Provocation, NSW Style:
Reform of the Defence of Provocation in NSW

Thomas Crofts* and Arlie Loughnan**

Abstract

Following a high profile and controversial case in which the defendant successfully invoked the provocation defence, the NSW government established a select parliamentary committee to review the defence and its operation. The Committee recommended that the current defence be 'relabelled' a defence of 'gross provocation', which was structured substantially along the lines of the reform recommended by the Law Commission for England and Wales in 2004. The NSW government has recently responded with a different proposal for a partial defence of 'extreme provocation'. This article critically evaluates the proposed reform of the provocation defence in NSW.

Introduction

In early 2012, Mr Chamanjot Singh was convicted of the manslaughter of his wife, Manpreet Kaur.[1] Singh had been charged with murder but had successfully raised the defence of provocation, on the basis that he lost self-control when his wife allegedly told him that she was in love with someone else and threatened to have his permission to stay in Australia revoked. Singh was sentenced to eight years imprisonment with a non-parole period of 6 years.

In June 2012, in the aftermath of this well-publicised and contentious trial outcome, and with bipartisan support, the New South Wales (NSW) government established the *Select Committee on the Partial Defence of Provocation* (the Committee) to inquire into and report on the partial defence of provocation. Electing to address the issue through a parliamentary process, rather than by referring it to the NSW Law Reform Commission, indicates the strong political will to promptly remedy perceived deficiencies in the law.[2] The Committee's terms of reference required it to consider the retention of the defence, the adequacy of the defence of self-defence for victims of prolonged domestic and sexual violence, and any other related matters.[3] It was able to consider abolition of the defence, or its amendment in light of the law in other jurisdictions. The Committee was unable to agree on the abolition of provocation, and, instead, put forward a proposal for reform closely modelled on the proposal of the Law Commission for England and Wales, and incorporating reforms undertaken

*Associate Professor, Faculty of Law, University of Sydney, Australia.
** ARC Postdoctoral Research Fellow, Faculty of Law, University of Sydney, Australia.
[1] *Singh* [2012] NSWSC 637.
[2] For a discussion of the political dimension of law reform, see R. Graycar, 'Frozen Chooks Revisited: The Challenge of Changing Law/s' in R. Hunter & M. Keane (eds), *Changing Law: rights, regulation and reconciliation* (2005) 49-76.
[3] Select Committee on the Partial Defence of Provocation (Legislative Council), *The partial defence of provocation*, April 2013, [1.5]-[1.7]. The Committee's report is available here: https://www.parliament.nsw.gov.au/prod/parlment/committee.nsf/0/61173C421853420ACA257B5500838B2E (hereafter, 'the Report') [accessed 15 October 2013].

in other Australian jurisdictions. It recommended 'relabelling' the defence, as 'gross provocation', which would, as a matter of law, not be available in particular factual circumstances (such as when the provocation was alleged to have arisen in a 'domestic' relationship) (an 'exclusionary model').

Shortly after the Committee published its Report, the NSW Department of Attorney-General and Justice released a response to it, in the form of a Discussion Paper, and an exposure draft Bill.[4] According to the Discussion Paper, the NSW government intends to introduce a partial defence of 'extreme provocation' that would be available to a charge of murder only where the defendant was responding to conduct by the deceased that amounted to a 'serious indictable offence' (a 'positive restriction model'), placing NSW out of step with other jurisdictions retaining provocation. As the Discussion Paper states, this 'significantly tightens' the partial defence, with the government stating that this proposed amendment reflects the view that, in contemporary society, 'there is an expectation that people otherwise faced with offensive, insulting or upsetting conduct should not resort to homicide'.[5]

This article explores the background to these reform proposals, and the areas of agreement and divergence between the Committee's and the government's reform proposals. It then assesses whether the government's draft Bill offers a preferable, 'workable' model for retaining the partial defence of provocation while excluding certain conduct from its scope.

Background to the Proposed Reform

It is fair to regard the Singh case as the latest in a line of cases highlighting problematic aspects of the defence of provocation. As such it can be seen as an excuse rather than a reason for the government to examine the law on provocation. Concern about the way in which criminal defences have been moulded around male patterns of behaviour and failed to reflect (indeed have silenced and excluded[6]) women's experiences began to filter into the political and legal area in Australia in the 1980s. A number of high profile cases – some in which women were convicted of murder for killing their abusive partners and some in which men were successful in using provocation to secure manslaughter convictions after killing their female partners – led to calls for change.[7] Such calls were picked up by the NSW government and a Task Force on Domestic Violence was established, which in a report published in 1981 recommended a number of reforms to improve access of women to appropriate defences.[8] In line with the report's recommendations, the law on provocation in NSW was amended in 1982 to remove the need for a sudden response to provocative conduct (thus allowing for recognition of cumulative provocation), to remove the

[4] NSW Department of Attorney General and Justice, *Reform of the Partial Defence of Provocation*, October 2013. The Attorney General's Discussion Paper is available here: http://www.lpclrd.lawlink.nsw.gov.au/lpclrd/lpclrd_index.html. The draft exposure Bill is available at http://www.lpclrd.lawlink.nsw.gov.au/agdbasev7wr/lpclrd/documents/pdf/provocation_exposure_bill.pdf (hereafter, the Discussion Paper and the Draft Bill, respectively) [accessed 17 October 2013].
[5] The Discussion Paper, p 2.
[6] S. Tarrant, 'Something is Pushing Them to the Side of Their Own Lives' (1990) 20 *University of Western Australia Law Review* 573.
[7] See K. Fitz-Gibbon and J. Stubbs, 'Divergent directions in reforming legal responses to lethal violence' (2012) *Australian and New Zealand Journal of Criminology* 318, 320-322.
[8] NSW Task Force on Domestic Violence, *Report of the NSW Task Force on Domestic Violence*, 1981.

mandatory life term for murder and to clarify the fact that the prosecution bares the onus of disproving a claim that the killing was provoked.

