limited feedback from Inquiry participants specifically about this aspect of the 'gross provocation' model, but those comments that were received generally reflect the position of stakeholders on the exclusionary conduct model, discussed in Chapter 6. Some Inquiry participants were supportive of the exclusionary conduct provisions of the

gross provocation model. For example, the Domestic Violence Committee Coalition submitted:

> There are however a number of useful features of this model, some of which reflect on comments raised…in relation to the other options, for example, the drafting of the exclusions provided at subsection (4).[519]

7.118 The Domestic Violence Committee Coalition were of the view that the difficulties with exclusionary conduct models could be addressed through a suite of reforms incorporating education and evaluation.[520]

7.119 However, other Inquiry participants raised concerns that exclusionary models would be ineffective, with some stakeholders referring to the outcome in the English case of *Clinton*. For example, Dr Fitz-Gibbon noted, in relation to the exclusionary conduct aspect of the 'gross provocation' model that the "exclusionary approach to reform is particularly vulnerable to manipulation."[521]

7.120 For a full discussion of the arguments presented in favour of and against reform based on excluding specific conduct, see 6.36 – 6.113.

7.121 The 'gross provocation' model in the Options Paper provided three circumstances in which the partial defence would not be available. They were where: the provocation was incited by the defendant for the purpose of providing an excuse to use violence; the defendant acted in considered desire for revenge; and in response to non-violent sexual advances. Self-induced provocation and considered desire for revenge are discussed below at 7.123 – 7.125 and 7.126 – 7.127 respectively. There is extensive discussion about the proposed exclusion of non-violent sexual advances in Chapter 6 (6.47 – 6.58).

7.122 The model also *restricted* the availability of the partial defence in domestic circumstances by providing that it would only be available if the circumstances were of a 'most extreme and exceptional character' if certain conditions were met. This is discussed below at 7.129.

Self-induced provocation

7.123 As noted at 7.46 – 7.49, the 'gross provocation' model denies access to the partial defence to defendants who incite the provocative conduct for the purpose of providing an excuse to respond with violence. This is referred to as 'self-induced provocation.'

7.124 The proposed exclusion was also a feature of the third model in the Options Paper (the Wood model) discussed at 6.148 – 6.151.

7.125 Unfortunately, there were no Inquiry participants who commented specifically on this proposal, although the Australian Lawyers Alliance commented in their submission that they considered such an exclusion would be appropriate.[522] The Committee has considered the

519 Response to options paper, NSW Domestic Violence Committee Coalition, p 4.

520 Response to options paper, NSW Domestic Violence Committee Coalition, p 3.

521 Response to options paper, Dr Kate Fitz-Gibbon, p 14.

522 Submission 48, Australian Lawyers Alliance, p 27.

comments of the United Kingdom Law Commission in weighing up whether exclusion for provocation incited by a defendant should be incorporated into any reform model.

Considered desire for revenge

7.126 The United Kingdom Law Commission included an exclusion that would bar access to the partial defence to defendants who kill in 'considered desire for revenge' (refer to 7.49).

7.127 There was almost no feedback from Inquiry participants on this proposal, beyond the concern that it did not seem to 'fit' with the requirement that the defendant have a 'justifiable sense of being seriously wronged' (refer to 7.87).

Issues raised in relation to domestic relationship provocation

7.128 A number of Inquiry participants were supportive of exclusions that would respond to concerns about how the partial defence of provocation operates in intimate partner and domestic homicides. These are discussed in detail in Chapter 6 (6.59 – 6.72). In particular, there was support for the use of the phrase that captured a range of conduct including 'anything said or done to change the nature of a relationship.'[523]

7.129 As discussed at 7.63 – 7.67, the 'gross provocation' model contained a similar exclusion for provocation occurring in domestic settings, and provided that it would only be available if 'extreme and exceptional circumstances' were met. There were a number of concerns raised by Inquiry participants about aspects of the exclusion included in the 'gross provocation' model. These included concerns about whether the phrase 'domestic relationship' would capture the appropriate types of relationships, and whether the phrase 'extreme and exceptional circumstances' would operate as intended.

7.130 Some Inquiry participants also raised questions about the extent of the proposal's application to circumstances involving domestic relationships. There were concerns about whether the language in the proposal was broad enough to ensure that defendants who killed following allegations of or actual infidelity were precluded from relying on the defence, as well as those who killed third parties who they were not in a relationship with.

7.131 For example, Professor Stubbs questioned whether the language of the model, namely the phrase 'change in the nature of the relationship' adequately captured infidelity.[524]

7.132 She also echoed concerns, which were also put forward by the Women's Electoral Lobby, that the phrase 'domestic relationship' may not be broad enough to cover ex-partners; or new partners of ex-partners, or indeed the lover of a current partner. The Women's Electoral Lobby submitted that the wording of the Options Paper gross provocation model was problematic:

> [The proposal] only excludes from the defence killings of a current spouse/partner. This means … that a man who kills his unfaithful wife is precluded from the defence

523 See, for example, Response to options paper, Domestic Violence Coalition Committee, p 3.

524 Professor Stubbs refers to footnote 1 of the Options paper to describe 'infidelity', which defines it as "including such "sexual jealousy upon the discovery of infidelity of the victim, confessions of infidelity by the victim, taunts by the victim about the accused's sexual inadequacy and/or threats by the victim to leave a relationship with the accused, or actual separation".

> of provocation but a man who kills his wife's lover is not… why is the killing of a person outside of the domestic relationship more excusable than a killing within it?[525]

7.133 Both Stubbs and the Women's Electoral Lobby referred to the matter of *Ko*[526] as involving circumstances which would, on the gross provocation model, be precluded from relying on the defence and imply that such an outcome would be unjust.[527]

7.134 As noted at 7.129, a number of Inquiry participants also raised some concerns about the language used in the part of the model that addresses domestic relationship provocation. In particular, concerns were raised about the phrase 'extreme and exceptional circumstances.'

7.135 The Director of Public Prosecutions stated that although the 'gross provocation' model in the Options Paper seeks to narrow the scope of the defence, the inclusion of the phrase 'extreme and exceptional circumstances' may not be easily understood and may allow for some circumstances considered 'inappropriate' to provide a basis for a successful partial defence of provocation to be raised:

> [The model would] introduce added complexity … by introducing new concepts of "extreme and exceptional circumstances" that a jury would have to interpret and apply. The model seems to retain the possibility that infidelity may in extreme and exceptional circumstances be provocation.[528]

7.136 The Inner City Legal Centre expressed concern that the phrase "extreme and exceptional circumstances' was undefined, stating that it could argued that "there are extreme and exceptional circumstances to be found in any situation where murder is committed."[529]

7.137 Mr Coss had a similar view, suggesting that the inclusion of the phrase 'extreme and exceptional circumstances' creates a loophole that could be abused by some defendants:

> I do not agree with people who argue that there should always be an out, "except in exceptional and extreme circumstances". Every time there is an out, that out will be embraced, so I would certainly not recommend doing that.[530]

7.138 Women's Legal Services NSW agreed, noting that as the phrase 'extreme and exceptional circumstances' is undefined it may be used in circumstances where it has the impact of sending an inappropriate message:

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525 Submission 10a, p 3.

526 In *R v Ko* [2000] NSWSC 1130 the female defendant had married the deceased out of shame after he raped her and forced her to have an abortion. Their sexual life was attended by significant brutality and degrading conduct on the part of the deceased. On the day of the killing the deceased had said he wanted a divorce. She responded by stabbing him 17 times. The Court accepted that both provocation and substantial impairment were at play and Ko was convicted of manslaughter.

527 Response to options paper, Professor Julie Stubbs, p 6; Submission 10a, p 3.

528 Response to options paper, Mr Lloyd Babb SC, Director of Public Prosecutions, p 2.

529 Response to options paper, Inner City Legal Centre, p 6.

530 Mr Graeme Coss, Evidence, 28 August 2012, p 64. See also Answers to questions taken on notice during evidence, Supplementary questions on notice and Response to options paper, 28 August 2012, Inner City Legal Centre, p 6.

> We are … concerned that exceptions in these circumstances send a message of condoning violence against women and homosexuals which legitimises discrimination and vilification.[531]

Committee comment

7.139 Chapter 6 contains an extensive discussion of exclusionary conduct provisions. However, the Committee notes that there was little information provided by Inquiry participants about the proposals to exclude 'self-induced provocation' and 'considered desire for revenge'.

7.140 The Committee has received feedback from stakeholders on the proposal dealing with domestic relationship provocation. In this regard, the Committee notes that there were some Inquiry participants who considered that the proposal in the gross provocation model would clarify the law. In particular, the Committee notes the comments of Associate Professor Crofts who commented that the inclusion of the phrase 'extreme and exceptional circumstances' would assist in responding to some of the concerns about the operation of the partial defence in domestic contexts (refer to 7.67).

7.141 The Committee also notes that the same phrase was criticised by some stakeholders, on the basis that it was unclear. The Committee notes that those stakeholders who raised concerns about this phrase also raised concerns about the phrase 'justifiable sense of being seriously wronged.'

7.142 The Committee notes that many areas of the law are complex and that there are, at times, phrases and language used within legislation that gives rise to concerns similar to those referred to above. However, the Committee does not consider that these concerns are insurmountable, and considers that with the benefit of hearing argument from counsel and direction from the bench, that a jury will be in a position to assess whether, in a particular case, the gross provocation could cause a 'justifiable sense of being seriously wronged' and meet the threshold of the objective test. Similarly, the Committee considers that a jury, properly informed and directed, could make an appropriate assessment about whether a particular case falls into the category of having 'extreme and exceptional circumstances' in assessing whether it is captured by the domestic relationships provision.

7.143 The Committee also recognises the concerns of some Inquiry participants that the scope of relationships captured by the domestic relationship provocation exclusionary provision may not capture all relationships for whom the defence should be available, including new partners of ex-partners and lovers of a current partner. The Committee considers that any reform to the law of provocation should ensure that victims who fall into these categories are captured by any reform that seeks to restrict the availability of the defence in domestic or intimate partner related homicides.

The role of the judge and jury

7.144 The 'gross provocation' model provides that a judge is not required to leave provocation to the jury if there is insufficient evidence. This reflects the current situation in NSW, although this is not statutorily enshrined in the partial defence. Given that the model does not propose

[531] Answers to questions taken on notice during evidence, Supplementary questions on notice and Response to options paper, 28 August 2012, Women's Legal Services NSW, p 6.

to change that situation except to clarify that that is the law, it is unsurprising that there was limited feedback from Inquiry participants on this issue. However, those who did comment on it were supportive.

7.145 The Australian Lawyers Alliance raised the issue early in the Inquiry, recommending in its submission that any reform of provocation should allow for argument from counsel about whether there was sufficient evidence to allow the defence to go to the jury, referring to comments from Justice Osborn in the Victorian *Ramage* case in support of its position:

> [T]here are certainly circumstances where it should be open to the crown to argue that the jury should not be involved in decision-making processes of provocation where there are significant evidentiary questions … [In *Ramage* the Court] was clearly not satisfied that the defence of provocation should succeed. His Honour made the damning comment that:
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> > "I should interpolate that it was not submitted to the Court at the conclusion of evidence that this was a case in which provocation should not be left to the jury. Furthermore, in my view the Crown was correct to adopt this position as reflecting the current law and I of course must apply the current law whatever view I may hold as to the desirability of change to it."[532]

7.146 It was suggested by academics Crofts and Loughnan that although there is nothing precluding the prosecution from arguing that provocation not be left to a jury, the inclusion of a provision along the lines of that included in the model might clarify that the defence, when raised, does not automatically need to go the jury.[533]

7.147 Mr Giddy submitted on behalf of the Law Society that there are cases where judges do exercise their power to reject provocation, but accepted that there might be 'practical difficulties' in them doing so if one accepts the proposition that appeals processes open to defendants are influential on judicial decision-making:

> There are cases where the judge will not even allow provocation to go to the jury … [In *Stingel* which was not overturned on appeal], [t]he High Court said that the judge made the appropriate ruling and that is the leading case on it. Yes, that is a practical difficulty if you want to perceive it that way with our justice system.[534]

Committee comment

7.148 The Committee acknowledges that the current law already provides flexibility and discretion to judges presiding over homicides where provocation may be at play to exercise their power to refuse to allow provocation to go to the jury.

7.149 In particular the Committee acknowledges the authority in *Stingel*, referred to by the Law Society, in which the High Court upheld the decision of the trial judge to refuse to leave provocation to the jury.

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532 Submission 48, pp 7-8, citing *R v Ramage* (2004) VSC 508 per Osborn J at 28.

533 Response to options paper, Associate Prof Thomas Crofts and Dr Arlie Loughnanp 4.

534 Mr David Giddy, Solicitor, Law Society of NSW, Evidence, 29 August 2012, pp 26-27.

7.150 However the Committee also notes the comments of Justice Osborn in *Ramage* and the comments of the Australian Lawyers Alliance on the importance of legal argument in appropriate matters. In this context, the comments by Crofts and Loughnan suggesting that an express provision might clarify the position further indicates that there is some support for a proposal such as that contained in the model.

Chapter 8 Procedural and evidentiary issues

During the Inquiry a number of issues were raised about the manner in which provocation cases are conducted procedurally, with some Inquiry participants making suggestions about how the system can be improved. These included recommending that pre-trial disclosure provisions be introduced, as well as reforms to address concerns about the process of plea and charge negotiation and prosecution guidelines. There were also various evidentiary issues raised, with a number of Inquiry participants recommending reforms to provide for 'social framework' evidence to be adduced to respond to concerns about the nature of domestic and family violence. In addition, there were suggestions to place restrictions on the type of evidence that could be put before a court in provocation cases. This Chapter explores those issues.

Procedural issues

Pre-trial disclosure

8.1 Prior to the passage of the *Criminal Procedure Amendment (Pre-Trial Defence Disclosure) Act 2013*, there was no requirement that a defendant intending to run the partial defence of provocation provide notification to the prosecution of that intention. Pre-trial disclosure provisions are designed to improve case management and can be ordered by the court in relation to particular cases.[535] There were some specific pre-trial disclosure provisions that applied in respect of other defences, including substantial impairment and alibi.[536]

8.2 The Honourable James Wood AO QC raised the issue of pre-trial disclosure requirements for provocation. Referring to the fact that the partial defence of provocation is often run alongside the partial defence of substantial impairment, Mr Wood argued that a pre-trial disclosure requirement for provocation would be desirable:

> I would … like to see a requirement for pre-trial disclosure of the defence. There is already a provision in the *Criminal Procedure Act* for the accused to disclose pre-trial where there is an intention to rely upon substantial abnormality of mind, and I do not see why the same should not apply to provocation, having regard to the overlap.[537]

8.3 The Director of Public Prosecutions, Mr Lloyd Babb SC, suggested that if the Committee were to recommend the proposal, an appropriate framework already existed in relation to pre-trial disclosure requirements:

> In my view were we to go down that route, disclosure of reliance upon the defence would be necessary, disclosure of the nature of the evidence sought to be adduced would be necessary and disclosure of the names of witnesses [similar to that applicable for alibis].[538]

535 *Criminal Procedure Act 1986*, s 141

536 *Criminal Procedure Act 1986*, ss 150, 151.

537 The Hon. James Wood AO QC, Evidence, 29 August 2012, p 3.

538 Mr Lloyd Babb SC, Director of Public Prosecutions, Evidence, Wednesday 29 August 2012, p 49.

8.4 However, Mr Babb noted that pre-trial disclosure provisions did not always operate in the way they were intended, suggesting that although penalties were applicable for a failure to comply with pre-trial disclosure requirements, in practice they were rarely enforced:

> There are penalties provided in the *Criminal Procedure Act*; however, in reality it is very difficult to enforce penalties in a criminal trial. Once a criminal trial has started my experience has been that breach of provisions such as the alibi provisions might lead to a short adjournment to enable the Crown to scurry and try and meet the case, but it very rarely leads to any penalties—for example, exclusion of the defence entirely, which is a penalty provided by the Act. The reasons for that are because that may lead to an appeal point later on, it may lead to some unfairness to an accused person in excluding a defence that may have been available. That is one of the real difficulties with pre-trial disclosure provisions. If the provisions are there and not followed and the penalties cannot really be applied then often the pre-trial disclosure may be ineffective.[539]

8.5 Mr Babb also advised the Committee that in most cases, the prosecution is aware of the intention to run provocation notwithstanding the absence of a pre-trial disclosure requirement:

> Having consulted with a number of Crown Prosecutors I can advise that it is not common for the Crown to be taken by surprise by a defence of provocation. Usually the possibility of provocation will be evident on the face of the brief.[540]

8.6 The NSW Bar Association rejected suggestions that pre-trial disclosure provisions be introduced in respect of the partial defence of provocation, arguing that they are unnecessary. It submitted that the existing provisions applicable under the *Criminal Procedure Act 1986*, combined with the practice and procedures of the Supreme Court, were adequate:

> The Association is satisfied that Division 3 of Part 3 of the *Criminal Procedure Act 1986* (ss 134-149F), and current practice in the Supreme Court of New South Wales, provides an appropriate system of pre-trial disclosure and there is no need to make special provision in that regard for the partial defence of provocation.[541]

Committee comment

8.7 The Committee notes that on 20 March 2013, the Legislative Council passed a Government bill[542] to amend the *Criminal Procedure Act 1987* to 'expand the scope of mandatory disclosure requirements in criminal trials and allows an unfavourable inference to be drawn by a jury against a defendant who fails to comply with a pre-trial disclosure requirement under the division.'[543] Speaking in the Legislative Assembly on 19 March 2013, the Attorney General,

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539 Mr Babb SC, Evidence, 29 August 2012, p 49.

540 Answers to questions taken on during evidence notice and Supplementary questions, 29 August 2012, Mr Lloyd Babb SC, Director of Public Prosecutions, p 4.

541 Answers to questions taken during evidence notice, Supplementary questions on notice and Responses to options paper, 29 August 2012, Mr Bernard Coles QC, President, NSW Bar Association, p 8.

542 *Criminal Procedure Amendment (Pre-Trial Defence Disclosure) Bill 2013*.

543 *LA Debates* (13/3/13) 85.

Greg Smith, stated in the second reading speech that the bill would require, among other things:

> … disclosure of the nature of the accused's defence, including particular defences to be relied on, the facts, matters or circumstances on which the prosecution intends to rely to prove guilt … and with which the accused intends to take issue, and points of law that the accused intends to raise.[544]

8.8 The Committee notes that, as a result of the passing of the *Criminal Procedure Amendment (Pre-Trial Defence Disclosure) Bill 2013*, defendants in all Supreme Court trials, which will include all homicide matters, will be required to disclose the nature of the defence that they intend to rely on pre-trial. Further, the Committee notes that the Bill appears to address the concerns raised during the Inquiry in relation to pre-trial disclosure.

Charge negotiation, and prosecutorial guidelines

8.9 Some Inquiry participants, including Professor Julia Tolmie, Professor Julie Stubbs, Women's Legal Services NSW, NSW Domestic Violence Committee Coalition and the Australian Lawyers Alliance, raised concerns about charge negotiation in cases involving provocative circumstances. This concern was noted in Chapter 5 (at 5.43).

8.10 Charge negotiation (sometimes referred to as 'charge' or 'plea' bargaining) refers to the process of negotiation between the prosecution and the defence in which agreements are sometimes reached about settling charges. The Law Society's website defines 'charge negotiation' as follows:

> Negotiations during a criminal trial, between an accused person and a prosecutor in which the accused agrees to admit to a crime (sometimes a lesser crime than the one set out in the original charge). A plea of guilty generally attracts a discounted sentence and avoids the expense of a public trial. Negotiations are conducted in accordance with the Prosecution Guidelines of the Office of the Director of Public Prosecutions.[545]

8.11 Concerns were raised about the appropriateness of laying murder charges against defendants who, after experiencing long-term abuse, killed their abuser in circumstances where there were elements of self-defence, albeit not 'traditional' self-defence, at play. This concern about 'overcharging'[546] gave rise to further concerns about the pressures placed on defendants facing murder charges to plead to the lesser charge of manslaughter on the basis of provocation, particularly where the circumstances give some indication of self-defence.

8.12 The appropriateness of existing prosecution guidelines are general in nature and cover a range of aspects related to the role of the prosecution and decision making about case management. The Prosecution Guidelines of the Office of the Director of Public Prosecutions for New South Wales Prosecution (hereafter 'Prosecution Guidelines') guide Crown Prosecutors and others prosecuting on behalf of the Crown with respect to the prosecution of offences, and

544 *LA Debates* (13/3/13) 85.

545 Glossary of legal terms, Law Society of NSW, accessed 18 April 2013, <http://www.lawsociety.com.au/about/news/Glossary/index.htm>

546 See, for example, Submission 31, NSW Domestic Violence Committee Coalition, pp 44-45.

include guidance on the exercise of specified functions. They are issued pursuant to section 13 of the *Director of Public Prosecutions Act 1987*.[547] In the context of this Inquiry, the Prosecution Guidelines were considered in relation to charge negotiation and in the context of provocation.

8.13 These issues were highlighted by Sheehy, Stubbs and Tolmie in their article *Battered women charged with homicide in Australia, Canada and New Zealand: How do they fare?*[548] The article "examines trends in the resolution of homicide cases involving battered women defendants from 2000 to 2010."[549] The research findings are explored below.

Data and analysis of outcomes for battered women defendants in homicide matters

8.14 Sheehy *et al* note that while the Australian homicide rate is at a historically low level, having reduced over the past decade, the trend in domestic homicides does not reflect this change as it has not declined over the same period.[550]

8.15 The study indicates that for domestic homicides involving battered women defendants, proceedings were "overwhelmingly" commenced by way of murder charges against the defendant, but that in the majority of those matters the prosecution accepted a plea to manslaughter:

> Most cases did not go to trial but were resolved by a plea of guilty (n=42, 63%). These cases generally involved a plea of guilty to manslaughter in exchange for murder charges being dropped by the prosecution … This demonstrates the importance of prosecutorial discretion.[551]

8.16 Professor Tolmie discussed this issue further during the Committee's hearings, referring to an 'emerging trend' of such defendants settling matters by pleading guilty to manslaughter, sometimes on the basis of a provocation defence, in return for the murder charge being dropped. She highlighted concern that this approach not only risks these defendants receiving unjust outcomes (in circumstances involving elements of self-defence where acquittal may have been a possibility), but also that the process can impede the development of the law of self-defence:

> While most of these negotiations appear to be on the basis that defendants lacked a sufficient *mens rea* for murder (but exhibited demonstrable criminal negligence for the purposes of manslaughter), some are still based on the likely success at trial of a provocation defence. There are … many problematic features of such plea-bargaining, including the fact that women who appear to have strong, although not necessarily traditional, self-defence cases are not claiming self-defence. One consequence of this

547 See also Prosecution guidelines, NSW Director of Public Prosecutions, accessed 18 April 2013 <http://www.odpp.nsw.gov.au/guidelines/guidelines.html>

548 Sheehy, E., Stubbs, J. and Tolmie, J. (2012) *Battered women charged with homicide in Australia, Canada and New Zealand: How do they fare?,* Australian & New Zealand Journal of Criminology 45(3) 383–399 (hereafter referred to as 'Sheehy *et al*').

549 Sheehy *et al*, p 383.

550 Sheehy *et al*, p 385.

551 Sheehy *et al*, p 386.

> is that the case law on self-defence is not given the opportunity to develop so that it can accommodate the circumstances of battered defendants in an appropriate way.[552]

8.17 On this point Sheehy *et al* refer to an earlier study by Rebecca Bradfield, the findings of which reflect a 'double edged sword' whereby these defendants receive outcomes that are less severe than a conviction for murder and avoid the impact of going through a trial, but their actual experience of family violence which provides the contextual background to the killing is largely hidden:

> A study by Rebecca Bradfield based on NSW cases from 1985 to 2000 also found that 'lack of intent' was a common basis on which women pleaded guilty to manslaughter; she suggested that it may be emerging as a 'de facto domestic violence defence'. While she found that this trend may demonstrate compassion in the exercise of prosecutorial discretion, it also had the undesirable effect of obscuring the violent context that the accused had been facing and the necessity of their 'self-preservation' [citations omitted].[553]

8.18 Sheehy *et al* provide data on the outcomes of homicide prosecutions of battered women across Australian jurisdictions. The outcomes in NSW and across Australia suggest that battered women defendants are not generally convicted of murder, reflecting both a shift since Bradfield's work over a decade ago and, arguably, a better understanding of the contexts in which women kill in domestic settings:

> [M]urder convictions of battered women appear to have become rare in Australia. By comparison, Bradfield's study of the period 1980–2000 found seven murder convictions (9%) and 10 acquittals (13%) from 76 cases (2002). This suggests that, over the past decade, greater recognition has been given to the context of domestic violence in cases involving battered women defendants for the purposes of assessing criminal liability and applying the legal defences. It also seems that in the majority of homicide cases involving battered women defendants, the prosecution accepted guilty pleas to charges less than murder – sparing the defendant, witnesses and society the costs involved in going to trial. In slightly less than half of these cases, it did so on the basis of one of the partial defences to murder.[554]

8.19 Sheehy *et al* express concern that there are some women defendants that agree to plead guilty to manslaughter as a result of charge negotiations who are consequently deprived of potentially valid claims to acquittal through self-defence. However their concern is balanced against the potential for significantly poorer outcomes for battered defendants if these types of charge negotiations are not available:

> While we worry about women's abandonment of their self-defence claims in favour of accepting a manslaughter plea, we recognise these verdicts are an improvement over murder convictions.[555]

8.20 The research also indicates that a significant minority of battered women defendants avoid conviction altogether, largely on self-defence grounds. While acknowledging this represents

552 Tolmie, J. (2005) *Is the Partial Defence an Endangered Defence? Recent Proposals to Abolish Provocation* 2005 NZ Law Review 25, at 40, cited in Submission 4, Associate Professor Julia Tolmie.

