Chapter Five

THE ‘ANGRY’ WOMAN - THE DEFENCE OF PROVOCATION AND HOMICIDE

5.1 INTRODUCTION

This chapter develops my primary aim of investigating the judicial treatment of women who kill their violent partners by examining the application of the defence of provocation. Traditionally, the provocation defence has been of limited assistance to battered women as their experiences did not easily fit within its masculinist model.¹ More recently, however, the defence of provocation has been one of the principal means by which the criminal justice system in Australia has responded to the predicament of battered women who kill their abusive partner.²

My analysis of reliance on the defence of provocation by battered women who kill in this chapter is divided into four main parts. In the first section, I examine cases where male and female offenders have successfully relied on provocation in the context of spousal homicide. This discussion provides a framework for the argument I develop in this chapter in relation to the gendered nature of the provocation defence. As stated in the Introduction, my thesis is primarily concerned with the law’s treatment of female offenders. However, in order to sustain my argument that the law of provocation operates in a profoundly gendered manner, it is necessary to examine the operation of the defence in the context of both male and female offenders.

¹ See 3.2.1. As Gleeson CJ stated in Chhay (1994) 72 A Crim R 1, that ‘the law’s concession to human frailty was very much, in its practical application, a concession to male frailty,’ at 11.
Next, I analyse the operation of the law of provocation in Australia. I consider the legal developments that have enabled greater access to the provocation defence by battered women who kill. The current operation of the defence of provocation is assessed to determine whether the recent changes to the defence of provocation have resulted in a paradigm shift from its essentially masculine framework and whether they have enabled the law to take account of the circumstances in which women kill their abusive partners. I also consider the operation of the objective test in the provocation defence to further my argument in relation to the masculinist nature of the defence of provocation. In advancing my critique of the gendered nature of the defence, I rely upon exculpatory reliance by men on the provocation defence in the circumstances of separation or jealousy, as well as the more recent phenomenon of the homosexual advance.

After considering the current operation of the defence of provocation, I reflect on whether the gendered character of the defence of provocation can be transformed or whether it is so fundamentally entrenched that the defence must be abolished. As I asserted in Chapter Three, the defence of provocation operates as a concession to killers who are regarded as less blameworthy than a 'murderer', and so the defence should only mitigate in cases where the accused had 'good' reasons to do what he or she did. The defence of provocation must enable assessments to be made of good and bad reasons for losing control. In this part, my argument is that the defence of provocation operates to entrench male possessiveness and challenges to male sexual integrity. In view of its failure to enable an assessment to be made between good and spurious reasons for loss of self-control, my argument ultimately is that the defence should be abolished.

In the last section of this chapter, I consider the consequences of reliance on provocation by battered women who kill. This discussion further develops my argument from Chapter Four, that reliance on provocation (and lack of intent for
murder) by battered women who kill operates to psychologise their responses, and thereby obscure the reality of their partner’s violence.³

5.2 SPOUSAL HOMICIDE: RELIANCE BY MEN AND WOMEN ON THE DEFENCE OF PROVOCATION

The defence of provocation provided the basis of the manslaughter conviction in 40% of cases (22) where women killed their male partner and in 28% of cases (15) where men killed their female partner.⁴ There was only one case identified in my research where a woman unsuccessfully relied on the defence of provocation at trial, and was convicted of murder.⁵ In contrast, 19 men convicted of murder had relied unsuccessfully on the defence of provocation at trial.⁶ The extent of successful reliance on the defence of provocation by women relative to men may lead some to suggest that empirical evidence does not support the assertion that provocation operates in a gendered way.⁷ However, the approach

³ See 4.3.2 and 4.4.3.
⁴ See 1.4. This includes cases where a plea of guilty to manslaughter was entered on the basis of provocation.
⁵ Oslund (1998) 197 CLR 316. At trial, Oslund had relied on both provocation and self-defence.
⁶ These are cases where the defence was left for the consideration of the jury. In these cases, the defence of provocation may not have been the only defence that was relied on at trial. See Audsley, SC NSW, 30 May 1997; Holscher, unreported, SC NSW, 9091/006; Capar, unreported, SC NSW, 27 Oct 1995; Dundas, unreported, SC NSW, 15 Apr 1992; Baraghith, unreported, CCA NSW, 14 Jun 1991; Croft [1981] 1 NSWLR 126; Majdalawi [2000] NSWSCA 240; Monreal (1984) 16 A Crim R 361; Buttigieg (1993) 69 A Crim R 21; Van Truong (1988) 35 A Crim R 57; Manly, unreported, SC SA, 2 Feb 1996; Arrowsmith (1994) 55 FCR 130; Fiame, unreported, CCA Vic, 18 Dec 1998; Hanley, unreported, CCA Vic, 9 Mar 1993; Telford, unreported, CCA Vic, 4 Jun 1996; Tuncay, unreported, CCA Vic, 27 Jun 1997; Hughes, unreported, CA Qld, 7 Dec 1993; Carroll (1984) 11 A Crim R 268; Leonard (1999) NSWSC 510. In addition, there were two cases in which an appeal against a murder conviction was successful on the basis that provocation should have been left to the jury: Hutton [1986] Tas R 24; Romano (1984) 36 SASR 283.
⁷ This argument was raised by the Law Reform Commission of Victoria in its consideration of the provocation defence: see Victoria Law Reform Commission, Homicide Prosecutions Study, Report 40, Melbourne, 1991 at para 164 – 169. See also discussion in A Howe, 'Provoking Comment: The Question of Gender Bias in the Provocation Defence - An Australian Case Study', in N Grieves & A Burns (eds), Australian Women: Contemporary Feminist Thought, Melbourne: Oxford University Press, 1994. The Judicial Commission of New South Wales also concluded that provocation does not operate to the detriment of women. This conclusion was based on two assertions: that women rely more successfully on the partial defence than men and that not all men who claim provocation in the domestic context are successful, see H Donnelly et al., Sentenced Homicides in New South Wales 1990 - 1993, Sydney: Judicial Commission of New South Wales, 1995 at 62 - 63. This was noted by the New South Wales Law Reform Commission, see New South Wales Law Reform Commission, Partial Defences to Murder: Provocation and Infanticide, Report 83, 1997 at 87. See S Bandali, 'Provocation from the Home
of equating successful reliance with the conclusion that provocation does not operate to the detriment of women is deficient, as success per se does not reveal the circumstances in which the successful (and unsuccessful) claims of provocation are made. An assessment of whether the defence of provocation operates in a gender-biased fashion is dependent on an assessment of the circumstances in which men and women rely on the defence.  

As noted at 3.2.1.2, the discovery by a male partner of his wife engaged in sexual intercourse with another man was the paradigm case of provocation. However, the concept of ‘sexual provocation’ has evolved beyond actual discovery of adultery to cases where men ‘claim that infidelity, desertion or sexual humiliation drove the offender to kill’. In 8 of the 15 cases, identified in my research, where a male successfully relied on the defence of provocation in respect of killing his female partner, the provocative conduct relied on was infidelity and/or separation. In 17 of the 19 unsuccessful cases of provocation, infidelity, jealousy and/or separation was the provocative conduct relied upon by the male offender. In addition, in two cases an appeal against a murder conviction was successful on the grounds that provocation should have been left to the jury in circumstances of sexual provocation. In contrast, a history of physical abuse provided the background for all of the 22 female defendants

Office' [1992] Criminal Law Review 716 who observes that the conclusion has been drawn from a similar UK study that "women are much more likely than men to mount a successful defence of provocation", a view which conveniently supports the Home Office belief that the law in this area is not prejudiced against women", at 716.

8 A Howe, 'Provoking Comment', ibid at 229.

9 Leader-Elliott, 'Passion and Insurrection in the Law of Sexual Provocation', in N Naffine & R Owens (eds), Sexing the Subject of Law, NSW: LBC Information Services Sweet and Maxwell, 1997 at 151.


identified in my research that successfully relied on provocation in respect of the killing of their male partner. A history of violence was also the provocative conduct relied upon in the case where the woman unsuccessfully sought to rely on provocation.

As shown at 1.3, there is a marked disparity in the circumstances in which men and women kill in the context of spousal homicide. Men typically kill their female partners in the context of separation, jealousy and infidelity whereas male violence usually provides the context in which women kill their male partner. The division on gendered lines that is identifiable in the circumstances/motivation for spousal homicide is translated into a disparity in the circumstances that form the basis for reliance on the defence of provocation. My analysis highlights the fundamental and qualitative difference in the circumstances in which men and women rely on the defence of provocation highlights in these circumstances. As Howe has observed, the circumstances ‘are not only vastly different; they are incommensurable’.

A similar pattern is found in other jurisdictions. A study by the Canadian Department of Justice observed that provocative conduct for men was likely to be sexual provocation, while provocation for women was likely to be physical violence. Similarly, in Chan’s English study, ‘[w]omen’s fear of further violent abuse [was] juxtaposed against men’s despair at being rejected by their partners’. In McDonald’s review of the operation of the provocation defence in

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13 See Table I.1.
15 See I.3.1.
16 See I.3.2.
20 Ibid.
21 W Chan, Women, Murder and Justice, Hampshire: Palgrave, 2001 at 125. Chan found there were four out of the six female offenders in her study who pleaded provocation based on violent assaults by their partners. In the three male offenders who pleaded provocation, the pleas were based on desertion and infidelity. See also S Bandalli, ‘Provocation from the Home Office’, above.
New Zealand, she found that in 20 cases where men killed their wives, girlfriends or ex-partners and relied on the defence of provocation (successfully or unsuccessfully), the provocation relied upon was a challenge to male sexuality.22 McDonald found that there was a history of male violence in five of the six provocation cases involving women killing their male intimates.23

5.3 THE LAW OF PROVOCATION

The law of provocation in Australia is governed by the common law in Victoria and South Australia, and by statute in the other states and territories.24 The defence of provocation operates as a partial defence in regard to an unpremeditated killing after the accused has lost self-control, if an ordinary person also could have lost control and acted as the accused did.25 The specific rules relating to provocation differ between jurisdictions. However, several requirements can be identified that are common to all jurisdictions.26 The defence of provocation contains a subjective and an objective test. The subjective test is that the defendant must have been deprived of the power of self-control and killed while under the influence of provocation.27 The objective test is that an ordinary person in the position of the defendant could have lost control and acted as the defendant did.28 In addition, there must be conduct that is capable of amounting to provocation.29

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23 Ibid n 7.
24 Criminal Code (Tas) s160; Crimes Act 1900 (NSW) s 23; Crimes Act 1900 (ACT) s 13; Criminal Code (Qld) s304; Criminal Code (WA) s 281, 245; Criminal Code (NT) s 34.
25 Note in New South Wales and the Australian Capital Territory it is only necessary that an ordinary person would have formed an intent to kill or to inflict grievous bodily harm, not necessarily do what the accused did, Crimes Act 1900 (NSW) s 23(2)(b); Crimes Act 1900 (ACT) s 13 and Green (1997) 191 CLR 334. See further at 5.3.3.1.
26 See Stingel (1990) 171 CLR 312 at 320 per the Court.
27 See 5.3.2.
28 See 5.3.3.
29 See 5.3.1.
5.3.1 THE ACT OF PROVOCATION

5.3.1.1 Cumulative provocation

Traditionally, the history of the relationship between the accused and the deceased only provided background context. The history of the relationship was irrelevant as a matter of law to the consideration of the adequacy of the provocative conduct identified immediately preceding the killing.\(^30\) The jury's consideration of adequate provocation focused solely in the alleged provocative incident immediately before the killing. This restrictive view of provocative conduct created infinite difficulties for women who killed their abusive partner in response to a relatively trivial act or in response to no apparent provoking event.\(^31\) In all Australian jurisdictions, the concept of 'cumulative' or 'last straw' provocation has now been recognised. The effect is that the history of the relationship between the accused and the deceased is relevant to an assessment of the gravity of the 'trigger' incident.\(^32\) This means that while the final provocative conduct may appear trivial in isolation, its full weight can be understood by a consideration of the course of conduct between the accused and the deceased.\(^33\)

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\(^{33}\) See R (1981) 28 SASR 321 where King CJ accepted that 'if' determining whether the deceased's actions and words on the fatal night could amount to provocation in law, it is necessary to consider them against the background of family violence and sexual abuse ... The deceased's words and actions in the presence of the appellant on the fatal night might appear innocuous enough on the face of them. They must, however, be viewed against the background of brutality, sexual assault, intimidation and manipulation', at 326.
The recognition of cumulative provocation has substantially expanded the operation of the defence of provocation in the domestic context. In all the 22 cases identified in my research where women have successfully relied on the defence of provocation, the provocative conduct is appropriately classified as cumulative provocation. The history of violence by the deceased towards the accused provided the context in which the final triggering incident was assessed and understood. For example, in *Raby*, the court accepted that the accused had:

Lost ... self-control as a result of the final provocative acts and words of the deceased, which must be viewed in the context of his treatment of you over the previous eleven weeks.\(^{34}\)

Similarly, in *Bradley*, Coldrey J accepted that the immediate provoking incident (the deceased refused to allow the prisoner back into bed and referred to her as a ‘dog’) ‘cannot be seen in isolation but as representing a culmination of years of abusive and controlling behaviour’.\(^{35}\)

### 5.3.1.2 *A triggering incident*

The concept of cumulative provocation has enabled an expanded operation for the defence of provocation. However, at common law and in Code jurisdictions, the need to identify a trigger incident means that considerable legal difficulties remain for women seeking to rely on the defence of provocation if they kill their violent partner in circumstances not conforming to the traditional paradigm of provocation. In contrast, this requirement has been removed in New South Wales and the Australian Capital Territory.