Despite subsequent reviews of the partial defence of provocation by the NSW Law Reform Commission in 1997,[9] and an Attorney-General's Working Party in 1998,[10] no legislative changes have been made to provocation since 1982.[11] The 1997 review was the result of broad inquiry into the partial defences to murder (diminished responsibility, provocation, infanticide) while the 1998 review was prompted by the outrage sparked by *Green*[12] when the majority of the Australian High Court failed to rule out the possibility that a non-violent homosexual advance could found a case of provocation. Instead it confirmed that the question of whether an ordinary person could have lost self-control depended on the jury's evaluation of the circumstances. This case fuelled concern that the partial defence still operated in a gendered way, to protect male honour, and was in need of reform or abolition. Although the Working Party recommended that a non-violent homosexual advance should not be able to form the basis of a provocation claim (by contrast with the 1997 Law Reform Commission Report which recommended against legislative restrictions on the conduct which could give rise to the partial defence[13]), no action was taken to change provocation in NSW, and the push for reform remained 'faltering and incomplete'.[14] This situation contrasts with the progress of reform efforts in other Australian criminal jurisdictions (three of which have abolished the partial defence,[15] while others have implemented reforms). It is therefore no surprise that the Singh case again ignited debate about the future of provocation in NSW.

Here, for clarity, it should be noted that as a common law-based federation of states and territories, Australia comprises nine criminal jurisdictions. The Commonwealth constitution grants specific powers to the commonwealth (federal) government with the remaining powers exercised by each state.[16] The commonwealth government has limited powers to govern crime where the crime falls within a specific federal head of power, for example, corporate crime pursuant to the federal corporations law or where it is incidental to one of the powers contained in the constitution. However, most criminal law is state based and, hence, varies across Australia, with a broad structural division between those states which have adopted criminal codes (code jurisdictions)

[9] NSW Law Reform Commission, *Partial Defences to Murder: Provocation and Infanticide* (Report 83, 1997).
[10] New South Wales Attorney-General's Department, *Homosexual Advance Defence: Final Report of the Working Party*, 1998.
[11] Of course alongside the legislative reform in 1982 there had been and continues to be developments at common law with courts beginning to relax the conditions which had made it difficult for women to successfully claim the partial defence of provocation as well as reducing 'the scope of the defence in the traditional paradigm cases of male behaviour', T. Crofts and A. Loughnan, 'Provocation: The Good, the Bad and the Ugly' (2013) 37 *Criminal Law Journal* 23, 31.
[12] (1997) 148 ALR 659.
[13] NSW Law Reform Commission, *Partial Defences to Murder: Provocation and Infanticide* (Report 83, 1997), 63
[14] See S. Tomsen and T. Crofts, 'Social and cultural meanings of legal responses to homicide among men: Masculine honour, sexual advances and accidents' (2012) 45 *Australian and New Zealand Journal of Criminology* 423, 427.
[15] Tasmania was the first to abolish in 2003 (Criminal Code Amendment (Abolition of Defence of Provocation) Act 2003), followed by Victoria (Crimes (Homicide) Act 2005) and Western Australia (Criminal Law Amendment (Homicide) Act 2008).
[16] See s51 Commonwealth of Australia Constitution Act.

and those which have not (common law jurisdictions). Of the various Australian jurisdictions, only the Australian Capital Territory, NSW, Queensland, the Northern Territory and South Australia retain provocation as a defence to murder.[17]

The provocation defence currently operative in NSW will look familiar to lawyers from other common law jurisdictions. The Crimes Act 1900 NSW provides that, where, on a trial for murder, if the conduct causing the death was the result of 'loss of self-control' that was 'induced' by 'any conduct of the deceased (including grossly insulting words or gestures)', and that 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 inflict grievous bodily harm', the onus will be on the prosecution to prove beyond reasonable doubt that the killing was not done under provocation.[18]

The NSW Parliament Select Committee was unable to reach agreement on whether the partial defence of provocation should be abolished. The lack of consensus around abolition (or, indeed, retention in its current form) mirrors the strikingly polarised academic and public debates about the on-going validity of the provocation defence.[19] Based on the public records generated by the Parliamentary Inquiry, these debates played out in the submissions the Committee received and in its public hearings. The Committee's Report identifies four main concerns with the defence: gender bias, that the defence is 'anachronistic and archaic', that it promotes a culture of victim blaming and that the defence itself is hard for juries to understand.[20] Balanced against these concerns was the Committee's view that provocation is valuable for women who have been subject to long-term domestic abuse, on the basis that 'provocation may appropriately reflect their legal and moral responsibility' and because self-defence may be hard to establish.[21]

Rather than recommend abolition, the Committee developed a model for reform of the defence. The proposal draws heavily on the model for the reform of provocation (as 'gross provocation') put forward by the Law Commission for England and Wales in 2004 and in 2006,[22] as well as reforms undertaken in other Australian jurisdictions to exclude provocation in certain circumstances. As is well known, the 'gross provocation' proposal was not taken up in England and Wales. While accepting the Law Commission's conclusion that the law of provocation was in need of reform, the British government released its own consultation paper containing distinct reform proposals. With the stated aim of reducing the role of the partial defence of provocation, the British government proposed abolition of the defence of provocation and also a jettisoning of the term 'provocation', which was seen to have negative

[17] See s13 Crimes Act 1900 (ACT), s23 Crimes Act 1900 (NSW), s304 Criminal Code (QLD) s34 Criminal Code (NT) and in South Australia, under the common law (see *Cox* [2006] SASC 188), respectively. It should be noted, however, that the Criminal Codes of Queensland (s.269) and Western Australia (s.246) are unique in that they provide a full defence of provocation to common assault or an assault based offence.

[18] Section 23, Crimes Act 1900 (NSW).

[19] See T. Crofts and A. Loughnan, 'Provocation: The Good, the Bad and the Ugly' (2013) 37 *Criminal Law Journal* 23, for an overview of these debates.

[20] See the Report, Chapter 4.

[21] See the Report, Chairman's foreword, pp x-xi.