553 Sheehy *et al*, p 386.

554 Sheehy *et al*, pp 387-388.

555 Sheehy *et al*, p 388.

some recognition of the difficult situation in which these defendants found themselves, the authors note that achieving these outcomes generally involved proceeding to trial:

> [I]n a sizeable minority of cases (19% Australia-wide; 25% in Victoria and NSW) battered women defendants are now successful in avoiding conviction altogether, mostly on the basis that their lethal self-help was a reasonable defensive response to the violent threat that they faced. This suggests that there is now some recognition, for the purposes of applying the law on self-defence, of both the dangerous nature of intimate partner violence and the limited resources available to some battered women to achieve safety. Most women who were exonerated had proceeded to trial, although in one case, atypically, the prosecution dropped homicide charges once it became apparent that there was a strong case for self-defence.[556]

8.21 Sheehy *et al* argue that although the data suggests that the system response to these defendants is improving, it is concerning that a significant number of matters where a plea to manslaughter was accepted involved circumstances demonstrating "strong defensive components" where acquittal based on self-defence may have been justified:

> [D]espite these positive developments, acquittals on the basis of self-defence are still not common … and those in non-traditional self-defence scenarios even rarer. What is of concern about this observation is that a number of the 39 cases involving guilty pleas to manslaughter demonstrate strong defensive components on the facts, suggesting that an acquittal on the basis of self-defence may have been justified in at least some of these cases.[557]

8.22 The authors suggest that this issue alone warrants an examination of prosecutorial decision making, particularly in relation to the 'public interest' test:

> This raises questions about the prosecutorial practice of indicting the defendant for murder when a guilty plea to manslaughter is subsequently accepted; is it in the public interest to charge murder and to accept a guilty plea to manslaughter when there may be serious doubts about the defendant's guilt?[558]

8.23 To demonstrate this point, the authors cited data from NSW as an example:

> [In] NSW, 16 of the 24 cases were resolved by guilty pleas. In all instances the accused had been indicted on murder charges. The accused pleaded guilty to manslaughter in 15 cases and the murder charges were dropped, and in nine (60%) of those cases she had, on her account, inflicted the lethal violence while being physically attacked or threatened by her violent partner. In a further two (13%) of these cases she was responding to the general threat posed to her by the deceased rather than a specific attack.[559]

8.24 The authors refer to the fact that some sentencing judges dealing with defendants in these matters acknowledged these concerns:

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556 Sheehy *et al*, p 388.

557 Sheehy *et al*, p 388.

558 Sheehy *et al*, pp 388-389.

559 Sheehy *et al*, pp 388-389.

> In several cases the sentencing judge effectively acknowledged that, had the case proceeded to trial, the accused may have had a realistic chance of being acquitted on the basis of self-defence or described the facts in a manner consistent with self-defence … In *R v Trevanna* (2003) …[the] sentencing judge commented that a jury may not have been persuaded that the Crown had negatived self-defence and may have acquitted the defendant altogether … In *R v Yeoman* (2003) …[t]he sentencing judge said that the Crown may have 'struggled' to make out manslaughter if she had contested it, as opposed to pleading guilty … Disturbingly, in *R v Burke* (2000), the one case where the accused pleaded guilty to murder, the sentencing judge acknowledged that the case was essentially one of manslaughter and used a manslaughter case as a guide in setting the sentence.[560]

8.25 Sheehy *et al* argue that these cases demonstrate the impact of pressure on defendants to plead when facing a charge of murder and the importance of prosecutorial discretion and charge negotiation. They also note that the pressures faced by battered women defendants exist notwithstanding discretion in sentencing in NSW:

> In jurisdictions where life is not mandatory or presumptive, a conviction for murder carries a sentencing tariff higher than that for manslaughter. This fact, combined with the discount available for an early guilty plea, will put pressure on defendants not to risk running a defence that, if unsuccessful, could see them convicted of murder.[561]

8.26 The authors refer to other research, including recommendations made by Judge Lynn Ratushny, a Canadian judge who, in conducting a review on self-defence in that jurisdiction, proposed changes to how prosecutors charged in such cases in order to respond to the pressures to plead faced by battered defendants. In doing so, Ratushny recognised the immense pressure on female defendants to plead guilty to manslaughter, even in cases where there are elements of self-defence:

> For a woman in this situation [weighing up the potential for a much heavier penalty of imprisonment; the need to provide and care for a young family; reluctance to testify publicly about her experience of abuse; feeling genuine remorse, even in the context of having acted in self-defence, and having difficult justifying taking a life] the forces compelling her to plead guilty are considerable. This situation causes me serious concern. It means that these guilty pleas are influenced in whole or in part by forces extraneous to the merits of the case. It also means that women (and men) may be pleading guilty to manslaughter when they are legally innocent because they acted in self-defence.[562]

8.27 Sheehy *et al* noted this and commented:

> Sheehy has argued, in line with the recommendations of Judge Lynn Ratushny from the Canadian Self-Defence Review, that Crown prosecutors should be governed by guidelines that instruct them to exercise caution in plea negotiations involving battered women where there is some evidence of self-defence. They should attempt to determine whether a proposed guilty plea is 'equivocal' or a true expression of the woman's acceptance of her guilt. If the former, the Crown should consider

560 Sheehy *et al*, pp 388-389. The article extracts comments made by sentencing judges in the matters of *R v Kennedy* (2000), *R v Trevanna* (2003), *R v Yeoman* (2003) as examples.

561 Sheehy *et al*, 389-390.

562 Ratushny, L. (1997) *Self Defence Review – Final Report*, p 24.

> proceeding to trial on manslaughter instead of murder in order to reduce the pressure on the woman to plead guilty and thus encourage the case to go to trial so that the self-defence evidence can be heard by the trier of fact [citations omitted].[563]

8.28 Professor Tolmie emphasised this point during the public hearings, referring to the proposal's capacity to reduce pressure on these defendants:

> Ratushny … called upon prosecutors to charge battered defendants in homicide cases with manslaughter if they were willing to accept a guilty plea to that offence. Such individuals would thus be relieved of the risks of a murder conviction resulting from a potentially unsuccessful claim of self-defence at trial.[564]

8.29 Professor Julie Stubbs also referred to Judge Ratushny's review, making the same point:

> In the Canadian self-defence review Justice Ratushny, who ran that review, raised some real concerns about practices in charging. She was encouraging the charge of manslaughter in more appropriate cases and giving people the opportunity to run self-defence to manslaughter rather than the much more risky strategy of trying to run self-defence to murder.[565]

8.30 Sheehy *et al* raised concerns that the data indicates that in Australia there does not appear to be a practice of charging manslaughter in 'appropriate' cases. They referred to the recommendations made by the Victorian Law Reform Commission to address this issue:

> Clearly this is not yet happening in Australia. In the overwhelming majority (85%) of cases murder charges were laid, even though in most (58%) cases pleas of guilty to manslaughter were eventually accepted. There must also be grave concerns about the integrity of a justice system in which the prosecution appears to be overcharging and then accepting guilty pleas in circumstances where there is evidence of self-defence that may raise a reasonable doubt as to the defendant's guilt. In fact the Victoria Law Reform Commission recommended that excessive self-defence be reintroduced … to encourage the prosecution in appropriate cases to lay charges of manslaughter on the basis of excessive self-defence, thereby removing the risk of a murder conviction for the accused going to trial, and to limit the number of issues at trial [as well as recognising] the need for prosecutorial guidelines and professional legal education to assist prosecutors and defence lawyers to arrive at appropriate charges and pleas, to identify available defences and to assist clients to make informed choices about their cases [citations omitted].[566]

8.31 In relation to the Victorian Law Reform Commission's recommendation, Professor Tolmie submitted that excessive self-defence, which exists in NSW alongside provocation, is a better proposition than provocation for battered women defendants because the latter may 'undercut' a self-defence case:

> While provocation currently performs a type of halfway house function for battered defendants, it is not as useful as the defence of excessive self-defence. Indeed, one of

563 Sheehy *et al*, 390.

564 Tolmie, J. (2005) *Is the Partial Defence an Endangered Defence? Recent Proposals to Abolish Provocation* 2005 NZ Law Review 25, at 40 - 41, cited in Submission 4, Associate Professor Julia Tolmie.

565 Professor Julie Stubbs, Evidence, Tuesday 28 August 2012, p 61.

566 Sheehy *et al*, p 390.

> the major problems with the provocation defence is that it may actually undercut, and thus be inconsistent with, the presentation of a self-defence case. Defence counsel are unlikely to feel comfortable arguing that, on the one hand, the accused was reasonable in perceiving the need to use lethal force in self-defence but, on the other, was emotionally out of control. By contrast, excessive self-defence is not strategically difficult to argue as an alternative to self-defence. Moreover, unlike provocation, it acknowledges the defensive nature of the accused's actions.[567]

Stakeholder views

8.32 Inquiry participant views on charge negotiation and prosecutorial discretion focussed on different aspects of these issues. Generally, women's organisations and advocacy groups raised concerns about 'overcharging' (of 'battered women' in particular). Other stakeholders, including legal groups, tended to focus on the importance of prosecutorial discretion and guidelines, which they generally considered to be 'appropriate'. Some Inquiry participants argued that greater transparency and a better process to record outcomes of charge negotiations would assist in dealing with some of the concerns raised about 'inadequate' guidelines and 'inappropriate' exercise of prosecutorial discretion.

8.33 The NSW Domestic Violence Committee Coalition referred to the work of Sheehy *et al* in raising concerns about prosecutors 'overcharging' in circumstances where a plea to manslaughter is later accepted, suggesting this may be a response to pressures to ensure that costs and efficiencies are made:

> Sheehy *et al* note their grave concern about the prosecution appearing to overcharge yet then accepting guilty pleas to manslaughter in circumstances where defensive elements are present. The DVCC shares this concern – it suggests that this practice (whether or not it is policy) may be an expedient method of disposing of the prospect of expensive trials.[568]

8.34 Women's Legal Services NSW also endorsed the view of Sheehy *et al*, arguing that there is a need for better prosecutorial guidelines to guide prosecutors making decisions about charges in cases where there appear to be elements of self-defence:

> As Sheehy argues, this highlights the strong need for prosecutorial guidelines for plea negotiations, particularly where there is "some evidence of self-defence". In some circumstances where defensive elements are present it may be appropriate not to proceed with any charges. In other circumstances where defensive elements are present the Crown should consider proceeding to trial on manslaughter rather than murder so as "to reduce the pressure on the woman to plead guilty [to manslaughter] and thus allow the self-defence evidence to be heard by the trier of fact."[569]

8.35 The NSW Domestic Violence Committee Coalition made the same statement, and both Inquiry participants referred to the fact that a similar recommendation had been made by the Victorian Law Reform Commission in its *Defences to Homicide Final Report*.[570]

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567 Tolmie, J. (2005) *Is the Partial Defence an Endangered Defence? Recent Proposals to Abolish Provocation* 2005 NZ Law Review 25, at 41 - 42, cited in Submission 4, Associate Professor Julia Tolmie.

568 Submission 31, p 44.

569 Submission 37, Women's Legal Services NSW, pp 26-27.

570 Recommendation 11. See Submission 37, p 27; and Submission 31, p 44.

8.36 The Law Society of NSW agreed that overcharging was a concern but considered that ultimately it was an issue of prosecutorial discretion:

> Well overcharging is not something that is not, how shall I say … uncommon and some cynics would suggest that overcharging might in part be to rattle people's confidence enough to accept a compromise. On occasions there is a justifiable criticism that overcharging is designed to take a person to trial to extract a compromise from a verdict. All those tactical issues are matters that might best be taken up with the Crown. Certainly overcharging is something that is concerning us and tactically it is a very difficult position for the defence to be in … It is a prosecutorial discretion issue. It is difficult for us to comment on except to say that … overcharging is always a concern, particularly if there is a suspicion that there is a tactical decision behind it.[571]

8.37 Ms Martha Jabour, Executive Director of the Homicide Victims Support Group, expressed the view that decisions about charges were appropriately left with the Director of Public Prosecutions in possession of all the facts. She stated that, from a victim's perspective, overcharging and subsequent acceptance of pleas to reduced charges can be frustrating and disappointing for families, but that once the process is explained to them they generally accept it:

> Maybe it is an overcharge when the police charge [some battered defendants] with murder but once again it is looking at all of the facts. I think the Director of Public Prosecutions probably is the best person to look at those facts when the brief is all put before him and his office. With that, we see it, a lot of our family members get very frustrated when the Director looks at a murder charge which is then agreed to by the Crown and by the defence that it be downgraded to manslaughter. Families are quite frustrated about it but when it is explained to them what that all means, the victim's families are accepting of it. They may not like it but they are accepting of it. I think we have enough filters in place to combat the battered wife who may be charged with murder but will not necessarily be convicted of murder.[572]

8.38 During the public hearings the Director of Public Prosecutions was questioned at length by the Committee about the adequacy of prosecutorial guidelines. He advised that charges are determined based on the available evidence:

> [I]n terms of the prosecution and whether sometimes we proceed with murder matters when it would be more appropriate to take a plea to manslaughter, I can only speak for myself and what I have done since being the Director. I would look carefully at the available evidence and assess it and not run a murder matter where I had formed the view that a matter was properly to be dealt with as a manslaughter matter.[573]

8.39 Mr Babb stated that in his experience, he was "not aware of specific instances" where the factual material was strongly suggestive that there would be available at least an arguable case

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571 Mr David Giddy, Solicitor, Law Society of NSW, Evidence, 29 August 2012, p 32.

572 Ms Martha Jabour, Executive Director, Homicide Victims Support Group, Evidence, 29 August 2012, p 62.

573 Mr Babb SC, Evidence, 29 August 2012, p 50.

of self-defence but that the defendant pleads guilty to manslaughter rather than risk a conviction for murder.[574]

8.40 Mr Babb went on to explain that the prosecutorial guidelines are general in nature, but that decisions are based on reasonable prospects of conviction in respect of particular charges:

> Our general prosecution guidelines apply, which state as a fundamental principle that there needs to be reasonable prospects of conviction in relation to the charge that runs and that in plea negotiations—[575]

8.41 Further to that, Mr Babb advised the Committee that there are no specific guidelines applicable to domestic homicides to assist prosecutors determine the appropriate charge (murder or manslaughter) and that, in his view, this was appropriate:

> I do not think that we should have [specific guidelines]. I think the appropriate guidelines are the ones in terms of decisions to prosecute and decisions about accepting pleas.[576]

8.42 Mr Babb rejected suggestions that his position was at odds with his acceptance that the partial defence was gender-biased:

> The Hon. ADAM SEARLE: … You say in your submission there is an inherent gender bias in the provocation defence and that it is unjust in its application. Is that not strongly suggestive of the need for you as the independent prosecutor to have a specific policy to carefully evaluate these matters to determine what is the appropriate charge in a particular matter? Is that not something you should look at?
>
> Mr BABB: I would do that on the basis of my current guidelines: reasonable prospect of conviction, and accepting a plea where that plea would enable the true objective criminality and subject features of the case to be taken into account on sentence. So I do not need a separate guideline to take into account the intricacies of the law in this regard.
>
> The Hon. ADAM SEARLE: Despite accepting an inherent gender bias as part of the law, you do not see that maybe the sensitivities around this require a particularly careful look to make sure defendants are not being disadvantaged?
>
> Mr BABB: No, I don't. The gender bias I was referring to there was really something that I believe the provocation springs from. I think it sprang from a more masculine view of what amounted to provocation; it sprang from an age of duels and protecting your honour in a male way. I think in lots of the cases that still get run it is more about things done in the name of honour than something that is truly a feature that should change a matter from murder to manslaughter.[577]

8.43 The NSW Bar Association when asked whether "there should be better guidelines for prosecutors in respect of the charges they pursue against battered women who kill and the

574 Mr Babb SC, Evidence, 29 August 2012, p 50.

575 Mr Babb SC, Evidence, 29 August 2012, p 50.

576 Mr Babb SC, Evidence, 29 August 2012, p 51.

577 Mr Babb SC, Evidence, 29 August 2012, p 51.

nature of domestic violence resulting in homicide when perpetrated by men and women," advised that they considered that existing prosecutorial guidelines were "satisfactory."[578]

8.44 Related concerns about the lack of transparency in the process of prosecutorial decision making and plea negotiations were also raised during the Inquiry.

8.45 In this regard, the NSW Domestic Violence Committee Coalition recommended a review of prosecutorial guidelines and practice, "particularly as they relate to the practice of plea bargaining in such cases and policies surrounding it. These practices must be made transparent."[579]

8.46 The Australian Lawyers Alliance made a similar recommendation, submitting:

> The ALA supports transparency in the plea bargaining process and recommends all negotiations around pleas are officially recorded so that statistical analysis of any reform can be properly undertaken.[580]

8.47 In doing so, the Australian Lawyers Alliance referred to the benefits of transparency in plea bargaining processes in the Victorian context, arguing that increased transparency may increase public confidence in the justice system and address concerns that convictions do not match culpability, particularly when homicides occur in a domestic context:

> [L]ack of transparency not only raises the risk that accused persons' convictions will not match their culpability, but it also hampers the public's ability to assess if that risk is realised. An improved system of plea bargaining, which incorporates the ideals of open and transparent justice, is essential in order to adequately understand how defensive homicide has operated, particularly within the context of gendered violence. Greater transparency and scrutiny would also serve to heighten public confidence in the legal process. Transparency of plea bargaining processes has been supported by the Victorian law Reform Commission. The ALA supports transparency in the plea bargaining process and recommends all negotiations around pleas are officially recorded so that statistical analysis of any reform can be properly undertaken.[581]

Committee comment

8.48 The Committee has noted with concern the findings of Sheehy, Stubbs and Tolmie regarding the outcomes of homicide matters involving 'battered women' defendants. The Committee also notes that the research points to two interrelated concerns about charge negotiation practices when dealing with these types of defendants. First, there is concern that murder is being charged inappropriately, in circumstances where there are defensive elements or where the intent is less than is required for murder. It was suggested that in some of these cases, manslaughter is a more appropriate charge. The second concern, which flows from the first, is that the 'battered woman' defendant is under immense pressure to plead guilty to manslaughter when charged with murder because the risk of running self-defence is too high if unsuccessful.

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578 Answers to questions taken on during evidence notice, Supplementary questions and Response to options paper, 29 August 2012, Mr Coles QC, p 2.

579 Submission 31, pp 44-45.

580 Submission 48, Australian Lawyers Alliance, p 22.

581 Submission 48, pp 21 - 22.

8.49 In relation to the first concern, the Committee is concerned by the data compiled by Sheehy *et al* which indicates that prosecutors are charging murder in matters involving 'battered women' type defendants, in circumstances where there are defensive elements and where a plea to manslaughter is subsequently accepted in exchange for the murder charge being dropped. In this regard, the Committee refers to the comments made by sentencing judges in the matters referred to at 8.24, and notes that there was some judicial acknowledgement of the possibility of acquittal in those matters. While the Committee recognises the qualitative nature of the data relied upon, the issues raised by it are of concern.

8.50 The Committee is equally concerned about the by-product of these processes, being that immense pressure is placed on defendants to plead guilty to manslaughter, rather than attempt to run self-defence and risk conviction on the murder charge, and heavier penalties that usually apply in the absence early plea discounts.

8.51 The Committee has also had regard to the comments of Professors Tolmie and Stubbs who both reflected on the recommendations of Judge Ratushny, which included the following:

> In all homicide cases, police should be required to consult with a prosecutor to ensure that the charge to be laid against the accused … is appropriate in the circumstances.
>
> Prosecutorial guidelines should require prosecutors to consider *all* of the evidence available to them, including evidence that may support a defence such as self-defence, in determining whether there is sufficient evidence to justify or continue a prosecution for homicide.
>
> Prosecutorial guidelines should instruct prosecutors to exercise extreme caution when involved in plea discussions concerning homicides where there is some evidence supporting a defence of self-defence. Specifically, they should be directed to consider whether the person's apparent willingness to plead guilty to manslaughter is a true expression of their acceptance of legal responsibility for the killing or is an equivocal plea. If the latter, the prosecutor should consider proceeding on manslaughter rather than murder so that the defence evidence can be heard at trial.[582]

8.52 The Committee agrees with the comments of Stubbs and Tolmie that Judge Ratushny's recommendations are worthy of consideration given the concern about the ability of 'battered women' defendants to access justice in a legal world structured around male experience.

8.53 The Committee notes the advice of the Director of Public Prosecutions that he is in the process of reviewing the Prosecution Guidelines and that, while he is not persuaded that guidelines relating to domestic homicides may require specific attention, he would reflect on the issue.[583]

8.54 The Committee recommends that the Director of Public Prosecutions give serious consideration to the issue of the adequacy of existing guidelines as they relate to homicides occurring in a domestic context. The Committee is of the view that specific guidelines are required to assist prosecutors determine the appropriate charge to lay against defendants in circumstances where there is a history of violence toward the defendant.

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582 Ratushny, L. (1997) *Self Defence Review – Final Report*, pp 198-199.

583 Mr Babb SC, Evidence, 29 August, 2012, p 54.

Recommendation 1

That the Director of Public Prosecutions include a specific guideline in the Prosecution Guidelines of the Office of the Director of Public Prosecutions in relation to homicides occurring in a domestic context. The guideline should provide clear direction to assist prosecutors in determining the appropriate charge to lay against defendants, particularly in circumstances where there is a history of violence toward the defendant.

8.55 The Committee has also considered the concerns raised by the Australian Lawyers Alliance and the NSW Domestic Violence Coalition Committee regarding the lack of transparency around plea negotiation processes.

8.56 The Committee has not received enough evidence to support making a recommendation in respect of suggestions to require system enhancements to improve transparency of these processes, but agrees in principle that such processes should be as transparent as possible. In particular the Committee agrees that increased transparency may contribute to greater public confidence in the criminal justice system, through better accountability and better evaluation of outcomes.

Evidentiary issues

8.57 Three key evidentiary issues relating to provocation were raised during the inquiry. First, there were suggestions that the partial defence of provocation should require that the onus of proof rest with the defendant to establish the defence on the balance of probabilities. Second, there was significant support among Inquiry participants for an amendment to provide for the admissibility of 'social framework' evidence, similar to those recently introduced in Victoria. Third, there was some (albeit limited) discussion about exclusionary evidentiary provisions. These are discussed below.

The onus and standard of proof

8.58 As discussed in Chapter 2 (2.32 − 2.34), section 23 requires that the Crown negate the partial defence of provocation beyond reasonable doubt.

8.59 During the Inquiry, a number of participants referred to the fact that in at least one other Australian jurisdiction, Queensland, the onus of proof is borne by the defendant.[584] Indeed, number of Inquiry participants, including the Australian Lawyers Alliance, Dr Fitz-Gibbon, the Honourable Mr Wood, Mr Coss, and Mr Babb indicated that they would support a change to the current position, which would place the persuasive burden on the defendant seeking to rely on provocation to establish the defence. It was argued that, because the defendant is usually the only witness to the killing, shifting the onus to establish the partial defence (on the balance of probabilities) would require the person with the most knowledge of the incident to put those facts before the Court.

[584] See, for example, Julie Stewart, Secretary, New South Wales Domestic Violence Coalition, Evidence, 28 August 2012, p 6; Dr Kate Fitz-Gibbon, Evidence, 28 August 2012, p 47.

8.60 The persuasive burden of proof did not always fall on the prosecution to negate the existence of the partial defence of provocation. A brief summary of the history of the onus and standard of proof in provocation follows, along with a discussion of the circumstances in which the onus and standard of proof in defences and offences rests with the defendant. There is a short examination of the American experience, before the impacts of reversing the onus are considered in the context of stakeholder responses.

History of the onus and standard of proof in the partial defence of provocation in English and NSW law

8.61 Historically, the onus of proving that there had been provocation rested upon the defendant.[585] In Britain, the position shifted in 1935 with *Woolmington v DPP*.[586] *Woolmington* set out the 'golden thread' rule applicable under criminal law:

> Throughout the web of the English Criminal Law one golden thread is always to be seen that it is the duty of the prosecution to prove the prisoner's guilt … No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.[587]

8.62 As noted in Chapter 2 (at 2.28 − 2.32), the partial defence of provocation was statutorily enshrined in NSW from 1883, and prior to amendments almost a century later (in 1982) the onus of establishing provocation rested with the defendant.

8.63 The High Court of Australia considered the issue of onus in section 23 of the *Crimes Act 1900* (NSW) in 1976 in *Johnson v The Queen*.[588] While noting the 'golden thread' principle enunciated in *Woolmington*, the Court considered whether section 23 (and its predecessor, 370 of the *Criminal Law Amendment Act, 1882*) did, in fact, reverse the common law position and shift the onus onto the prosecution.[589]

8.64 The situation was clarified with the 1982 amendments, which included amending section 23 to explicitly place the onus with the prosecution.[590] The rationale was described by the then Attorney General Frank Walker as reflecting the golden thread rule:

> The other major change introduced by the new section 23 is that the onus of proof rule, which is unique in Australia, will be reversed. At present, where an accused raises the defence of provocation, the onus is upon him or her to prove it on the balance of probabilities. The usual rule in the criminal law for defences is that once the accused raises a particular issue, such as alibi or self-defence, the prosecution must disprove it beyond reasonable doubt before a conviction can be obtained. This is the time-honoured rule which, it is generally recognised, should also apply to provocation. Section 23 will now bring the law of provocation in this regard into line with the law in all other Australian jurisdictions and in England . . . [591]

585 Refer to Chapter 2, at 2.33.

586 *R v Woolmington* (1935) AC 462.

587 *R v Woolmington* (1935) AC 462, per Lord Chancellor at 7-8.

588 *Johnson v* R (1976) HCA 44.

589 *Johnson v* R (1976) HCA 44, per Barwick CJ at p 632.

590 *Crimes (Homicide) Amendment Act 1982* (NSW).

591 *LA Debates* (11/3/1982) 2486.

Offences and defences in which the onus of proof is borne by the defendant

8.65 There are some offences and defences in NSW for which a defendant bears the onus of proof on the balance of probabilities.[592] In relation to offences, this requires the defendant to raise a reasonable doubt about their commission of the offence. An example of an offence where a reverse onus applies is found in section 29 of the *Drugs Misuse and Trafficking Act 1985* (NSW).