**The common law position**

The common law would seem to require that there be an identifiable trigger incident. Although it has been argued that the common law does not require as a matter of law a ‘triggering’ incident,\(^{36}\) recent High Court authority supports the conventional view there must be a ‘trigger incident’ even if the provocative

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\(^{34}\) Unreported, SC Vic, 22 Nov 1994 at 2 per Teague J.

\(^{35}\) Unreported, SC Vic, 14 Dec 1994 at 149a.
conduct relied upon is a series of events. In *Osland*, the appellant was convicted of murder in respect of her involvement in the death of her violent husband. The prosecution case was that the appellant and her son planned the murder, that they had dug a grave in advance, and that the appellant had mixed sedatives with her husband’s meal. The appellant then watched as her son bludgeoned his stepfather to death with an iron bar. At her trial, the appellant relied on the defences of provocation and self-defence. In directing the jury on the issue of provocation, the trial judge had directed the jury that:

> It will be open to you ... to consider whether or not there might be some relatively minor act of abuse – I do not mean trivial, but relatively minor act of abuse – which was, as it were, the last straw that breaks the camel’s back and which produced a sudden loss of control for a woman in her circumstances that might possibly have caused her to react as she did and which might cause an ordinary person in the circumstances in which she was, to do so.

However, the appellant’s evidence did not suggest that there was ‘any particular conduct on the part of the deceased in the day or days preceding his death that could be described as the “last straw”’.

Before the High Court, the appellant argued that the trial judge had erred in directing the jury that a ‘specific triggering incident’ was necessary to rely on provocation. This argument was expressly rejected by Kirby J, who stated that the trial judge’s direction in relation to provocation was correct. In approving the comments of the trial judge, Kirby J stressed that:

> Evidence of a long-term abusive relationship ... did not afford a person in the position of the appellant a blank cheque to plan and execute the homicide of her abuser, protected by the law of provocation, with only a passing nod at the immediate circumstances said to have driven her to the grave step of participating in the termination of human life.

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38 *Osland* (1998) 197 CLR 316 at 379 per Kirby J.
39 *Osland* (1998) 197 CLR 316 at 379 - 380 per Kirby J.
40 *Osland* (1998) 197 CLR 316 at 376 per Kirby J. The other members of the High Court did not specifically comment on this issue in their reasons for decision. However, Kirby J noted that ‘neither Gaudron and Gummow JJ nor Callinan J would uphold the complaint ‘about the
In view of Osland, it appears that there will need to be some temporal connection between the identified trigger incident and the loss of self-control. The need to identify a final provocative incident that serves as a ‘trigger’ for the loss of self-control and the fatal response may operate as a barrier to reliance on the defence of provocation for battered women.

**Code jurisdictions**

There is no doubt that a ‘trigger’ incident is required in Code jurisdictions, as these jurisdictions ‘double dip’ in relation to the requirement of suddenness: in addition to the requirement that the accused act on the sudden, there must be ‘sudden provocation’. The prerequisite of suddenness governs both the provocation and the retaliation: “Suddenness” is a necessary element of both the insult and the reaction to it. In Western Australia, Queensland and Tasmania, cumulative provocation has only been accepted in the narrow sense that the history of the relationship is relevant to assess the gravity of the act/conduct that is identified as the provocative conduct. Battered women who seek to rely on the defence of provocation must be able to point to a specific triggering incident.

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adequacy and accuracy of the instruction concerning provocation’, at 369. Kirby J’s view echoes the view expressed by O’Brien CJ in Croft [1981] 1 NSWLR 126, that ‘the whole doctrine of provocation fundamentally depends upon [the existence of some provocative incident] … it is never sufficient that there simply be a history of violence and abusive conduct on the part of the deceased … such a history must be taken into account … But that there be a provocative incident of things said and/or done by the deceased towards the accused provoking a sudden response is essential’, at 140.

41 Although, as discussed at 5.3.2.1, there may be some interval between the provocative conduct of the deceased and the loss of self-control.


43 See 5.3.2.1.

44 Tasmania: ‘… if the person caused death does so in the heat of passion caused by sudden provocation’, *Criminal Code* (Tas) s 160(1); Griffith Code: ‘… the act which caused death [is] in the heat of passion caused by sudden provocation’, *Criminal Code* (WA) s 281, *Criminal Code* (Qld) s 304, (emphasis added).

45 Daniels (1984) 7 CCC (3d) 542 at 549 per Laycroft JA, cited with approval by the Tasmanian Court of Criminal Appeal in Attorney-General’s Reference No 1 of 1992 (1993) 1 Tas R 349 at 360 per Cox J, 369 per Crawford J, 382 per Zeeman J.

46 In Hutton (1986) Tas R 24, it was recognised that ‘although past events may not be relied upon as constituting provocation the history of the relationship between the accused and the victim is capable of being material in determining the significance and gravity of the act or insult relied upon as constituting provocation’, at 30 per Cox J. This was cited with approval in Attorney-General’s Reference No 1 of 1992 (1993) 1 Tas R 349. This is the position in Canada: see Daniels (1984) 7 CCC (3d) 542 at 554.
occurring immediately, or very shortly before the loss of self-control by the accused.\textsuperscript{47}

In cases where women kill their abusive partners immediately following a violent attack or a verbal taunt, the requirement of ‘sudden provocation’ is satisfied. In \textit{Franke}, the accused killed her husband with a claw hammer. The deceased had begun to ‘carry out a cruel and aberrant sexual attack [on the accused] ... which involved the use of the handle of the claw hammer’\textsuperscript{48}. The accused managed to obtain the claw hammer and immediately struck her husband. It was accepted that the accused had ‘lost the power of self-control and caused her husband’s death in the heat of sudden provocation’.\textsuperscript{49} However, if there is a delay between the provocative conduct and the loss of self-control or if there is no identifiable trigger incident, it will be difficult to satisfy this requirement of ‘sudden provocation’.

There have been attempts to argue that the requirement of ‘sudden provocation’ is not a substantial obstacle to a liberal interpretation of the provocation provisions in the Criminal Codes. The most thorough attempt to argue for an expansive interpretation of the requirement of ‘sudden provocation’ is Tarrant’s consideration of sections 245 and 281 of the Western Australian \textit{Criminal Code}.\textsuperscript{50} In her article, Tarrant contends that section 281 can be interpreted so as to remove the need to isolate a specific trigger incident. This position is advanced by arguing that the requirement of ‘sudden provocation’ in section 281 can be equated with the common law formulation of ‘a sudden and temporary loss of self-control’.

\textsuperscript{47} The definition of a specific triggering incident is based on the definition provided by Tarrant, who defined a ‘specific triggering incident’ as ‘specific, clearly identified conduct by the victim immediately, or very shortly, before the \textit{retaliation by the accused}’, S Tarrant, ‘The “Specific Triggering Incident” in Provocation: Is the Law Gender Biased?’ (1996) 26 \textit{Western Australian Law Review} 190 at 190 n 1, (emphasis added). I would define ‘specific triggering incident’ in the context of ‘sudden provocation’ to mean specific, clearly identified conduct by the victim immediately, or very shortly, before the \textit{loss of self-control by the accused}.

\textsuperscript{48} Unreported, SC Tas, 22 Aug 1983 at 2 per Neasey J.

\textsuperscript{49} Unreported, SC Tas, 22 Aug 1983 at 2 per Neasey J.

\textsuperscript{50} S Tarrant, ‘The “Specific Triggering Incident”’, above n 47 at 192 - 196. See also E Colvin et al, \textit{Criminal Law in Queensland and Western Australia}, 2nd ed. Australia: Butterworths, 1998 at [17.19].
As a result of this parallel being drawn, Tarrant argues that the reasoning of
Chhay in relation to the common law requirement of 'a sudden and temporary
loss of self-control' can be applied in interpreting the Code. Tarrant cites
Gleeson CJ's view in Chhay that:

As a matter of common law ... it is essential that at the time of the killing there was a sudden
and temporary loss of self-control caused by the alleged provocation but, at the same time, it
denies that the killing need follow immediately upon the provocative act or conduct of the
deceased.\(^{51}\)

Thus, it is possible (the argument goes) to interpret section 281 as 'referring to
the process of losing control, not to the time between the provocative conduct
and the subsequent loss of self-control'.\(^{52}\) In summary, Tarrant's argument is that
sudden provocation 'may be understood to be a reference to the kind of
emotional and mental experience of the accused, as Gleeson CJ concluded in
relation to the common law in Chhay'.\(^{53}\) And, interpreted in this way there is no
need for a specific trigger.

However attractive the conclusion may be that the restrictive wording of the
Code can be equated with the common law or even the more liberal legislative
position in New South Wales,\(^{54}\) Tarrant's argument is flawed. The flaw stems
from Tarrant's initial assumption that 'sudden provocation' in section 281 can be
equated with the common law formulation of a 'sudden and temporary loss of
self-control'. This assumption enables the argument to be advanced that 'sudden
provocation' refers to the process of losing control and refers to the time between

\(^{51}\) (1994) 72 A Crim 1 at 10.
\(^{52}\) S Tarrant, 'The "Specific Triggering Incident"', above n 47 at 195. It must be noted that an
interpretation of the common law that holds that a specific trigger incident is not required must be questionable in view of the High Court decision in Oslund, (1998) 197 CLR 316
\(^{53}\) Ibid at 196. It is noted that Tarrant also discusses the phrase 'before there is time for ... passion
to cool'. She argues that one possible interpretation of this requirement is 'as with the
requirement of suddenness, the time may be that between the onset of loss of self-control and the
retaliatory act', at 195. This interpretation is the correct interpretation of 'before there is time for
... passion to cool', as far as Tarrant asserts that it refers to the time frame between the loss of
self-control and the killing, see 5.3.2.1.
\(^{54}\) Note that the Victorian Court of Criminal Appeal rejected an argument that the common law
could be interpreted in the same way as the liberal New South Wales provision, Oslund [1998] 2
VR 636. This argument was not advanced before the High Court at the subsequent appeal, see
the loss of self-control and the retaliation.\textsuperscript{55} As will be seen below, this is not an accurate assessment of the role of the phrase 'sudden provocation'.

In advancing her interpretation of section 281, Tarrant observed that ‘the traditional concept of a triggering incident has not been challenged\textsuperscript{56} in Western Australia. However, the need to identify a triggering incident has been directly considered and affirmed by the Tasmanian Court of Criminal Appeal in \textit{Attorney-General’s Reference No 1 of 1992}.\textsuperscript{57} The respondent killed the deceased in March 1992 and at his trial for murder was convicted of manslaughter on the grounds of provocation. The respondent had been persistently sexually abused by the deceased between 1983 and February 1992 with the last incident of sexual abuse occurring several days before the killing.