[22] Law Commission for England and Wales, *Partial Defences to Murder* (Law Com 290, 2004); Law Commission for England and Wales, *Murder, Manslaughter and Infanticide* (Law Com 304, 2006).

connotations.[23] Similarly, the impetus behind the Committee's proposed reform in NSW is to restrict the availability of the partial defence.[24] Accordingly, the bar was to be raised to require 'grossly provocative' conduct, and additional amendments would be made to ensure that it would not be possible to raise the defence when the provocation was alleged to have arisen in a specified range of factual circumstances..

As mentioned above, since the publication of the Committee's Report, the NSW Department of Attorney General and Justice has released a response to the Report, and an exposure draft Bill. The relatively short timeframe in which the draft legislation has appeared indicates there is significant political will to reform the law. As was the case regarding the law in England and Wales, the government's response takes the law in a different direction from that recommended by the Committee. Contrary to the recommendations of the Committee, the Bill provides for a partial defence of 'extreme provocation', which is to be available only where the defendant was responding to conduct that amounted to a 'serious indictable offence'. The draft Bill follows the recommendations of the Committee, however, in providing that a 'non-violent sexual advance' will not be able to ground a defence of 'extreme provocation'.

Proposed Reform I – Areas of Substantial Agreement between the Committee's and the NSW Government

The Trigger - 'Extreme Provocation'

According to the NSW government's draft Bill, the current partial defence of provocation is to be 'recast' as a partial defence of 'extreme provocation', which will continue to be available to murder only.[25] The Committee had recommended that the partial defence be 'renamed' 'the partial defence of gross provocation'.[26] Although the NSW government response expressly rejects the term 'gross' (on the basis that it has multiple meanings[27]), it does not seem that there is much in the different names adopted in the government response and the Committee Report. Renaming as either 'extreme provocation' or 'gross provocation' represents a desirable step in that, while not claiming a clean and definitive break with the defence of provocation (as has happened in England and Wales), it clearly indicates that the defence has been changed significantly and thus, the enactment of new legislation should foster a fresh jurisprudence on the defence. In addition, such a 'renaming' should serve a labeling purpose in that it indicates that only particularly grievous cases of provocation are captured by the defence, and are able to provide an excuse for defendants who have resorted to lethal violence.[28]

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[23] Ministry of Justice, *Murder, Manslaughter and Infanticide: proposals for reform of the law* (CP19/08), 12.
[24] See the Report, Chairman's foreword, pp x-xi.
[25] The Discussion Paper, p 3.
[26] The Report, Recommendation 4; discussed at [9.21]-[9.30]. The notion of 'recasting' or 'renaming' the defence is of course somewhat ambiguous (is it an amendment or a new defence?) but it seems that this ambiguity was useful to the Committee in its attempt to chart a path between the two extremes of retention as is and abolition, and was subsequently adopted by the NSW government.
[27] The Discussion Paper, p 3.
[28] For the importance of labels in relation to homicide, see T. Crofts, 'Two Degrees of Murder: Homicide Law Reform in England and Western Australia' (2008) 8 *Oxford University Commonwealth Law Journal* 159, 195-200.

In its Discussion Paper, the NSW government refers to the rationale for provocation as the reduction in the moral culpability of an individual who kills under circumstances of provocation.[29] In a similar vein, the Report stated that the Committee had been persuaded by the views of the Law Commission for England and Wales that the moral basis for the provocation defence properly lies in the defendant's justifiable sense of being seriously wronged.[30] Holding that provocation has been raised successfully in cases in which, while appropriately labelled provocative, are not 'so grossly provocative as to justify or excuse (even partially) the taking of human life', the Committee concluded that the partial defence should be limited to 'grossly provocative' conduct, and available only in circumstances that are 'more extreme than ordinary life events'.[31] But, in restricting 'extreme provocation' to a defendant who responded to a 'serious indictable offence', the NSW government's response departs from the Committee's recommendation and ensures that the defence will be available only in an extremely narrow category of 'more extreme than ordinary life events'. This is discussed further below.

The proposed 'extreme provocation' defence can be contrasted with the reform that was adopted in England and Wales in the Coroners and Justice Act 2009. Prior to reform, and as reflected in the debates in the House of Lords and the Privy Council, most notably in R v Smith (Morgan)[32] and Attorney-General v Holley,[33] provocation had come to be dogged by controversy about its breadth and its relationship with the partial defence of diminished responsibility (controversies which played out specifically in relation to the kind of characteristics that could be accorded to the reasonable person to be taken into account for the objective part of the defence). The Ministry of Justice proposed in its Consultation Paper that provocation be abolished, and replaced with what was initially to be two new partial defences, covering killing in response to fear of serious violence, and killing in response to words and conduct causing a justifiable sense of being seriously wronged.[34] To narrow the scope of the latter, it was proposed that it would be anchored in a statutory provision providing that discovering that a partner is having, or had, an affair cannot found the defence, and that the threshold for the defence should be raised to allow words and conduct to found the defence only in exceptional circumstances.[35] This proposal was adopted as the new two-limbed partial defence to murder of 'loss of control' in 2009.[36]

Neither the NSW government's response, nor the NSW Committee's proposal includes any express requirement that the loss of self-control be attributable to things done or said which 'constituted circumstances of an extremely grave character'.[37] The

[29] The Discussion Paper, p 2.
[30] The Report, [9.24].
[31] The Report, [9.25]. The Committee defined 'gross provocation' as 'words or conduct, or a combination of words and conduct, which caused the defendant to have a justifiable sense of being seriously wronged' (The Report, Recommendation 5).
[32] *Smith (Morgan)* [2001] 1 Cr App R 5.
[33] *Attorney-General for Jersey v Holley* [2005] 2 AC 580.
[34] Ministry of Justice, *Murder manslaughter and infanticide: proposals for reform of the law* (CP19/08), 9-10.
[35] Ministry of Justice, *Murder manslaughter and infanticide: proposals for reform of the law* (CP19/08), 12.
[36] See ss 54, 55 Coroners and Justice Act 2009 (England and Wales).
[37] Section 55(4)(a) Coroners and Justice Act 2009 (England and Wales).

inclusion of this provision in the Coroners and Justice Act 2009 amendment to the Homicide Act 1957 reflects the fact that, rather than accept the 'gross provocation' model recommended by its Law Commission, the British government elected to enact a new defence of 'loss of control'. Such an inclusion would have been unnecessary in the NSW Committee's proposal because of the shift to require that the 'justifiable sense of being seriously wronged' must have been caused by 'gross provocation'. Now that, if enacted, 'extreme provocation' will be available only in response to conduct which constitutes a 'serious indictable offence', the bar will be raised higher still, such that provocation will only be available in extraordinary (and rare) situations.