8.66 In relation to defences, the partial defence of substantial impairment by abnormality of the mind places a persuasive onus of proof on defendants who seek to rely on it (as noted in Chapter 2 (at 2.39).

8.67 The inconsistency between where the onus rests in the partial defences of substantial impairment as opposed to provocation was considered by the NSW Law Reform Commission in 1997. The Commission noted that the reverse onus applicable under diminished responsibility (the predecessor to substantial impairment) is inconsistent with the general principle that the prosecution bear the onus. The Commission also noted that the two defences were very different in nature and rejected suggestions that the prosecution should bear the onus of establishing substantial impairment, notwithstanding that the two defences are sometimes raised together:

> This position [with diminished responsibility] has been criticised for being inconsistent with the general principle that it is the prosecution who bears the persuasive burden of proving its case against the accused [and that it] … is inconsistent with the burden of proof in respect of the partial defence of provocation … There is concern that, where both diminished responsibility and provocation are raised together, juries may by confused by the distinctions in the burden and standard of proof for the two defences.
>
> … the Commission is of the view that the burden of proof in relation to the defence of diminished responsibility should remain on the accused. Diminished responsibility is a special matter which calls for expert evidence intimately connected with facts wholly known to the accused. It is therefore appropriate that the accused should continue to bear the burden of proof. **To the extent that the burden of proof is different for the defence of provocation, this reflects the different nature of that defence, which does not rely on expert evidence to rebut the general presumption of sanity. Provided that diminished responsibility and provocation remain markedly different in concept and by definition, we do not agree that confusion will arise from the differing burdens of proof where the two are raised together** [emphasis added].[593]

Reverse onus in other jurisdictions

8.68 There are examples in other jurisdictions where a defendant bears the onus of proof to establish a defence on the balance of probabilities. Two examples are discussed below. Queensland is particularly relevant in that the reverse onus applies in relation to the partial

592 The Committee is not aware of any defences or offences where a defendant bears the onus of proof to a standard higher than on the balance of probabilities (for example, beyond reasonable doubt). This reflects the requirement that to achieve a criminal conviction, all elements of the offence must be established beyond reasonable doubt.

593 NSW Law Reform Commission, *Report 82 (1997) - Partial Defences to Murder: Diminished Responsibility*, 3.107-3.108.

defence of provocation. There are also several jurisdictions throughout the United States of America where a defendant bears the onus of proof when it comes to establishing a defence that they wish to rely on. It is worth noting that in each of the instances examined below, the prosecution has established, beyond reasonable doubt, all the elements of the *offence* charged. Any reduction in criminal liability resulting from a conviction on that charge relies on the ability of the defendant to establish, on the balance of probabilities, the existence of a positive defence (or partial defence). This is discussed further below.

8.69 As noted in Chapter 3, Queensland has reformed the law of provocation to require that the defendant bear the onus of proof of establishing the defence on the balance of probabilities.

8.70 The Queensland reforms endorsed the recommendations of the Queensland Law Reform Commission in 2008, which evaluated the arguments for and against reversing the onus. The Commission set out the key arguments supporting a reversal of the onus as follows:

> The prosecution [P] will very often not be in a position to contest the factual detail of the claim as the only other potential witness will have been killed by the defendant [D]. Once P has established, beyond reasonable doubt, all the elements of the offence of murder against D, it is not unreasonable to require D to establish, on the balance of probabilities, the essential facts on which the claim of mitigation is based as normally D will be the only witness with knowledge of all the relevant facts.
>
> If the onus of proof is placed on the party who wishes to rely on provocation, it is likely to result in more clearly articulated claims of provocation ... The more clearly defined a claim of provocation, the fairer it is to all concerned in the trial (including the jury). Generally, the administration of justice will be enhanced if the onus of proof is on the party who wishes to rely on the claim.
>
> If the onus of formulating the claim of provocation is placed on the party who wishes to rely on the claim, the trial judge may have a greater capacity to act as a gatekeeper to prevent unmeritorious claims being advanced before juries ... This capacity is essential if the parameters of provocation are to be redrawn in a way that is more consistent with current community expectations.
>
> A strong analogy exists to the partial defence of diminished responsibility [substantial impairment to abnormality of mind in NSW]. A successful claim of [substantial impairment], like provocation, reduces murder to manslaughter. [Substantial impairment], like provocation, need only be considered after the prosecution has proved that the defendant is guilty of murder.[594]

8.71 In addition, the Commission rejected the proposition that reversing the onus was incompatible with the presumption of innocence, stating:

> In the Commission's view, a reverse persuasive onus on a defendant claiming the benefit of provocation is not incompatible with a presumption of innocence about murder. Under a reverse persuasive onus, the defendant is not required to prove that he or she is innocent of murder but instead that, because of the circumstances in

[594] Queensland Law Reform Commission, *A Review of the Excuse of Accident and the Defence of Provocation, Report 64* (2008), pp 492-493, cited in Mr Graeme Coss, Responses to options paper, pp 1-2.

> which the offence was committed, the offence should be reclassified as manslaughter.[595]

8.72 The position in the United States is different to that in Australia (and in Britain). The United States have "given constitutional status to the presumption of innocence and the reasonable doubt standard in criminal cases."[596] However, in relation to 'positive' or 'affirmative' defences, the onus is generally borne by the defendant.[597]

8.73 The Supreme Court of Vermont considered the circumstances in which the onus can be shifted to the accused in *State v St Francis*.[598] It considered that there might be some circumstances in which it may be appropriate, from a policy and fairness perspective, to require the defendant to bear the onus of proof:

> Our analysis must start with the general rules guiding the allocation of the burden of proof. "There are no hard-and-fast standards governing the allocation of the burden of proof in every situation." … This proposition is based in part on Professor Wigmore's conclusion that "there is not and cannot be any one general solvent for all cases. It is merely a question of policy and fairness based on experience in the different situations" … Professor Wigmore states various considerations for allocating the burden of proof. The first is to place the burden on the "party having in form the affirmative allegation." This is an application of the obvious principle that it is easier to prove the existence of a fact than the nonexistence of a fact. A second test is to determine "to whose case the fact is essential." … And finally, "[s]till another consideration has often been advanced as a special test for solving a limited class of cases, i.e., the burden of proving a fact is said to be put on the party who presumably has peculiar means of knowledge . . ." [citations removed].[599]

8.74 Following from this assessment, the Supreme Court in *Vermont v Baker* observed that a persuasive burden to establish an affirmative defence could be placed upon a defendant once the Crown had established all elements of the offence beyond reasonable doubt, without breaching the constitutional protection afforded to defendants:

> Once we determine that an affirmative defence does not challenge an element of the crime, the constitutional requirement that the burden rest upon the State evaporates. Hence, the burden of persuasion may be placed on either the defendant to prove the defence by a preponderance of the evidence or the prosecution to disprove the defence beyond a reasonable doubt …
>
> … recently, we held that once the State proves beyond a reasonable doubt that a defendant committed a crime within the boundaries of the State, the burden is then

595 Queensland Law Reform Commission, *A Review of the Excuse of Accident and the Defence of Provocation, Report 64* (2008), p 495, cited in Mr Graeme Coss, Responses to options paper, pp 1-2.

596 *Report on the Burden of Proof in Criminal Cases* (1985) Parliament of Victoria Legal and Constitutional Committee, p 55.

597 A positive defence is one where the defendant relies on facts other than those which are alleged by the prosecutor. Sometimes the defendant concedes that the offence elements are met. An example of a positive defence is self-defence. Conversely, a negating defence is one which hinges on the defendant's ability to raise a reasonable doubt about the existence of an essential element of the defence (for example, intention). See also *State of Vermont v Baker* 88-616.

598 563 A.2d 249 (1989).

599 *State v St Francis* 563 A.2d 249 (1989), per Dooley J at 252.

> allocated to defendant to prove by a preponderance that the State lacks jurisdiction over him because he is an Indian and the alleged crime was committed in Indian country … In *St. Francis*, we developed several factors to consider when allocating the burden of persuasion … These factors generally place the burden upon the party: (1) seeking to prove the existence of a fact rather than its nonexistence, (2) to whose case the fact is essential, and (3) who has peculiar knowledge of the existence of the facts at issue… [citations omitted].[600]

Inquiry participant views on potential impacts of a reverse onus

8.75 The Committee sought the views of Inquiry participants, on the proposal to shift the onus and standard of proof to require that the defendant establish provocation on the balance of probabilities, in the Options Paper referred to at 1.16.

8.76 Inquiry participant feedback was split between those who supported changing the onus and standard of proof to require that a defendant seeking to rely on provocation establish the defence on the balance of probabilities, and those who did not. A majority of Inquiry participants who commented on the proposal opposed any change, however, there was some support from a range of stakeholders. Most, but not all, of those supporting a shift also took the view that the partial defence should be abolished.[601]

8.77 Inquiry participants who supported a reversal of the onus (and a change in the standard) of proof put forward two main reasons.

8.78 First, it was suggested that it went some way toward ensuring that defendants give evidence in their trial and, perhaps more importantly, that it would impose a responsibility on them to explain what happened in circumstances where there is likely to be no other witness who could shed light on the events, particularly where the prosecution had established all the elements of murder and the only issue is whether an affirmative defence exists. Comments from those Inquiry participants reflected the concern that it was very difficult for the prosecution to negative the non-existence of a fact and it was suggested that reversing the onus would result in claims of provocation being more clearly articulated, and therefore fairer to all involved.

8.79 Second, some noted that it would align provocation with substantial impairment to a degree, arguing that this consistency would be beneficial.

8.80 The Honourable James Wood AO QC referred to both of these arguments in supporting the proposal for a reverse onus, but accepted that it was controversial. He stated that shifting the onus to the defendant would align provocation with substantial impairment and noted that the defences are commonly run together; and also suggested that it would respond to the concern that, in most provocation matters, the facts are known only to the defendant and there are few (if any) witnesses to the incident and as such they are not easily tested:

> The second thing I would do, and I realise this is quite radical, would be to reverse the onus, to say that the onus is on the accused to prove that they acted under

600 *State of Vermont v Baker* 88-616, per Dooley J, cited in Correspondence received from the Hon. Trevor Khan MLC, 16 October 2012.

601 Including, for example, Mr Lloyd Babb SC; Mr Graeme Coss; the Australian Lawyers Alliance; Homicide Victims Support Group.

> provocation. The reason I say that is twofold. First of all it would bring provocation into line with the substantial impairment defence, where the onus does lie upon the accused. That is important because in these cases, almost always, there is both substantial impairment and provocation. Particularly in the battered wife situation, very often the accumulative abuse and so on has produced what can be an abnormality of mind or a substantial impairment. The two things run together, so a jury is faced at the moment with different onuses if the two defences are raised … Secondly, I think it is important because the only person who really knows the true facts is the accused, and I think that that accused should be in the position of placing the facts before the court and having the onus of establishing the diminished responsibility; otherwise it is not easy for the prosecution to negative it.[602]

8.81 The Director of Public Prosecutions, while preferring abolition of the partial defence, agreed that shifting the onus onto the defendant may assist in addressing difficulties that arise when multiple defences with different onuses are run at trial and would be a beneficial reform:

> I think that it would be appropriate to put the onus on the person raising the partial defence to get over some of the [issues arising from different onuses applying to different defences run concurrently]. There is the idea that it can be raised somehow on the evidence but you do not give any evidence about it and the fact that you lost control, and it is then put to the jury to try to work it out.[603]

8.82 The idea that the imposition of a burden of proof onto the defendant would result in greater transparency and accountability was also noted by Assistant Commissioner Mark Murdoch of the NSW Police Force. In response to a question about how to ensure juries get 'the full picture', Mr Murdoch suggested reversing the onus:

> If an accused wants to raise the defence of provocation the onus becomes one for the accused to prove that they were provoked as opposed to the prosecution having to prove that they were not provoked. I would think that that is probably an option … The prosecution cannot be briefed or instructed by the deceased, so the accused on many occasions … could say what they like because they know there is no rebuttal. If they are half smart in their defence, as perpetrators are—they are intelligent, they are cunning, they are calculating—they would have a defence sorted before they jumped in the witness box or even gave their views from the Bar table, but they would have something sorted that they knew would be difficult to rebut.[604]

8.83 Mr Coss, while strongly favouring abolition of the partial defence, argued that if it were to be retained reversing the onus was an obvious reform option. He referred to the rationale enunciated by the Queensland Law Reform Commission (see 8.70 − 8.71) to support the argument and, referencing the Commission's report, suggested that the proposal strikes an appropriate balance between the rights of the defendant and those of the community:

> [It is] not unreasonable for society to insist that a defendant who wishes to claim the benefit of provocation establish, on the balance of probabilities, his or her entitlement to provocation … the Commission believes that a transfer of the persuasive onus to

602 Hon. Wood AO QC, Evidence, 29 August 2012, p 3.

603 Mr Babb SC, Evidence, 29 August 2012, p 57. See also, Mr Lloyd Babb SC, Director of Public Prosecutions, Office of the Director of Public Prosecutions, Responses to options paper, p 1.

604 Mr Mark Murdoch, Assistant Commissioner, NSW Police Force, Evidence, 29 August 2012, p 23.

> the defendant represents a fair balance between the rights of the individual and the wider interests of the community.[605]

8.84 The desire to see defendants give evidence at trial was apparent in submissions supporting a reverse onus, however the Committee was advised that in the majority of cases this already occurs. Dr Fitz-Gibbon, in an answer to a question on notice, submitted that this was the case in 70% of provocation matters in NSW courts between January 2005 and August 2012 where the matter was not resolved by plea:

> … from January 2005 to August 2012 there were 17 cases in New South Wales (NSW) where provocation was successfully raised as a partial defence to murder. Seven of these cases were resolved by the defendant entering a guilty plea prior to trial, however, the remaining 10 cases proceeded to trial and resulted in a jury verdict of guilty to manslaughter by reason of provocation. In the majority of these cases (7 of the 10 cases) the defendant gave evidence at trial. This would suggest that whilst reversing the onus of proof would arguably increase the prospect of defendants giving evidence at trial, in NSW since 2005 the majority of defendants who have successfully raised provocation at trial have given evidence to support their defence.[606]

8.85 While there was strong support from some participants, the majority of Inquiry participants who commented on the reverse onus proposal rejected it. There were two main reasons for this.

8.86 First, it was argued that it offended the fundamental principal of the legal system that the prosecution should establish a defendant's criminal liability beyond reasonable doubt (i.e. the golden thread rule).

8.87 Second, it was suggested that reversing the onus places too great a burden on defendants and, in particular, would have a significant detrimental impact upon 'battered women' defendants. A significant proportion of those opposing reversing the onus included groups that can broadly be described as focussing on women's rights and family violence,[607] and academics working in these fields.[608]

8.88 Those Inquiry participants who rejected the proposal based on principle, that is on the basis that it offends the 'golden thread' rule, included Crofts and Loughnan, the Public Defender's Office, Professor Stubbs, Hawkesbury Nepean Community Legal Centre, the NSW Bar Association, the Law Society of NSW and the NSW Council for Civil Liberties.

8.89 The Bar Association submitted that exceptions to the 'golden thread' should not be made because of difficulties in proving the defendant's state of mind:

> The "golden thread" of our system of criminal justice is that the prosecution bears the onus of proof in respect of both elements of offences and defences. An exception is

605 Queensland Law Reform Commission, *A Review of the Excuse of Accident and the Defence of Provocation, Report 64* (2008), pp 495-496, cited in Mr Graeme Coss, Responses to Options Paper, p 2.

606 Answers to questions on taken on notice during evidence, 28 August 2012, Dr Kate Fitz-Gibbon, School of Humanities and Social Sciences Deakin University, p 2.

607 See, for example, Women's Electoral Lobby; NSW Domestic Violence Committee Coalition; Women's Legal Services NSW.

608 See, for example, Professor Julie Stubbs; Professor Julia Tolmie.

> made in respect of the defences of insanity and diminished responsibility where psychiatric issues arise and expert evidence is necessarily required. However, no exception is made simply because it may be difficult for the prosecution to prove the state of mind of the accused (for example, proving such states of mind as intention, recklessness, knowledge, belief, etc.).[609]

8.90 Similarly, the Public Defender's Office rejected the proposal, with reference to the presumption of innocence:

> The Public Defenders strongly oppose [reversing the onus of proof]. The fundamental precepts of our criminal justice system include the presumption of innocence. A necessary corollary to that fundamental principle is the requirement that the Crown bears the onus of proof.[610]

8.91 Several Inquiry participants opposed or were concerned about reversing the onus of proof on the basis that it would make it more difficult for defendants, particularly those defendants who kill after long-term domestic abuse. These included Professor Julie Stubbs, Professor Julia Tolmie, the NSW Domestic Violence Committee Coalition and the Inner City Legal Centre.

8.92 Professor Tolmie explained her view, which was supported by Professor Stubbs,[611] as follows:

> I think it is inappropriate to reverse the onus of proof … it is like using a sledgehammer to crack a nut. Battered women traditionally have struggled to raise provocation along with the other criminal defences, so I think to reverse the onus of proof is just going to place extra obstacles in front of those defendants. It is not targeted particularly to the situations where we want to remove the defence.[612]

8.93 The NSW Domestic Violence Committee Coalition and Women's Legal Services NSW recommended that the issue be considered as part of a broader review of homicide. In its response to the Options Paper, the Coalition submitted that there were several issues that needed to be considered, including how such a move would impact on (particularly) victims of family violence, both as defendants and as homicide victims:

> … further information is needed about whether the onus of proof in provocation has been reversed only in combination with other amendments that better take account of homicides in the context intimate partner violence … [as well as information about] how this would operate in the context of other defences that may be relied on by the accused at the same time. It is important to note that such a reversal of the onus of proof would also apply to women who are seeking to rely on provocation in the context of their own victimisation.[613]

8.94 A number of those opposing the proposal also specifically rejected some of the arguments for it. For example, the NSW Bar Association, Professor Stubbs, the Law Society of NSW and the Women's Electoral Lobby, all stated that the argument that it would simplify provocation for

609 Answers to questions on taken on notice during evidence, Supplementary questions on notice and Responses to options paper, 29 August 2012, Mr Coles QC, p 5.

610 Response to options paper Ms Dina Yehia SC, Public Defender, Public Defenders Office, p 3.

611 Response to options paper, Professor Julie Stubbs, University of New South Wales, p 1.

612 Professor Julia Tolmie, Faculty of Law, University of Auckland Evidence, 21 September 2012, p 10.

613 Response to options paper, Ms Betty Green, Convenor, NSW Domestic Violence Committee Coalition, p 4.

juries by bringing it into line with substantial impairment was unjustified on the basis that the proposal would put the onus directions relating to provocation at odds with those for self-defence, which is also commonly run with provocation:

> Reversing the onus would increase the complexity of jury directions in cases where provocation, self-defence and excessive self-defence are in issue. The jury would have to be directed that the *accused bears the burden* of proving on the *balance of probabilities* that they were provoked and yet the *prosecution bears the burden* of proving *beyond reasonable doubt* that the accused did not kill in self-defence or excessive self-defence [emphasis in original].[614]

8.95 A number of these participants also submitted that there were clear distinctions between the defence of provocation and those of substantial impairment and insanity which justified a reverse onus, namely the latter defences necessarily require expert opinion:

> There are some exceptions to the [golden thread rule] but they are restricted to defences of insanity and diminished responsibility [substantial impairment] where psychiatric issues arise and expert evidence is necessarily required.[615]

8.96 The Women's Electoral Lobby made a similar point:

> The prosecution bears this burden in relation to offence elements as well as negating defence elements, with two exceptions: the defence of mental illness and the partial defence of substantial impairment by abnormality of the mind. The rationale behind these exceptions is the presumption of sanity. Every person is presumed to be of sufficient soundness of mind to be criminally responsible for his or her actions until the contrary is proved.[616]

8.97 Mr Giddy, representing the Law Society, also rejected the suggestion that the onus for provocation should be aligned with that of substantial impairment and that the principle that the prosecution bear the onus should be upheld:

> It is the same as excessive self-defence. I do not see how it is different. The Crown still carries the burden beyond reasonable doubt … That area is very easy to be critical of on a case-by-case basis but it is absolute bedrock stuff, the burden of proof and the standard of proof.[617]

Committee comment

8.98 The Committee notes the arguments for and against the proposal to reverse the onus of proof for the partial defence of provocation to place a persuasive burden of proof on the defendant and to change the standard of proof to the balance of probabilities.

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614 Submission 10a, Women's Electoral Lobby, p 1. See also Responses to options paper, Professor Julie Stubbs, p 2; Answers to questions taken on notice, supplementary questions on notice and Responses to options paper, Mr Coles QC, p 5.

615 Response to options paper Ms Dina Yehia SC, Public Defender, Public Defenders Office, p 3.

616 Submission 10a, p 1.

617 Mr Giddy, Solicitor, Evidence, 29 August 2012, p 26.

8.99 In light of the divergent views on the issue, and the significance of some of the criticisms levelled against the proposal, the Committee has not been able to reach a firm conclusion and does not make any recommendation in respect of it.

8.100 The Committee is concerned that if progressed, the proposal may inadvertently impact upon other areas of the criminal law which the Committee has not had the opportunity to turn its mind to.

8.101 While acknowledging the strength of some of the arguments for the proposal, the Committee of the view that such a reform should only be considered as part of the reference to the NSW Law Reform Commission contemplated by Recommendation 11 of this Report.

'Social framework' evidence

8.102 A major issue arising throughout the course of the Inquiry, and one which divided opinion, was whether there was adequate scope within the current evidentiary framework to ensure that certain types of evidence was able to be adduced during provocation trials or whether a specific legislative provision is warranted. Specifically, this related to evidence of the circumstances of (usually) women who experience family violence and who either kill an abusive partner, or who are killed by their abuser. This type of evidence is sometimes referred to as 'social framework evidence'.

8.103 Social framework evidence is evidence that provides context to the experiences of victims of domestic and family violence. It includes information about the general nature and dynamics of relationships affected by family violence and the cumulative effect on the person or a family member of that violence (more examples are included below at 8.107). Such evidence includes not only evidence of, for instance, the history of violence relating to the specific case, but also contextual information relevant to the experiences of victims of domestic violence to assist the court and the jury to understand the specifics of the case and the common myths and misconceptions about family violence. For example, social framework evidence could be used help a jury understand the difficulties faced by abused women deciding whether to leave a violent situation, countering the contention that she "should just leave." Similarly, it could explain circumstances where abused women 'snap', killing an abuser in a non-confrontational situation knowing that future violence against her or her children is inevitable and imminent, even if not immediately so.

8.104 It was argued that the consequences of failing to ensure that such evidence was able to be presented to the Court would, as well as potentially resulting in unjust outcomes, also include ongoing criticism that the partial defence operates in a gender biased way and fails to account for women's experiences. It was submitted that introducing an explicit provision enabling such social framework evidence to be adduced in homicide cases would respond to these concerns.

8.105 Inquiry participants who were supportive of the introduction of 'social framework' evidentiary provisions were, generally, organisations working in the fields of women's welfare and rights and/or family violence, or were academics researching in this area.[618] Many of them referred

618 See, for example, Submission 16, Women's Domestic Violence Court Advocacy Service NSW; Submission 31; Submission 35, Wirringa Baiya Aboriginal Women's Legal Centre; Submission 37; Submission 44 Hawkesbury Nepean Community Legal Centre; Submission 12, Mr Graeme Coss.

to a provision that was introduced in Victoria in 2005 following a review of intimate partner homicides by the Victorian Law Reform Commission, which aim to ensure that "a wide range of social framework evidence can be admitted in criminal trials [not only homicides] where intimate partner violence is raised."[619]

8.106 Most Inquiry participants advocating for the introduction of 'social framework' evidentiary provisions did so in a broad sense. That is, they recommended that such provisions apply broadly to homicide matters, as opposed to provocation cases specifically. This is reflective of the manner in which the Victorian social framework provisions operate.

8.107 Section 9AH of the Victorian *Crimes Act 1958* is limited to murder, defensive homicide or manslaughter. In these types of cases, where the killing occurs in a context of family violence, or where there is a history of family violence, section 9AH specifically provides for evidence explaining the impacts and consequences of that violence to be admitted. The types of evidence captured by the Victorian provision is defined in section 9AH(3) as follows:

> Evidence of-
>
> (a) the history of the relationship between the person and a family member, including violence by the family member towards the person or by the person towards the family member or by the family member or the person in relation to any other family member;
>
> (b) the cumulative effect, including psychological effect, on the person or a family member of that violence;
>
> (c) social, cultural or economic factors that impact on the person or a family member who has been affected by family violence;
>
> (d) the general nature and dynamics of relationships affected by family violence, including the possible consequences of separation from the abuser;
>
> (e) the psychological effect of violence on people who are or have been in a relationship affected by family violence;
>
> (f) social or economic factors that impact on people who are or have been in a relationship affected by family violence.[620]

8.108 Ms Betty Green, Convenor of the NSW Domestic Violence Committee Coalition, argued that the existing law in NSW failed to adequately account for and recognise women's experiences of violence, stating that they are 'invisible':

> At the moment … how the cases are put forward and run, domestic violence may be completely invisible, so the victim's experience is invisible. It becomes her behaviour, what she did and what she said. [Research into] men who had killed their partner [demonstrates] that invariably their story started with, "I only", or "If she had not". It

619 Submission 37, p 11.

620 *Crimes Act 1958* (Vic), s 9AH(3).

> becomes the focus of what the victim did or did not do, so the act itself and the responsibility for that act in terms of sitting with the perpetrator do not eventuate.[621]

8.109 Ms Green explained this view as follows:

> [What] we are saying with the social framework, that in a way it would make sure that the story of domestic violence was told, that the people in court and the jury would be … standing in her shoes. They would hear about the cumulative effect, including the psychological effects of violence on a person. They would hear about the social, cultural and economic factors that impact upon the person, and the general nature and dynamics of the relationship affected by domestic violence … [including] possible consequences of separation, and we know that there is a very significant body of research that continues to tell us that separation, impending separation, perceived separation, the period after separation, is incredibly dangerous for women. They are more likely to be killed at that time. We should not be then surprised when the argument is put forward as a defence of provocation that, "She said she was about to leave me".[622]

8.110 The introduction of social framework evidentiary provisions would, according to supporters, go some way toward addressing the level of understanding about the dynamics and nature of family violence perceived to be lacking among key players in the criminal justice system, including the judiciary, legal counsel and perhaps most significantly, the jury.