On the day of the homicide, the respondent and a friend agreed that they would go the deceased’s house with a view to robbery. On the way to the deceased’s house, the respondent and his friend were picked up by the deceased. In the car the deceased touched the respondent on his thigh. Whilst at the premises, the respondent’s friend struck the deceased with a heavy object and he fell to the floor. The respondent then obtained a rock from outside and then struck the deceased several times on the head with the rock, as well as with a shovel.

There was psychiatric evidence that the respondent suffered ‘sexual abuse accommodation syndrome’. A feature of the syndrome was ‘an inability to do anything to prevent further victimisation by his molester, or to denounce him, and feelings of utter helplessness’.\textsuperscript{58} Expert evidence was given that the respondent’s ‘rage that would have been there for years would have been released at that moment when [the respondent] suddenly had power over the person who had been abusing him’.\textsuperscript{59}

\textsuperscript{55} See n 53.
\textsuperscript{56} S Tarrant, ‘The “Specific Triggering Incident”’, above n 47 at 194.
\textsuperscript{57} (1993) 1 Tas R 349. It is noted that special leave to appeal was refused by the High Court.
\textsuperscript{58} (1993) 1 Tas R 349 at 352 per Crawford J.
\textsuperscript{59} (1993) 1 Tas R 349 at 352 per Crawford J quoting the psychiatrist.
At trial, the trial judge ruled that:

It would be open to the jury to find that because of the respondent’s mental and emotional condition the deceased’s earlier wrongful acts did not deprive him of the power of self-control until his companion struck the deceased and he thereupon acted on a sudden and before there was time for his passion to cool.\(^{56}\)

The trial judge ruled that:

If the accused was not deprived of the power of self-control until a long time after the doing of the wrongful act the defence of provocation was still available provided the accused thereupon acted on the sudden and before there’d been time for his passion to cool.\(^ {57}\)

In effect, His Honour ruled that the respondent was entitled to rely on the cumulative course of abuse as the provocative act and that there was no need to identify a specific triggering incident that was near in time to the loss of self-control and the killing.

In consequence of the trial judge’s ruling, the Attorney-General referred a question of law concerning provocation to the Court of Criminal Appeal. On appeal, the issue was whether the trial judge had erred in his ruling, and, in particular, whether there was:

In addition to a requirement that the offender act upon it on the sudden, a requirement that the loss of the power of self-control by the offender follow suddenly upon the wrongful act or insult relied upon\(^ {58}\)

The Court of Appeal unanimously held that the answer was ‘yes’: the loss of the power of self-control by the offender had to follow suddenly upon the wrongful act or insult.

The specification of ‘sudden provocation’ was not merely a semantic difference between the Code and the common law position. It imports an additional legal requirement into the doctrine of provocation. The requirement of ‘sudden

\(^{56}\) (1993) 1 Tas R 349 at 352 – 353 per Crawford J.

\(^{57}\) (1993) 1 Tas R 349 at 372 per Zeeman J.

\(^{58}\) (1993) 1 Tas R 349 at 350.
provocation' was interpreted to mean that the 'wrongful act or insult ... [must make] an unexpected impact in that it takes the accused by surprise'.\textsuperscript{63} Accordingly, Zeeman J considered:

Where there is a significant interval of time between the provocative conduct and the loss of self-control that loss of self-control is not the result of conduct which has taken the understanding by surprise. It may be the result of provocative conduct but that conduct will not have the quality of being 'sudden'. The use of the word 'sudden' in s 160(1) has the effect of requiring that the loss of the power of self-control occurs immediately or very soon after the unlawful act or conduct.\textsuperscript{64}

Clearly, a specific triggering incident needs to be identified in Tasmania (and presumably other Code jurisdictions) in order to rely on the defence of provocation. It is not possible for provocative conduct that occurred in the past to endow the 'wrongful act or insult' with the necessary quality of suddenness.\textsuperscript{65}

Despite the expansion of the defence of provocation resulting from the recognition of the concept of cumulative provocation, the need to identify a specific triggering incident means that 'the primary model for the defence has not changed'\textsuperscript{66} in Code jurisdictions. A provocative incident must induce an immediate loss of self-control. And as Tarrant observes, the requirement of a specific triggering incident creates 'the model of immediacy [that]... directly contradicts the response patterns of women who are repeatedly beaten'.\textsuperscript{67} Consequently, the requirement for 'sudden provocation' poses a substantial obstacle for battered women who kill in circumstances that do not conform to the traditional masculine response pattern.\textsuperscript{68}

\textsuperscript{63} (1993) 1 Tas R 349 at 383. Note Quigley's comment that this is 'precisely the opposite situation from that faced by a battered woman. She knows all too well what has happened in the past. Moreover, she has the apprehension and uncertainty of not knowing what is coming next, especially in an atmosphere of increasing violence', T Quigley, 'Battered Women and The Defence of Provocation' (1991) 55 Saskatchewan Law Review 223 at 249.

\textsuperscript{64} (1993) 1 Tas R 349 at 383.

\textsuperscript{65} Note also Canadian authority to the same effect, see Daniels (1983) 7 CCC (3d) 542 at 554, 549 per Laycraft JA.

\textsuperscript{66} S Tarrant, 'Something is Pushing them to the Side', above n 31 at 592.

\textsuperscript{67} Ibid at 593.

\textsuperscript{68} See 1.3.2.
New South Wales and the Australian Capital Territory

In contrast to the position at common law and in Code jurisdictions, the law in New South Wales and the Australian Capital Territory has been extended by statute. The effect of the statutory amendments was addressed by the New South Wales Court of Criminal Appeal in Chhay. In that case, the appellant killed her abusive husband and was convicted of murder. The Crown’s case (and one accepted by the jury) was that the accused had killed her husband while he was asleep. On appeal, it was held that if this version of the facts was accepted (that the accused had killed her sleeping husband), this was not a legal impediment to the availability of the defence of provocation. As stated by Gleeson CJ, ‘a loss of self-control can develop even after a lengthy period of abuse, and without the necessity for a specific triggering incident’. There was no legal requirement that the defendant point to any specific event as the basis of provocation, and the defendant may rely on a history of violence to provide the content of the provocative conduct.

5.3.2 THE SUBJECTIVE REQUIREMENT: LOSS OF SELF-CONTROL

The subjective test is whether the accused lost self-control in response to the provocative conduct and killed while under the influence of the provocation. The subjective test is said to operate to ensure that ‘[the killing] was not a revenge killing, but rather a sudden and uncontrolled reaction to perceived injustice’. However, as discussed at 3.4.1.2, the centrality of loss of self-control privileges the reactions of those who fly into a rage and act impulsively and without

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69 Crimes Act 1900 (NSW) s 23; Crimes Act 1900 (ACT) s 13. It is noted that the amendments in New South Wales were introduced in 1982 by Crimes (Homicide) Amendment Act 1982 (NSW) following the New South Wales Taskforce on Domestic Violence, Report of the New South Wales Task Force on Domestic Homicide to Honourable N C Wran QC, MP Premier of New South Wales, Sydney: Government Printers, 1981.


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reflection: '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'.

5.3.2.1 Suddenness

The traditional legal position was that the killing needed to be an immediate and spontaneous response to the provocation offered by the victim. However, this requirement of suddenness has been modified in all Australian jurisdictions. In Code jurisdictions and at common law the time frame encapsulated by the requirement of the ‘sudden and temporary loss of self-control’ has been enlarged and there has been an associated judicial recognition of ‘slow-burn’. These developments appear to significantly broaden the operation of the defence of provocation for battered women who kill their abusive partners. In New South Wales and the Australian Capital Territory, the requirement of suddenness has been removed.

The common law position and Code jurisdictions

As explained above, at common law, the concept of ‘suddenness’ has been broadened. There is now no need for the killing to occur immediately after the provocative conduct and the primary issue is whether the accused had lost control at the time of the killing. As was expressed by Gleeson CJ in Chhay, the common law position is that there is no need for the killing:

[to follow immediately upon the provocative act or conduct of the deceased [and there is] the possibility of a significant interval of time between such act or conduct and the accused's sudden and temporary loss of self-control.]

However, there must still be ‘a sudden and temporary loss of self-control’ by the accused caused by the provocation. In Osland, this requirement was seen to be

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72 Chhay (1994) 72 A Crim R 1 at 11.
73 See Hayward (1833) 6 Car and P 157 at 159; 172 ER 1188 at 1189 per Tindal CJ.
74 See Parker (1963) 111 CLR 610.
75 Chhay (1994) 72 A Crim R 1 at 10 cited with approval in Osland [1998] 2 VR 636 at 649 per the Court of Appeal.
essential to prevent ‘the mercy extended in cases of provocation ... [being] extended to some cases of pre-mediated killing’.\(^7\)

The legislative embodiment of this requirement of sudden retaliation is found in the Code requirement that the accused acted ‘on the sudden and before there has been time for his passion to cool’\(^7\) or that the accused acted ‘before there was time for his passion to cool’.\(^8\) There has been judicial acceptance that the expanded interpretation of the common law requirement of the ‘sudden and temporary loss of self-control’ was equally as applicable to the Code provisions.\(^8\) In Attorney-General’s Reference No 1 of 1992, Cox J commented that:

The doctrine has always contemplated that while the loss of control must be suddenly induced, it need not manifest itself in the immediate performance of the fatal act. So long as that is performed while the offender remains deprived of the power of self-control by the provocative conduct which induced it, the extenuation will be available and the act will, in addition, be said to have been done on the sudden.\(^8\)

In Code jurisdictions, as a matter of law, there may be a time delay between the loss of self-control and the fatal response. However, ‘the longer the delay and the stronger the evidence of deliberation on the part of the defendant, the more likely it will be that the prosecution will negative provocation’.\(^8\)

At common law, the concept of suddenness has been further modified by the recognition that there are two typical responses to provocation: ‘an immediate loss of self-control and a slow burn reaction culminating eventually in a loss of self-control’.\(^8\) In recognition of research and case law that demonstrates that the

\(^7\) Oslan [1998] 2 VR 636 at 645 - 650 per the Court of Appeal.
\(^8\) Oslan [1998] 2 VR 636 at 649 per the Court of Appeal.
\(^7\) Criminal Code (Tas) s 160(2); Criminal Code (NT) s 34(2).
\(^8\) Criminal Code (WA) s 281; Criminal Code (Qld) s 304.
\(^8\) Attorney-General’s Reference No 1 of 1992 (1993) 1 Tas R 349 at 358 per Cox J; at 380 per Zeeman J; Herlihy [1956] Qld St R 18 at 64 per Mack J; Van Den Hoek (1986) 161 CLR 158 at 168 per Mason J.
\(^8\) (1993) 1 Tas R 349 at 358.
\(^8\) Ahtuwalla [1992] 4 All ER 880 at 896 cited with approval in Attorney-General’s Reference No 1 of 1992 (1993) 1 Tas R 349 at 358 per Cox J.
\(^8\) S Yeo, Unrestrained Killings and the Law, above n 30 at 51. Judicial acceptance of ‘slow-burn’ anger has been connected with the reception of evidence of ‘battered woman syndrome’.

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way in which battered women respond to provocation is different from the male response, the courts have endorsed the concept of the ‘slow-burn’ loss of self-control. This was endorsed in respect of the Criminal Code (Tas) by the Tasmanian Court of Criminal Appeal in Attorney-General’s Reference No 1 of 1992.

A critique of suddenness

Despite the expansion of the concept of ‘sudden and temporary loss of self-control’ and the recognition of ‘slow-burn’, the accused still needs to respond ‘suddenly’ to the provocation in the sense that the formation of the intention to kill was spontaneous and was caused by a sudden loss of self-control in the accused in response to the provocative act and that the accused acted before composure was regained. The archetypal standard of the abrupt and explosive reaction to provocative conduct remains unaffected. The loss of self-control must still manifest in an explosive loss of self-control culminating in the fatal act. At the time of the killing, the brooding emotion must erupt (like a volcano). This means that a woman’s loss of self-control must ultimately meet the male standard of suddenness and in view of the circumstances in which some women kill, their actions may not conform to this male model.