Here it should be noted that neither the NSW Committee recommendation nor the government response recommend extension of 'extreme provocation' to include fear of serious violence on the part of the accused as an alternative ground for the defence. Arguably, this step is unnecessary in NSW because a partial defence of excessive self-defence was introduced into the Crimes Act 1900 through the Crimes Amendment (Self-defence) Act 2001.[38]

The test for provocation

In NSW at present, as in England and Wales before its abolition, provocation contains both a subjective and an objective limb. As mentioned above, in relation to a murder charge, the partial defence of provocation in NSW requires a 'loss of self-control' that was 'induced' by 'any conduct of the deceased', and that 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 inflict grievous bodily harm'.[39] The Committee had not suggested any change to the test for provocation, which would thus have carried over to 'gross provocation'. The NSW government has proposed that 'extreme provocation' will be available 'if and only if' the lethal act of the accused was in response to conduct of the deceased 'towards or affecting' the accused, the conduct was a 'serious indictable offence' which caused the accused to lose self-control, and the conduct of the deceased could have caused an 'ordinary person' to lose self-control to the extent of intending to kill or inflict grievous bodily harm on the deceased. Other than with respect to the limitation to 'serious indictable offence', which is discussed separately below, this change in wording does not represent a substantive change to the test for provocation.

In relation to the subjective limb of the test for provocation – that the person lost self-control – the Committee had expressed concern that this phrase adds unnecessary complexity and ambiguity to the defence.[40] Arguably, developments in case law that have loosened the requirement of a loss of control in so-called slow-burn provocation cases,[41] have compounded difficulties surrounding the loss of control. Yet, despite such changes, some submissions to the Inquiry claimed that this element of the defence continues to make it easier to use for men (particularly where they kill an

[38] Section 421, Crimes Act 1900 (NSW); see The Report, [7.94]-[7.95].
[39] Section 23, Crimes Act 1900 (NSW).
[40] The Report, [9.16]. For a model to unpack what is meant by and required by a loss of self-control, see R. Holton and S. Shute, 'Self-Control in the Modern Provocation Defence' (2007) 27 *Oxford Journal of Legal Studies* 49.
[41] See e.g. *Chhay* (1994) 72 A Crim R 1, 13.

intimate partner, as in the *Singh* case) than for women who kill after suffering long-term abuse.[42] In addition, some submissions to the Parliamentary Inquiry suggested that this element of the defence suffers from fundamental flaws in that it 'lacks a clear foundation in science or medicine', and argued that there is no appropriate measure to assess whether or not a person has lost self-control.[43]

According to the Committee, removing the requirement of a loss of self-control would have been desirable because such a move would focus attention on the nature of the provocation (the provocative act) and the defendant's response to that provocation.[44] Such a move had been recommended by the Law Commission for England and Wales in 2004,[45] but was not adopted when the new defence of 'loss of self-control' was introduced through the Coroners and Justice Act 2009.[46] Although it favoured removing this requirement, the Committee did not actually advocate the removal of a 'loss of self-control' in its recommendations, and the NSW government draft Bill retains reference to 'loss of self-control' on the basis that replacing it with a requirement of a 'justifiable sense of being seriously wronged' could significantly expand the law.[47]

Despite perceived difficulties with the concept of loss of self-control, and the possibility that it could act as a barrier to an abused person also raising self-defence, it is appropriate to retain this element. Without it there is a danger that provocation would be opened up to cold-blooded killing.[48] Furthermore, concerns that the requirement causes problems for victims of abuse responding to the violence after a period of delay are already addressed by the statutory provision which states that there is no rule of law that provocation is negatived if the act or omission causing death was not sudden.[49] Indeed, the draft Bill makes this clearer by stating that '[c]onduct of the deceased may constitute extreme provocation even if the conduct did not occur immediately before the act causing death'. More fundamentally, retaining the requirement of a loss of control is in line with the historical trajectory of the defence from a justification to an excuse.[50] In the current era, provocation centres on a 'loss of control' and it is this that (partially) excuses a defendant: the 'loss of control' affects the accused's culpability for the murder with which he or she is charged and thus this element of provocation is crucial to the reduced culpability conveyed via the defence.[51]

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[42] See e.g. Wirringa Baiya Aboriginal Women's Legal Centre, Submission 35, the Report [4.4].
[43] These issues are discussed in the Report at [4.97]-[4.118].
[44] The Report, [9.20].
[45] Law Commission for England and Wales, *Partial Defences to Murder* (Law Com 290, 2004)
[46] Section 54, Coroners and Justice Act 2009 (England and Wales).
[47] The Discussion Paper, p 4.
[48] The Discussion Paper, p 4. See also Ministry of Justice, Murder, manslaughter and infanticide: proposals for reform of the law (CP(R) 19/08, 2009) [62].
[49] See Crimes Act 1900 (NSW) s23(3)(b). This provision amended the common law which required that the defendant to have acted suddenly: see R v Mawgridge (1707) Kel. 117.
[50] See e.g. J. Dressler 'Provocation: Partial Justification or Partial Excuse" (1988) 51 *Modern Law Review* 467. See also N. Lacey 'Partial Defences to Homicide: Questions of Power and Principle in Imperfect and Less Imperfect Worlds' in A. Ashworth et al (eds), *Rethinking English Homicide Law* (2000).
[51] For further discussion of the requirement of loss of self-control see, for example, A. Reilly 'Self-Control in Provocation' (1997) 21 *Criminal Law Journal* 320; R. Holton and S. Shute, 'Self-Control in the Modern Provocation Defence' (2007) 27 *Oxford Journal of Legal Studies* 49.