8.111 Professor Julie Stubbs gave an example of the Victorian provocation case of *Bradley*,[623] which pre-dated section 9AH. In *Bradley*, self-defence was not left to the jury. Stubbs argues that had social framework evidence been admitted, the court may have had a greater appreciation of the impact of cumulative domestic and family abuse.

> In my submission I gave as an example the case of *Bradley* … Because the court did not give full weight to the full history of the relationship, what they saw as important in the lead-up to the homicide that she committed was an insult directed towards her by her partner. If we look only at the insult, it does not seem significant nor does it easily go to the argument put that her culpability should be reduced. However, if we had a more appropriate understanding it would be different. So, yes, social framework evidence could do that. Again it would need to be very carefully crafted.[624]

8.112 Self-defence, like the partial defence of provocation, is only left to the jury if the trial judge considers that there is sufficient evidence upon which a reasonable jury, properly instructed, might find in favour of the defendant.[625]

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621 Ms Betty Green, Convenor of the NSW Domestic Violence Committee Coalition, Evidence, 28 August 2012, p 5.

622 Ms Green, Evidence, 28 August 2012, p 5.

623 See *R v Bradley* (1994) (Unreported, Supreme Court of Victoria, Coldrey J, 14 December 1994). Ms Bradley was subjected to 'brutal, degrading and humiliating acts' over two decades. The husband had also committed incest. Ms Bradley divorced her husband while he was in prison and moved to Perth. On his release, her husband located her and forced her and the children to return to him. Ms Bradley received a two-year suspended sentence for manslaughter on the basis of provocation, but self-defence was not left to the jury.

624 Professor Stubbs, Evidence, 28 August 2012, p 53.

625 D. Brown *et al*, *Criminal Laws: Materials and commentary on Criminal Law and Process of New South Wales* (2011, 5th ed.), p 533, cited in Submission 10, Women's Electoral Lobby.

8.113 Professor Stubbs submits that the failure to leave self-defence to the jury in *Bradley* "demonstrates how much relies on how the threat which the woman faces is construed by judges and lawyers and, in turn, on whether legal professionals have an adequate understanding of domestic violence."[626]

8.114 The role of social framework evidence in relation to women who kill after domestic abuse was argued to be vital in ensuring that the complete defence of self-defence was considered in appropriate circumstances.

8.115 Sydney University academic, Mr Graeme Coss, who strongly advocated for abolition of the partial defence of provocation, also recommended that 9AH type provisions be introduced to assist women who kill the context of intimate relationships to raise self-defence:

> I recommend that special evidentiary provisions [similar to s9AH Crimes Act 1958 (Vic)] need to be introduced to assist those victims of prolonged abuse in successfully raising a defence of self-defence…[627]

8.116 Ms Helen Campbell, Executive Officer, Women's Legal Services NSW, also argued that social framework evidence was 'essential' in appropriately responding to intimate partner homicides,[628] as did Dr Jane Wangmann:

> We submit that the social framework evidence is critical to changing the way in which we understand self-defence and any of the other partial defences that might be in operation, whether they are excessive self-defence or defensive homicide and so on. Without that social framework evidence, we do not understand either the position of the victim or the defendant, depending on what circumstance you are talking about.[629]

8.117 Those Inquiry participants who advocated the introduction of 'social framework' evidentiary provisions similar to those provided by section 9AH of the Victorian *Crimes Act* argued that without them, women would continue to be disadvantaged through the criminal justice process. For example, the Women's Domestic Violence Court Advocacy Service commented:

> [V]ictims of domestic violence are significantly disadvantaged by the legal process if she is unable to convey through evidence her experience of domestic violence, even if this means including what might not be traditionally considered in the scope of admissible evidence.[630]

8.118 In recommending that a provision similar to section 9AH of the Victorian *Crimes Act* be introduced in NSW, the NSW Domestic Violence Committee Coalition submitted:

> That the "social framework" [provision would] ensure the complexity of the history and dynamics of domestic violence experienced by a defendant be included in

626 Submission 41, Professor Julie Stubbs, p 5.

627 Submission 12, p 1.

628 Ms Helen Campbell, Executive Officer, Women's Legal Services NSW, Evidence, 28 August 2012, p 9.

629 Dr Jane Wangmann, Member, New South Wales Domestic Violence Coalition, Evidence, 28 August 2012, p 4.

630 Submission 16, Women's Domestic Violence Court Advocacy Service NSW, p 6.

> evidence where the killing of an intimate partner on a background of domestic violence has been indicated.[631]

8.119 Women's Legal Services NSW submitted that social framework evidence can contribute toward the education of the community, and juries in particular:

> The lack of understanding [about why women simply do not leave the relationship] … highlights the need for social framework evidence to "assist juries and judiciary to better assess the reasonableness of a defendant's claim to self-defence."[632]

8.120 There was general agreement among Inquiry participants that such evidence was important, but dispute about whether existing provisions in NSW adequately provided for it to be adduced. However, other Inquiry participants, generally from the legal community, argued that the current law was adequate.

8.121 For example, the Bar Association provided a detailed response to this issue, strongly asserting that the existing provisions of the *Evidence Act 1995* (NSW) already allow for the type of evidence covered by the Victorian section 9AH to be admitted:

> There is no doubt that, under the *Evidence Act 1995* (NSW), "relationship evidence" relevant to facts in issue arising in respect of the application of the partial defence of provocation would be admissible, subject to the general discretionary provisions in Part 3.10. Such evidence is not classified as "tendency evidence" and would not be subject to the admissibility provisions in s 97 and s 101.[633]

8.122 Mr Stratton, Public Defender and Member of the Criminal Law Committee, representing the NSW Bar Association told the Committee during the hearings that the common law position is reflected in the legislation in relation to the admissibility of relevant evidence. Specifically, he made it clear that "material about violence and relationships" is able to be adduced under existing statutory provisions and under the common law:

> There is a case called *Wilson*, a High Court case which, years ago, set the standard in about 1970, that in effect in murder cases the whole thing gets in. It is not an asymmetrical system. In both cases the material about violence and relationships gets in.[634]

8.123 The Bar Association provided further information in support of this view in its answers to questions on notice, quoting from the judgments of Chief Justice Barwick in *Wilson v the Queen*,[635] and that of Justice Howie in *R v Toki*, which explain where evidence will be admissible. The key factor is relevance:

631 Submission 31, p 14.

632 Submission 37, p 7.

633 Answers to questions taken on notice during evidence, supplementary questions on notice and Response to options paper, 29 August 2012, Mr Coles QC, p 6.

634 Mr John Stratton SC, Public Defender and Member of the Criminal Law Committee, representing the NSW Bar Association, Evidence, 29 August 2012, p 42.

635 See Answers to questions taken on notice during evidence, supplementary questions on notice and Response to options paper, 29 August 2012, Mr Coles QC, pp 6-7.

> Where the accused and another person have been living together over a lengthy period of time before the occurrence of the acts which give rise to the charge before the court, the relationship between the parties will be admissible if it is relevant to the facts in issue in the trial … This was so under the common law [and it] remains so under the provisions of the *Evidence Act 1995* … The rules that govern the admission of the evidence will depend upon the purpose for which the evidence is to be admitted.
>
> Evidence of the relationship between the accused and another person can be admissible in order to put the facts giving rise to the charge into a proper context so that the jury can understand the acts of the accused relied upon by the Crown against the background of the circumstances that existed at the relevant time … The evidence is admitted not simply because it describes the relationship of the parties, but because statements or acts of the parties occurring within the relationship are relevant to the issues before the jury.
>
> Where the relationship between the accused and the other person includes the infliction of injuries upon the other person by the accused, this fact can be proved by direct evidence of witnesses or, where admissible, statements made by the other person. It can also be proved by circumstantial evidence which raises a presumptive inference that the accused was the author of the injuries [citations omitted].[636]

8.124 The Director of Public Prosecutions, Mr Lloyd Babb SC, agreed that the current evidentiary provisions already allow for tendency and relationship evidence to be adduced. In response to a question about whether 'the *Evidence Act* provides an appropriate armoury for defence counsel to adduce evidence of family relationship and the contextual evidence as to family violence', Mr Babb responded:

> I think that is possible but it is not certain because we have not in a sense run many cases in terms of self-defence as opposed to provocation or diminished responsibility in this area. But I think it is possible. I only raise it as a possibility that change would be required … I must say that certainly one would think that a lot of that material would be able to be adduced using tendency and coincidence or some other provisions of the *Evidence Act*.[637]

8.125 The Bar Association and Mr Babb both noted that the *Evidence Act 2008* (Vic) had not been enacted at the time that section 9AH was introduced into the *Crimes Act 1958* (Vic). The Victorian *Evidence Act 2008* mirrors the NSW *Evidence Act 1995*.[638] In recognising this, both the Bar Association and Mr Babb suggest that while section 9AH may have been necessary in Victoria in the absence of uniform evidence provisions in that State, that situation does not

636 *Regina v Toki* (2000) 116 A Crim R 536, per Howie J at 540, cited in Answers to questions taken on notice during evidence, supplementary questions on notice and Response to options paper, 29 August 2012, Mr Coles QC, p 7.

637 Mr Babb SC, Evidence, 29 August, 2012, p 49.

638 Both are based on the uniform evidence legislation developed by the Australian Law Reform Commission as part of a project to develop evidentiary provisions that could be adopted by all Australian jurisdictions.

apply now in NSW because the NSW *Evidence Act* already allows for tendency, coincidence and relationship evidence to be adduced.[639]

8.126 Ms Dina Yehia, Public Defender with the Public Defender's Office, told the Committee that in her experience running trials she had also not experienced difficulties getting evidence about a history of family violence within the relationship admitted, but commented that she would be would be supportive of an explicit provision to provide for such evidence to be adduced:

> [I]n cases in which I have appeared where I have represented women who have suffered from domestic violence, we have always in those cases had admitted evidence of the background to the relationship, the physical abuse … But certainly, if there is a proposal whereby a legislative provision could facilitate that, then we would be in favour of that.[640]

8.127 In responding to a question about the 'desirability and necessity' of a legislative regime that provided for the admissibility of social framework evidence, Ms Musgrave, Director of the Criminal Law Review Division of the Department of Attorney General and Justice submitted she had some reservations about examining evidentiary provisions in specific, isolated contexts, suggesting that such proposals required significant consideration and work:

> There are broader contextual issues. I am always hesitant to look at it solely in the context of family violence. I think there are many areas where contextual evidence may be relevant or useful and there are the same challenges about leading that evidence, who gives it, who is an expert qualified to give it and what form it should take. It is coming up in people's writing; it is a recurring issue. It is something I think would merit a significant piece of work, which we have not yet done.[641]

8.128 However, those stakeholders supporting the introduction of a provision similar to that in Victoria were of the view that while the current law may allow for such evidence to be adduced, in practice it fails to adequately do so and therefore a specific provision was desirable. Professor Stubbs explained:

> While evidence concerning domestic violence can be admitted where relevant … this relies on the prosecution, defence and judiciary having a good understanding of domestic violence and its context … A legislative provision [similar to that adopted in Victoria] would make the relevance and value of such evidence clear to all parties, and may assist in making self-defence more readily available to battered women in appropriate cases.[642]

8.129 In making this statement, Professor Stubbs referred to the work of the Australian and NSW Law Reform Commission in their 2011 joint report on family violence. That report recommended that state and territory legislation "ensure that defences to homicide

639 Answers to questions taken on notice during evidence, supplementary questions on notice and Response to options paper, 29 August 2012, Mr Coles QC, p 6; Mr Babb SC, Evidence, Wednesday 29 August, 2012, p 49.

640 Ms Dina Yehia SC, Public Defenders Office, Evidence, Tuesday 28 August 2012, p 75.

641 Ms Penny Musgrave, Director of the Criminal Law Review Division of the Department of Attorney General and Justice, Evidence, 29 August 2012, p 14.

642 Response to options paper, Professor Julie Stubbs, p 7.

accommodate the experiences of family violence victims who kill, recognising the dynamics and features of family violence"[643] and that comprehensive reviews be undertaken in all jurisdictions to ensure that criminal defences to homicide are able to respond homicides occurring in a domestic context.[644]

8.130 Ms Green commented that 'social framework' provisions would greatly assist in placing the full context of the circumstances in which the killing occurred before the court:

> Our concern is what happens now is that the complete context of the dynamics of domestic violence is lost and it becomes what the woman did or did not do or did or did not say rather than the act of the killing itself and the context in which it was committed.[645]

Committee comment

8.131 The Committee agrees that the contextual background to fatal incidents is an important part of the puzzle that juries are asked to piece together. In particular, the Committee notes the comments made by various organisations working with victims of family violence about the dynamics and nature of abuse, and considers that such information, along with a history of the relationship and experiences of defendants (particularly women defendants who kill violent partners) can be relevant.

8.132 The Committee is concerned by suggestions that defendants who kill in what may be described as 'desperate' circumstances, particularly where there may be some suggestion of self-defence, are facing difficulties getting evidence relevant to their experiences before the court. However, the Committee also acknowledges the comments of some defence counsel that these concerns do not bear out in practice.

8.133 The Committee notes that some stakeholders, including those who are strongly advocating for the introduction of 'social framework' evidentiary provisions in NSW along the lines of section 9AH of the Victorian *Crimes Act 1958*, also support reforms to provide better education to key players in the criminal justice system, including lawyers, judges, police and others, as well as to the community more broadly.

8.134 The Committee considers that, notwithstanding that some social framework evidence may already be able to be admitted under current NSW law, there is merit in explicitly providing for such evidence to be adduced in homicide matters. In reaching this position, the Committee notes that the comments made by legal organisations, including the Bar Association and the Public Defender's Office, focusses, almost exclusively, on the types of conduct covered by section 9AH(3)(a)(b) and (c), which relate to the history and impact of violence specifically on the victim. There was no information provided about whether the existing law in NSW allows for *broader* evidence about the general nature and dynamics of relationships affected by family violence; the psychological, social and economic effect of violence on people who have been affected by family violence, which is covered by

643 Australian Law Reform Commission/NSW Law Reform Commission (2011) *Family Violence – A National Legal Response,* Recommendation 14.1.

644 Australian Law Reform Commission/NSW Law Reform Commission (2011) *Family Violence – A National Legal Response,* Recommendation 14.2.

645 Ms Green, Evidence, 28 August 2012, p 2.

subsections 9AH(3)(d)(e) and (f) of the Victorian *Crimes Act*. The Committee considers that this type of evidence is critically important to challenging some of the misconceptions about the responses of defendant's who kill in the context of family violence.

8.135 There appears to be a lack of clarity about whether such evidence can be (and in fact is) being adduced in relevant matters. In this regard, the Committee refers to the comments made by the Director of Public Prosecutions that it was 'possible but not certain' (8.124).

8.136 In addition, the Committee considers that the law is not simply a mechanism through which those who find themselves entangled in the legal system must manoeuvre, but rather the law serves an important educative function to the broader community. In that respect, the Committee considers that explicitly providing for the admission of evidence of the domestic and family violence in homicide matters, which draws on Victorian provision for guidance, is appropriate.

8.137 The Committee notes that the Victorian provision is contained within the *Crimes Act 1958*. The Committee did not receive any information about whether a similar provision should be inserted into the NSW *Crimes Act 1900*. On that basis, the Committee considers that further work needs be undertaken to identify the appropriate place for such a provision to sit.

8.138 The Committee therefore recommends that the Government introduce an amendment that is similar to section 9AH of the Victorian *Crimes Act 1958* to explicitly provide that evidence of domestic and family violence may be adduced in homicide matters.

Recommendation 2

That the NSW Government introduce an amendment similar to section 9AH of the Victorian *Crimes Act 1958*, to explicitly provide that evidence of family violence may be adduced in homicide matters.

Restricting evidence that denigrates the deceased

8.139 Another issue raised during the Inquiry, and discussed at 4.75 − 4.95, was concern about the partial defence of provocation 'enabling' victim blaming throughout the course of the trial. In this regard it was argued that the trial process allows for the character of the deceased victim to be disparaged through the adducing of evidence at trial about, for example, their sexual history, promiscuity, infidelity, poor parenting skills, and drug and alcohol use. This reflects a broader concern that has been expressed for some time about women victim's experience of the criminal justice system, but is particularly acute in respect of provocation because of the way in which the defence operates in practice in respect of women as defendants and as victims (refer to Chapters 4 and 5).

8.140 The Committee was referred to a number of cases by Inquiry participants who suggested that the character and reputation of the deceased victim was 'blackened', and, further, that this was a deliberate strategy designed to portray the victim to the jury in a particular way in order to garner sympathy for the defendant.

8.141 The Australian Lawyers Alliance referred to the cases of *Ramage* in 2004 and *Stevens* in 2008, when raising concerns about the negative portrayal of the victim:

> In *Regina v Stevens* the Defendant's portrayal of his partner's drug use, the fact she had been out too often, leaving him with the baby, her infidelity and inadequacies as a mother were relied upon as provocation for her killing. In *Ramage* the deceased wife's marital unhappiness, her striving for independence and her new romantic attachment were held up to ridicule.[646]

8.142 Mr Cleary, social commentator and sister of Vicki Cleary who was killed by her ex-partner in a Victorian manslaughter on the basis of provocation case in the 1980s, argued, in relation to the *Ramage* case, that the relevance of some questions relating to infidelity was questionable and inappropriate:

> [Defence counsel] portrayed the murdered 42-year-old Julie Ramage as promiscuous and selfish. So troublesome was the line of questioning that prosecutor Julian Leckie raised it with the judge asking, in the absence of the jury, whether it was appropriate for [Defence counsel] to be 'blackening' the dead woman's name. The endless salacious questioning about Julie's 'affairs' was, I genuinely believe, designed to diminish the victim's character in the eyes of the jury… At one point [Defence counsel] asked the doctor who had performed the autopsy whether he found a tampon in situ. We don't need much imagination to understand the import of the question…[647]

8.143 Mr Cleary went on to refer to the 1988 case of *Crowe*, in which defence counsel succeeded in putting photographic evidence of the victim, depicting her in various nude poses, before the jury. In that case, the victim, a sex worker, was shot by her estranged partner in front of her children. Mr Cleary argued that the rationale for the photographs being shown to the jury was not, as argued by counsel, to show that the "deceased in this case was an attractive woman both in face and body and was in fact the wife of the deceased man".[648] Mr Cleary argued that instead:

> Is it unreasonable to suggest that the real way to understand Kent's argument for the admission of the photos is as an attempt to cheapen the woman's character and the value of her life? Only a whore would allow herself to be photographed nude in this way. And a whore's life is not as valuable or sacred as that of a chaste or decent woman. That, I believe, was the real reason why [Defence counsel] wanted the jury to view the photographs.[649]

8.144 These types of concerns led to some, albeit limited, discussion during the Committee's hearings about the desirability of amendments that would operate to restrict the types of evidence that could be adduced in homicides to prevent or restrict questions that go to matters that are 'not relevant' and which serve only to traduce the character of the victim. Comparisons were drawn with the evidentiary provisions that apply in respect of questions

646 Submission 48, Australian Lawyers Alliance, p 13.

647 Submission 26, Phil Cleary Enterprises Pty Ltd, p 9.

648 Submission 26, p 7.

649 Submission 26, p 7.

going to prior sexual history in sexual assault matters, sometimes referred to as 'rape shield' provisions.[650]

8.145 The Inner City Legal Centre suggested that consideration be given to whether provocation should be subject to exclusions as to the evidence that can be adduced by the defence that relates to particular things that might damage the image and reputation of the victim. A common example, which arose in *Ramage* and to a lesser extent in *Singh*, related to evidence of the victim's prior sexual history. The Centre suggested that consideration should be given to whether such provisions might address some of the concerns about victimisation or the traducing of the character of the deceased for the purpose of obtaining a strategic or tactical advantage.[651]

8.146 The Committee was advised that the success of such proposals, and indeed any recommendations for reform, rely heavily on their acceptance by key players in the criminal justice system. For example, Professor Stubbs stated:

> The difficulty is that whatever you come up with you will need to persuade the legal profession to come on board. [The effectiveness of any] recommendation you make … will depend very much on how the legal profession interprets and applies this. Having them on board is very important.[652]

Committee comment

8.147 The Committee notes the concerns raised by Inquiry participants that there have been cases where evidence is adduced by defence counsel in homicide trials that is of limited or no relevance to the facts, but which serves only to traduce and denigrate the deceased victim. The Committee notes that these concerns were raised not only because it seems 'improper' and hurtful to the families of deceased victims to hear this type of evidence, but perhaps more importantly that such evidence was adduced in an attempt to gain a strategic advantage for the defence by creating a sense of contempt toward the victim and sympathy for the defendant.

8.148 It has been suggested that evidentiary provisions that would operate to prohibit the adducing of evidence that defames or denigrates the deceased victim in provocation cases are warranted. The Committee is of the view that this is an issue of significant concern and agrees that there may be merit in such proposals. The Committee therefore recommends that the Attorney General examine this issue further, with a view to determining whether such provisions are warranted. The Committee notes that similar provisions, which were designed to afford better protection to victims, already exist in relation to sexual assault trials. The Committee also notes that while those provisions did not receive support from many quarters of the legal sector prior to their introduction, they have nonetheless been effective.

650 *Criminal Procedure Act 1986*, s 293.

651 Ms Claire Jobson, Principal Solicitor Inner City Legal Centre and Mr Craig Mulvey, Co-Chair, Inner City Legal Centre Board, Evidence, 28 August 2012, pp 32-33.

652 Professor Stubbs, Evidence, 28 August 2012, pp 58-59.

Recommendation 3

That the Attorney General undertake an examination of the appropriateness or otherwise of existing evidentiary provisions insofar as they enable evidence to be adduced which denigrates the deceased victim in homicide trials, with a view to improving protection for victims and their families while also ensuring that legitimate social framework evidence is able to be admitted.

Chapter 9 Elements of a preferred model

The Committee has considered various models to reform the partial defence of provocation and Inquiry participant feedback on all of them. The Committee considers that a 'gross provocation' model based, in part, on that developed by the United Kingdom Law Commission and consulted upon with variations in the Options Paper, offers the most appropriate starting point. The Committee has considered all of the comments and submissions received and in this Chapter sets out the key elements of a new model for the partial defence of provocation. This Chapter draws on the extensive analysis in Chapters 6, 7 and 8 to set out the recommended reform model.

Outline of the model

9.1 The model draws heavily on the framework and rationale underpinning the United Kingdom Law Commission's model, however not all aspects of the Commission's model are endorsed. The discussion below sets out the key elements or principles around which the Committee's preferred reform of the partial defence of provocation is framed.

Overriding principle underpinning the partial defence of provocation

9.2 There are significant problems associated with the partial defence of provocation. These were highlighted by a number of stakeholders involved in this Inquiry, and have been ventilated in various law reform commission inquiries in recent years, including those undertaken in Victoria, New Zealand and the United Kingdom. The Committee notes that, in an ideal world, there would never be an excuse for killing another person. However, the law operates in an imperfect world and attempts to respond sensitively by acknowledging the difficult and unusual circumstances in which ordinary people sometimes find themselves.

9.3 The Committee is concerned about the use of the partial defence of provocation in circumstances where a person attempting to exercise what can be referred to as 'equality rights' – their right to make their own decisions about their lives, including whether to leave or otherwise change the nature of a relationship – is killed as a result of those actions or words. An extensive analysis of issues relevant to provocation in domestic settings is undertaken throughout the Report, but in particular in Chapters 4 and 5.

9.4 However, the Committee notes that there are circumstances in which the partial defence is appropriately used with success by those who kill in response to highly provocative conduct, including some who kill in response to fear or in self-defence in circumstances where establishing the latter may be impossible or extremely difficult.

9.5 As discussed in Chapter 5, the Committee is particularly concerned that the abolition of provocation may result in limiting the options available to those people who eventually kill in desperation, often after many years of abuse, in an effort to defend or free themselves from an imminent threat, whether that threat be immediate or not.

9.6 For these reasons, the Committee has concluded that the partial defence of provocation should be retained, but amended to restrict its application to those circumstances where the provocative conduct is grossly provocative and to specifically exclude its use in certain circumstances, so as to ensure that the partial defence reflects current societal norms.

9.7 In recommending retention but restriction of the partial defence, the Committee aims to strike a delicate but appropriate balance between strongly held and polarised views on when provocation should be available. The Committee acknowledges community disquiet about some recent cases and therefore the recommended model aims to clarify the circumstances in which provocation should be available, and those in which it should not be available or significantly restricted.

9.8 The Committee does not consider it appropriate that the partial defence of provocation be available to a person who kills another in circumstances where the provocative conduct relied upon by the accused involves the deceased exercising or attempting to exercise their right to make decisions about their lives and relationships.

9.9 The breakdown and changing nature of relationships are incidents which, in the Committee's view, are ordinary and common events that most people experience at some point in their lives. Sometimes what is said and done in these contexts is hurtful, harmful and offensive and can be understood to evoke intense feelings of distress, anger and rage. However, the Committee does not accept that responding such situations with force, let alone with lethal force, is ever justified. Nor does the Committee accept that, in circumstances where lethal force does result, a person who kills another should be entitled to invoke a partial defence of provocation to reduce murder to manslaughter.

9.10 The Committee also considers that there are some other specific circumstances in which provocation should not be available, including where a defendant incited the 'provocative conduct' to justify their lethal response and where the defendant perceives the provocative conduct as a result of being voluntarily intoxicated. The Committee considers it important that the legislation expressly remove the availability of the partial defence in such circumstances on the basis that both are entirely inappropriate grounds upon which a defendant can have their criminal liability reduced from murder to manslaughter.