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Expert evidence about the different perceptions of women in battering relationships has been admitted to assist the jury understanding of the battered woman’s ‘slow-burn’ response to provocative conduct, see Osland [1998] 2 VR 636; Thornton (No 2) [1996] 2 All ER 1030; Ahluwalia [1992] 4 All ER 889. See Chapter Seven for a consideration of battered women syndrome.


In Ahluwalia [1992] 4 All ER 889 counsel submitted that women who have been subjected to a history of domestic violence may react with ‘a “slow-burn” reaction rather than by an immediate loss of self-control’. Lord Taylor CJ stated at 896 that ‘we accept that the subjective element in the defence of provocation would not as a matter of law be negatived simply because of the delayed reaction in such cases, provided that there was at the time of the killing a “sudden and temporary loss of self-control”’. See Osland [1998] 2 VR 636 at 645 – 649; Attorney-General’s Reference No 1 of 1992 (1993) 1 Tas R 349 at 358 – 359 per Cox J; 380 per Zeeman J; Chhay (1994) 72 A Crim R 1 at 9 – 13 per Gleeson CJ.


Parker (1963) 111 CLR 610. See also Ahluwalia [1992] 4 All ER 889 at 895.

In contrast, the man who kills his partner immediately following the discovery of infidelity fits the conception of loss of self-control most readily endorsed by the law of provocation, that is the ‘sudden eruption of violence’. In cases of sudden discovery of ‘infidelity’ the requirement of sudden retaliation is satisfied. For example, in Hutton, the accused lost self-control upon the discovery of his defacto and another man cuddling and hearing a ‘scornful laugh’. He immediately picked up a rifle and shot them both. There was a close temporal link between the insult, the loss of self-control and the fatal response. This case reveals the sympathy shown to the reactions of those who fly into a rage and act impulsively and without reflection. The abhorrence of premeditation in these cases enables the law to maintain its abhorrence of the ‘revenge’ killing.

Despite the assertion that male offenders typically kill ‘with instantaneous outbursts,’ there is evidence that in some cases where men kill women and successfully rely on the defence of provocation, the element of ‘suddenness’ is absent. There is not any red-hot anger exploding after the sudden discovery of adultery. Sometimes there is just the confirmation of what has already been strongly suspected, or hurt and brooding emotions following rejection. ‘Suddenness’ is lacking in circumstances where men armed themselves in advance, and/or engineer a confrontation with their former (or current) female partner and then kill. The defence of provocation ought to be excluded in cases where the accused deliberately places himself in a situation that is likely to be provocative. However, there is an apparent acceptance that the circumstances of the killing conform to the concept of a provoked killing.

90 Chhay (1994) 72 A Crim R 1:13 per Gleeson CJ.
92 However, the question could be asked why the accused had taken a gun with him.
94 Leader-Elliott asserts that ‘enraged men who engineer a confrontation, lose all self-control and kill their wives, lovers, or rivals after separation, are likely candidates for the ranks of those who are, morally speaking, murderers’, I Leader-Elliott, 'Sex, Race and Provocation: In Defence of Stingel' (1996) 20 Criminal Law Journal 72 at 85. See also J Morgan, 'Provocation Law and Facts: Dead Women Tell no Tales, Tales are told about them' (1997) 21 Melbourne University Law Review 237 at 253.
In *R v Attai*,\(^95\) the applicant learned of his former wife’s new marriage. He armed himself with a long-bladed knife, went to her house and climbed onto the balcony. The applicant tried to encourage his former wife to leave with him, but she declined. The applicant became ‘incensed at the situation’, he slapped her face and dragged her around. An ‘argument of increasing intensity ensued’ and the applicant produced his concealed weapon and fatally stabbed the deceased. Despite the evidence that the deceased had pre-planned the killing (arming himself with knife) and his conduct of illegally entering the deceased’s premises and engineering a confrontation, the jury returned a verdict of not guilty of murder, but guilty of manslaughter. As the Crown submitted ‘the verdict was merciful, there being very little evidence to found provocation; that there was an element of planning’.\(^96\)

It appears that (even with evidence of pre-planning) the male offender can shape his experience to mirror the legally endorsed narrative that a man will suddenly lose self-control following a partner’s unfaithfulness.\(^97\) As Wells observes:

> Provoked anger is understood in law to involve the desire for retaliatory suffering by the victim inflicted by the wronged person. Retaliatory suffering negates a threat to the self-worth of the wronged person. Common causes of male violence are prompted by possessiveness and/or jealousy.

> Judges, juries and textbook writers reflect this in giving latitude to men who find their wives with other men, with pre-planning and lack of suddenness ignored. The mitigation of provocation ultimately reinforces these aspects of male self-esteem which themselves lead to the violence.\(^98\)

The male pattern of domestic homicide does not necessarily correspond with the accepted ‘male model’ of loss of self-control. Yet, our historical and social understanding of the doctrine of provocation informs the acceptance of the appropriateness of the provocation defence in these circumstances. In contrast,

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\(^95\) Unreported, CCA Vic 11 Feb 1993.

\(^96\) Unreported, CCA Vic, 11 Feb 1993 at 6 per Southwell J.


\(^98\) C Wells, 'Battered Woman Syndrome', above n 17 at 272.
there is an absence of any comparable historical or social understanding of female provoked offenders.\textsuperscript{99}

**New South Wales and the Australian Capital Territory**

In New South Wales and the Australian Capital Territory, statutory changes were made to the defence of provocation partly as a response to the inadequacy of the defence in cases where women killed their abusive partners.\textsuperscript{100} The amendments to the provocation defence included the removal of the requirement of suddenness.\textsuperscript{101} Although a loss of self-control remains central to the defence of provocation, there is no requirement that the 'act or omission causing death be done or omitted suddenly'.\textsuperscript{102} The concept of loss of self-control need not manifest in a 'sudden eruption of violence',\textsuperscript{103} and can be understood to develop 'even after a lengthy period of abuse'.\textsuperscript{104} As Gleeson CJ stressed in Chhay, the 'law is concerned with ... whether the killing was done whilst the accused was in an emotional state which the jury are prepared to accept as a loss of self-control'.\textsuperscript{105}

The amended provision has facilitated greater utilisation of the defence of provocation for battered women who kill in 'non-traditional' provocation situations. For example, in *Morabito*\textsuperscript{106} the accused relied at trial on the defence of provocation in circumstances where she had arranged the killing of her violent husband with her current boyfriend. At the time that the plan to kill her husband was conceived, her husband was in gaol. He was involved in a day release program and was due to come home for Christmas release the next day. Despite the appalling history of violence and abuse inflicted by the deceased on his family, there was no provocative conduct of the deceased directed towards the

\textsuperscript{99} See 3.2.1.3.

\textsuperscript{100} See J Tolmie, above n 2 at 63; S Yeo, 'Resolving Gender Bias in Criminal Defences' (1993) 19 Monash University Law Review 104 at 112 – 114; S Yeo, Unrestrained Killings, above n 30 at 53 – 54.

\textsuperscript{101} Crimes Act 1900 (NSW) s 23(2), 3(b); Crimes Act 1900 (ACT) s 13(2), (3).

\textsuperscript{102} (1994) 72 A Crim R 1 at 13 per Gleeson CJ.

\textsuperscript{103} Chhay (1994) 72 A Crim R 1 at 13 per Gleeson CJ.

\textsuperscript{104} Chhay (1994) 72 A Crim R 1 at 13 per Gleeson CJ.

\textsuperscript{105} Chhay (1994) 72 A Crim R 1 at 14 per Gleeson CJ.
accused at any time proximate to the killing: 'there was no immediate trigger from the deceased to cause panic or sudden emotional reaction on the part of [the accused]' 107 In addition, there was no conduct on the part of the accused that amounted to a 'sudden' loss of self-control. However, the defence of provocation was successfully left to the jury, and the accused convicted of manslaughter.

5.3.2.2 Fear/anger

The primary emotion associated with a loss of self-control is anger. However, it is the recognition that fear is also capable of causing a loss of self-control 108 that has expanded the subjective test and has enabled provocation to have a wider applicability to battered women. In all of the 22 provocation cases identified in my research, the provocative conduct relied upon by battered women consists (at least in part) of physical violence, so it provides a degree of recognition of the reality of these women’s lives to speak of the response in terms of fear as well as anger. 109 For example, in Cornick, the view was expressed that ‘your stabbing of the deceased resulted directly from your fear and anger engendered by his selfish and violent conduct’. 110

While Yeo has welcomed the recognition of fear (in addition to anger) as giving rise to loss of self-control as a development enabling greater recognition of the emotions of battered women who kill (calmly and deliberately), 111 I would assert that the primary model of the defence remains unchanged. A person’s action during a loss of self-control induced by fear, despair or panic must still reflect the actions of a person acting in anger (at least at common law and in Code jurisdictions). The need for a ‘sudden and temporary loss of self-control’ at the

107 (1992) 62 A Crim R 82 at 86 per Wood J. This case can be contrasted with Oslan (1998) 197 316 (decided at common law) where the accused was convicted of murder, see 5.3.1.2.
108 See Masciantonio (1995) 183 CLR 58 at 68 per Brennan, Deane, Dawson and Gaudron JJ; Van Den Hoek (1986) 161 CLR 158 at 168 per Mason J. The Australian position is in contrast with the position in the United Kingdom where fear is not a sufficient emotion. In Acott [1997] 1 All ER 706, Lord Steyn said ‘a loss of self-control caused by fear, panic, sheer bad temper or circumstances (eg a slow down of traffic due to snow) would not be enough’, at 712 – 713.
109 See Table 1.1.
110 Unreported, CCA Tas, 28 Jul 1987 at 13 per Cox J citing the trial judge.
111 S Yeo, Unrestrained Killings, above n 30 at 50.
time of the killing remains unaltered and as such the doctrine of provocation still supports the model of explosive anger rather than the pattern of ongoing fear and desperation.\textsuperscript{112} Even in New South Wales and the Australian Capital Territory where the requirement of suddenness has been removed,\textsuperscript{113} loss of self-control (in a practical sense) may still be conceived by the jury in terms of the traditional (male) images of passions suddenly erupting into violence.\textsuperscript{114}

The danger in recognising fear as an emotion capable of founding the defence of provocation is that women (and the courts) may rely on provocation rather than considering the potential application of the defence of self-defence.\textsuperscript{115} Fear is an emotion more closely associated with notions of self-defence than provocation. The circumstances in which women kill their abusive partners suggest that the killings are predominantly motivated by a genuine fear for safety (self-defence) rather than a loss of self-control (provocation). For example, in \textit{Franke},\textsuperscript{116} the accused's conviction for manslaughter on the basis of provocation rests uneasily with the circumstances of the case. The accused killed her husband during a sexual attack with a claw hammer. It is difficult to understand how this would not have given rise to a legitimate claim for self-defence. The tendency automatically to classify women who kill after prolonged domestic abuse as 'provoked killers' has meant that the fact that women were predominately acting out of a motive of self-preservation has been obscured. The courts can claim to be doing something to improve the situation of the battered woman, while in fact ignoring the issues associated with a reconsideration of the defence of self-defence.\textsuperscript{117}

\textsuperscript{112} See 5.3.2.1.
\textsuperscript{113} See 5.3.2.1.
\textsuperscript{114} See for example Gleeson CJ's comments in \textit{Chhay} (1994) 72 A Crim R 1, that "[i]t will probably be the case that, for many people, loss of self-control is a concept that is most easily understood, and distinguished from, a deliberate act of vengeance in the factual context of a sudden eruption of violence" at 13.
\textsuperscript{115} See Chapter Six.
\textsuperscript{116} \textit{Franke}, unreported, SC Tas, 22 Aug 1983.
\textsuperscript{117} See discussion at 5.5 and Chapter Six.
5.3.3 THE OBJECTIVE STANDARD: THE ORDINARY PERSON TEST

It is not sufficient that the accused lose self-control in response to the provocation, there is a further requirement that an ordinary person in the position of the accused could also have lost self-control and acted as the accused did. The objective standard enables an assessment of the moral status of the accused: it operates to enable a determination of whether the accused met the socially accepted standard of manslaughter. The objective standard fulfils an essential evaluative role, as it provides an objective measure of the gravity of the provocation.