The Committee also recommended that the objective limb of the provocation defence – assessing the gravity of the provocation to an ordinary person and the power of self-control of the ordinary person – be retained, and the NSW government has followed this recommendation in its draft Bill. As the main issue here seemed to be jury comprehension of the elements of the defence, this is discussed under this heading.

Jury Understanding of the Elements of the Defence

The NSW government response does not give consideration to the issue of jury capacity to understand the elements of the defence. The Committee had noted the concerns that the test for provocation is too complex for juries, but agreed with the submission from the NSW Bar Association that such concerns were 'overstated', concluding that the existing test for provocation 'strikes a balance in allowing for the partial defence to be properly used'.[52] It therefore did not recommend any substantial change to the test, such that it would continue to contain a subjective limb (discussed above) and a two limb objective test – assessing the gravity of the provocation to an ordinary person and the power of self-control of the ordinary person.

Given the complexities surrounding the ordinary person test, it would have been preferable to clarify the ordinary person test along the lines recommended by the Law Commission for England and Wales. The objective test in provocation is designed to act as a barrier, representing the standard of control that can be expected of each member of the community. Expressly requiring that a person of the same age and 'ordinary temperament' 'might have reacted in the same or similar way' would go a significant way towards dealing with the difficulties created by the objective limb of the current defence. The reference to a person of 'ordinary temperament' is something a jury is likely to grasp readily.[53] This requirement would also work well in tandem with the other changes recommended by the NSW Committee, including the reference to 'justifiable' to qualify a defendant's 'sense of being seriously wronged', and with specific exclusions from the scope of the defence where it is considered that no ordinary person should have lost his or her self-control (concerns about an exclusionary model discussed further below). This combination would have further invoked community standards about what may give rise to a 'justifiable sense of being seriously wronged'.[54]

Onus of Proof

The NSW government's draft Bill regarding the partial defence of 'extreme provocation' does not propose to alter the onus of proof. In response to the submissions it received, the Committee had considered the option of reversing the onus of proof for provocation. This would have meant the defendant had the onus of proof, to a balance of probabilities standard – an approach that was adopted in Queensland in 2011.[55] The proposal to reverse the onus of proof was problematic and

[52] The Report, [9.37]-[9.38].
[53] As explained by the Law Commission for England and Wales, this reference means the defence is only available to a person of 'ordinary tolerance and self-restraint': see Law Commission for England and Wales, *Partial Defences to Murder* (Law Com 290, 2004) [3.109].
[54] This is the import of the Law Commission's explanation for its proposed reform: see Law Commission for England and Wales, *Partial Defences to Murder* (Law Com 290, 2004) [3.70].
[55] Criminal Code of Queensland, s304(7).

it is inconsistent with the history of provocation.[56] Furthermore, it was unwarranted if a reformulated defence of 'gross provocation' or 'extreme provocation' is to be constructed around a comparison with the 'ordinary person' (a comparison that marks the defence out from those defences with reverse burdens[57]). In the end, the Committee could not come to a 'firm conclusion' on this point, and made no recommendation about it.[58] It is pleasing to see that the NSW government response also gives no consideration to this option.

Proposed Reform II – Where the Committee and the Government part Company

An 'Exclusionary Model'

The adoption of an exclusionary model – the express unavailability of the defence where it is alleged to have arisen in certain factual circumstances – was the core feature of the Committee's proposed defence of 'gross provocation'. This feature of the proposed reform attempted to address the rather fraught judicial debate over what factors can be attributed to the ordinary (reasonable) person for the purposes of the defence. The courts' answer to this question has varied according to whether the characteristic is alleged to have affected the gravity of the provocation or to have rendered the defendant less able to control him or herself. In relation to the former, all kinds of characteristics – including discreditable ones – may be taken into account if they become the subject of the taunt or the action (words or conduct) to which the defendant reacts. In relation to the latter, the approach has been more restrictive in NSW with only age taken into account.[59]

In order to further restrict the scope of the partial defence, over and above the restriction to 'gross provocation', the Committee had recommended that the statutory defence of 'gross provocation' exclude provocation that arises in certain contexts. These contexts were: where the provocation is self-induced, where it consists of a 'non-violent sexual advance' or where it arises out of a 'domestic relationship' between the defendant and the victim or another person.[60] An express exclusion of 'gross provocation' that is self-induced mirrors the current law of provocation and is not controversial. But, in referencing non-violent sexual advances, and domestic relationships, the Committee's proposal went beyond the model provided by the Law Commission for England and Wales. Each of these two exclusions is considered in turn.

[56] See further T. Crofts and A. Loughnan, 'Provocation: The Good, the Bad and the Ugly' (2013) 37 *Criminal Law Journal* 23.
[57] See A. Loughnan, *Manifest Madness: Mental Incapacity in Criminal Law* (2012), chapter 2.
[58] The Report, [8.99].
[59] *Stingel* (1990) 171 CLR 312. This contrasts with the approach taken in *Camplin* [1978] AC 705, where the House of Lords held that, for the purposes of determining whether a reasonable person would have done as the defendant did, the reasonable person is to be accorded only the defendant's age and sex.
[60] The Commission also considered an express exclusion of defendants who act in 'considered desire for revenge' as per the Law Commission for England and Wales proposed reform. The Committee received no specific comment on this potential reform and concluded that it was 'undecided' about the need for such an exclusion: see the Report, [9.55]-[9.59].