9.11 Finally, the Committee also considers that it is entirely inappropriate and out of step with contemporary Australian society for the partial defence of provocation to be open to a defendant responding to 'provocative conduct' comprising of a non-violent sexual advance. The Committee notes the significant number of submissions to the Inquiry on this issue as it relates to male to male sexual advances. The Committee agrees with many Inquiry participants that it is unacceptable and inappropriate that the current law of provocation accommodates and legitimises homophobia and violent manifestations of it through a reduction in criminal liability. A non-violent sexual advance, of itself, should never be sufficient grounds upon which a person who intentionally kills another is entitled to have their criminal liability reduced from murder to manslaughter.

In what circumstances should provocation be available?

9.12 The Committee considers that the first key reform, which aims to clarify what provocation is, involves two significant elements. First, the Committee is of the view that the current requirement for a 'loss of self-control' on the part of the defendant should be abandoned; instead the focus should be shifted onto the nature of the provocative conduct. Second, and following from the first, the Committee considers that the bar should be raised to require that the nature and gravity of the provocative conduct capable of attracting the defence be 'grossly provocative'.

9.13 The Committee considers that a third key reform is necessary to further restrict the availability of the partial defence, and recommends that certain conduct should be statutorily excluded from forming the basis of a provocation defence.

9.14 The Committee's recommendations are interrelated and therefore should be read as a whole.

Removal of the element of 'loss of self-control'

9.15 The requirement that a defendant lose their self-control is a central part of the current provocation defence. As discussed in Chapters 4 and 7, a number of concerns were raised about this aspect of the partial defence.

9.16 The Committee considers that the element of 'loss of self-control' is, as submitted by several Inquiry participants, and recognised by the United Kingdom Law Commission, ambiguous and unclear. The Committee acknowledges stakeholder comments that this aspect of the current test lacks a clear foundation in science or medicine, and is concerned that there is no existing medical or scientific criteria against which to measure whether or not a person has lost their self-control, and that this contributes to ambiguity about what the phrase actually means (see 4.101 − 4.117).

9.17 In today's modern society, there is an expectation that people 'maintain control' and that if there is to be an exception to that which provides for a reduction in criminal liability, then the exception necessarily requires clear definition.

9.18 The Committee is concerned that the practical effect of the partial defence requiring a loss of self-control is that it inappropriately lends itself to killings in which extreme violence is used to reduce a defendant's culpability. In relation to intimate partner homicides, this tends to favour male defendants who kill women, further contributing to concerns about gender bias. Conversely, the requirement to show a loss of self-control tends to disadvantage those defendants, usually women, who kill in 'slow burn' cases.

9.19 The Committee refers to the concerns about the phrase 'loss of self-control' raised by various groups working to support women and victims of family violence, and their comments that the requirement to show 'loss of self-control' was difficult for those who kill after long term domestic abuse, notwithstanding some improvements in this regard in recent decades.

9.20 The Committee considers it appropriate that the 'loss of self-control' requirement be removed and that the partial defence of provocation instead focus on the nature of the provocation and the defendant's response to that provocation.

Grossly provocative conduct

9.21 At present section 23 does not explicitly define or restrict the type of provocative conduct that is capable of forming the basis of the partial defence.

9.22 The Committee has considered the report of the United Kingdom Law Commission, and the comments from Inquiry participants in relation to the proposal that reform to the law of provocation should restrict its application to 'grossly provocative' conduct (comprising gross provocation (meaning words or conduct or a combination of words and conduct) which

caused the defendant to have a justifiable sense of being seriously wronged; or fear of serious violence towards the defendant or another; or a combination of both.

9.23 The Committee agrees with the views of United Kingdom Law Commission that the moral basis for the partial defence of provocation rests in circumstances where the defendant has 'legitimate grounds to feel strongly aggrieved at the conduct of a person at whom his or her response was directed, to the extent that it would be harsh to regard their moral culpability for reacting as they did in the same way as if it had been an unprovoked killing.'[653]

9.24 The Committee is persuaded by the logic applied by the Law Commission regarding the framing of the defence around the concept of 'gross provocation' which causes the defendant to have a justifiable sense of being seriously wronged.[654]

9.25 This reflects the Committee's concern that the partial defence is at times being successfully run in circumstances that are appropriately labelled 'provocative', but are not so grossly provocative as to justify or excuse (even partially) the taking of a human life. Most people experience events throughout their lives that might be described as 'provocative', including being betrayed by partners, feeling unloved, or being told hurtful and offensive things in the context of intimate relationships. While such events may be 'provocative', the Committee is concerned that such events are being used, inappropriately in the Committee's view, to found the partial defence of provocation. The Committee therefore considers that the partial defence of provocation should be limited to conduct that is 'grossly provocative' and should be available only in circumstances that are more extreme than ordinary life events.

9.26 The Committee acknowledges the concerns of some Inquiry participants that some of these phrases, including 'justifiable sense of being seriously wronged', may be confusing for juries and that it may overlap with the prohibition of provocation applying in circumstances where the defendant acts in 'considered desire for revenge'. However, the Committee notes that there were a number of Inquiry participants who commented that the language in the 'gross provocation' model operated to clarify the existing law, and will reinforce that the partial defence is for circumstances that are outside the usual experience of most in the community (refer to 7.81 – 7.83).

9.27 The Committee shares the view of the United Kingdom Law Commission that juries, properly directed and having heard argument from counsel, will be able to understand these phrases and to contextualise them in relation to their own experiences. This also reflects the Committee's view that the partial defence of provocation should not be available in circumstances that are a normal part of human experience, but only in those exceptional and extreme cases which are extraordinary.

9.28 The Committee notes that at the time the Law Commission released its report the United Kingdom did not have a partial defence of excessive self-defence, nor does it have one now. It is clear that the Law Commission's proposed model, by including the phrase 'fear of serious violence towards the defendant or another', sought to accommodate defendants who killed in circumstances that might constitute the basis of a successful excessive self-defence case in NSW. That is, defendants who killed in genuine fear of violence toward themselves or another person, but the lethal response to that fear was excessive.

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653 See 7.12, citing *Partial Defences to Murder – Final Report* (2004) UK Law Commission, 3.68.

654 *Partial Defences to Murder – Final Report* (2004) UK Law Commission, 3.69.

9.29 The Committee has not incorporated this aspect of the Law Commission's model because NSW law already provides for the partial defence of excessive self-defence, and to do so would create a clear overlap with that partial defence. In doing so, the Committee acknowledges the many comments from Inquiry participants who were concerned that the potential for overlap with self-defence (and excessive self-defence) of this aspect of the model may, in NSW, result in unjust outcomes for categories of defendants that the community expects should, as a result of any reform of provocation, have better outcomes. In particular, the Committee refers to comments from Inquiry participants about the pressure placed on defendants who have killed after long term abuse to enter into plea negotiations, for example by pleading guilty to manslaughter on the basis of provocation notwithstanding that, in some cases, there may be some indication that self-defence was at play.

9.30 The Committee is keen to ensure that, in cases where it appears that there are elements of self-defence (particularly in the context of domestic and family violence), that such defences are fully considered and explored. The Committee does not consider it appropriate that the partial defence of provocation be reformed in a manner that creates a clear and direct overlap with excessive self-defence, but notes that the proposed reform of provocation to require 'gross provocation causing the defendant to feel a sense of being seriously wronged' may still allow for cases that have defensive elements but fall short of self-defence or excessive self-defence to run the partial defence of provocation.

Recommendation 4

That the NSW Government introduce an amendment to section 23 of the *Crimes Act 1900* to rename the partial defence 'the partial defence of gross provocation'.

Recommendation 5

That the NSW Government introduce an amendment to section 23 of the *Crimes Act 1900* to provide that the partial defence is only available in circumstances where the defendant acted in response to 'gross provocation', meaning words or conduct, or a combination of words and conduct, which caused the defendant to have a justifiable sense of being seriously wronged.

Objective test

9.31 The Committee received a significant amount of comment from stakeholders about the current ordinary person test. In particular, many Inquiry participants suggested that the two-limbed test was highly complex and artificial, and that these issues made the test difficult to explain to juries and, arguably, that it was beyond what many jurors were capable of understanding (see 4.119 − 4.161).

9.32 The Committee notes that these concerns were not universal, and we acknowledge the comments made by the NSW Bar Association and the Public Defender's Office in particular, both of which argued that there are many areas of the law that are complex and that juries deal with them, and complicated jury directions, daily.

9.33 The Committee notes that the United Kingdom Law Commission, in its 'gross provocation' model, adopted an alternative approach to the 'ordinary person' test. Instead of the 'two limbed' objective test, Commission recommended that a jury should be able to consider all of the offender's characteristics in all circumstances (that is, in assessing both gravity and response). The Commission did so on the basis that the existing test was complex and its alternate test would enable juries to more readily grasp and assess the language and phrases used in the model in the context of each case. This reflected the (then) common law approach set out by the House of Lords in *Smith (Morgan)*[655] in 2001. That approach was overruled by the Privy Council in 2005, subsequent to the release of the Commission's Report, in the matter of *Attorney-General for Jersey v Holley*.[656]

9.34 The Committee is not persuaded that the United Kingdom Law Commission's proposed test is appropriate. The Committee considers that a purely subjective test is inappropriate on the basis that it may produce unacceptable results. Nor does the Committee favour a purely objective test which would operate too harshly. Although a combined 'subjective and objective' ordinary person test is complex, the Committee considers that such an approach, as is applicable under section 23 at present, strikes an appropriate balance.

9.35 The Committee notes concerns that the existing test is too complex, including comments made by some Inquiry participants and other bodies include that the test is highly artificial and that understanding it requires jurors to perform 'mental gymnastics'. However, the Committee refers to the comments of the Privy Council in *Attorney-General for Jersey v Holley*[657] (refer to 7.43) which emphasises the need for a clear objective standard against which the conduct of the defendant can be judged, as opposed to an 'objective' standard which varies from defendant to defendant, based on the traits of that defendant.

9.36 The Committee considers that a test such as that proposed by the United Kingdom Law Commission does not allow for a truly 'objective' assessment of the defendant's conduct, because the 'ordinary person' is in fact a person with the sharing all of the characteristics and circumstances of the defendant. A test of this type would, in the Committee's view, be at odds with ensuring that the defendant's conduct be measured against an expected community standard which the Committee considers vital to the fair operation of the partial defence.

9.37 The Committee also notes the comments of the NSW Bar Association and the Public Defender's Office that the suggestions that jurors lack the capacity to fully understand and apply the two-limbed ordinary person test are 'overstated', and that conceptually the test is not that difficult if it is properly explained to juries. Mr Odgers, speaking for the Association, referred to comments of the Privy Council in *Holley*, which supported his point (refer to 4.144). In that case, the court stated:

> [I]n recent years much play has been made of the "mental gymnastics" required of jurors in having regard to a defendant's "characteristics" for one purpose of the law of provocation but not another. Their Lordships consider that any difficulties in this regard have been exaggerated. The question is largely one of presentation.[658]

655 *R v Smith (Morgan)* (2001) 1 AC 146.

656 (2005) UKPC 23 (PC).

657 (2005) UKPC 23 (PC).

658 *Attorney-General for Jersey v Holley* (2005) UKPC 23 (PC), per Lord Nicholls of Birkenhead at 26.

9.38 The Committee agrees with the arguments put by the NSW Bar Association and others that juries are regularly asked to make decisions based on complex areas of the law. The Committee is of the view that the existing test strikes a balance in allowing for the partial defence to be properly used.

9.39 The proposal in the Options Paper also included a 'reasonableness' requirement, which was not a part of the Law Commission's model in the United Kingdom. As discussed at 7.59, the inclusion of the word 'reasonably' was intended to raise the requisite standard to require that the jury be satisfied not simply that a person of the defendant's characteristics and circumstances *might* have reacted in the same or similar manner to the defendant, but that they might *reasonably* be expected to have so reacted.

9.40 Four Inquiry participants commented on the inclusion of a 'reasonableness' requirement and all were strongly opposed to it. These stakeholders include the NSW Bar Association and the Public Defender's Office, both of whom have direct experience in working with the law of provocation in practice.

9.41 The Committee has considered the key argument raised by these stakeholders and others that the inclusion of a reasonableness requirement in the objective test would effectively make the partial defence redundant. The Committee refers to the comments made by the NSW Bar Association, the Public Defender's Office, the Women's Electoral Lobby and Professor Stubbs that the partial defence has operated as a concession to human frailty, and in that respect recognises that 'ordinary, not necessarily reasonable, people' can respond in extreme ways when pushed to the limits (see 7.106).

9.42 For these reasons, the Committee recommends that the existing 'ordinary person' test be retained.

9.43 This would mean that a jury would first assess the gravity of the gross provocation with reference to an 'ordinary person' who has all the characteristics of the defendant and whether that gross provocation could cause an ordinary person, having all the characteristics of the defendant, to feel a justifiable sense of being seriously wronged; before then assessing whether an 'ordinary person' of the same age and maturity of the defendant could respond in a similar way to gross provocation of equivalent gravity.

In what circumstances should provocation be unavailable or further restricted?

9.44 The Committee has concluded that, in addition to restricting the partial defence to 'grossly provocative' conduct, there should be additional limitations on the availability of the defence. In particular, the Committee is concerned to ensure that it is not available in circumstances where the provocation was incited by the defendant for the purpose of providing an excuse to use violence; or the defendant acted in response to the conduct of the deceased consisting of a non-violent sexual advance.

9.45 The Committee is also concerned about the successful use of the partial defence in domestic homicides where the 'provocative conduct' involves a person exercising their personal autonomy and right to make decisions about their lives. For this reason, the Committee is of the view that in the context of domestic relationships, the partial defence should be restricted so that it is not available, other than in circumstances of a most extreme and exceptional

character', where the provocative conduct is based on anything said or done to end or change the nature of the relationship.

9.46 The Committee has considered responses from Inquiry participants to the option of specifically excluding certain circumstances from forming the basis of a provocation defence. (see Chapters 6 and 7). The Committee has also had regard to the decision in *Clinton*,[659] and acknowledges the view of the Court in that case that specific events cannot be isolated from their context.

9.47 The Committee also acknowledges the comments of a number of stakeholders that a model setting out clear exclusions could offer a way forward in terms of removing the availability of the partial defence in circumstances which in today's modern society are not appropriate on which to base the partial defence (see Chapter 6).

9.48 The Committee has given consideration to all the proposed 'exclusions' suggested by stakeholders and considers that there are three specific sets of circumstances which should be excluded from being capable of founding the partial defence of 'gross provocation'. These are where:

- the provocation was incited by the defendant for the purpose of providing an excuse to use violence;
- the defendant acted in response to the conduct of the deceased consisting of a non-violent sexual advance; and
- where the provocative conduct is based on anything said or done to end or change the nature of the relationship (except in circumstances of the most extreme and exceptional character).

Self-induced provocation

9.49 As discussed in Chapter 7 (7.46 – 7.48), the 'gross provocation' model contained an exclusion for provocation that is incited by the defendant for the purpose of providing an excuse for them to use violence.

9.50 The Committee received limited comment on the potential impact of such an exclusion, as the only Inquiry participants to comment on it were Mr Wood, who incorporated a similar provision into his proposed model, and the Australian Lawyers Alliance which recommended that an exclusion of this type be included in any reform of the partial defence.

9.51 The Committee has considered the comments made by Mr Wood during the public hearings, and has reviewed the 1997 report of the NSW Law Reform Commission which made a similar recommendation. It has also considered the comments of the Australian Lawyers Alliance in its submission to the Inquiry, along with the comments of the United Kingdom Law Commission. The Committee agrees that there is merit in such a proposal and recommends that provocation that is incited by the defendant for the purpose of providing an excuse for them to use violence should be excluded from being capable of being relied upon for the purposes of the partial defence.

659 *R v Clinton, Parker and Evans* (2012) EWCA Crim 2.

Non-violent sexual advances

9.52 The Committee acknowledges the significant number of submissions to the Inquiry dealing specifically with the issue of non-violent sexual advances. There was widespread support for reform to the partial defence to ensure that the non-violent homosexual advances are not able to be used as grounds for manslaughter on the basis of provocation. The analysis of this issue is contained in Chapter 6 (6.47 – 6.58).

9.53 The Committee agrees with the comments made by many Inquiry participants that non-violent sexual advances should be excluded from being able to be relied upon under the partial defence of provocation. The Committee recommends that non-violent sexual advances be expressly excluded from being capable of forming the basis of a provocation defence.

9.54 Although the Committee's recommendation that non-violent sexual advances be excluded is gender neutral, the Committee acknowledges that in practice non-violent sexual advances have only ever been capable of establishing manslaughter on the basis of provocation in the context of male on male advances. The Committee is of the view that a reduction in criminal liability should never be able to be founded on non-violent sexual advances on their own, irrespective of the gender of the parties involved. The Committee is concerned that the acceptance of non-violent homosexual advances founding the partial defence provocation sends an inappropriate message and condones homophobia.

Considered desire for revenge

9.55 Another exclusion provided by the 'gross provocation' model, which was discussed in Chapter 7 (at 7.49), was designed to deny access to the partial defence to defendants who act in 'considered desire for revenge.'

9.56 The Committee received limited comment on this proposed exclusion. However, concerns were raised that it conflicted with another element of the model – the requirement that the provocation cause the defendant to feel a 'justifiable sense of being seriously wronged.'

9.57 In acknowledging these concerns, the Committee has had regard to the rationale of the United Kingdom Law Commission for the inclusion of a restriction on defendants who act in considered desire for revenge.

9.58 Notwithstanding the limited comment specifically on the proposal exclusion, it was clear from submissions made by a number of Inquiry participants that there is a concern that the partial defence of provocation may be used, inappropriately, in response to 'revenge' killings.[660]

9.59 The Committee does not consider provocation an appropriate vehicle by which defendants who kill in considered desire for revenge should be able to mitigate the killing. However, the Committee is undecided on the rationale of the United Kingdom Law Commission that there is a need for a specific exclusion. The Committee received no specific evidence on this matter and is of the view that this matter should be considered by the NSW Law Reform Commission in accordance with Recommendation 11 of this Report.

660 See, for example, Ms Betty Green, Convenor, NSW Domestic Violence Coalition Committee, Evidence, 28 August 2012, p 2; Ms Helen Campbell, Executive Officer, Women's Legal Services NSW, Evidence, 28 August 2012, p 9; Mr Graeme Coss, Sydney Law School University of Sydney, Evidence, 28 August 2012, p 67.

Recommendation 6

That the NSW Government introduce an amendment to section 23 of the *Crimes Act 1900* to ensure that the partial defence is not available to defendants who:

- incite a response to provide an excuse to respond with violence; or
- respond to a non-violent sexual advance by the victim.

9.60 The Committee acknowledges the decision of the UK Court of Appeal in *Clinton* (which is discussed at 6.88 – 6.100). Notwithstanding some of the concerns raised by stakeholders about the efficacy of exclusionary provisions flowing from the decision in *Clinton*, the Committee is not convinced that they do not have merit. The Committee notes that the Court in that case drew heavily on the Parliamentary debates in interpreting the intention behind the exclusionary provision.

9.61 The Committee considers that the lessons to be learnt from *Clinton* are that a clear policy intention to exclude particular conduct is capable, with careful drafting and supported by clear statements of that intention throughout the passage of any legislative reform, of delivering the desired result.

9.62 In addition, the Committee is not persuaded that a NSW court would necessarily adopt the view of the England and Wales Court of Appeal in *Clinton*, which determined that sexual infidelity (which is an exclusion under the legislation) could not be taken out of its context, and therefore evidence of infidelity may be a relevant factor in assessing whether a set of circumstances involving other words and/or conduct are capable of comprising 'gross provocation' within the scope of the partial defence, notwithstanding the explicit legislative exclusion.

Provocation in domestic settings

9.63 The Committee recognises that although the partial defence of provocation applies in a broad range of settings (see Chapter 2), this Inquiry has had a significant focus on its application in domestic settings. The issue of domestic and family violence is integral to many of the concerns about the use of the partial defence, particularly how it operates in respect of women – as victims and as defendants.

9.64 The Committee notes that this has been a common theme throughout the many reviews and examinations of the partial defence of provocation, and indeed of homicide broadly, in recent years across Australia and internationally. It is evident that the issue of domestic and family violence is one that many countries and communities grapple with, and that the issue of homicide in domestic settings is the most extreme and arguably one of the most difficult to address.

9.65 Given the concern about the use of provocation by defendants, generally men, who kill their female partners after victimising them for long periods; and the converse concern about women defendants who 'lash out', killing their tormentor after years of abuse; there is a desire to restrict access to the partial defence for the former group, while ensuring that it is available to the latter.

9.66 The Committee is concerned to ensure that the partial defence is not available to defendants who respond with lethal force to conduct that essentially involves a person exercising their rights to autonomy and choice.

9.67 The Committee has been moved and disturbed by the many stories involving a person exercising their right to make choices about their relationships and their lives who is killed, or where a third party killed, by a defendant who has then been able to rely on that fact to achieve a conviction for the lesser charge of manslaughter.

9.68 The 'gross provocation' model in the Options Paper included a restriction designed to further limit the use of the partial defence in domestic settings. It would mean that partial defence would not apply 'other than in circumstances of a most extreme and exceptional character' if:

- a domestic relationship exists between the defendant and another person; and
- the defendant unlawfully kills that person and/or another person (the deceased); and
- the provocation is based on anything done by the deceased or anything the person believes the deceased has done—
  - to end the relationship; or
  - to change the nature of the relationship; or
  - to indicate in any way that the relationship may, should or will end, or that there may, should or will be a change to the nature of the relationship.

9.69 The Committee notes the concerns of some Inquiry participants that the phrase 'extreme and exceptional circumstances' is vague and creates a 'loophole' (refer to Chapter 7 at 7.137). The Committee has also had regard to the comments of Inquiry participants Associate Professor Crofts and Dr Loughnan that the inclusion of the phrase "goes a significant way toward addressing the issues arising from reliance on provocation in the context of domestic violence" by restricting it further.

9.70 The Committee has also reviewed the findings of the Queensland Law Reform Commission, which draws on case law involving the same phrase. The Committee notes the comments from various Inquiry participants, including the Bar Association and the Public Defender's Office, that many areas of the law are complex and which include language which could be said to be 'confusing' or 'complex', yet juries are asked to make decisions in respect of these daily. As noted at 7.142, the Committee is of the view that juries, properly instructed from the Bench, and having the benefit of argument from counsel about the nature and dynamics of violence in the context of domestic relationships, will be able to understand and appreciate the language contained in the proposal.

9.71 The Committee also notes concerns raised about the scope of the relationships and circumstances captured by this exclusionary provision. Specifically, the Committee acknowledges stakeholder concerns that the language used in the proposal may not be broad enough to ensure that defendants who killed following allegations of, or actual, infidelity were precluded from relying on the defence; as well as defendants who killed third parties who they were not in a relationship with, such as new partners of ex-partners and lovers of a current partner.

9.72 The Committee agrees with stakeholder concerns that the phrase 'domestic relationship' may result in some groups, including those above, that would fall outside the scope and whom the

Committee would prefer to see fall within it. For this reason, the Committee recommends that the legislation be drafted in a manner that ensures that these relationships are captured by the phrase 'domestic relationship'. The Committee has considered section 5 of the *Crimes (Domestic and Personal Violence) Act 2007*, and considers it may offer an appropriate starting point from which a broad range of close and intimate relationships will be captured.

9.73 The Committee has also considered the range of specific exclusions that Inquiry participants suggested might be appropriate to address the concerns about the use of provocation in domestic settings, including infidelity, sexual jealousy and taunts about sexual inadequacy (see Chapter 6). The Committee is of the view that there could be a significant list of matters that may be worthy of inclusion on such a list, including those above. For this reason, the Committee prefers a broad approach, that will allow for a common-sense assessment about whether the specific conduct was of the kind that indicated either an end, or change in the nature of, the relationship.

9.74 For clarity and guidance, the Committee has included a non-exhaustive list of scenarios below. In these circumstances, the Committee does not consider it appropriate that the partial defence be available to a defendant who, absent some 'extreme and exceptional circumstance' kills a person with whom they are (or have been) in a domestic relationship:

- The deceased indicates to the defendant they wish to end a relationship
- The deceased discloses infidelity to the defendant
- The deceased taunts the defendant about sexual inadequacy
- The defendant discovers their partner or ex-partner *in flagrante* and kills that person
- The defendant discovers their partner or ex-partner *in flagrante* and kills the third party
- The defendant kills a third party who they know or believe has been having a relationship with their partner/ex-partner.

9.75 The Committee reiterates that the above list is not intended to be exhaustive, but is intended to reflect the types of scenarios which, in the Committee's view, should not be capable of amounting to provocation except in the most extreme and exceptional circumstances. The Committee refers to the facts in *R v Ko*, which involved a history of extreme violence and degradation toward to the defendant by the deceased which could be described as 'extreme' and 'exceptional' (refer to Chapter 7 at 7.133).

Recommendation 7

That the NSW Government introduce an amendment to section 23 of the *Crimes Act 1900* to ensure that the partial defence is not available to defendants, other than in circumstances of a most extreme and exceptional character, if—:

- a domestic relationship exists between the defendant and another person; and
- the defendant unlawfully kills that person and/or another person (the deceased); and
- the provocation is based on anything done by the deceased or anything the person believes the deceased has done—
  - to end the relationship; or
  - to change the nature of the relationship; or
  - to indicate in any way that the relationship may, should or will end, or that there may, should or will be a change to the nature of the relationship, and

that for the purposes of determining the above, the court should have regard to the following circumstances which provide guidance on the types of circumstances where a defendant, (except in some 'extreme and exceptional circumstances') should not be able to avail themselves of the partial defence of gross provocation:

- the deceased indicates to the defendant they wish to end a relationship
- the deceased discloses infidelity to the defendant
- the deceased taunts the defendant about sexual inadequacy
- the defendant discovers their partner or ex-partner in flagrante delicto and kills that person, or the third person
- the defendant kills a third party who they know or believe has been having a relationship with their partner or ex-partner
- the defendant kills a person with whom they are in conflict about parenting arrangements for children.