5.3.3.1 The ‘ordinary person’ test

In Stingel, the High Court made it clear that the ordinary person test is a two-pronged test. The ordinary person test requires the jury to distinguish those characteristics of the accused that would affect the gravity of the provocation to him or her from those characteristics that would affect his or her power of self-control under the provocation in question. In terms of assessing the gravity of the provocation any relevant characteristics of the accused may be taken into account and 'the content and extent of the provocative conduct must be assessed from the viewpoint of the particular accused'. In contrast, the accused's power of self-control is expected to be that of the ordinary person, and is unaffected by the personal characteristics of the accused, subject to a qualification in relation to

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118 For detailed discussion of the objective test, refer to S Yeo, Unrestrained Killings, above n 30; S Yeo, 'Recent Australian Pronouncements on the Ordinary Person Test in Provocation and Automatism' (1991) 33 Criminal Law Quarterly 280; S Yeo, 'Power of Self-Control in Provocation and Automatism' (1992) 14 Sydney Law Review 304; S Yeo, 'Sex, Ethnicity, Power of Self-Control and Provocation Revisited', above n 93; I Leader-Elliott, 'Sex, Race and Provocation', above n 94.

119 See 5.3.3.1.

120 See 3.4.1.2 and 3.4.2.2.

121 New South Wales Law Reform Commission, Partial Defences to Murder: Provocation and Infanticide, above n 7 at 42. See also I Leader-Elliott, 'Sex, Race and Provocation', above n 94 at 83 – 85. See also 3.4.

122 (1990) 171 CLR 312 at 327. This was affirmed by the majority of the High Court in Mascia (1995) 183 CLR 58 at 66 – 67 in relation to the common law and in Green (1997) 191 CLR 334 at 340 – 341 per Brennan CJ, at 357 per Toohey J, at 404 - 406 per Kirby J in relation to the New South Wales provisions.

123 Stingel (1990) 171 CLR 312 at 326. This was affirmed in Mascia (1995) 183 CLR 58.
age.\textsuperscript{124} So, in assessing the power of self-control to be expected of the ordinary person the only relevant characteristic of the accused was age (in the sense of youth).\textsuperscript{125}

In addition, a further component of the ordinary person test is the nature of the ordinary person’s response after losing self-control.\textsuperscript{126} In Stingel, the High Court considered that the provocative conduct ‘must have been capable of provoking an ordinary person not merely to some retaliation, but to retaliation “to the degree and method of continuance of violence which produces the death”’.\textsuperscript{127} Some doubt has been cast on the status of this requirement by the later High Court decision in Masciantonio. According to the High Court:

Whether an ordinary person could form an intention to kill or do grievous bodily harm is of greater significance than the question whether an ordinary person could adopt the means adopted by the accused to carry out the intention.\textsuperscript{128}

It appears that the response of the accused is still a relevant factor to the operation of the ordinary person test at common law and under Code jurisdictions, albeit not as significant as the formation of the necessary intent.\textsuperscript{129}

In contrast, in New South Wales, section 23(2)(b) of the Crimes Act 1900 creates a lesser standard. It only requires that the provocation must be such as to have ‘induced an ordinary person ... to have so far lost self-control as to have formed the intent to kill, or to inflict grievous bodily harm upon the deceased’. In

\textsuperscript{124} Stingel (1990) 171 CLR 312 at 329 - 332.
\textsuperscript{125} The division between the gravity of the provocation and the powers of self-control was also in New Zealand (Campbell [1997] 1 NZLR 16 and Rongonui, unreported, CA, 13 April 2000) and Canada (Hill [1986] 1 SCR 313). In contrast, the recent House of Lords decision in Smith [2000] 4 All ER 289 held that the jury was entitled to consider the personal characteristics of the accused in respect of both parts of the ordinary person test – in assessing the gravity of the provocation and in deciding the degree of self-control to be expected.
\textsuperscript{126} See S Yeo, Unrestrained Killings, above n 30; S Yeo, ‘Sex, Ethnicity, Power of Self-Control and Provocation Revisited’, above n 93.
\textsuperscript{127} Stingel (1990) 171 CLR 312 at 325 per the Court citing Holmes [1946] AC 588 at 597 per Viscount Simon.
\textsuperscript{128} Masciantonio (1995) 183 CLR 58 at 70.
Green,\textsuperscript{130} the High Court confirmed that the test in New South Wales is not that the ordinary person could have been induced to respond in the same way as the accused, it is that the ordinary person could have been induced to form the intent to kill or inflict grievous bodily harm.\textsuperscript{131} As the focus is not on the nature of the conduct but on the formation of the intent to kill or inflict grievous bodily harm, this lesser standard will be especially beneficial to the accused where the accused's response to the allegedly provocative conduct is particularly brutal.\textsuperscript{132}

5.3.3.1 Critique of the 'ordinary person' test

Despite assertions that the objective test rests on the fundamental principle of equality before the law,\textsuperscript{133} the objective standard in the defence of provocation has been the subject of considerable controversy.\textsuperscript{134} Despite its appearance of gender-neutrality, the ordinary person is really the ordinary man, and, more specifically the ordinary, heterosexual, 'white, middle-classed male'.\textsuperscript{135} One only

\textsuperscript{130} (1996) 191 CLR 334.
\textsuperscript{132} Commentators have observed that in cases of homosexual advance killings (ie a heterosexual male alleging that he killed following a homosexual advance by the victim) there has been 'overkill' in the sense of excessive violence in the manner of the killing, see A Howe, 'More Folk Provoke Their Own Demise' (Homophobic Violence and Sexed Excuses - Rejoining the Provocation Law Debate, Courtesy of the Homosexual Advance Defence) (1997) 19 Sydney Law Review 353 at 355; S Oliver, 'Provocation and Non-violent Homosexual Advances' (1999) The Journal of Criminal Law 586. The focus on the formation of the intent to kill or inflict grievous bodily harm is obviously an advantage in these cases as the jury is not directed to the particularly excessive manner of the killing.
\textsuperscript{133} See Stingel (1990) 171 CLR 312 at 324 per the Court; Green (1997) 191 CLR 334 at 415 –416 per Kirby J.
\textsuperscript{134} See for example, the New South Wales Law Reform Commission who considers that the ordinary person test has been the most controversial element of the defence of provocation, New South Wales Law Reform Commission, Partial Defences to Murder: Provocation and Infanticide, above n 7 at 33.
has to reflect on the history of the defence of provocation and the ordinary person test, to be aware that it is only a particular type of person’s response (male) that was contemplated by the defence.\textsuperscript{136} According to Edwards:

What judges and juries consider constitutes justification for provocation ... whilst being hailed as an objective legal standard making claims of neutrality and universality, is instead a masculinist construct encapsulated within a legal form.\textsuperscript{137}

The accepted narrative of the circumstances in which it is ‘ordinary’ to lose self-control and respond with fatal violence is predicated on the circumstances in which it is ordinary for men to respond in this way. The ordinary person protects masculinity – men whose sexuality and manliness is under threat. In contrast, there is not an equivalent narrative of when it is ‘ordinary’ for women to lose self-control and act violently. Rather, there is an expectation that women will not use force as this is the opposite of conventional femininity.\textsuperscript{138} As Naffine has commented, women are not expected to use force when their femininity is impugned; in fact, the use of force to assert one’s status is seen as the very antithesis of conventional femininity.

The objective standard of the ‘reasonable man’, and its later reincarnation as the ‘ordinary person’ have legitimated men’s anger (and violence) at unfaithfulness or separation.\textsuperscript{139} This is illustrated in \textit{Button}\textsuperscript{140} where the accused shot his de facto wife. Several weeks before the shooting, the accused was told that his de facto wife had had sexual intercourse with his younger brother. The accused confronted her about this allegation. She denied it and continued to deny the allegation until a week before the killing. On the day of the killing, the accused was drinking with his de facto wife. The accused again raised the subject of the sexual intercourse with his younger brother. At this time, she agreed that it was true, but claimed that she had been drunk. There was a physical altercation,

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\textsuperscript{136} See 3.2.1.2 and 3.4.2.2.
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\textsuperscript{137} S Edwards, above n 89 at 366.
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\textsuperscript{138} N Naffine, \textit{Feminism and Criminology}, Sydney: Allen & Unwin, 1997 at 147.
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\textsuperscript{139} S Edwards, above n 89 at 380.
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\textsuperscript{140} Unreported, CCA NSW, 9 Aug 1993.
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during which the accused hit her with plates from the kitchen cupboard. He smashed other plates on the table, and emptied the contents of a drawer on the kitchen floor. The accused then shot her.

The Crown accepted a plea of guilty to manslaughter. The sentencing judge stated that 'other than the act of the deceased in having sexual intercourse with the prisoner's brother and her original denials of having done so, I know nothing of the provocation offered'. However, His Honour accepted that 'the Crown acted properly in accepting the plea to manslaughter upon the basis of provocation'. In view of the provocative conduct relied on by the accused, my contention is that the plea to manslaughter should not have been accepted by the Crown. Although it was undoubtedly hurtful to the accused that his wife had slept with his brother, surely it was not a sufficient reason to partially excuse his act of killing. Fatal violence in these circumstances should not be endorsed as the response of the 'ordinary person'.

The legal narrative of the provocation defence has focussed, in cases such as *Button*, on the outrage of men following the discovery of infidelity. However, in some cases, the relationship is over and the 'intimate relationship' only still exists in the male offender's mind. How can a man's use of violence against his partner following her decision to end the relationship be partially excused? Provocation has been successfully relied upon where the parties have separated, even in cases where the separation is lengthy, on the basis of the accused's inability to accept that the relationship has ended or jealousy following the discovery that his former partner now has a new partner. How does the concept of unfaithfulness have any relevance in the context of a relationship that is over?

It is only possible to argue that the provocation defence potentially applies to anger following unfaithfulness in the context of a relationship that has ended, if

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141 Unreported, CCA NSW, 9 Aug 1993 at 4 per Hunt CJ.
142 Unreported, CCA NSW, 9 Aug 1993 at 4 per Hunt CJ.
the male's 'fantasy' relationship is substituted for the reality. He still conceives his former partner as his possession. As Detmold observes:

In patriarchy ... there is an illusory (private) metaphysics at work giving men the authority to deal with their women without regard to the relational question of whether they really are their woman any longer. If a man loves a woman in his mind, that is, as it were, where the action is. So, in his mind she is still his woman no matter what is going on in the real world.\textsuperscript{144}

The availability of the defence of provocation in these circumstances suggests that, for the purposes of the provocation defence, the legally endorsed position in respect to the status of a relationship is that 'it ain't over, until HE says it is'.\textsuperscript{145} It appears that underlying the laws response to any domestic violence – rape or homicide - is the male centred possessive view of sex.\textsuperscript{146}

In \textit{R v Panozzo},\textsuperscript{147} the applicant killed his wife. At the time of the killing, the applicant and his wife had been separated for more than twelve months. After the separation, there had been contact between the applicant and his wife to enable the applicant to have access to his children. The children were the remaining link between the applicant and his wife. However, the applicant was unable to appreciate that the intimate relationship was over, as he 'was obviously still very emotionally attached to Mrs Panozzo'. In her mind, the relationship had terminated and she 'had become interested in other men and ... developed a very deep attachment to [another] ... man'. The applicant discovered a letter which she had written to this man. He went to another part of the house, obtained a loaded gun, and then returned to the other room and shot his wife in the head, in the presence of their two young children.


\textsuperscript{147} Unreported, CCA NSW, 25 Mar 1993.
The applicant successfully relied on the defence of provocation. It was not, apparently, considered significant for the purposes of the provocation defence that the applicant’s intimate relationship with his wife had ended. The discovery of a letter that she had written to another man ‘fuell[ed] his passion and excited his jealousy.’ How could a love letter written by a former partner ever be sufficient to cause an ordinary person to lose self-control and form the intention to kill or cause grievous bodily harm? Why should the applicant’s inappropriate feelings of jealousy and passion considered to be any less blameworthy than those experienced by Michal Stingel? One answer may be that the relationship between the applicant and the deceased had been one of marriage, rather than young girlfriend and boyfriend. In cases of marriage or relationships akin to marriage, the language of the defence of provocation creates so powerful a narrative that it fosters and sustains the jury’s understanding of the moral outrage of men. Mr Panozzo was the ‘wronged husband’ and the precise details of currency of the relationship pale into insignificance.