In recommending that the partial defence of 'gross provocation' not be available to defendants who respond to a 'non-violent sexual advance by the victim',[61] the Committee had addressed concerns raised in a significant number of submissions, and the legacy of cases involving so-called 'homosexual advance'. The Committee expressed concern that the acceptance of non-violent homosexual advances as a basis for provocation condones homophobia.[62] The Committee's recommendation is in line with reform in two other Australian jurisdictions that have retained provocation.[63] Such a recommendation had already been made, as noted above, in NSW by an Attorney-General's Inquiry into the defence as a result of the outrage that followed the decision of *Green* (1997) 148 ALR 659.[64]

Excluding provocation in cases of a 'non-violent sexual advance by the victim' is appropriate given that, in the words of Kirby J, dissenting, in *Green*:

> 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. […] 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.[65]

Barring a non-violent homosexual advance as a basis for provocation is thus in line with contemporary movements to ensure equality and remove bias against homosexual persons.[66] This had received significant media attention, which, overall, seems to have been positive.[67] It had also sparked Tammy Franks, an MP for The Green Party to lay the Criminal Law Consolidation (Provocation) Amendment Bill 2013 before the Parliament of South Australia in May 2013. This Bill proposes to introduce the following limitation on the defence of provocation: '[f]or the purposes of proceedings in which the defence of provocation may be raised, conduct of a sexual nature by a person does not constitute provocation merely because the person was the same sex as the defendant.' Plans to take such a step in Queensland in 2012 were abandoned when the government changed in March 2012.[68] In explaining the reluctance to make any such change the Attorney-General noted that amendments made to the Criminal Code of Queensland in 2011 to prohibit words from forming the

[61] The Report, Recommendation 6.
[62] The Report, [9.54].
[63] For example, s 13(3) Crimes Act 1900 (ACT) provides that a non-violent sexual advance by the deceased to the accused cannot be taken to be sufficient, by itself, to have induced an ordinary person to have lost self-control. See also Criminal Code (NT), s 158(5).
[64] See S. Tomsen and T. Crofts, 'Social and cultural meanings of legal responses to homicide among men: Masculine honour, sexual advances and accidents' (2012) 45 *Australian and New Zealand Journal of Criminology* 423, 426.
[65] *Green* (1997) 148 ALR 659, 714.
[66] See further G. Coss, 'Lethal Violence by Men' (1996) 20 *Criminal Law Journal* 305, 306.
[67] See e.g. A. Patty and H. Alexander, 'Provocation defence should be severely limited, say MPs', *Sydney Morning Herald*, 24 April 2013, available at http://www.smh.com.au/nsw/provocation-defence-should-be-severely-limited-say-mps-20130423-2icu6.html [accessed 22 August 2013].
[68] See D. Mack, '"But Words Can Never Hurt Me": Untangling and Reforming Queensland's Homosexual Advance Defence' (2013) 35 *Sydney Law Review* 167; S. Tomsen and T. Crofts, 'Social and cultural meanings of legal responses to homicide among men: Masculine honour, sexual advances and accidents' (2012) 45 *Australian and New Zealand Journal of Criminology* 423.

basis of a provocation claim (other than in extreme circumstances) were sufficient to make the defence harder to apply.[69]

The proposed defence of 'gross provocation' would also have excluded provocation that arises in 'domestic' relationships. Here, the Committee found itself in a dilemma familiar to law reform agencies in several common law jurisdictions: the Committee sought to restrict access to the defence by men who, after inflicting long term abuse, kill their female partners, and – at the same time – ensure the defence is available to women who might lash out at abusers after suffering years of abuse.[70] Overall, the Committee was concerned that the defence not be available to defendants who respond with lethal force to conduct that involves individuals exercising their rights to autonomy and choice.[71]

According to the Committee's recommendation, the proposed defence of 'gross provocation' would not have been available where the defendant kills a person with whom he or she is in a 'domestic relationship', and the provocation is based on anything done or believed to be done by the deceased to end the relationship, 'change the nature of the relationship' or indicate that 'the relationship may, should or will end, or that there may be, should or will be a change to the nature of the relationship'.[72] 'Domestic relationship' is defined broadly along the same lines as in the Crimes (Domestic and Personal Violence) Act 2007 (NSW).[73] While in England and Wales the main exclusion is that provocation may not be based on 'sexual infidelity',[74] the NSW Committee drew upon examples from other Australian jurisdictions in an effort to exclude a broader range of circumstances that it regarded as inappropriate grounds for provocation. The prohibition on provocation in relation to anything said or done, or believed to be said or done, to change the nature of, or end, a domestic relationship is broadly based on reforms undertaken to the Criminal Code of Queensland.[75] This approach aimed to strike a balance by allowing the defence to continue to operate while denying the defence where there are, in Alan Norrie's words, 'bad' grounds for being provoked.[76] This point is discussed further below.

The prohibition on raising the defence of 'gross provocation' in the context of a 'domestic relationship' was subject to the proviso that provocation arising in this context may be capable of founding the defence if the circumstances are of 'a most extreme and exceptional character'.[77] Since the publication of the Committee's report,

[69] See R. Wilson, 'No changes for "gay panic": Bleijie', The Chronicle, 17 July 2012, available at http://www.thechronicle.com.au/news/no-changes-gay-panic-bleijie/1456538/ [Accessed 22 Aug 2013].
[70] The Report, [9.65].
[71] The Report, [9.66].
[72] The Report, Recommendation 7.
[73] Crimes (Domestic and Personal Violence) Act 2007 (NSW), s5. Here, domestic relationship includes married couples, de facto partners, those who live together and those in care relationships, and encompasses all those who have been in such relationships. In relation to Aboriginal and Torres Straight Islanders, such a relationship extends to cover those in the same kinship group.
[74] Coroners and Justice Act 2009 (England and Wales), s55(6)(c).
[75] See Criminal Code and other Legislation Amendment Act 2011 (Qld).
[76] A. Norrie, 'The Coroners and Justice Act 2009 – partial defences to murder (1) Loss of control' [2010] Crim. L.R. 275, 280
[77] Recommendation 7. The Committee was motivated here by submissions it received indicating that such a 'get out' clause would provide valuable flexibility in the operation of the defence: discussed at [9.69].