Self-induced intoxication

9.76 As discussed in Chapter 6, some Inquiry participants supported an amendment that would preclude the partial defence applying in matters where the defendant had voluntarily become intoxicated.

9.77 The rationale behind the recommendation to exclude self-induced intoxication from consideration in relation to provocation reflects the policy position that a person who 'voluntarily' becomes intoxicated should be held accountable for their actions.

9.78 The Committee notes that while there was comparatively little comment on this proposal, those who did comment, including the Director of Public Prosecutions and the Honourable James Wood AO QC, were supportive of such an amendment.

9.79 The Committee therefore recommends that the legislation should provide that where a defendant is intoxicated at the time of the act or omission causing death, and the intoxication

is self-induced, a justifiable sense of being seriously wronged caused by that intoxication or resulting from a mistaken belief occasioned by that intoxication is to be disregarded.

Recommendation 8

That the NSW Government introduce an amendment to section 23 of the Crimes *Act 1900* to provide that where a defendant is intoxicated at the time of the act or omission causing death, and the intoxication is self-induced, a justifiable sense of being seriously wronged caused by that intoxication or resulting from a mistaken belief occasioned by that intoxication is to be disregarded.

The role of the judge and jury

9.80 As discussed in Chapter 7, the current law in NSW provides trial judges with discretion about whether to leave the issue of provocation to the jury (see discussion at 7.144 – 7.147).

9.81 The Committee notes that there has been a suggestion that judges, notwithstanding that they have discretion, may be reluctant to exercise it on the basis that such decisions may be appealed. The Committee notes however that not all appeals of judicial decisions to refuse to allow provocation to go to the jury are successful. In particular, the Committee notes the High Court decision in *Stingel*, which upheld the decision of the trial judge in refusing to allow the partial defence to go to the jury.[661]

9.82 The Committee's concern regarding this issue is highlighted by the public response to some matters, in NSW and elsewhere, where a jury has accepted provocation in circumstances that are perceived to be inappropriate or unacceptable.[662]

9.83 However, the Committee notes that this is balanced by the fact that such decisions are made by members of the community – the jury.

9.84 While the Committee acknowledges that the current law already provides flexibility and discretion to judges presiding over homicides where provocation may be at play, the Committee is of the view that the inclusion of a provision which specifically provides for this would be beneficial.

9.85 The Committee agrees with Dr Crofts and Dr Loughnan that such a provision will make it clear that there is no 'automatic' right for the partial defence, once raised, to go to the jury and considers that this may operate as a form of safeguard, not least because it may increase the likelihood of the Crown arguing the strength of evidence of provocation in the early stages.

661 See, for example, *Stingel v R* (1990) 171 CLR 312 (HCA). See also at 7.93.

662 See, for example, *R v Ramage* (2004) VSC 508; *R v Dincer* (1983) 1 VR 460; *R v Singh* (2012) NSWSC 637; *R v Won* (2012) NSWSC 855.

Recommendation 9

That the NSW Government introduce an amendment to section 23 of the *Crimes Act 1900* to provide that a judge should not be required to leave the defence to the jury unless there is evidence on which a reasonable jury, properly directed, could conclude that it might apply.

Non-legislative recommendations

9.86 In addition to the legislative recommendations made in the previous chapter relating to procedural and evidentiary matters, and to the proposed reform of section 23 of the *Crimes Act 1900* (NSW) set out above, the Committee acknowledges that there were calls for supporting non-legislative recommendations. Specifically, these related to two things. First, a number of non-government organisations strongly advocated for education of the legal sector and the community about the nature and dynamics of domestic and family violence. Second, there were calls for a comprehensive review of the law of homicide and defences to homicide by the NSW Law Reform Commission.

Education

9.87 A number of Inquiry participants recommended that key stakeholders in the legal sector (in particular), including judges, lawyers, police, and law students, as well as the community more broadly, need to be better educated about the nature and dynamics of family violence.

9.88 Most of those calling for education were from the non-government sector. For example, Women's Legal Services NSW recommended ongoing education about family violence, referring to the findings of the Victorian Law Reform Commission:

> The Victorian Law Reform Commission's (VLRC) *Defences to Homicide—Final Report* recommended professional education for police, legal practitioners and judiciary on the broader social context in which homicide takes place, the nature and dynamics of domestic violence and its long term effects, as well as the interrelationship between family violence and use of fatal force and a "continuous improvement approach in ensuring family violence is properly understood and taken into account." This education needs to begin at law school. The VLRC felt this was "essential to the effective operation of defences and informed decisions being made concerning pleas and sentencing." Additionally, the VLRC argued that a proper understanding by police, legal practitioners and judiciary of the interrelationship between family violence and use of fatal force would "have a significant impact at a number of stages of the legal process." This includes at the preliminary and investigations stage, pre-trial, trial and at sentencing [citations omitted].[663]

9.89 Dr Jane Wangmann, speaking on behalf of the NSW Domestic Violence Coalition Committee, also argued that education of key players in the system was vital to ensuring fairer outcomes and to reinforce appropriate messages:

> We need to have further professional education for defence lawyers—defence lawyers need to be well equipped to defend women on self-defence and not encourage them

663 Submission 37, Women's Legal Services NSW, p 27.

> to accept a plea of manslaughter—and the prosecution needs to be equipped to counter arguments that defence solicitors might raise as provocative behaviour by men. In turn, we need to also ensure that there is adequate community education for jury members so that they are not persuaded that some of their stories about provocation are acceptable. The message that our criminal law sends about what is acceptable behaviour and what is not is incredibly important. It is this level of education we need, and probably the hardest thing to do is to get this education to be effective. We have talked about it for a number of years now, but we need to make a more concerted effort.[664]

9.90 Ms Betty Green, Convenor of the Coalition, noted that the Victorian legislative reforms were supported by a raft of education programs to improve the way that the law operates:

> There was a comprehensive education program and package that targeted those particular areas that Dr Wangmann has spoken about before with the prosecution, the defences and judicial officers, so that everybody was very clear about what domestic violence is, how it works and how it operates within the context of a violent relationship. So it was done together … what we are saying … is rather than a surgical strike and just tinkering at the edges of the law, to actually look at it from a holistic point of view, what could be done for significant and lasting change, challenging the narratives of men who kill their intimate partners—and it is intimate partners where our focus is, that that is where we need to start.[665]

9.91 Some Inquiry participants, including Professor Stubbs, drew on joint recommendations made recently by the Australian and NSW Law Reform Commissions', which emphasised the importance of educating key players about issues of family violence. The Commissions' report stated:

> [A] focus on the doctrinal content of defences is insufficient to ensure that the experiences of family violence victims who kill are accommodated in practice. Continuing legal professional and judicial education is essential to ensuring that judges and lawyers practicing in criminal law understand the nature and dynamics of family violence, and how evidence of family violence may be relevant to criminal defences.[666]

9.92 The Commissions' made a total of 187 recommendations, with a number of them relating to education of key players in the legal and welfare systems, throughout its report. In particular, Recommendations 26–3 and 31–1 provided respectively:

> Federal, state and territory governments and relevant educational, professional and service delivery bodies should ensure ongoing and consistent education and training for judicial officers, lawyers, prosecutors, police and victim support services in relation to the substantive law and the nature and dynamics of sexual assault as a form of family violence, including its social and cultural contexts. [667]

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664 Dr Jane Wangmann, Member, NSW Domestic Violence Coalition Committee, Evidence, 28 August 2012, p 4.

665 Ms Betty Green, Evidence, 28 August 2012, p 5.

666 Australian Law Reform Commission/NSW Reform Commission, *Family Violence—A National Legal Response, Final Report* (2010) 14.99, cited in Submission 41, Professor Julie Stubbs, p 12.

667 Australian Law Reform Commission/NSW Reform Commission, *Family Violence—A National Legal Response, Final Report* (2010), Recommendation 26-3.

> The Australian, state and territory governments and educational, professional and service delivery bodies should ensure regular and consistent education and training for participants in the family law, family violence and child protection systems, in relation to the nature and dynamics of family violence, including its impact on victims, in particular those from high risk and vulnerable groups.[668]

9.93 Ms Penny Musgrave, Director of the Criminal Law Review Division within the Department of Attorney General and Justice, told the Committee that the NSW Government response to the Commissions' report is being prepared but noted that it is a significant task. She also commented that NSW has already implemented a number of recommendations:

> There is no finalised government response. [The] recommendations fell into … three conceptually different buckets. There is a group of recommendations that are being examined at a national level and that national response should be formulated by the end of this year. There is a bundle of recommendations that are being addressed in the statutory review of the *Crimes (Domestic and Personal Violence) Act*. That leaves the remainder of the recommendations, some of which New South Wales does not need to act on because it has already addressed those issues. It must be remembered that it was a national report and we had already acted on a number of the recommendations. Because the statutory review is being finalised, it is likely the government response will finalised at the end of that.[669]

9.94 A strong link was made by Inquiry participants that advocated for an 'education package' between increased understandings of domestic and family violence and fairer outcomes for victims of domestic and family violence. In particular, it was suggested that self-defence could be more widely available to women (generally) who kill following years of abuse, but usually in non-confrontational (non-traditional) circumstances, for example, when the abusive partner is asleep or unconscious. For example, Wirringa Baiya Aboriginal Legal Women's Centre submitted:

> It is frustrating that the defence of self-defence, and its application, continues to be incapable of adequately understanding and catering for … women who have experienced prolonged domestic violence and who kill their abusive partners. **This failure is fundamentally are reflection of how far we need to still to educate the community (which make up our juries, our lawyers, our magistrates and judges) about the complexity of domestic violence and the profound impact it has on a woman's life in its' every aspect.** Too many people still ask the question: "But why didn't she just leave him?" Therefore any changes in the law need to be coupled with an extensive education campaign across the community and in our law schools. Such an education campaign should also specifically target legal professionals, especially prosecutors and defence counsel and the judiciary through the appropriate professional bodies and agencies [emphasis added].[670]

9.95 Several Inquiry participants submitted that education could be also enhanced and supported through the introduction of social framework evidence.

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668 Australian Law Reform Commission/NSW Reform Commission, *Family Violence—A National Legal Response, Final Report* (2010), Recommendation 31-1.

669 Ms Penny Musgrave, Director, Criminal Law Review Division, Department of Attorney General and Justice, Evidence, 29 August 2012, p 14.

670 Submission 35, Wirringa Baiya Aborigianl Legal Women's Centre, p 10.

Committee comment

9.96 The Committee agrees that legislative reform, on its own, is unlikely to achieve the desired cultural and systemic changes in attitudes and responses to issues of domestic and family violence which, as has been evident throughout this Inquiry, has been a key factor raised in respect of the operation of the partial defence of provocation.

9.97 The Committee is persuaded that legislative reforms should be accompanied by an education package that targets key stakeholders working in the criminal justice system, including members of the judiciary, defence counsel, prosecutors, police and victim support workers.

9.98 Additionally, the Committee is of the view that there should be better education of the community about the nature and dynamics of domestic and family violence, including addressing common misperceptions about victims of violence and, in particular, challenging views about why they do not 'just leave' violent and destructive relationships.

9.99 The Committee considers that, in relation to defences to homicide, education of these groups will be supported by other recommendations that are being made by the Committee, including Recommendation 2 which relates to 'social framework' evidence. In this regard, the Committee agrees with the comment made by Women's Legal Services NSW (at 8.119) that the introduction of social framework evidentiary provisions can assist in educating the community, and juries in particular.

9.100 The Committee considers that the comprehensive recommendations made by the Australian and NSW Law Reform Commissions' that relate to education of police, defence counsel, prosecutors, the judiciary in relation to family violence are appropriate. The Committee considers that education of the ongoing community education is also important. The Committee therefore recommends that, in developing a response to the recommendations of the Australian and NSW Law Reform Commissions' report, the NSW Government endorse and implement recommendations relating to education, but in particular Recommendations 26–3 and 31–1, and that a supporting education program targeting the community be incorporated.

Recommendation 10

That the NSW Government develop and implement an education package on the nature and dynamics of domestic and family violence targeting the legal sector and the community more broadly.

Review of the law of homicide and homicide defences

9.101 As discussed in Chapter 6, a number of Inquiry participants recommended that the NSW Law Reform Commission undertake a wholesale review of the law of homicide and defences to homicide, which would incorporate a review of the partial defence of provocation.

9.102 It was argued by some Inquiry participants that the complexity of this area of the law, specifically in respect of the partial defence of provocation and more broadly across the law of

homicide, warranted a comprehensive review undertaken by a body established to undertake such inquiries.

Committee comment

9.103 As noted at 5.92 – 5.95, the Committee considers that immediate action is required in relation to section 23 of the *Crimes Act 1900*, which provides for the partial defence of provocation.

9.104 However, notwithstanding the recommendations made by the Committee, which are designed to enable a swift and effective response to issues raised in relation to the operation of the partial defence, the Committee considers that the law of homicide and homicide defences in NSW would benefit from a comprehensive examination.

9.105 The Committee considers that regular evaluation and assessment of the operation of the laws of the State is vital, and is of the view that any legislative reform resulting from its recommendations should be monitored and evaluated at the end of a period of operation.

9.106 The Committee therefore recommends that the Attorney General, being the relevant minister, refer a review of the law of homicide and defences to homicide in NSW to the NSW Law Reform Commission, to commence after five years.

Recommendation 11

That the Attorney General issue a reference to the NSW Law Reform Commission, requiring that it undertake a comprehensive review of the law of homicide and homicide defences in NSW, including reforms made in accordance with the recommendations in this report, to commence at the end of five years from the date of this report.

Concluding comment

9.107 The Committee notes that this has been a long and complex Inquiry, which commenced in response to significant community concern following a number of high profile cases involving the partial defence of provocation.

9.108 The Committee has made a number of recommendations that are designed to respond to the key concerns raised about the operation of the partial defence of provocation, including specific reforms to section 23 of the *Crimes Act 1900*. The proposed reform to section 23 is supported by the two recommendations contained in Chapter 8, which are intended to respond to concerns about the operation of the defence in relation to domestic homicides.

9.109 The Committee considers that this package of reforms, which combines recommendations designed to address specific concerns about the way the defence is currently operating, procedural and evidentiary issues, an education component and a review mechanism, is critical to ensuring that the law is able to respond in a fair and just way to the devastating circumstances of cases involving homicides and the partial defence of provocation.

Appendix 1 Submissions

No	Author
1	Name suppressed
2	Mr Peter Butler
3	Name suppressed
4	Associate Professor Julie Tolmie
5	The Law Society of New South Wales
6	Anti-Discrimination Board of New South Wales
7	Ms Glenda Gartrell
8	FamilyVoice Australia
9	Name suppressed
10	Women's Electoral Lobby
11	NSW Law Reform Commission
12	Mr Graeme Coss
13	Name suppressed
14	Mr James Trevallion
15	NSW Bar Association
16	Women's Domestic Violence Court Advocacy Service (WDVCAS) NSW Inc.
17	The Public Defender's Office
18	Dr Kate Fitz-Gibbon
19	NSW Young Lawyers
20	Mrs Jaspreet Kaur
21	Mr Alastair Lawrie
22	New South Wales Gay and Lesbian Rights Lobby
23	Australian Law Reform Commission
24	Justice Action
25	Homicide Victims Support Group (Australia) Inc
26	Mr Phil Cleary
27	NSW Beat Project
28	Ms Clover Moore
29	Associate Professor Thomas Crofts and Dr Arlie Loughnan
30	Legal Aid NSW
31	New South Wales Domestic Violence Committee Coalition
32	NSW Council for Civil Liberties Inc.

No	Author
33	Mr Winston Terracini SC QC
34	Office of the Director of Public Prosecutions (NSW)
35	Wirringa Baiya Aboriginal Women's Legal Centre
36	FairGO
37	Women's Legal Services NSW
38	Inner City Legal Centre
39	Victims of Crime Assistance League (VOCAL)
40	Ms Amy Fox
41	Professor Julie Stubbs
42	Redfern Legal Centre
43	ACON
44	Hawkesbury Nepean Community Legal Centre
45	Outer West domestic Violence Network (OWDVN)
46	Miss Natasha Godwin
47	Miss Lauren Blumberg
48	Australian Lawyers Alliance
49	Ms Catherine Smith
50	Mr James Moshides
51	Attorney General and Justice NSW
52	Victims Advisory Board

Appendix 2 Witnesses at hearings

Date	Name	Position and Organisation
Tuesday 28 August 2012 **Jubilee Room** **Parliament House**	Mr John McKenzie	Chief Legal Officer Aboriginal Legal Service
	Mr Mark Murdoch APM	Assistant Commissioner NSW Police Force
	Dr Justin Koonin	Convenor New South Wales Gay and Lesbian Rights Lobby
	Mr Dean Price	Committee Member New South Wales Gay and Lesbian Rights Lobby
	Mr Dan Stubbs	Centre Director Inner City Legal Centre
	Ms Maura Boland	Deputy Director General Department of Family and Community Services
	Ms Alison Frame	Executive Director Department of Family and Community Services
	Dr Kate Fitz-Gibbon	Lecturer in Criminology, School of Humanities and Social Sciences Deakin University
	Prof Julie Stubbs	Faculty of Law University of New South Wales
	Mr Graeme Coss	Senior Lecturer, Sydney Law School University of Sydney
	Ms Dina Yehia SC	Public Defender Public Defenders Office
	Ms Betty Green	Convenor NSW Domestic Violence Coalition
	Ms Julie Stewart	Secretary NSW Domestic Violence Coalition
	Dr Jane Wangmann	Management Committee Member NSW Domestic Violence Coalition
	Ms Helen Campbell	Executive Director Women's Legal Services NSW

Date	Name	Position and Organisation
	Ms Clare Jobson	Principal Solicitor Inner City Legal Centre
	Mr Craig Mulvey	Co-Chair Inner City Legal Centre Board
Wednesday 29 August 2012 **Jubilee Room** **Parliament House**	Mr Phillip Gibson	Member, Criminal Law Committee The Law Society of New South Wales
	Mr David Giddy	Member, Criminal Law Committee The Law Society of New South Wales
	Mr Stephen Odgers SC	Chair, Criminal Law Committee NSW Bar Association
	Mr John Stratton SC	Member, Criminal Law Committee NSW Bar Association
	Ms Chrissa Loukas	Member, Bar Council NSW Bar Association
	Mr Lloyd Babb SC	Director of Public Prosecutions Office of the Director of Public Prosecutions
	Ms Martha Jabour	Executive Director Homicide Victims Support Group (Australia) Inc
	Ms Jaspreet Kaur	Sister of Manpreet Kaur
	Mr Phil Cleary	Individual
	Associate Professor Thomas Crofts	Sydney Law School University of Sydney
	Dr Arlie Loughnan	Associate Dean and Senior Lecturer Sydney Law School, University of Sydney
	The Hon James Wood AO QC	
	Ms Penny Musgrave	Director, Criminal Law Review Department of Attorney General and Justice
Friday 21 September 2012 **Jubilee Room** **Parliament House**	Ms Jacqui Swinburne	Acting Chief Executive Officer, Redfern Legal Centre & Sydney Women's Domestic Violence Court Advocacy Service
	Ms Susan Smith	Coordinator Sydney Women's Domestic Violence Court Advocacy Service
	Ms Elizabeth Morley	Principal Solicitor Redfern Legal Centre

Date	**Name**	**Position and Organisation**
	Associate Professor Julia Tolmie	Faculty of Law University of Auckland
	Mr Cameron Murphy	President NSW Council for Civil Liberties

Appendix 3 Tabled documents

Wednesday 29 August 2012
Jubilee Room, Parliament House

1 Suggested direction [6-410] to jury on the defence of provocation from Office of the Director of Public Prosecutions, dated 29 August 2012, *tendered by Mr Lloyd Babb SC.*

Monday 24 September 2012
Judicial Commission of NSW, Sydney

2 *Braysich v The Queen* (2011) 243 CLR 434, *tendered by Mr Ernest Schmatt***.**
3 Better Decision-Making with Technology: The Judicial Information Research System, *tendered by Mr Ernest Schmatt.*
4 Judicial Officers' Bulletin, April 2004 – Volume 16 Number 3, Sexuality-related hate crime, by Ivan Potas, *tendered by Mr Ernest Schmatt.*
5 Warning against possible prejudice or sympathy [1-580], *tendered by Mr Ernest Schmatt.*

Friday 26 October 2012
Room 1153, Parliament House

6 Analysis of options open to the Committee in relation to the partial defence of provocation discussion paper, *tendered by the Secretariat.*
7 The onus of proof paper, dated 16 October 2012, *tendered by the Hon. Trevor Khan MLC.*

Appendix 4 Answers to questions on notice

The Committee received answers to questions on notice from:

- Bar Association of NSW
- Inter City Legal Centre
- NSW Gay and Lesbian Rights Lobby
- Mr Phil Cleary
- NSW Police Force
- Dr Kate Fitz-Gibbon
- Public Defender's Office
- Mr Graeme Coss
- Associate Professor Thomas Crofts and Dr Arlie Loughnan
- Office of the Director of Public Prosecutions
- Professor Julie Stubbs
- The Law Society of NSW
- NSW Domestic Violence Committee Coalition
- Homicide Victims' Support Group (Aust) Inc.
- NSW Law Reform Commission
- Women's Legals Services NSW
- Department of Family & Community Services
- Criminal Law Review, Department of Attorney General & Justice
- NSW Council for Civil Liberties Inc.
- Aboriginal Legal Service (NSW/ACT) Ltd
- Redfern Legal Centre and Sydney Women's Domestic Violence Court Advocacy Service.

Appendix 5 Suggested direction [6-410] to jury on the defence of provocation

MR LLOYD BABB SC,
DPP
29/08/2012

[6-410] Suggested direction

The final issue which the Crown must establish in order to prove that the accused is guilty of murder is that the accused was not acting under provocation when [*he/she*] killed [*the deceased*]. It is not for the accused to prove that [*he/she*] was acting under provocation but for the Crown to prove that beyond reasonable doubt that [*he/she*] was not.

If the Crown satisfies you beyond reasonable doubt that all the other elements of murder have been established beyond reasonable doubt and the accused was not provoked to do what [*he/she*] did, the appropriate verdict is "guilty of murder". If, however, the Crown does not satisfy you that [*he/she*] was not provoked, the accused will be "not guilty of murder" but "guilty" of the less serious offence of manslaughter (that is, manslaughter by provocation).

How then do you determine whether the accused was (or may have been) provoked to do what [*he/she*] did?

The law provides that an [*act/omission*] causing death is an act [*done/omitted*] under provocation where —

1. The [*act/omission*] is the result of a loss of self control on the part of the accused that was induced by any conduct of [*the deceased*] (including grossly insulting words or gestures) towards or affecting the accused; and
2. That conduct of [*the deceased*] was such that it could have induced an ordinary person in the position of the accused to have so far lost self control as to have formed an intent to kill, or to inflict grievous bodily harm upon, [*the deceased*], whether the conduct of [*the deceased*] occurred immediately before the [*act/omission*] causing death, or at any previous time.

... [*where raised, intoxication must be taken into account when considering question one, but not when considering question two*].

Question One

These principles of law require you to consider the following question or questions. The first question is — "May [*the deceased's*] conduct, that is, the things [*he/she*] did or said, or both, have induced (that is, caused) the accused to lose [*his/her*] self control?".

[Where applicable

The conduct or words of [*the deceased*], which allegedly induced the loss of self control on the part of the accused, need not have occurred immediately before the act causing death but may have occurred at any previous time and may be a course of conduct over a period of time, even years, or may include a course of conduct over a period of time together with other conduct immediately prior to the act causing death.**]**

There must be a causal connection between the conduct of [*the deceased*] and the loss of self control by the accused. In determining whether there was such a connection, you must consider the gravity of the alleged provocation so far as the accused is concerned. There are relevant matters raised in this case by the evidence.

You must appreciate that conduct which might not be insulting or hurtful to one person may be extremely hurtful to another because of that person's age, sex, race, ethnic or cultural background, physical features, personal attributes, personal relationships or past history ... [*refer to the special characteristics of the accused raised by the evidence. This would include in an appropriate case the "battered wife syndrome". It will be necessary to relate any expert*

evidence as, for example, with regard to the "battered wife syndrome" to the particular facts and circumstances of the subject case].

It is proper that you view the words or conduct in question as a whole and also in the light of any history or disputation between [*the deceased*] and the accused since particular acts or words which considered separately could not amount to provocation may, in combination or cumulatively, be enough to cause the accused to lose [*his/her*] self control in fact.

That is quite different from a deliberate act of vengeance, hatred or revenge, and likewise quite different from a consideration of whether in the light of [*his/her*] conduct [*the deceased*] got [*his/her*] just deserts.

If you are satisfied beyond reasonable doubt that the answer to that question is "No", then the Crown has negatived provocation and providing you are satisfied beyond reasonable doubt as to all the elements of murder to which I have earlier referred, the appropriate verdict is "guilty of murder".

Question Two

If, however, the answer is "Yes", then you must turn to the second question, which is — "May the conduct of [*the deceased*] have induced an ordinary person in the position of the accused to have so far lost self control as to have formed an intent to kill, or inflict grievous bodily harm on [*the deceased*]?".

An "ordinary person" is simply one who has the minimum powers of self control expected of an ordinary citizen who is sober and of the same age and consequent level of maturity as the accused.

When one speaks of the effect of provocation on an ordinary person in the position of the accused, that phrase means an ordinary person who has been provoked to the same degree of severity and for the same reason as the accused.

In the present case, this translates to a person with the minimum powers of self control of an ordinary person, as described earlier, who is subjected ... [*for example, to a sexual advance by the victim which is aggravated because of the accused's special sensitivity to a history of violence and sexual assault within the family*]. [*None of the attributes or characteristics of a particular accused will be necessarily irrelevant to an assessment of the content and extent of the provocation involved in the relevant conduct*].