In contrast, the traditional narratives of provocation have not recognised women’s lethal actions as morally appropriate for provocation, much less self-defence. As stated above, the legitimacy of women’s actions in anger have not been culturally recognised. While violence in response to provocation is considered a natural response for men, an angry and violent response by women contradicts culturally endorsed notions of appropriate femininity. There is an expectation that women will not use violence, and so it has been difficult to perceive that fatal violence was the reaction of an ‘ordinary’ woman. Even the

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148 It is significant though that the masculinist paradigm is so powerful that counsel attempted to argue that provocation was applicable in a case such as Stingel (1990) 171 CLR 312. In Stingel, the applicant was unable to accept the termination of his relationship with his girlfriend. He was obsessed with the girl and harassed her to the extent that she obtained a restraining order. Stingel discovered his former girlfriend and another man in a car, allegedly engaged in sexual activities. The man told him to ‘piss off you cunt’. Stingel then obtained a knife and stabbed the man.

149 See M Detmold, above n 144 at 18 – 19. See also J Morgan, above n 94 at 257.


151 See S Edwards, above n 89 at 397. This brings to mind the narrative power of the language the court used in Moffa (1977) 138 CLR 601. For further detail, see Morgan’s insightful analysis of the case, J Morgan, above n 94.

152 See also Attai, unreported, CCA Vic, 11 Feb 1993; Do, unreported, SC SA, 20 Dec 1988.
recognition of infidelity as the basis for female defendant’s to rely on
provocation has been a relatively recent concession to ‘female frailty’.154
However, in view of the factual circumstances in which women kill,155 it is a
rather hollow concession of equality. The operation of the ordinary person test in
regard to women who kill their violent partners has meant that:

The reasonable man (woman) test is not judged on the same footing as it is for men, with the
result that women who kill are not regarded as defending their honour, being motivated by an
affront to their pride, justifiably morally outraged, or even less defending themselves.156

If a female defendant is to successfully rely on the defence of provocation, she
has to endure more severe provocation than that expected of male defendants
before her decision to respond with lethal force is understood as an ordinary
response.157

In Osland, the appellant appealed to the High Court on a number of grounds,
including the trial judge’s summing up to the jury on the issue of provocation.159
The appeal was rejected on this ground (and all the other grounds). Although the
case was presented in the media as a case centred on the application of the
defences of provocation and self-defence to a battered woman, the High Court’s
decision centred on the issue of whether the accused’s conviction for murder was

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153 See 4.2. See also N Naffine, Feminism and Criminology, above n 138 at 145 – 147.
154 In Holmes [1946] 2 All ER 124, it was accepted that wives who killed husbands or their
husband’s lovers could rely on the defence of provocation. It should be noted that this was not a
case where a wife killed her husband in these circumstances. Rather, it conformed to the standard
case of the jealous male killing his wife following the discovery of adultery.
155 See 1.3.
156 S Edwards, above n 89 at 398.
157 A Howe, ‘Provoking Comment’, above n 7 at 231 – 232. Howe observes that ‘in the case of
the male killer, the provocation is readily apparent to masculinist judges; whereas in the case of
the woman who kills a man with a long and continuing history of violence, judges struggle to
perceive provocation, let alone the necessity of self-defence’, at 234.
159 The grounds of appeal in relation to provocation were that the trial judge erred in his summing
up to the jury by: (a) referring to what an ordinary person in the accused’s situation “would” have
done, instead of what such a person “might” or “could” have done; (b) directing the jury at
several points that provocation, to be made out, required a “specific triggering incident”, and (c)
failing to make clear the connection between the evidence of “battered woman syndrome”,
admired at trial, and the law of provocation. See further at 5.3.1.2.
160 Macdonald & Kissane ‘A murder case that tests the law on battered woman who kill: Victim
of abuse may go free’, The Age, Thurs 23 April 1998, 8.
inconsistent with the jury’s failure to reach a verdict in respect of her son.\textsuperscript{161} However, there was consideration by some members of the Court of the application of the defence of provocation. In Kirby J’s judgment, although it was accepted that the ‘past conduct of the deceased towards ... [the appellant and her family] was deplorable’,\textsuperscript{162} his Honour delivered a strongly worded judgment concerning the need to discourage violent self-help. His Honour, in rejecting the appeal, built upon the theme of the ‘civilised society’ (evidenced initially in his judgment in \textit{Green}).\textsuperscript{163}

No civilised society removes its protection to human life simply because of the existence of a history of long-term physical or psychological abuse. If it were so, it would expose to unsanctioned homicide a large number of persons who, in the nature of things, would not be able to give their version of the facts. The law expects a greater measure of self-control in unwanted situations where human life is at stake. It reserves cases of provocation and self-defence to truly exceptional circumstances. While these circumstances may be affected by contemporary conditions and attitudes, there is no legal carte blanche, including for people in abusive relationships, to engage in premeditated homicide. Nor in any view should there be.\textsuperscript{164}

His Honour relied on the comments of Gleeson CJ in \textit{Chhay}, that ‘the law of provocation is still only a limited concession to a certain type of human frailty’.\textsuperscript{165} However, as Coss writes ‘how curious it is that there should be a caution against encouraging women to resort to self-help through violence, when the law has effectively nourished male violence for centuries’.\textsuperscript{166}

\textsuperscript{161} Osland’s son was subsequently acquitted at his re-trial. The High Court by a majority of 3 to 2 held that there was no inconsistency (McHugh, Kirby and Callinan, Gaudron and Gummow JJ dissenting). See discussion in G Hubble, ‘Osland v The Queen’ (1999) 23 \textit{Criminal Law Journal} 109.

\textsuperscript{162} (1998) 197 CLR 316 at 378.

\textsuperscript{163} See \textit{Green} (1997) 191 CLR 334 at 412.

\textsuperscript{164} (1998) 197 CLR 316 at 374 - 375. Jerrard comments that to assume that our society is civilised ‘seems a very large assumption to make in a society in which it has been increasingly impossible to deny that the members of one sex experience a considerable and unacceptable amount of criminal violence, mostly from members of the other sex’, J Jerrard, ‘Conceptualising Domestic Violence in the Criminal Law’ (1995) 14 \textit{Social Alternatives} 23 at 25.

\textsuperscript{165} (1998) 197 CLR 316 at 379 citing \textit{Chhay} (1994) 72 A Crim R 1 at 13. See Wells who comments that in \textit{Osland}, ‘there was plenty in the case that would enable a jury to read into her actions evidence of premeditation and calculations. But at the same time the story that emerged was of a woman who was unable to articulate her predicament of living with an abusive husband’, C Wells, ‘Provocation: The Case for Abolition’, above n 150 at 97.

A concern to minimise violence in society is commendable. In a modern society, such as the society that exists in twenty first century Australia, it is important that the courts do not promote violence as a means of resolving disputes. There is currency to the view that courts must not condone the inappropriate use of violence by individuals in the form of vigilantism or other means of individual retribution. However, my challenge to those who rely on the mantra of ‘violent self-help’ to silence the voices of those who argue for an expansion of the current criminal defence to account for the experiences of women is to ask: does the current operation of the defence of provocation (or the defence of self-defence) truly reflect any sensible assessment of the moral culpability of the respective offenders (male and female)?

The assertion that the defence of provocation operates only in ‘truly exceptional circumstances’ raises the question of the appropriateness of the circumstances that currently fall within this classification. In view of the High Court’s recent handling of cases involving provocation, it is abundantly clear that in providing a concession to a ‘certain type of human frailty’, the law has in mind the frailty of men. In their consideration of the operation of the defence of provocation in the context of a ‘non-violent homosexual advance’, the majority of the High Court in Green was willing to endorse a very wide view of provocation in the context of men’s anger in response to threatened masculinity.\(^\text{167}\) However, for the battered woman who participated in the killing of her violent partner, the High Court was not as eager to expand the boundaries of the defence to provide an allowance for women’s fear.\(^\text{168}\)

Aside from the compelling feminist critique of the objective standard, the ordinary person test and its duality (gravity and loss of self-control) have been attacked from other fronts. It has been argued that it fails to take account of


\(^{168}\) B Hocking, above n 167 at 61.
ethnicity, and that it reflects a particular view of sexuality (heterosexuality). In addition, the assessment of the behaviour of the accused according to the standard of a hypothetical ordinary person has been subjected to the more general attack that it fails to accord with the reality of human behaviour. It is asserted that the test as set out in Stingel ‘runs counter to human reality’ as it is ‘inconsistent with the opinion of behavioural scientists that the accused’s personality must be taken as a whole and cannot be dissected.

5.4 ABOLITION OF PROVOCATION

‘The problem of provocation is its masculinism’. Is there a solution to this problem short of the abolition of the defence? Can the defence of provocation break from its masculinist past and step forward into the new century truly transformed? In view of the entrenched and fundamentally sexed nature of the doctrine, the answer to both these questions ultimately must be no. The

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170 See A Howe, ‘Green v The Queen’, above n 167; A Howe, ‘Reforming Provocation’, above n 17; A Howe, ‘More Folk Provoke Their Own Demise’, above n 132; P Johnston, ‘More than Ordinary Men Gone Wrong: Can the Law Know the Gay Subject?’ (1996) 20 Melbourne University Law Review 1152 at 1174. Howe observes that ‘for all the law’s grandstanding efforts to endow itself with a genderless “truly hypothetical ordinary person”, the ordinary person emerges as an ordinary man, in this case, an ordinary homophobic man who would repel a homosexual advance with blows – and possibly with lethal violence, if he could produce a “sexual abuse factor” rendering him susceptible to sexual advances’, A Howe, ‘Green v The Queen’ at 487.


172 S Yeo, Unrestrained Killings and the Law, ibid at 60. The division within the ordinary person test in relation to factors affecting the gravity of the provocation compared with those factors relevant to loss of self-control was rejected in England: see Smith (2000) 4 All ER 289. See also P Thornton, ‘Personal Characteristics and the Provocation Defence’ (2000) 2 All England Legal Opinion 2.

173 S Edwards, above n 89 at 393. Although, it is generally accepted that the defence of provocation is gender-biased, there are a few lone voices that have asserted that empirical evidence does not bear out this claim, see 5.2.

174 Howe comments that the defence of provocation operates as a ‘deeply sexed excuse’, see A Howe, ‘More Folk Provoke Their Own Demise’, above n 132 at 337.
preceding discussion has demonstrated the essentially sexed operation of the doctrine of provocation. As Horder reminds us:

[U]nder the cover of an alleged compassion for human infirmity, [the provocation defence] simply reinforces the conditions in which men are perceived and perceive themselves as natural aggressors, and in particular women's natural aggressors. 175

It condones domestic violence as it operates as an excuse for men to kill women who challenge their conception of self-worth. 176 It is not an overstatement to suggest, as Howe has suggested, in relation to cases where men kill their partners and then claim provocation that 'nowhere, except perhaps in rape cases, is the gendered – or, more accurately, "sexed"- nature of laws more apparent'. 177 My analysis confirms the currency of this view.

Legal stories impact on the availability of a defence, as well as the development of social norms. 178 As Reilly comment '[n]orms do not exist in isolation from legal rules. Legal rules not only reflect norms, but have an influence in developing what is the norm'. 179 The doctrine of provocation has constructed a narrative of the circumstances in which the law will provide a 'concession to human frailty', in particular, providing a concession to male anger. It allows the story to be told of men who kill to assert control: men who have been rejected, rebuffed, or told to 'hit the road'; men whose violence ultimately culminates in death, and this story gains social and legal legitimacy. It is correct to assert, as

175 J Horder, *Provocation and Responsibility*, Oxford: Clarendon Press, 1992 at 192. Horder adds that 'the existence of such mitigation simply reinforces in the law that which public institutions ought in fact to be seeking to eradicate, namely, the acceptance that there is something natural, inevitable, and hence in some (legal) sense-to-be-recognised forgivable about men's violence against women, and their violence in general', at 194.
176 Ibid at 192.
177 A Howe, 'More Folk Provoke Their Own Demise', above n 132 at 356. For a discussion of the similarities in the masculinist operation of the defence of provocation and the law of rape, see E McDonald, 'Provocation, Sexuality and the Actions of "Thoroughly Decent Men"', above n 22.
Reilly does, that 'if a legal rule espouses a norm that the ordinary man can lose self-control when his wife is unfaithful, men can weave this apparent reality into narratives of excuse'.\textsuperscript{180} The defence of provocation operates to confirm and to entrench the legitimacy of men's anger and use of violence in circumstances of jealousy and/or separation.