this proviso has been subject to criticism, on the basis that its inclusion in any new statute may reduce the effectiveness of the exclusions and just re-orientate the defence argument around exceptionality. These criticisms have been eclipsed now that, according to the draft Bill, the defence is to be narrowly circumscribed around conduct amounting to a serious indictable offence. Regarding domestic violence, it is notable that the Committee made a 'non legislative' recommendation that the Attorney General engage in an education campaign targeting the legal sector and the broader public about the realities of domestic and family violence.[78] This has been ignored in the NSW government response. Furthermore, disappointingly, the recommendation that an amendment be introduced 'to explicitly provide that evidence of family violence may be adduced in homicide matters' was also absent from the NSW government's response.[79]

The judicial wrangling over what the characteristics that may be appropriately attributed to the ordinary (reasonable) person for the purposes of provocation, evident in R v Smith (Morgan) and Attorney-General v Holley, referred to above, has revealed that it is extremely difficult to limit the availability of the defence around normatively desirable cases without express prohibitions.[80] As Norrie writes in relation to the defence of provocation in England and Wales, now abolished, 'the law essentially declined to commit itself on what were good or bad reasons to be provoked'.[81] As a result, express exclusions circumscribing the scope of provocation represented an attractive way out of this impasse. The exclusionary model therefore aimed to posit as a matter of law the circumstances in which an ordinary person would not, or rather should not, be provoked. The exclusions were designed to override jury sympathy in cases that have been declared to be, and labeled as, undeserving by the legislature. They also served to send a strong message about those factual circumstances in which provocation is not morally acceptable.

The 'positive restriction' model

Against the Committee's recommendations, the NSW government goes further in restricting the partial defence of provocation. As mentioned above, by contrast with 'gross provocation', as it was outlined by the Committee, 'extreme provocation' will be restricted to those defendants who respond with fatal violence when the conduct of the deceased amounted to a 'serious indictable offence'. According to existing law, this is defined as an offence which, when dealt with on indictment, attracts a maximum penalty of five years imprisonment or more.[82] The NSW government Discussion Paper defends this departure from the Committee's recommendations by stating that it nonetheless achieves the Committee's 'policy intent'[83] and it posits that, in adopting this approach, the government offers a 'workable' model for excluding certain conduct from provocation.[84]

[78] See Recommendation 10, discussed at [9.87]-[9.100].
[79] See Recommendation 2, discussed at [8.102]-[8.138].
[80] See further T. Crofts and A. Loughnan, 'Provocation: The Good, the Bad and the Ugly' (2013) 37 *Criminal Law Journal* 23; see also A. Loughnan, *Manifest Madness: Mental Incapacity in Criminal Law* (2012).
[81] A. Norrie, 'The Coroners and Justice Act 2009 – partial defences to murder (1) Loss of control' [2010] Crim. L.R. 275, 280.
[82] See s 4, Crimes Act 1900 (NSW).
[83] The Discussion Paper, p 2.
[84] The Discussion Paper, p 3.

The approach of limiting provocation to a 'serious indictable offence' was expressly considered (in the language of 'violent criminal behaviour') – and rejected – by the Committee on the basis that it would too severely circumscribe the defence by making it more like self-defence.[85] In its Report, the Committee referred to this model as a 'positive restriction' model and found that there was limited support for this proposal by Inquiry participants.[86] While the government's proposal refers to a 'serious indictable offence' and thus sidesteps the problem of determining what is meant by 'violent criminal behavior' the substance of the concerns with this model remains.

The major issue with this model is that it 'fails to recognise the true nature of abusive relationships'.[87] This could make the defence difficult to access for a person who kills in response to on-going emotional abuse, such as belittling, persistent taunts and criticism.[88] It is not necessarily the case, despite the Discussion Paper's confident assertion, that 'ongoing domestic violence will generally involve serious indictable offences such as assaults'.[89] As Julia Tolmie notes, 'it is not uncommon for victims of domestic violence, including victims of severe physical abuse, to observe that the physical abuse is easier to withstand than the emotional abuse experienced in such a relationship.'[90] In such instances there may be no acts of physical violence amounting to a serious indictable offence but rather a pattern of coercive control that entraps a woman in an abusive relationship.[91] The government does not fully appreciate that the restriction might prevent women who kill in such circumstances from accessing the defence because, while it correctly notes, psychological abuse can amount to a serious indictable offence under s. 13 Crimes (Domestic and Personal Violence) Act 2007 (NSW),[92] it overlooks the fact that this offence requires proof that a person stalks or intimidates a person intending to cause the other person to fear physical or mental harm, which may be difficult to furnish in court. It may also severely restrict the availability of the defence in other cases in which a concession may be thought deserved but where no serious indictable offence has been committed, or where the link between the triggering behaviour and a serious indictable offence is not clear. Furthermore, as the Committee noted in rejecting the 'positive restriction' model, it may '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'.[93]

[85] See the Report [6.28].
[86] The Report [6.4]. See in general Chapter 6.
[87] The Report [6.28]-[6.35].
[88] J. Wood, Report [6.22],
[89] The Discussion Paper, p 2.
[90] J. Tolmie, 'Is the Partial Defence an Endangered Defence?' (2005) 45 *New Zealand Law Review*, 42; New South Wales, Parliament, Legislative Council, Select Committee on the Partial Defence of Provocation, *The Partial Defence of Provocation*, 2013, para 4.56 and 4.61; T. Crofts and A. Loughnan, 'Provocation: The Good, the Bad and the Ugly' (2013) 37 *Criminal Law Journal* 23; E. Stark, *Coercive Control: How Men Entrap Women in Personal Life*, New York: Oxford University Press, 2007.
[91] See E. Stark, *Coercive Control: How Men Entrap Women in Personal Life*, New York: Oxford University Press, 2007; E. Stark, 'Re-presenting women battering: From battered woman Syndrome to coercive control' (1995) 58 *Albany Law Review* 973.
[92] The Discussion Paper, p. 2.
[93] The Report [6.34].