This question requires you to take full account of the sting of the provocation actually experienced by the accused, but eliminates from your consideration an extraordinary response (if such there be) by the accused to the provocation actually experienced.

You should understand that when you are dealing with this question you are considering the possible reaction of an ordinary person in the position of the accused, not [*his/her*] inevitable or even probable reaction, but [*his/her*] possible reaction.

If the answer to this question is "No", the Crown has negatived provocation and all the other elements of murder have been established beyond reasonable doubt, the appropriate verdict is "guilty of murder".

If the answer is "Yes", the Crown has failed to negative provocation and the appropriate verdict is "not guilty of murder but guilty of manslaughter".

Appendix 6 Minutes

Minutes No. 1
Friday, 22 June 2012
Select Committee on the Partial Defence of Provocation
Room 1153, Parliament House, at 2:45am

1. Members present
Mr Nile *(Chair)*
Mr Searle
Mr Shoebridge
Ms Westwood
Mr Khan
Mr Macdonald

2. Apologies
Mr Clarke

3. Meeting declared open
The Chair declared the meeting open.

4. Tabling of the resolution establishing the Committee
The Chair tabled the resolution establishing the Committee from the Minutes of the Legislative Council of 14 June 2012.

5. Election of Deputy Chair
The Chair called for nominations for Deputy Chair.

Mr Shoebridge moved: That Mr Khan be elected Deputy Chair of the Committee.

There being no further nominations, the Chair declared Mr Khan elected Deputy Chair.

6. Procedural motions
Resolved, on the motion of Mr Shoebridge: That, unless the Committee decides otherwise, the following procedures apply for the life of the Committee:

That the Committee authorises the filming, broadcasting and still photography of the public proceedings of the Committee, in accordance with the resolution of the Legislative Council of 18 October 2007.

That the Committee authorises the publication of transcripts of evidence taken at public hearings.

That the Committee authorises the publication of answers to questions on notice.

That the Committee authorise the publication of all submissions to the inquiry, subject to the Committee Clerk checking for confidentiality, adverse mention and other issues and, where those issues arise, bringing them to the attention of the Committee for consideration.

That media statements on behalf of the Committee may be made only by the Chair.

That arrangements for inviting witness are to be left in the hands of the Chair and the Committee Clerk, after consultation with the Committee.

7. Conduct of Inquiry

The Committee noted the terms of reference and proposed timeline (attached) and discussed the conduct of the Inquiry.

The Chair noted that the Secretariat is preparing a briefing paper for circulation to members, with a view to publishing it on the website and providing it to stakeholders.

Resolved, on the motion of Mr Searle: That a media release announcing the Inquiry and calling for submissions be issued by the Chair.

Resolved, on the motion of Mr Macdonald: That advertisements calling for submissions be placed in the *Newscastle Herald, Illawarra Mercury* and *The Land*, in addition to *The Sydney Morning Herald* and *The Daily Telegraph*.

Resolved, on the motion of Mr Shoebridge: That advertisements calling for submissions also be placed in the *Sydney Star Observer* and *SX*.

Resolved, on the motion of Mr Searle: That the closing date for submissions be Friday 10 August 2012; and that the Committee write to the stakeholders identified on the attached list to invite them to make a submission, and that Members advise the Secretariat of any additional stakeholders to invite by 5pm Monday 2 July 2012.

Resolved, on the motion of Mr Shoebridge: That the Committee hold two days of hearings on Tuesday 28 August and Wednesday 29, and a reserve day on Thursday 30 August 2012; and that the Chair finalise the hearing dates after consultation with the Secretariat in relation to other committee activity.

Resolved, on the motion of Mr Khan: That the Committee require that answers to questions taken on notice taken during the hearings be provided to the Secretariat within 21 days.

Resolved, on the motion Mr David Shoebridge: That the Committee meet on the morning of Friday 16 November 2012 for the report deliberative.

The Committee noted that consideration be given to an earlier time frame for reporting, should it be necessary.

8. Other business

Resolved, on the motion of Mr Shoebridge: That the committee staff be thanked for staying back late tonight to assist with the deliberative meeting after the rising of the House.

9. Adjournment

The Committee adjourned at 3:00am, *sine die*.

Julie Langsworth
Clerk to the Committee

Minutes No. 2
Monday, 13 July 2012
Select Committee on the Partial Defence of Provocation
Room 1153, Parliament House, at 10:00am

1. Members present

Mr Nile, *Chair*
Mr Khan, *Deputy Chair*
Mr Searle
Mr Shoebridge
Ms Westwood

Mr Macdonald
Mr Clarke

2. Previous minutes
Resolved, on the motion of Ms Westwood: That the Minutes No 1 be confirmed.

3. Correspondence
The Committee noted the following items of correspondence:

Received

- 20 June 2012 – Ms Kate Fitz-Gibbon, Department of Criminology, Deakin University expressing her interest in the inquiry and advising of her research examining the effects of law reform approaches in relation to the partial defence of provocation.
- 2 July 2012 – Director, NSW Bureau of Crime Statistics and Research, advising that the Bureau does not normally make a submission to Parliament and does not have any information on the defence of provocation.
- 4 July 2012 – Secretary-General, Law Council of Australia, advising that our stakeholder letter has been forwarded to the Law Society of New South Wales and the New South Wales Bar Association as the relevant bodies to make comment on state issues.
- 13 July 2012 – Ms Kate Fitz-Gibbon, Department of Criminology, Deakin University, attaching two published journal articles which she has authored: 'Provocation in New South Wales: The need for abolition'; and 'Homicide Law Reform in Victoria, Australia - From Provocation to Defensive Homicide and Beyond.'
- 27 July 2012 – Prof Julie Stubbs, Faculty of Law, University of NSW, attaching a copy of an article (co-authored by Liz Sheehy, Julia Tolmie and Stubbs) to be published in the Sydney Law Review later this year titled 'Defences to Homicide for Battered Women: A Comparative Analysis of Laws in Australia, Canada and New Zealand.'
- 31 July 2012 – Sentencing Advisory Council, Victoria, advising that they do not wish to make a submission, and attaching a copy of their report 'Provocation in Sentencing: Research Report, Second Edition.'
- 2 August 2012 – The Hon Trevor Khan MLC, requesting that the Secretariat obtain sentencing statistics for Murder and Manslaughter.
- 8 August 2012 – Department of Justice, Victoria to Chair advising that they will not be making a submission as it would be inappropriate given the Victorian Government is currently reviewing their homicide laws, but referring to the Victorian Law Reform Commission's report *Defences to Homicide.*

The Committee also noted the following correspondence, which is the subject of an embargo:

- 10 July 2012 – Prof Julie Stubbs, Faculty of Law, University of NSW, attaching copies of articles to be printed in upcoming edition of Australian and New Zealand Journal of Criminology on 'Legal responses to lethal violence' (all articles are embargoed and are not for further distribution or publication).

4. Submissions
Resolved, on the motion of Mr Shoebridge: That, as previously agreed via email on 8 August 2012, the submission deadline be extended until Friday 24 August 2012.

4.1 Public submissions
The Committee noted that Submission Nos 2, 4, 5, 6, 7, 8, 10 and 11 were published by the Committee Clerk according to the Committee's resolution of 22 June 2012.

4.2 Partially confidential submissions
Resolved, on the motion of Mr Khan: That the Committee authorise the publication of Submission Nos 1, 3 and 9 with the exception of the name and other identifying information which are to remain confidential.

Resolved, on the motion of Mr Shoebridge: That the Committee write to the Department of Premier and Cabinet inviting the Department to provide a submission containing background, historical information and any relevant data on issues related to the Inquiry that may assist the Committee in its deliberations.

5. Consideration of witnesses for hearings

The Committee discussed the proposed witness list and considered whether to utilise the reserve hearing day.

Government

Resolved, on the motion of Mr Khan: That the following be invited to give evidence before the Committee:

- The Hon James Wood AO QC, Commissioner of the NSW Law Reform Commission
- The Public Defenders Office
- The Office of the Director of Public Prosecutions.

Resolved, on the motion of Mr Khan: That the Criminal Law Review Division of the Department of Attorney General and Justice and the NSW Police Force be invited to give evidence before the Committee, and that they be invited to provide a submission to the Committee prior to the hearing day.

Resolved, on the motion of Ms Westwood: That the Office for Women's Policy within the Department of Family and Community Services be invited to give evidence before the Committee, and that they be invited to provide a submission to the Committee prior to the hearing day.

Resolved, on the motion of Ms Westwood: That the Committee write to Dr Don Weatherburn requesting that the Bureau of Crime Statistics and Research provide the Committee with any data that may be relevant to the Inquiry terms of reference, including but not limited to data on domestic violence, non-domestic assault and homicide offences.

Legal advocacy

Resolved, on the motion of Mr Clarke: That the following be invited to give evidence before the Committee:

- NSW Bar Association
- Law Society of NSW
- Women's Legal Services NSW
- Inner City Legal Centre.

Resolved, on the motion of Mr Shoebridge: That the Aboriginal Legal Service be invited to given evidence before the Committee, and that they be invited to provide a submission to the Committee prior to the hearing day.

Other advocacy

Resolved, on the motion of Mr Clarke: That the following be invited to give evidence before the Committee:

- NSW Domestic Violence Coalition
- Gay and Lesbian Rights Lobby
- Victims Advisory Board
- Homicide Victims Support Group.

Academics

Resolved, on the motion of Mr Khan: That the following be invited to give evidence before the Committee:

- Professor Graeme Coss, Law School, Sydney University
- Dr Kate Fitz-Gibbon, Schjool of Humanities and Social Sciences, Deakin University
- Professor Julie Stubbs, Faculty of Law, University of NSW

Resolved, on the motion of Mr Khan: That the Hon Michael Kirby AC CMG be invited to give evidence before the Committee, and that he be invited to provide a submission to the Committee prior to the hearing day.

Resolved, on the motion of Mr Shoebridge: That Professor Larissa Behrendt, Jumbunna Indigenous House of Learning at the University of Technology Sydney be invited to give evidence before the Committee, and that she be invited to provide a submission to the Committee prior to the hearing day.

Resolved, on the motion of Mr Shoebridge: That the reserve hearing day currently scheduled for Thursday 30 August be postponed until September, with a date to be confirmed by the Secretariat in consultation with the Committee; and that a proposed witness list for the reserve day also be circulated after consideration of submissions received.

6. Briefing of the Committee by the Secretariat
Resolved, on the motion of Mr Khan: That the Committee meet on Thursday 23 August at 1.00pm for a 1.5 hour briefing by the Secretariat.

7. Adjournment
The Committee adjourned at 11:00am until Thursday 23 August at 1.00pm *(briefing)*.

Vanessa Viaggio
Clerk to the Committee

Minutes No. 3
23 August 2012, at 1.00pm
Select Committee on the Partial Defence of Provocation
Room 1136, Parliament House, Sydney

1. Members present
Mr Nile, *Chair*
Mr Khan, *Deputy Chair*
Mr Searle
Mr Shoebridge
Ms Westwood
Mr MacDonald
Mr Clarke

2. Previous minutes
Resolved, on the motion of Mr MacDonald: That Minutes No. 2 be confirmed.

3. Correspondence
The Committee noted the following items of correspondence:

Received

- 16 August 2012 – From The Hon Michael Kirby AC CMG, declining the invitation to appear as a witness, and referring to his judgment in *Green v. The Queen* (1997) 191 CLR 334 at 387.
- 20 August 2012 – From The Hon. T F Bathurst, Chief Justice of the Supreme Court of NSW, declining the invitation to make a submission to the Inquiry.
- 20 August 2012 – From Dr Don Weatherburn, Director of BOCSAR, providing data on recorded rates of domestic assault by Local Government Area, and attaching copies of recent BOCSAR reports on domestic violence.

Sent

- 13 August 2012 – Letter to Mr Chris Eccles, DG of Department of Premier and Cabinet, inviting the Government to reconsider its decision not to make a submission to the Inquiry.
- 15 August 2012 – Letter to Dr Don Weatherburn, Director of BOCSAR, acknowledging his earlier correspondence and inviting him to provide the Committee with any data held by BOCSAR that may be relevant to the Inquiry terms of reference, including but not limited to, data on domestic violence, non-domestic assault and homicide offences broadly.

4. Submissions

4.1 Public submissions

The Committee noted that Submission Nos 12-24 and 26- 28 have been published according to the Committee's resolution of 22 June 2012.

4.2 Partially confidential submissions

Resolved, on the motion of Ms Westwood: That, as previously agreed via email on 16 August 2012, the Committee authorise the publication of Submission No 25 with the exception of Appendix 4.

5. Briefing from the Secretariat

The Secretariat briefed the Committee on issues arising from the Inquiry terms of reference.

6. Adjournment

The Committee adjourned at 2.20pm.

7. Next meeting

Tuesday 28 August 2012, 9.00am, Jubilee Room, for the first hearing.

Vanessa Viaggio
Clerk to the Committee

Minutes No. 4
28 August 2012, at 9.00am
Select Committee on the Partial Defence of Provocation
Jubilee Room, Parliament House, Sydney

1. Members present

Mr Nile, *Chair*
Mr Khan, *Deputy Chair*
Mr Clarke
Mr MacDonald
Mr Searle
Mr Shoebridge
Ms Westwood

2. Public Hearing - Inquiry into the partial defence of provocation

Witnesses, the public and media were admitted.

The Chair made an opening statement regarding the broadcasting of proceedings and other matters.

The following witnesses from the NSW Domestic Violence Coalition were sworn and examined:

- Ms Betty Green, Convenor,
- Ms Julie Stewart, Secretary,
- Dr Jane Wangmann, Management Committee Member.

The evidence concluded and the witnesses withdrew.

The following witness was sworn and examined:

- Ms Helen Campbell, Executive Director, Women's Legal Services NSW.

The evidence concluded and the witness withdrew.

The following witnesses were sworn and examined:

- Mr John McKenzie, Chief Legal Officer, Aboriginal Legal Service.

The evidence concluded and the witnesses withdrew.

The following witnesses were sworn and examined:

- Mr Mark Murdoch APM, Assistant Commissioner, NSW Police Force.

Mr Murdoch tendered a document titled 'Memorandum concerning Legal Council - Select Committee Inquiry into the partial defence of provocation'.

The evidence concluded and the witnesses withdrew.

The following witnesses were sworn and examined:

- Ms Clare Jobson, Principal Solicitor, Inner City Legal Centre,
- Mr Craig Mulvey, Co-Chair, Inner City Legal Centre,
- Dr Justin Koonin, Convenor, NSW Gay and Lesbian Rights Lobby,
- Mr Dean Price, Committee Member, NSW Gay and Lesbian Rights Lobby.

The evidence concluded and the witnesses withdrew.

The following witnesses from the Department of Family and Community Services were sworn and examined:

- Ms Maura Boland, Deputy Director General, Strategy and Policy,
- Ms Alison Frame, Executive Director, Women NSW.

The evidence concluded and the witness withdrew.

The following witness was sworn and examined:

- Dr Kate Fitz-Gibbon, Lecturer in Criminology, School of Humanities and Social Sciences, Deakin University.

The evidence concluded and the witness withdrew.

The following witness was sworn and examined:

- Prof Julie Stubbs, Professor, Faculty of Law, University of NSW.

The Chair acknowledged the presence in the audience of staff from a number of pacific parliaments who are attending the Effective Parliamentary Committee Inquiries Course this week held by the NSW Parliament and the Centre for Democratic Institutions.

The evidence concluded and the witness withdrew.

The following witness was sworn and examined:

- Mr Graeme Coss, Senior Lecturer, Sydney University Law School.

The evidence concluded and the witness withdrew.

The following witness was sworn and examined:

- Ms Dina Yehia SC, Public Defender, Public Defenders Office.

The Chair acknowledged the presence in the audience of Mr Lenny Roth and Ms Lyndsey Blayden, from the NSW Parliamentary Research Service, authors of *Provocation and self-defence in intimate partner and sexual advance homicides*, Briefing Paper 5/2012.

The evidence concluded and the witness withdrew.

3. Adjournment

The Committee adjourned at 5.30 pm. The public and media withdrew.

4. Next meeting

Wednesday 29 August 2012, 9.00am, Jubilee Room, for the second hearing.

Vanessa Viaggio
Clerk to the Committee

Minutes No. 5
29 August 2012, at 9.00 am
Select Committee on the Partial Defence of Provocation
Jubilee Room, Parliament House, Sydney

1. Members present

Mr Nile, *Chair*
Mr Khan, *Deputy Chair*
Mr Clarke
Mr MacDonald
Mr Searle
Mr Shoebridge
Ms Westwood

2. Public hearing - Inquiry into the partial defence of provocation

Witnesses, the public and media were admitted.

The Chair made an opening statement regarding the broadcasting of proceedings and other matters.

The following witness was sworn and examined:

- The Hon James Wood AO QC, Chairperson, NSW Law Reform Commission.

The evidence concluded and the witness withdrew.

The following witness was sworn and examined:

- Ms Penny Musgrave, Director, Criminal Law Review, Department of Attorney General and Justice.

The evidence concluded and the witness withdrew.

The following witnesses, members of the Criminal Law Committee, The Law Society of New South Wales were sworn and examined:

- Mr Phillip Gibson
- Mr David Giddy.

The evidence concluded and the witnesses withdrew.

The following witnesses from the NSW Bar Association were sworn and examined:

- Mr Stephen Odgers SC, Chair, Criminal Law Committee
- Mr John Stratton SC, Member, Criminal Law Committee
- Ms Chrissa Loukas, Member, Bar Council.

The evidence concluded and the witnesses withdrew.

The following witness was sworn and examined:

- Mr Lloyd Babb SC, Director of Public Prosecutions, Office of the Director of Public Prosecutions (NSW)

Mr Babb tendered a document titled '[6.410] Suggested direction'.

The evidence concluded and the witness withdrew.

The following witnesses were sworn and examined:

- Ms Martha Jabour, Executive Director, Homicide Victims Support Group (Australia) Inc.
- Ms Jaspreet Kaur, sister of Manpreet Kaur.

The evidence concluded and the witnesses withdrew.

The following witness was sworn and examined:

- Mr Phil Cleary, sister of Vicki Cleary.

The evidence concluded and the witness withdrew.

The following witnesses from Sydney Law School, University of Sydney were sworn and examined:

- Associate Professor Thomas Crofts
- Dr Arlie Loughnan, Associate Dean and Senior Lecturer.

3. Deliberative meeting

3.1 Previous minutes

Resolved, on the motion of Mr Searle: That Minutes No.3 be confirmed.

3.2 Correspondence

The Committee noted the following items of correspondence:

Received

- 20 August 2012 – From Dr Don Weatherburn, Director of BOCSAR, apologising for his misleading advice and advising that data on court outcomes for people charged with domestic violence offences may be available.

- 20 August 2012 – From Dr Don Weatherburn, Director of BOCSAR, providing data on conviction rates and penalty outcomes for domestic violence offences.
- 22 August 2012 – From Ms Gail Meyer, Manager, Wagga Women's Health Centre Inc., endorsing the submission from the NSW Domestic Violence Coalition.

- 23 August 2012 – From Jane Gold, Manager, Penrith Women's Health Centre, on behalf of the MetWest Violence Prevention Network, endorsing the submission provided by the NSW Domestic Violence Coalition Committee.
- 28 August 2012 – From Ms Silvia Romano, Senior Advisory Officer, Office of the Police Commissioner, confirming that the NSW Police Force will not be making a submission to the inquiry and stating that the Department of Premier and Cabinet ultimately decided not to make a whole of government submission to the inquiry.

3.3 Submissions

Public submissions
The Committee noted that Submission Nos 35-40 and 41-48 have been published according to the Committee's resolution of 22 June 2012.

Witnesses
The Committee discussed the proposed witness list for the third hearing day.

Resolved, on the motion of Ms Westwood: That the following be invited to give evidence before the Committee:
- Redfern Legal Centre and Sydney Women's Domestic Violence Court Advocacy Service
- Mr Winston Terracini SC QC
- Legal Aid NSW
- Australian Lawyers Alliance
- Ms Julia Tolmie, Associate Professor, University of Auckland
- Victims of Crime Assistance League
- NSW Council for Civil Liberties

The Committee discussed the options for reform of the law of provocation and future inquiry activity.

Resolved, on the motion of Ms Westwood: That the Secretariat prepare a paper setting out the a number of options for reform of the law of provocation for the committee's comment with a view to the paper forming the basis of further consultation with stakeholders.

Resolved, on the motion of Mr Searle: That Mr Wood be invited to review the transcript of his evidence and provide any additional information regarding his reform proposal by the end of next week.

Resolved, on the motion of Mr Shoebridge: That the Law Society and Bar Association be included in any further consultation on reform options.

4. Questions on notice

Resolved, on the motion of Mr Khan: That members provide the Secretariat with any questions on notice by 5pm Friday 31 August 2012.

5. Other business

5.1 Document tendered by Mr Murdoch

The Committee discussed the document tendered by Mr Mark Murdoch APM, Assistant Commissioner, NSW Police Force at today's hearing.

Resolved, on the motion of Mr Searle: That the Secretariat hold all copies of the document and contact Mr Murdoch to seek his advice on the status of the document.

5.2 Seeking submission from Domestic Violence Death Review Team

The Committee noted that there has not been any evidence to the Inquiry regarding the findings of the Domestic Violence Death Review Team.

Resolved on the motion of Ms Westwood: That the Committee write to the Domestic Violence Death Review Team, inviting it to make a submission providing information and data relevant to the inquiry terms of reference.

5.3 Bar Association reference to Singh transcript

The Committee discussed the evidence of Ms Chrissa Loukas of the Bar Association.

Resolved, on the motion of Ms Westwood: That the Secretariat explore the possibility obtaining the full transcript of the proceedings in the Singh matter.

5.4 Guiding principles

Resolved, on the motion of Ms Westwood: That the Committee note the evidence of Mr Cleary regarding the embedding of human rights principles in any reform proposal and that the Secretariat explore this proposition.

6. Next meeting

Friday 21 September 2012, 10.00am, Jubilee Room, for the third hearing.

Vanessa Viaggio
Clerk to the Committee

Minutes No. 6
Friday 21 September 2012
Select Committee on the Partial Defence of Provocation
Jubilee Room, Parliament House, 10.00am

1. Members present

Mr Nile, *Chair*
Mr Khan, *Deputy Chair*
Mr Clarke
Mr MacDonald
Mr Searle
Mr Shoebridge
Ms Westwood

2. Deliberative meeting

2.1 Previous minutes

Resolved, on the motion of Mr Khan: That Minutes No.4 and 5 be confirmed.

2.2 Correspondence

The Committee noted the following items of correspondence:

Received

- 24 July 2012 – From Dr Adam Tomison, Director (Chief Executive), Australian Institute of Criminology, advising no recent material for a formal submission and providing a list of AIC publications for background information.
- 24 August 2012 – From Mr Ken Beilby, Principal Solicitor Northern Rivers Community Legal Centre, endorsing the recommendations made by the Women's Legal Services NSW.

- 31 August 2012 – From the Hon James Wood AO QC, Chairperson, NSW Law Reform Commission, providing a draft of a possible amendment of the *Crimes Act 1900* (NSW) reflecting the reformulation of provocation discussed at the Hearing (previously circulated).
- 6 September 2012 – From Ms Dina Yehia SC, Public Defender, providing responses to questions taken on notice and supplementary questions.
- 12 September 2012 – From Ms Emily Price, Legal and Policy Officer, Australian Lawyers Alliance (ALA), declining the invitation to appear before the Committee as the relevant officers will be on leave.
- 13 September 2012 – From Ms Annmarie Lumsden, Executive Director, Strategic Policy, Planning and Management Reporting, Legal Aid NSW, declining the invitation appear before the Committee as no appropriate representative is available.
- 14 September 2012 - From the Hon James Wood AO QC, Chairperson, NSW Law Reform Commission, providing an amendment to the draft of a possible amendment of the *Crimes Act 1900* (NSW).

Sent

- 31 August 2012 - Letter to Magistrate Mary Jerram, State Coroner and Chair of the Domestic Violence Death Review Team, inviting the Team to make a submission to the Inquiry.

2.3 Document tendered by Assistant Commissioner Mark Murdoch APM

The Committee noted Mr Murdoch's advice regarding the document tendered to the Committee during the hearing on Tuesday 28 August, and considered his request to withdraw the document.

Resolved, on the motion of Mr Searle: That the Committee agrees to Assistant Commissioner Murdoch's request that the document tendered to the Committee on Tuesday 28 August 2012 be returned as it was tendered in error.

2.4 Formal adoption of Options Paper

The Committee discussed the Options Paper and the deadline for responses to the Options Paper and to questions on notice.

Resolved, on the motion of Ms Westwood: That the Committee adopt and publish the Options Paper; and note the return date of Thursday 4 October for responses to the Options Paper and to questions taken on notice.

2.5 Singh transcript

The Committee noted the steps taken by the Secretariat in seeking to obtain a copy of the transcripts of proceedings in the *Singh* matter.

Resolved, on the motion of Mr Shoebridge: That the Secretariat follow up with both the Court and with the judge's associate about obtaining a copy of the transcript as soon as possible.

2.6 Judicial Commission visit

The Committee noted the Judicial Commission's invitation to attend their premises on Monday 24 September 2012 at 2.00pm for a briefing on their database and research.

Resolved, on the motion of Mr Khan: That the Committee accept the Commission's invitation.

2.7 Timeframe for members to provide additional questions on notice

Resolved, on the motion of Mr Shoebridge: That any additional questions on notice be provided to the Secretariat by 5pm Monday 24 September 2012.

2.8 Other business

Public submissions

The Committee noted receipt of Submission No 49 and that the submission would be published to the website according to the Committees resolution of 22 June 2012.

3. Public Hearing – Inquiry into the partial defence of provocation

Witnesses, the public and media were admitted.

The Chair made an opening statement regarding the broadcasting of proceedings and other matters.

The following witnesses were sworn and examined:

- Ms Jacqui Swinburne, Acting Chief Executive Officer, Redfern Legal Centre and Sydney Women's Domestic Violence Court Advocacy Service.
- Ms Elizabeth Morley, Principal Solicitor, Redfern Legal Centre.