A man's conception of self-worth is intrinsically linked with his conception of his sexuality. The law of provocation recognises that anger and loss of self-control sufficient to induce an ordinary person to form the intent to kill or cause grievous bodily harm may automatically flow from a challenge to the sexual integrity of a man.\textsuperscript{181} In Moffa, the implied taunt of the appellant's sexual incapacity combined with her rejection of him were sufficient to mandate the availability of the defence of provocation. The recent High Court decision in Green\textsuperscript{182} reinforces the high value placed by the law of provocation on male sexual integrity and is a neat extension of the kind of conduct the law has been willing to accept as provocative.\textsuperscript{183} My view (as with Howe's) is that the High Court's treatment of the 'homosexual advance defence' (HAD) builds a powerful cumulative case in support of the abolition of the defence of provocation - a case that is ultimately unanswerable.\textsuperscript{184} The decision in Green throws into sharp relief the inability of the provocation defence to distinguish a 'good' reason to lose self-control from a 'bad' reason.\textsuperscript{185} The struggles that have accompanied the attempts by those who advocate for battered women to have women's claims of provocation accepted are contrasted to the 'common-sense' understanding that a non-violent homosexual advance is offensive to the ordinary person.\textsuperscript{186} As Wells

180 A Reilly, 'Loss of Self-Control in Provocation', above n 97 at 335.
184 See Howe's powerful and invaluable contributions to this debate, A Howe, 'Provoking Comment', above n 7; A Howe, 'More Folk Provoke Their Own Demise', above n 132; A Howe, 'Green v The Queen', above n 167; A Howe, 'Reforming Provocation', above n 17. See also R Bradfield, 'Provocation and Non-Violent Homosexual Advances: Lessons from Australia' (2001) 65 The Journal of Criminal Law '76; P Johnston, above n 170.
185 See 3.4.2.2.
comments 'the development of BWS, and its deployment on behalf of battered women is cruelly mirrored in the ready reception of HPD [homosexual panic defence] and HAD'.\textsuperscript{187} The contrast between the claims of battered women and the reception of the HAD highlights that provocation is not equipped to distinguish between homophobia and excusable violence.\textsuperscript{188}

In addition, the provocation defence endorses patriarchal views of relationships between men and women as a sufficient reason to lose self-control and kill.\textsuperscript{189} The acceptance of men's anger and violence in response to rejection, jealousy and separation endorses a view that men 'own' their wives and legitimately can assert authority over them - even by the use of physical coercion.\textsuperscript{190} However, the New South Wales Law Reform Commission has rejected the argument that the defence of provocation condones domestic violence. It asserts that there is a need to retain the defence of provocation as:

The law considers that certain provoked killings, committed as a result of loss of self-control, do not fall within the worst category of unlawful homicide, and should not be classified as murder... There may be a risk that a particular accused will seek to rely on the defence of provocation to excuse an act of violence which was in fact premeditated and was committed in the context of a history of violence and domestic abuse. However, that hardly justifies abolishing the defence. To do so would exclude other, deserving cases from the reduction of murder to manslaughter by way of the defence of provocation.\textsuperscript{191}

The Commission recommended the retention of the defence of provocation as it 'would be to throw the baby out with the bath water'\textsuperscript{192} to accede to the demands of those who suggest that provocation operates as an excuse for men to kill. It considered the risk of 'spurious' claims of provocation succeeding was reduced by the abolition of the unsworn statement.\textsuperscript{193}

\textsuperscript{187} C Wells, 'Provocation: The Case for Abolition', above n 150 at 95.
\textsuperscript{188} Ibid. See also 3.4.2.2.
\textsuperscript{189} See 5.3.3.2.
\textsuperscript{190} See discussion in N Naffine, Feminism and Criminology, above n 138 at 146.
\textsuperscript{191} New South Wales Law Reform Commission, Partial Defences to Murder: Provocation and Infanticide, above n 7 at 29 - 31.
\textsuperscript{192} Ibid at 29 - 30.
\textsuperscript{193} Ibid.
The Commission's approach has missed the central thrust of those who have argued for the abolition of the defence of provocation on gendered grounds.\textsuperscript{194} The primary concern of the abolitionists is not that some men kill women in circumstances of premeditation and then successfully rely on provocation. The whole point of the feminist critique of the doctrine of provocation is that the circumstances in which men predominately use violence against women or other (homosexual) men and then seek to rely on the defence of provocation are 'spurious'. The risk of the 'undeserving' accused successfully relying on the defence of provocation is not merely a random perverse case or a plausible lying accused; rather the undeserving case informs our central understanding of the defence of provocation. Adultery as provocation is the paradigm case:

We have all read the French novel where the husband comes home and finds the wife in bed with the lover, and that is often cited as a classic example of provocation'.\textsuperscript{195}

The images of the 'French novel' and the 'lover' convey the idea that a killing in these circumstances is a case of romantic passion gone astray. It connotes the deserving man who killed for love.\textsuperscript{196}

The Commission's view was that 'loss of self-control' was central to the defence and the measure of the appropriateness of that loss of self-control was an 'application of community standards'.\textsuperscript{197} It considered that 'where a person's mental state is significantly impaired by reason of a loss of self-control, it is appropriate that that person not be treated as a "murderer"'.\textsuperscript{198} This conception of the doctrine of provocation aligns the defence more closely with the approach of the American Model Penal Code that operates in cases of 'extreme emotional

\textsuperscript{194} See A Howe, 'Provoking Comment', above n 7; A Howe, 'More Folk Provoke Their Own Demise', above n 132; A Howe, 'Green v The Queen', above n 167; A Howe, 'Reforming Provocation', above n 17; J Horder, 'Autonomy, Provocation and Duress' [1992] Criminal Law Review 706; G Coss, above n 166; J Morgan, above n 94.

\textsuperscript{195} In Bush, (1993) 69 A Crim R 416, Drummond J referring to the trial judge's direction to the jury, at 427.

\textsuperscript{196} See I Leader-Elliott, 'Passion and Insurrection', above n 9 at 162.

\textsuperscript{197} See New South Wales Law Reform Commission, Partial Defences to Murder: Provocation and Infanticide, above n 7 at 49 – 52.

\textsuperscript{198} Ibid at 30.
disturbance for which there is reasonable explanation or excuse’. The lynchpin of the defence now clearly is the accused’s loss of self-control. The focus is on the emotion and its intensity as it is assumed that ‘emotion obscures reason’.

In making loss of self-control the central aspect of the defence of provocation, the New South Wales Law Reform Commission has endorsed the ‘capacity view’ of defences and an essentially mechanistic conception of emotion. As I explained at 3.4.1.2, the central concern of the ‘capacity view’ in relation to the accused’s diminution of culpability is the impact of the loss of self-control on the accused’s mental state. The accused’s claim to a partial defence arises because his or her act is viewed as less than fully volitional as a result of the loss of self-control following provocation. Emotion, viewed in this light, is seen as a thing that sweeps over a person and takes charge with the consequence that he or she is not able to control their actions. My contention is that this approach to provocation (and to emotions for the purposes of the criminal law) is flawed.

The concern of the defence of provocation is to assess whether the accused has reached the standard of a manslaughterer rather than a murderer. In addressing this issue, as I have argued at 3.4.2, a better approach is to rely upon the ‘reasons view’ and to look at the accused’s reason for losing self-control in determining culpability. According to the ‘reasons view’, it is possible to evaluate the appropriateness or inappropriateness of a person’s reason for actions, including the emotions that motivated their conduct. It is not then enough for the

200 V Nourse, ibid at 1390. See 3.4.1.2.
201 See 3.4.1.2.
202 See discussion at 3.4.1 and 3.4.2.
203 Note the Model Criminal Code Officers Committee’s concern that the modern approach to provocation ‘in failing to assess the validity of the reasons for the defendant’s violence, … overrules much that is relevant to the question of the defendant’s culpability. Thus, while provocation in its modern setting is designed to afford a middle ground to better reflect criminal culpability it falls significantly short of that goal by reason of its limited focus which inescapably gears the partial defence towards male patterns of aggression and loss of self-control (its origin) at the expense of the sanctity of human life’, Model Criminal Code Officers Committee of the Standing Committee of the Attorneys-General, Offences Against the Person Chapter 5, Discussion Paper, 1998 at 103 – 105.
provocation defence that the accused has lost self-control; the crucial requirement is that self-control must have been lost for a ‘good’ reason. This is the role of the objective test – to enable community assessment of the accused’s reason for action and to deny the partial defence in cases where the accused has acted for inappropriate reasons.

In this thesis, my contention is that the continued existence of the defence of provocation is dependent on its ability to distinguish between ‘good’ and ‘bad’ reasons for loss of self-control.\(^{24}\) In assessing the ability of the defence to fulfil this role, my view is that the assessment of the accused’s reason for action as a solution for the defence of provocation will ultimately fail to remedy the gendered nature of the defence. In other words, the flaws in the defence of provocation cannot be remedied even if the focus is on the reason for the loss of self-control as a means to impose community standards and to determine the appropriateness of the accused’s reason for actions. The masculinist nature of the defence is just too embedded.\(^{25}\) The fundamental premises of the defence are modelled on men’s emotions and the response pattern of angry men. It is to be recalled that the origins of the defence of provocation rest upon the recognition that ‘jealousy is the rage of a man, and adultery is the highest invasion of property ... a man cannot receive a higher provocation’.\(^{26}\) Although impartiality, neutrality and objectivity are foundational principles of law, I endorse the view of Allen that the gendered nature of the defence of provocation is so embedded that the ‘law cannot even allow itself to ‘think’ or conceive of gender-neutral provocation – such provocation is simply “unthinkable”’.\(^{27}\)

As long ago as 1964, the acceptability of homicide as a response to the breakdown of a relationship and associated insults or infidelity was queried,\(^{28}\) but still the view that adultery is grave provocation such that an ordinary person could form the intention to kill or to cause grievous bodily harm prevails. In

\(^{24}\) See 3.4.2.2.
\(^{25}\) See 3.4.2.2.
\(^{26}\) *Mawrige* (1707) 84 ER 1107 at 1115 per Holt CJ. See 3.3.1.2.
\(^{27}\) H Allen, above n 135 at 429.
\(^{28}\) In Tsigos [1964] NSWR 1607 at 1634 per Moffit J.

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Khan, the availability of the defence of provocation in these circumstances was accepted as just something men do because they are men (as if that were sufficient):

For many men adultery committed with his wife is an intolerable insult to his manhood and an act of gross betrayal. Violent reaction to adultery is no new phenomenon. It has existed as long as men have been men and doubtless it will continue for as long as men are men.  

Such acceptance of the inevitability of violence as ‘acceptable male behaviour’ is also evidenced in the remarks of those commentators who consider that ‘men who kill because they are unable or unwilling to distinguish between the reality and the ideal have some claim to compassion’.