The only express exclusion which found its way into the draft Bill relates to conduct amounting to a non-violent sexual advance. While this is to be commended, it is not clear that this inclusion will have a substantive role to play in 'extreme provocation' given that a non-sexual advance would rarely amount to a serious indictable offence.[94] In this respect, it is tempting to suggest that this merely constitutes a formal and somewhat hollow acknowledgement about the unacceptability of homophobic violence. And if this is the case, it is all the more disappointing that provocation that is alleged to have arisen in circumstances in which the victim had been unfaithful or wished to end the relationship escaped even such a mention.

In rejecting an exclusionary model of provocation, the NSW government noted the concerns that were raised about the efficacy of such a model after the decision of the Court of Appeal of England and Wales in *Clinton*, which concerned the new partial defence of 'loss of self-control'.[95] As is well known, the defence of loss of self-control requires a 'qualifying trigger', which, under the legislation, may not comprise 'facts or things said that constitute sexual infidelity'.[96] In *Clinton*, the Court of Appeal held that the exclusion clause was intended to operate only where sexual infidelity was the only 'qualifying trigger'. The Court concluded that, in that factual context, it was not possible to take sexual infidelity (the alleged provocation) out of the broader factual context, and thus the defendant was able to raise the defence despite the express statutory exclusion.

The issue that arose in *Clinton*, in relation to the loss of self-control defence, is one that courts in NSW could have faced in relation to 'gross provocation' had it been taken up in legislation. Cases involving allegations of provocation are rarely simple and often involve a complex combination of factors. Thus, potentially, an excluded factor may be combined with other non-excluded matters. For instance, in *Green* the provocation allegedly resulted not only from the non-violent sexual advance (which would be excluded under the new NSW model), but also due to the appellant's sensitivity because of his knowledge or belief in his father's abuse of his sisters. But, the Committee had concluded that the lessons from *Clinton* are that careful drafting, and clear statements of policy intent, are required to effect reform (and had also observed that a NSW court would not necessarily adopt the view of the statute adopted by the Court of Appeal in England and Wales[97]). The NSW government concluded that the Committee's exclusionary model could have been 'problematic'[98] and may not have been effective in excluding particular sorts of conduct, but such problems may not have eventuated. In any case, it is hard to overlook the central advantage of the exclusionary model – its recognition that provocation has an appropriate role to play in the criminal law, and its simultaneous clear communication about the unacceptability of provoked lethal violence in certain circumstances.

Discretion to withhold the Defence from the Jury

The Committee had recommended that the Crimes Act 1900 (NSW) be amended to expressly provide that a judge is not required to leave the defence to the jury unless

[94] Unless the behaviour is regarded to amount to a sexual assault or indecent assault or attempt to commit such an offence.
[95] *Clinton, Parker and Evans* (2012) EWCA Crim 2.
[96] Coroners and Justice Act 2009, s54, amending Homicide Act 1957 (England and Wales).
[97] The Report, [9.61]-[9.62].
[98] The Discussion Paper, p 4.

there is evidence to suggest that a reasonable jury properly instructed could conclude that the defence applies. Here, concerns about the operation of the defence in England and Wales, which had been identified by the Law Commission, weighed on the Committee. The Committee noted that, while the trial judge has discretion about whether to leave the defence to the jury, it recommended that the legislative provision include an express statement to this effect ('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').[99] The NSW government did not pick up this point in its response, noting that codifying this rule in this context alone, when the same general rule applies to all defences and partial defences, may produce uncertainty.[100]

Conclusion

It has proved difficult to bridge the divide between the usual positions taken on the issue of provocation (simple for or against), and the recommendations made by the NSW Committee can be seen to be an attempt to reconcile the varied views. Here, it should be noted that, by contrast with England and Wales, there is no mandatory life sentence for murder, and thus provocation is not able to be justified in instrumental terms as a necessary means of evading the imposition of a life sentence (although it did operate to allow a defendant to avoid the death penalty prior to abolition). In NSW the key issue was whether provocation should continue to operate to reduce a conviction for murder to one of manslaughter. The Committee therefore had to confront directly the moral-evaluative issues raised by the provocation defence.

The NSW Parliamentary Select Committee was clearly divided over what role provocation should play in modern Australian society. The Committee expressed concern about the use of the provocation defence in circumstances in which an individual was killed attempting to exercise what the Committee calls 'equality rights' – to make autonomous decisions about their lives, including in personal relationships.[101] However, the Committee also expressed concern that there were some circumstances in which provocation is 'appropriately used', such as when, after sustained abuse, an individual kills the abuser in an effort to defend themselves, or free themselves from a threat.[102] Thus, the specific reforms advanced by the Committee were two-fold: to raise the bar on what conduct may amount to provocation by requiring that such conduct be grossly provocative, and to retain but limit the scope of the defence by articulating express exclusions regarding the sort of conduct that may amount to provocation.

By contrast, the NSW government's response suggests that the Department of Attorney General and Justice was not so divided, and the careful balance struck by the Committee has been lost. The government's proposed defence of 'extreme provocation', to be available only where the accused was responding to conduct comprising a serious indictable offence, is unequivocal: provocation is to be severely circumscribed in NSW. While claiming to reflect the Committee's policy intent, the government's response departs in significant ways from the recommendations of the

[99] The Report, Recommendation 9, discussed at [9.80]-[9.85].
[100] The Discussion Paper, p 5.
[101] The Report, [9.5].
[102] The Report, [9.4]-[9.5].

Committee, and the reforms now proposed by the NSW government mean that NSW is out of step with other jurisdictions retaining provocation. If enacted, the defence of ‘extreme provocation’ will represent a new stage in the evolution of provocation, and its incorporation into the Crimes Act 1900 (NSW) will re-orientate the academic, legal and public debate. If the defence continues to generate controversial success stories, it is likely that this will be provocation's last hurrah in NSW.