The evidence concluded and the witnesses withdrew.

The following witness, located in New Zealand and heard via teleconference, was sworn and examined:

- A/Professor Julia Tolmie, Associate Professor, University of Auckland, Faculty of Law.

The evidence concluded and the teleconference was terminated.

The following witness was sworn and examined:

- Mr Howard Brown, President, Victims of Crime Assistance League.

The evidence concluded and the witnesses withdrew.

The following witnesses from the NSW Council for Civil Liberties were sworn and examined:

- Mr Cameron Murphy, President
- Mr David Bernie, Vice President.

The evidence concluded and the witnesses withdrew.

The public and media withdrew.

4. Adjournment

The Committee adjourned at 12.50pm until Monday 24 September 2012, at 2.00pm for the visit to Judicial Commission of NSW.

Vanessa Viaggio
Clerk to the Committee

Minutes No. 7
Monday 24 September 2012
Select Committee on the Partial Defence of Provocation
Judicial Commission of NSW
Level 5 Thakral House, 301 George Street Sydney, 2.00pm

1. Members present
Mr Nile, *Chair*
Mr Khan, *Deputy Chair*
Mr Clarke
Mr MacDonald
Mr Searle
Mr Shoebridge
Ms Westwood

2. Site visit – Judicial Commission of NSW
The Committee visited the Judicial Commission of NSW to be briefed about the operation of the Judicial Information Research System and the monograph published by the Commission in 2006, titled *Partial Defences to Murder in NSW 1990-2004*.

3. Adjournment
The Committee adjourned at 3.15pm, *sine die*.

Vanessa Viaggio
Clerk to the Committee

Minutes No. 8
Friday 26 October 2012
Select Committee on the Partial Defence of Provocation
Room 1153, Parliament House, 11.00am

1. Members present
Mr Nile (Chair)
Mr Clarke
Mr Khan
Mr MacDonald
Mr Searle
Mr Shoebridge
Ms Westwood

2. Previous minutes

Resolved, on the motion of Mr Searle: That Draft Minutes Nos. 6 and 7 be confirmed.

3. Correspondence
The Committee noted the following items of correspondence:

Received:

- 21 September 2012 – From Dr Kate Fitz-Gibbon, Deakin University, providing responses to questions taken on notice.
- 6 September 2012 – From Ms Dina Yehia SC, Public Defender, Public Defenders Office, providing responses to questions taken on notice.

- 21 September 2012 – From Mr Justin Dowd, President of the NSW Law Society, providing responses to questions taken on notice and responses to supplementary questions.
- 21 September 2012 – From Mr Bernard Coles QC, President, Bar Association of NSW, providing responses to questions on notice, responses to supplementary questions and on the Options Paper; and attaching copies of documents referred to in Mr Stratton's evidence.
- 21 September 2012 – From Ms Betty Green, Convenor, NSW Domestic Violence Coalition, providing responses to questions taken on notice and responses to supplementary questions.
- 21 September 2012 – From Ms Liz Snell, Law Reform and Policy Co-ordinator, Women's Legal Services NSW, providing responses to questions taken on notice, responses to supplementary questions and on the Options Paper.
- 24 September 2012 – From Ms Maura Boland, Deputy Director General, Strategy and Policy, Family and Community Services, providing responses to questions taken on notice and responses to supplementary questions.
- 24 September 2012 – From Mr Graeme Coss, Senior Lecturer, Sydney University Law School, providing responses questions taken on notice.
- 24 September 2012 – From Ms Martha Jabour, Executive Director, Homicide Victims Support Group, providing responses to supplementary questions.
- 26 September 2012 – From A/Prof Thomas Crofts and Dr Arlie Loughnan, providing a response to questions taken on notice.
- 26 September 2012 – From Dr David Phillips, National President, Family Voice Australia, providing a response to the Options Paper.
- 26 September 2012 – From Ms Maura Boland, Deputy Director General, Department of Family and Community Services, advising that the Department will not be providing comment in response to the Options Paper.
- 27 September 2012 – From Reporting Services Branch, NSW Courts, providing copies of transcripts of the proceedings in the *Singh* matter.
- 28 September 2012 – From Ms Penny Musgrave, Director, Criminal Law Review Division, Department of Attorney General and Justice, providing responses to questions taken on notice and responses to supplementary questions.
- 4 October 2012 – From Mr Graeme Coss, providing response to the Options Paper.
- 4 October 2012 – From Mr Lloyd Babb SC, Director of Public Prosecutions, providing a response to the Options Paper.
- 4 October 2012 – From Mr Lloyd Babb SC, Director of Public Prosecutions, providing responses to questions taken on notice.
- 4 October 2012 – From Mr Justin Dowd, President, Law Society of NSW, providing a response to the Options Paper.
- 4 October 2012 – From A/Professor Thomas Crofts and Dr Arlie Loughnan, providing a response to the Options Paper.
- 4 October 2012 – From Professor Julie Stubbs, providing a response to the Options Paper.
- 4 October 2012 – From Mr Daniel Stubbs, Centre Director, ICLC, providing responses to questions on notice, supplementary questions on notice and to the Options Paper.
- 4 October 2012 – From Dr Justin Koonin, Co-Convenor, NSW GLRL, providing responses to questions on notice, responses to supplementary questions and on the Options Paper.
- 4 October 2012 – From Ms Dina Yehia SC, Public Defender, Public Defenders Office, providing a response to the Options Paper.
- 5 October 2012 – From Dr Kate Fitz-Gibbon, Deakin University, providing a response to the Options Paper.
- 8 October 2012 – From Deputy Commissioner Nick Kaldas APM, NSW Police Force, providing responses to questions taken on notice and supplementary questions on notice.
- 8 October 2012 – From Ms Betty Green, Convenor, NSW Domestic Violence Committee Coalition, providing a response to the Options Paper.

- 10 October 2012 – Ms Martha Jabour, Executive Director, Homicide Victims Support Group (Australia) Inc., providing a response to the Options Paper.
- 16 October 2012 – From Mr Cameron Murphy, President, NSW Council for Civil Liberties Inc., providing responses to questions taken on notice and to the Options Paper.
- 18 October 2012 – Mr John McKenzie, Chief Legal Officer, Aboriginal Legal Service (NSW/ACT) Ltd. providing a response to the Options Paper.

Sent:

- 27 September 2012 – Letter to Mr Ernest Schmatt PSM, Chief Executive, Judicial Commission of NSW, thanking him for briefing the Committee on 24 September 2012.

Resolved, on the motion of Mr Khan: That the Committee publish the responses to the Options Paper.

4. Submissions

The Committee noted the request of Magistrate Mary Jerram, Convenor of the Domestic Violence Death Review Team to keep the Team's submission confidential until its 2011-12 Annual Report is tabled on 31 October 2012.

Resolved, on the motion of Mr Shoebridge: That the Committee keep Submission 51 confidential until after the Annual Report of the Domestic Violence Death Review Team has been tabled.

5. Documents tendered during the briefing at the Judicial Commission

The Committee noted four documents tendered by Mr Schmatt of the Judicial Commission during the site visit on 24 September 2012:

- *Braysich v The Queen* (2011) 243 CLR 434,
- Better Decision-Making with Technology: The Judicial Information Research System,
- Judicial Officers' Bulletin, April 2004 – Volume 16 Number 3,
- [1-580] Warning against possible prejudice or sympathy.

Resolved, on the motion of Ms Westwood: That the Committee accept the documents tendered during the briefing at the Judicial Commission on Monday 24 September 2012.

6. Discussion about the options open to the Committee regarding provocation

The Committee noted two documents. The first was prepared by the Secretariat, and set out an analysis of the pros and cons of each of the options open to the Committee in relation to the partial defence of provocation; the second, authored by the Hon. Trevor Khan MLC, was a paper addressing the onus of proof.

Resolved, on the motion of Mr Searle: That the discussion papers prepared by the Secretariat and the Hon. Trevor Khan MLC be accepted.

The Committee discussed the various options open to it in relation to its terms of reference.

Resolved, on the motion of Mr Searle: That the Committee seek the agreement of the House to extend the reporting date to no later than the Wednesday of the first sitting week of 2013.

Resolved, on the motion of Ms Westwood: That, after the House has agreed to the extension of the reporting date, the Chairman issue a press release advising that due to the complexity of the terms of reference the House has extended the reporting date.

Resolved, on the motion of Ms Westwood: That the Committee prepare a legislative amendment give effect to the recommendations of the Committee, using the services of the Parliamentary Counsel's Office pursuant to Standing Order 226(2) and (3).

7. Adjournment
The Committee adjourned at 2.00 pm *sine die*.

Vanessa Viaggio
Clerk to the Committee

Minutes No. 9
Wednesday 12 December 2012
Select Committee on the Partial Defence of Provocation
Room 1043, Parliament House, 10.00am

1. Members present
Mr Nile, *Chair*
Mr Khan, *Deputy Chair*
Mr Clarke
Mr MacDonald
Mr Shoebridge
Ms Westwood

2. Apologies
Mr Searle

3. Previous minutes
Resolved, on the motion of Ms Westwood: That Draft Minutes No. 8 be confirmed.

4. Correspondence
The Committee noted the following items of correspondence:

Received

- 6 November 2012 – Email from The Hon. Trevor Khan MLC, attaching a paper discussing Pre-Trial Disclosure Reform.
- 12 November 2012 – Email from The Hon Trevor Khan MLC, attaching the Trial Judge's written directions on the issue of provocation in the murder trial of *R v Maglovski*.

Resolved, on the motion of Mr Shoebridge: That the Committee note the following additional piece of correspondence:

- 6 November 2012 – Email from Mr Shoebridge to the Committee in response to Mr Khan's paper on Pre-Trial Disclosure Reform.

5. Submissions

5.1 Public submission
The Committee noted that Submission 51 has been published on the website.

6. Discussion about the options open to the Committee regarding provocation
The Secretariat briefed the Committee on the analysis of a hybrid model and on options open to the Committee. The Committee discussed the various options open to it in relation to its terms of reference.

Resolved, on the motion of Ms Westwood: That the Secretariat provide an analysis of the viability of strengthening self defence in the event that abolition of provocation were recommended.

Resolved, on the motion of Mr Shoebridge: That the Secretariat further analyse the 'gross provocation' model (Option 4 in the Options Paper) to ensure that homicides occurring in the context of domestic and family violence is not precluded from being able to constitute provocation; and that, in addition to exclusionary provisions, consideration be given to ensuring that the provision does not allow for evidence of these exclusionary conduct being adduced at trial.

7. Adjournment

The Committee adjourned at 12:28 pm, until Thursday 14 February 2013.

Vanessa Viaggio
Clerk to the Committee

Minutes No. 10
Thursday 14 February 2013
Select Committee on the Partial Defence of Provocation
Room 1153, Parliament House, 10.05 am

1. Members present

Mr Nile, *Chair*
Mr Khan, *Deputy Chair*
Mr Clarke
Mr MacDonald
Mr Searle
Mr Shoebridge
Ms Westwood

2. Previous minutes

Resolved, on the motion of Mr Khan: That Draft Minutes No. 9 be confirmed.

3. Correspondence

The Committee noted the following items of correspondence:

Received

- 17 December 2012: Email from Dr Kate Fitz-Gibbon, Lecturer in Criminology, School of Humanities and Social Sciences, Deakin University, advising that the Special Issue of the Australian and New Zealand Journal of Criminology has now been published, and that the embargo on journal articles provided early in the Inquiry has consequently been lifted.

4. Discussion about the options open to the Committee regarding provocation

The Secretariat briefed the Committee on the further analysis of the gross provocation model. The Committee discussed and analysed various issues within the gross provocation model.

Resolved, on the motion of Mr Shoebridge: That the changes to the reform model discussed by the Committee be incorporated, and subsequently emailed to the Committee members, with a view to them being provided to the Parliamentary Counsel's Office to draft a bill.

5. Discussion about contacting the Parliamentary Counsel for the drafting of a Bill

Resolved, on the motion of Mr Searle: That the Chair write to the Premier on behalf of the Committee seeking approval for the Committee to utilise the resources of the Parliamentary Counsel's Office to draft a bill, pursuant to SO 224(2) and (3).

6. Proposed timeframe

The Committee discussed various options in relation to their progression toward the reporting date and the finalisation of the Chair's report.

Resolved, on the motion of Mr Khan: That the Committee seek the agreement of the House to extend the reporting date to no later than Thursday, 2 May 2013.

Resolved, on the motion of Mr Khan: That, when the motion in the House is put, the Chair give the reasons for the extension if appropriate.

Resolved, on the motion of Mr Khan: That, after the House has agreed to the extension of the reporting date, the Chair issue a media release advising that the Committee has unanimously decided to extend the reporting date to Thursday 2 May 2013.

7. Adjournment

The Committee adjourned at 12:47 pm, until report deliberative 10.00 am Monday, 18 March 2013.

Vanessa Viaggio
Clerk to the Committee

Draft Minutes No. 11
Monday 15 April 2013
Select Committee on the partial defence of provocation
Room 1153, Parliament House, Sydney, 9:30 am

1. Members present

Revd Nile, *Chair*
Mr Khan, *Deputy Chair*
Mr Clarke
Mr MacDonald
Mr Searle
Mr Shoebridge
Ms Westwood

2. Previous minutes

Resolved, on the motion of Mr Khan: That draft Minutes No. 10 be confirmed.

3. Correspondence

The Committee noted the following items of correspondence:

Received

- 14 March 2013: Letter from the Hon. Barry O'Farrell, Premier declining the Committee's request to utilise the resources of Parliamentary Counsel's Office, but committing to consulting with Committee members on the form of amendments subsequent to the release of the Committee's report.

Sent

- 15 February 2013: Letter to the Hon. Barry O'Farrell, Premier, requesting his approval to utilise the resources of Parliamentary Counsel's Office to draft a Bill to give effect to the Committee's recommendations, pursuant to SO 226(2) and (3).

4. Inquiry into partial defence of provocation – Consideration of Chair's draft report

The Chair submitted his draft report entitled *The partial defence of provocation*, which, having been previously circulated, was taken as being read.

Chapter 1 read.

Resolved, on the motion of Ms Westwood: That Chapter 1 be adopted.

Chapter 2 read.

Resolved, on the motion of Mr Khan: That the words "the common law position (on which the provisions were based)" in paragraph 2.32 be deleted and the following words inserted "the position in NSW".

Resolved, on the motion of Shoebridge: That throughout the report the terms "manslaughter provocation" and "provocation manslaughter" be replaced with the term "manslaughter on the basis of provocation".

Resolved, on the motion of MacDonald: That Chapter 2, as amended, be adopted.

Chapter 3 read.

Resolved, on the motion of Mr Khan: That Chapter 3 be adopted.

Chapter 4 read.

Resolved, on the motion of Mr Shoebridge: That the second sentence of the quote in paragraph 4.12 be omitted.

Resolved, on the motion of Ms Westwood: That the following new paragraph be inserted after paragraph 4.23:

> 'It is noted, however, that the first point in Mr Giddy's assertion is not borne out by the evidence (refer to 2.53 and 2.70 – 2.75).'

Resolved, on the motion of Mr Shoebridge: That the words 'strong arguments' be omitted from the first sentence of paragraph 4.59 and instead insert the words 'a case', and that the words 'may be' be omitted from the second sentence of paragraph 4.59 and instead insert the word 'are'.

Mr Shoebridge moved: That the following words be inserted after the second sentence in paragraph 4.72:

> 'It is equally important to note the role of the jury in keeping the application of the partial defence in line with social developments.'

Question put.

The Committee divided.

Ayes: Mr Clarke, Mr MacDonald, Mr Shoebridge.

Noes: Mr Khan, Revd Nile, Mr Searle, Ms Westwood.

Question resolved in the negative.

Resolved, on the motion of Mr Khan: That the following new paragraph be inserted after paragraph 4.91:

> 'The Committee notes the strength of Ms Yehia's submission, however, does observe that in the case of *Ramage*, the accused James Ramage did not enter the witness box during his trial'.

Resolved, on the motion of Mr Shoebridge: That in paragraph 4.93 the word 'the' following the word 'that' be omitted and that the word 'any' be inserted instead.

Resolved, on the motion of Mr Shoebridge: That the words 'reality of the' be inserted after the words 'fails to adequately acknowledge the' in paragraph 4.152, and that the word 'that' be inserted after the word 'position'.

Resolved, on the motion of Mr Searle: That Chapter 4, as amended, be adopted.

Chapter 5 read.

Resolved, on the motion of Mr Shoebridge: That the following words be inserted at the beginning of the second sentence in paragraph 5.32:

'The double discount may be one explanation for the relatively modest sentences seen in some high profile provocation cases, however'.

Resolved, on the motion of Mr Searle: That the words 'for self-defence' be omitted from the third sentence in paragraph 5.65.

Resolved, on the motion of Mr Shoebridge: That in paragraph 5.95 the word 'accordingly' be inserted before the words 'the Committee is the appropriate body'.

Resolved, on the motion of Mr Searle: That the word 'those' be inserted before the words 'Inquiry participants' in the third sentence in paragraph 5.97, and that the words 'who say' be inserted after the words 'Inquiry participants'.

Resolved, on the motion of Mr Searle: That the first sentence in paragraph 5.101 omit the words 'perceived to be', and omit the word 'or' and insert instead the word 'and', and omit the word 'by' and insert instead the word 'to'.

Resolved, on the motion of Mr Shoebridge: That the second sentence in paragraph 5.101 omit the words 'are strong arguments for abolition including those' and insert instead the words 'is a case for abolition, as'.

Resolved, on the motion of Mr Searle: That Chapter 5, as amended, be adopted.

Chapter 6 read.

Resolved, on the motion of Mr Searle: That the second sentence in paragraph 6.78 omit all the words following 'by' and to insert instead the following words 'the Chief Judge at Common Law, Wood J in *Lees*:'

Resolved, on the motion of Mr Shoebridge: That the following sentence be inserted at the end of paragarph 6.116:

'However, absent such a history it is extremely difficult to see how 'words alone' could reasonably found a partial defence.'

Resolved, on the motion of Mr Shoebridge: That the following sentence be inserted at the end of paragragh 6.117:

'This is one area where social norms as mediated through a jury provides the Committee with some assurance.'

Resolved, on the motion of Mr Shoebridge: That the words 'test based reform to' in paragraph 6.167 be omitted and the words 'reform of the ordinary person test in' be inserted instead.

Resolved, on the motion of Mr Shoebridge: That Chapter 6, as amended, be adopted.

Chapter 7 read.

Resolved, on the motion of Mr Searle: That the words 'Domestic Violence Committee' be inserted before the word 'Coalition' in paragraph 7.118.

Resolved, on the motion of Mr Searle: That in paragraph 7.135 the words following 'inappropriate' be omitted, and the following words inserted:

'to provide a basis for a successful partial defence of provocation to be raised'

Resolved, on the motion of Ms Clarke: That Chapter 7, as amended, be adopted.

Chapter 8 read.

Resolved, on the motion of Ms Westwood: That the first sentence in paragraph 8.1 omit the word 'currently' and insert instead the words 'Prior to the passage of the *Criminal Procedure Amendment (Pre-Trial Defence Disclosure) Act 2013*', and in third sentence omit the word 'are' and insert instead the word 'were'.

Resolved, on the motion of Mr Khan: That the following paragraphs be deleted.

'8.7 The Committee has considered the limited information is received in relation to the proposal to require that defendants seeking to rely on provocation be subject to pre-trial disclosure requirements.

8.8 The Committee acknowledges that there is already scope for a court to order pre-trial disclosure under the *Criminal Procedure Act 1986*, and notes the comment of the Director of Public Prosecutions that the Crown will usually be aware that a defendant intends to rely on provocation. The Committee also notes Mr Babb's comments that sometimes existing pre-trial disclosure provisions do not operate as intended.

8.9 Based on the limited feedback from Inquiry participants regarding the suggestion to require pre-trial disclosure by the defendant of an intention to rely on the partial defence of provocation, the Committee considers that there may be merit in that suggestion.'

Resolved, on the motion of Mr Khan: That the following paragraph be omitted:

'8.11 The Committee is encouraged by the proposal that defendants in all Supreme Court trials, which will include all homicide matters, will be required to disclose the nature of the defence that they intend to rely on pre-trial. However, the Committee has not had the opportunity to consider the legislation in detail and does not make any further comment in respect of it, except to note that it does appear to address the concern raised during the Inquiry in relation to pre-trial disclosure.'

Resolved, on the motion of Mr Khan: That a new paragraph be inserted after paragraph 8.10:

'The Committee notes that as a result of the passing of the *Criminal Procedure Amendment (Pre-Trial Defence Disclosure) Bill 2013* defendants in all Supreme Court trials, which will include all homicide matters, will be required to disclose the nature of the defence that they intend to rely on pre-trial. Further, the Committee notes that the Bill appears to address the concerns raised during the Inquiry in relation to pre-trial disclosure.'

Resolved, on the motion of Mr Shoebridge: That the second sentence in paragraph 8.57 omit the following words, 'and where the prosecution may be willing to accept a plea of guilty to manslaughter'.

Resolved, on the motion of Mr Shoebridge: That the second sentence in Recommendation 1 omit the following words, 'and where the prosecution may be willing to accept a plea of guilty to manslaughter'.

Resolved, on the motion of Mr Searle: That Recommendation 1, as amended, be adopted.

Resolved, on the motion of Mr Khan: That the word 'queried' in the second sentence of paragraph 8.66 be omitted and insert instead the word 'considered'.

Resolved, on the motion of Mr Khan: That the words following 'the Committee is' in paragraph 8.102 be omitted, and the insert instead:

'of the view that such a reform should only be considered as part of the reference to the NSW Law Reform Commission contemplated by Recommendation 11 of this Report.'

Resolved, on the motion of Mr Khan: That the following paragraph be omitted:

8.103 In addition, the Committee is concerned that if progressed, the proposal may inadvertently give rise to the reform being proposed in relation to other areas of the criminal law (in particular) which the Committee has not turned its mind to, and therefore may hold serious reservations about.

Resolved, on the motion of Mr Khan that a new paragraph be inserted after paragraph 8.101:

'The Committee is concerned that if progressed, the proposal may inadvertently impact upon other areas of the criminal law which the Committee has not had the opportunity to turn its mind to.'

Resolved, on the motion of Mr Khan: That paragraph 8.104 be moved to before paragraph 8.102.

Resolved, on the motion of Mr Searle: That the word 'full' be omitted from paragraph 8.117 and the word 'complete' be inserted instead.

Resolved, on the motion of Mr Searle: That the word 'some' be inserted before the words 'social framework evidence' in paragraph 8.137.

Resolved, on the motion of Mr Khan: That Recommendation 2 omit the words 'pursue an amendment that is' and instead insert the words 'introduce an amendment'.

Resolved, on the motion of Mr MacDonald: That Recommendation 2, as amended, be adopted.

Resolved, on the motion of Mr Shoebridge: That Recommendation 3 omit the words 'for the purpose of obtaining a strategic advantage', and insert the words 'while also ensuring that legitimate social framework evidence is able to be admitted.' after the word 'families'.

Resolved, on the motion of Ms Westwood: That Chapter 8, as amended, be adopted.

Chapter 9 read.

Resolved, on the motion of Mr Searle: That the words 'and interpreted' be omitted from paragraph 9.14.

Resolved, on the motion of Mr Searle: That the words 'as springboards from which defendants launch' be omitted from the third sentence of paragraph 9.25, and the words 'to found' be inserted instead.

Mr Khan moved: That in Recommendations 4, 5, 6, 7, 8 and 9 the words 'seek to amend' be omitted and the words 'introduce an amendment to' inserted instead.

Resolved, on the motion of Mr Searle: That Recommendations 4 and 5, as amended, be adopted.

Resolved, on the motion of Mr Searle: That the second sentence in paragraph 9.59 be omitted and the following words inserted:

> 'However, the Committee is undecided on the rationale of the United Kingdom Law Commission that there is a need for a specific exclusion. The Committee received no specific evidence on this matter and is of the view that this matter should be considered by the NSW Law Reform Commission in accordance with Recommendation 11 of this Report.'

Mr Searle moved: That Recommendation 6 omit the words '; or act in considered desire for revenge'.

Resolved, on the motion of Ms Westwood: That Recommendation 6, as amended, be adopted.

Resolved, on the motion of Mr Shoebridge That Recommendation 7, as amended, be adopted.

Resolved, on the motion of Mr Khan: That Recommendation 8, as amended, be adopted.

Resolved, on the motion of Mr Clarke: That Recommendation 9, as amended, be adopted.

Resolved, on the motion of Ms Westwood: That Recommendation 10 be adopted.

Resolved, on the motion of Ms Searle: That the words 'including reforms made in accordance with the recommendations in this report' be inserted after the words 'defences in NSW' in Recommendation 11, and insert the words 'from the date of this report' after the words 'five years'.

Resolved, on the motion of Mr MacDonald: That Recommendation 11 as amended, be adopted.

Resolved, on the motion of Mr Searle: That Chapter 9, as amended, be adopted.

Resolved, on the motion of Mr Shoebridge: That the draft report, as amended, be the report of the Committee and that the Committee present the report to the House.

Resolved, on the motion of Ms Westwood: That the transcripts of evidence, submissions, tabled documents, answers to questions on notice and to supplementary questions, minutes of proceedings and correspondence relating to the inquiry, be tabled in the House with the report; and

That upon tabling, all transcripts of evidence, submissions, tabled documents, answers to questions on notice and to supplementary questions, minutes of proceedings and correspondence to the inquiry not already made public, be made public by the Committee except for those documents kept confidential by resolution of the Committee.

Resolved, on the motion of Mr Searle: That the report be tabled on Tuesday 23 April 2013.

Resolved, on the motion of Mr Khan: That, in light of the Premier's refusal of the Committee's request to utilise SO226, the issue of the efficacy of SO226 be referred to the Chair's Committee for consideration.

5. Adjournment

The Committee adjourned at 12.20pm, *sine die*.

Vanessa Viaggio
Clerk to the Committee