The strongest argument for the abolition of the defence of provocation is the ‘question of gender-bias’. However, in addition to the issue of the gendered operation of the provocation defence, the Model Code Officer’s Committee (MCCOC) based its recommendation that the defence of provocation be abolished upon several additional grounds. These were that: (a) an intention to kill is murder; (b) the removal of inflexible sentencing regimes; (c) the rejection of reduced culpability of a ‘hot-blooded killer’; (d) the abolition of excessive

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209 (1996) 86 A Crim R 552 at 558 per Allen J.
210 A Howe, ‘Reforming Provocation’, above n 17 at 133.
211 For example note the view of Bungay who writes that ‘if radical feminists had their way, sexual provocation of men by women would be struck from the law as a defence for murder. Juries, however, tend to be more realistic and more understanding. They appreciate that for many men personal identity, and self-worth are inextricably bound up with concepts of masculinity and sexual prowess. They realise that to be branded a failure as a lover, to be unfavourably compared with another man, either in terms of quality or quantity, is the ultimate insult to the male ego, the ultimate provocation’, E McDonald, ‘Provocation, Sexuality and the Actions of “Thoroughly Decent Men”,’ above n 22 at 128 citing M Bungay & B Edwards, Bungay on Murder, Christchurch: Whitcoulls, 1983 at 29. See also Oliver who accepts that if violence in response to conduct is an example of the common frailty of men, then the defence of provocation should be allowed in the context of ‘trivial non-violent homosexual advances’, see S Oliver, Provocation and Non-violent Homosexual Advances’ (1999) 63 The Journal of Criminal Law 586. For a response, see R Bradfield, ‘Provocation and Non-Violent Homosexual Advances: Lessons from Australia’ (2001) 65 The Journal of Criminal Law 76.
212 A Howe, ‘Reforming Provocation’, above n 17 at 130. The provocation defence ‘operates as a licence for men to kill women and, more recently, as a licence for men to kill men who they allege made a sexual advance to them’, at 131.
self-defence; (e) the potential for abuse of the defence; and (f) the fact that the defence of provocation is an anomaly.\(^{213}\)

The defence of provocation evolved to mitigate against the harshness of a rigid sentencing regime at a time when the penalty for murder was death.\(^{214}\) The death penalty was subsequently replaced by a mandatory life sentence following a conviction for murder. Now, in most jurisdictions, the mandatory life sentence for murder has been removed.\(^{215}\) In those jurisdictions where a mandatory life sentence is still imposed for murder, the removal of the defence of provocation would have unduly harsh implications for women who kill their partners after a prolonged period of domestic violence. In those jurisdictions, the mandatory life penalty for murder must be removed.\(^{216}\)

I would suggest that for many people (men and women) adultery committed by a partner is extremely upsetting and hurtful. It undoubtedly makes a person feel inadequate, it lowers self-esteem, it may cause feelings of strong emotions such as sadness, grief, hurt, anger or bitterness. Separation (if unwanted) causes similar feelings. Rejection is a traumatic experience. While these emotions can be constructed to incite sympathy for the aggrieved person, our sympathy must not extend to an acceptance that violence is the inevitable outcome. Most people do not respond violently. Most people do not use violence against their partner. I

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\(^{214}\) See discussion of history of provocation at 3.2.1.

\(^{215}\) See 8.2.3.

\(^{216}\) See 8.4.1.
would argue that a person (male or female) who responds with fatal violence to the discovery of adultery or who is rejected or cast aside (whether for another or not) does not have a claim for compassion by way of a legal defence.

5.5  BATTERED WOMEN AND THE CONSEQUENCES OF RELIANCE ON THE PROVOCATION DEFENCE

Some commentators concerned to improve the legal position of women who kill their abusive partners have argued for the retention of the defence of provocation. The basis of the argument for the retention of the provocation defence stems from the difficulty women have encountered successfully relying on the defence of self-defence. For example, Kirkwood argues that 'while provocation is gender biased it is proving more successful than self-defence'. It is certainly true that, in contrast to the defence of self-defence, there has been a judicial willingness to expand the concept of provocation to give some recognition to the reality of the lives of battered women. However, my view is that provocation has been a convenient tool, but it is not the answer.

It needs to be remembered that the defence of provocation has operated to provide a partial defence for men who lose control and kill their female partners following separation, infidelity or rejection. It is ironic that a defence that has operated to endorse violence in response to separation and/or women choosing a new partner as the response of the 'ordinary person' should be considered the most appropriate defence to provide justice for victims of domestic violence.

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218 See Chapter Six.

219 D Kirkwood, above n 217 at 14.

220 Wells makes a similar point that there is 'something profoundly paradoxical about women attempting to convert provocation to their own defence', C Wells, 'Battered Woman Syndrome', above n 17 at 272.
Those who argue that provocation serves as a useful defence for women need to reflect upon its origins and its potential use by men as a ‘licence to kill’ women, as well as a licence to kill homosexuals.\footnote{See 5.3.3.2 and 5.4.} There is the genuine concern that unless the ‘fundamental masculinity’ of the provocation defence can be addressed, the expansion of the defence to address the needs of battered women may allow an expanded operation for men who kill their female partners.\footnote{S Bandali, ‘Provocation - a Cautionary Note’ (1995) 22 Journal of Law and Society 398 at 399.} In these circumstances, there should be a concern in relation to the acceptability of the defence of provocation in the context of spousal homicide – not its expansion.\footnote{Ibid at 405.}

The expansion of the provocation defence has provided women with a partial defence, in circumstances where previously no defence may have been available. Although this would appear at first glance a positive step, the concern is at what cost? The most substantial cost of the focus on provocation has been the diversion of attention from a proper reconsideration of the defence of self-defence. The tendency automatically to classify women who kill after prolonged domestic abuse as provoked killers (or as lacking the requisite intent for murder)\footnote{See 4.4.2.} has meant that the fact that these women predominantly are acting in self-preservation is obscured. In relying on the defence of provocation, a killing in self-preservation is equated with a killing committed in anger resulting from jealousy and betrayal.\footnote{Tolmie observes that the courts have readily translated responses to domestic abuse into the defence of provocation, as provocation ‘easily accommodated the types of uncontrolled emotions induced by the kinds of circumstances men might experience as intolerable in their domestic relationships’, J Tolmie, above n 2 at 66.}

The judicial flexibility demonstrated in the development of the doctrine of provocation has not been mirrored in the development of self-defence in its application to battered women.\footnote{See Chapter Six.} The courts have been able to demonstrate mercy for battered women by remodelling the common law defence of
provocation and by imposing relatively lenient sentences on women convicted of manslaughter.\textsuperscript{227} However, while the sentences may be considered lenient for a provoked killer, they are not lenient for people who are defending their lives. The courts can claim to be doing something to improve the situation of battered women who kill, while in fact ignoring the issues associated with a reconsideration of self-defence and leaving underlying masculinist conceptions of acceptable behaviour untouched.

In constructing women's acts of self-preservation within the framework of the provocation defence, there has not been recognition of the rationality of the women's violent response. In order to conform to the stereotype of the 'out of control' killer, there has been a focus on the woman's psychological state as an explanation for the killing.\textsuperscript{228} An example is Spencer, where the accused's manslaughter conviction for killing her abusive husband was accepted by the prosecution on the basis of the provocation offered by her husband – taunting and physical violence that extended over a long period of time. Instead of centring on the seriousness of her husband's violence, the focus of judicial inquiry was placed on the accused's emotional fragility and vulnerable personality as providing explanations for her extreme stress reaction. The judge noted that this 'was not the first time the prisoner had snapped', and recounts an earlier episode where she 'became so overcome with stress that she started to shout and became entirely irrational'.\textsuperscript{229} His Honour considered that the evidence of the 'fragile nature of the prisoner's mental state' was relevant as it raised the possibility of diminished responsibility, 'whether or nor the defence ... existed in a legal sense'.\textsuperscript{230} The frequent references to her (abnormal) mental state means that her claim to 'rational' provocation appears tenuous.\textsuperscript{231}

\textsuperscript{227} See Chapter Eight.
\textsuperscript{228} See also 8.3.3.1 and 8.3.4.2.
\textsuperscript{229} Unreported, SC NSW, 18 Dec 1992 at 10 per Mathews J.
\textsuperscript{230} Unreported, SC NSW, 18 Dec 1992 at 12 per Mathews J.
\textsuperscript{231} See also Chhay (1994) 72 A Crim R 1 at 14 per Gleeson CJ. His Honour is discussing jury understanding of loss of self-control in cases of domestic abuse, and comments that in these cases 'psychiatric evidence may assist juries to develop their understanding beyond the commonplace and the familiar', at 14.
The psychologisation of provocation has meant that the staggering problem of domestic violence has not had to be faced. In focusing on the accused's mental deficiencies, her violent situation is not clearly visible. Her partner's violence is only seen through her (abnormal) mental state and so its potency is diminished and obscured. In classifying the killing as a provoked killing, the courts have trivialised the deceased's violence and explained the killing in terms of the pathology of the individual accused. The killings were the result of a loss of self-control, rather than an all-encompassing and legitimate fear that must be the terror of living in a violent relationship. In focusing on the individual woman's psychological deficiencies, society is comfortably absolved of responsibility as the systemic nature of domestic violence and the serious threat posed by domestic violence has not been recognised by the courts.

5.6 CONCLUSION

This chapter has demonstrated the inherent gender-bias underpinning the defence of provocation. The critique of provocation began by considering the circumstances in which men and women rely on the defence in the domestic context. My research shows that there is a fundamental and qualitative difference in the circumstances in which men and women rely on provocation. It confirms the finding of previous Australian and international research that shows that provocation for men is associated with issues of jealousy, separation and infidelity. In contrast, women who utilise the provocation defence are typically relying on a history of domestic violence as providing the content of the provocative act.

There is no doubt that the changes to the laws of provocation have made the defence more receptive to the claims of battered women who kill. My research found that there were 22 women who successfully relied on provocation, and

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233 See J Tolmie, above n 2 at 66 – 67. Tolmie asserts that the courts by classifying the killings as provocation rather than self-defence have avoided an examination of the 'deep societal structures
only one case where a women unsuccessfully relied on provocation and was convicted of murder. In view of the fact that women are typically not responding to an isolated provocative act, but an ongoing history of violence, the acceptance of cumulative provocation has expanded the operation of the provocation defence for battered women who kill. However, the expanded operation of the defence is limited in some jurisdictions by the need to isolate a specific trigger incident. The more flexible approach to the concept of ‘suddenness’ and the recognition of ‘slow burn’ loss of self-control has facilitated reliance on the defence for battered women. Yet, the requirement of suddenness and the model of loss of self-control encapsulated in the provocation defence (the sudden explosion) may limit the application of the defence to women who kill in circumstances where ‘suddenness’ is absent. In contrast, in New South Wales and the Australian Capital Territory, the reforms have been more far-reaching and have removed the need for a trigger incident and the need for suddenness.

In my analysis of the operation of the provocation defence, I concluded that despite the reforms, provocation remains a manifestly inappropriate and inadequate vehicle to address societal concerns about access to justice for battered women who kill. Although the provocation defence may appear more ‘female friendly’, this chapter has shown that the changes to the defence have only been a tinkering at its masculinist edges, and have failed to challenge the fundamental masculinity of provocation. The essential masculinity of provocation is encapsulated in the ordinary person test. The objective test which is intended to operate as the ‘safety-valve’ for provocation by enabling community standards to limit the availability of the defence, in essence endorses a white, heterosexual male view of what amounts to provocation.

This study demonstrates that the current law of provocation serves to condone male violence against women by providing a partial excuse to murder when men kill their female partners following separation, infidelity or rejection. The

and attitudes by which violence against women is institutionalised throughout our society’ as provocation ‘deals with private passions and emotions running wildly out of control’, at 67.

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narrative of provocation recounts the familiar story of jealousy, betrayal and infidelity – the story of the jealous husband. The structuring of women’s acts of self-preservation within the framework of the provocation defence does not enable the accurate retelling of a different story, a story of fear, violence and oppression – the story of the battered wife.

In considering the implications that follow from the expanding notion of provocation, my argument was that provocation appears to have provided a ‘half-way’ defence, unfortunately at the expense of a reconsideration of the defence of self-defence. The focus on provocation has meant that it has been possible to divert attention from a proper reconsideration of the defence of self-defence. The criminal justice system can claim that it is sensitive to the situation of the battered woman who kills, while ignoring the reality of the circumstances of the killing and the complex issues associated with a reconsideration of the defence of self-defence.

My contention is that reliance on the defence of provocation operates to distort the circumstances in which battered women kill and it nourishes the male excuse for violence against their partners in circumstances of separation or jealousy. Ultimately, I conclude that the defence of provocation should be abolished. This recommendation necessitates a re-evaluation of the current operation of mitigatory and aggravating factors at the sentencing stage, as well as a reconsideration of the defence of self-defence. In Chapter Six, I address the application of the defence of self-defence in the domestic context.

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234 It is noted that the majority of the cases in my research study are from New South Wales, so it is difficult to gauge the impact of the more restrictive rules in other jurisdictions.

235 See Chapter Eight.