

Victorian Law Reform Commission

Defences to Homicide Options Paper

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CALL FOR SUBMISSIONS

The Victorian Law Reform Commission invites your comments on this Options Paper and seeks your responses to the recommendations and questions that are raised. If you wish to make a submission to us on this reference, you can do so by mail, email, phone, fax or in person. If your submission is in writing, there is no particular form or format you need to follow. If you prefer to make a submission by phone or in person, contact the Commission and ask to be put through to one of the researchers working on the Defences to Homicide reference. You can send your written submissions by post, or by email to <law.reform@lawreform.vic.gov.au>.

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Please note that this Options Paper contains a number of case studies, each of which is based on a real case. In each case the names of the accused and the victim has been changed and in some cases the details of the case have been changed. The case studies also contain details of offences, where this is necessary to explain the issues involved. These details may be disturbing to some readers.

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Preface

Publication of this Options Paper marks the second stage of the Victorian Law Reform Commission's work on defences to homicide. The Paper is intended to stimulate discussion about possible changes to the current law and provide the basis for the Commission's consultations on whether and how the law should be changed.

The Options Paper argues that reform of this area of law should take account of the social context in which homicides typically occur. Chapter 2 describes the contexts in which people kill and provides information about the defences raised by those who are charged with homicide offences. The Paper goes on to describe the main defences and partial excuses to homicide, including self-defence, provocation, infanticide and mental impairment.

The Paper explains how these defences operate in practice, puts forward options for reforming specific defences and also raises the possibility of introducing a new defence of diminished responsibility. It also considers whether there should be more fundamental changes to defences and partial excuses, based on a new conceptual approach to this area of law.

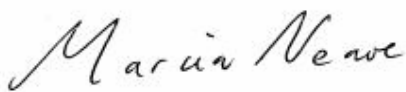
Production of this Options Paper was a team effort. Research and Policy Officers Siobhan McCann and Jamie Walvisch were the main authors of the Paper and also played a significant role in overseeing its empirical component. Victoria Moore, who became a staff member when the Paper was virtually completed, played an important role in the quality control. Julie Bransden prepared the Bibliography and chased up many obscure references. Valina and Tony Rainer, with some early assistance from Trish Luker, edited the Paper. Kathy Karlevski prepared the Paper for publication and Lorraine Pitman was involved in the production process.

Many people were involved in the Commission's empirical work on homicide, which is reported in Chapter 2. Professor Ken Polk and Dr Bronwyn Naylor assisted us in refining the methodology for the study. Sanya Reid-Smith, Ramanan Rajendran and Hilary Little were responsible for collecting prosecutions data from the Office of Public Prosecutions and Dr Kristin Diemer undertook the statistical analysis on behalf of the Commission. Sanya Reid-Smith made an outstanding contribution in ensuring the accuracy and intellectual rigour of Chapter 2.

The Commission acknowledge the assistance of the Australian Institute of Criminology and researcher Jenny Mouzos, who gave the Commission access to national homicide data. Kay Robertson, the Solicitor of Public Prosecutions allowed us to undertake research on homicide prosecutions. I am particularly grateful to Carl Barbaro, Dung H Van and Adrian Bendeler of the Office of Public Prosecutions who gave researchers a great deal of practical assistance while they were collecting the homicide prosecutions data.

Finally I should thank members of the Advisory Committee (see Acknowledgments below) and others who read and commented on drafts of the whole Options paper or on particular Chapters. I am particularly grateful for the critical skills and assistance of Ian Leader-Elliot from Adelaide Law School,

Associate Professor Jenny Morgan from Melbourne Law School, Dr Bronwyn Naylor and Associate Professor Bernadette McSherry from the Law Faculty at Monash University and Dr Ruth Vine, Director of the Mental Health Division of the Department of Health and Community Services. The Commission received very useful assistance on mental health issues from Ian Freckleton of Counsel, forensic psychiatrists Dr Douglas Bell, Dr Paul Mullen, Dr Bill Glaser, and forensic psychologist Dr James Ogloff.



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Terms of Reference

On 21 September 2001 the Attorney-General, the Honourable Rob Hulls MP, gave the Victorian Law Reform Commission a reference

1. To examine the law of homicide and consider whether:
 - it would be appropriate to reform, narrow or extend defences or partial excuses to homicide, including self-defence, provocation and diminished responsibility;
 - any related procedural reform is necessary or appropriate to ensure that a fair trial is accorded to persons accused of murder or manslaughter, where such a defence or partial excuse may be applicable; and
 - plea and sentencing practices are sufficiently flexible and fair to accommodate differences in culpability between offenders who are found guilty of, or plead guilty to, murder or manslaughter.

In reviewing these matters, the Victorian Law Reform Commission should have regard to relevant provisions of the Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General's 1998 discussion paper on *Fatal Offences Against the Person*, along with developments and proposals in other jurisdictions.

2. To recommend actions, including the development of educational programs, which may be necessary to ensure the effectiveness of proposed legislative, administrative and procedural reforms.

Abbreviations

A Crim R	Australian Criminal Reports
ABS	Australian Bureau of Statistics
AC	Appeal Cases (United Kingdom)
ACT	Australian Capital Territory
ALJR	Australian Law Journal Reports
ALR	Australian Law Reports
ALRC	Australian Law Reform Commission
ANZJ Crim	Australian and New Zealand Journal of Criminal Law
BC	Butterworths Cases
CCA Qld	Court of Criminal Appeal Queensland
CCC	Canadian Criminal Cases
CJ	Chief Justice
cl	clause
CLR	Commonwealth Law Reports
CMIA	<i>Crimes (Mental Impairment and Unfitness to be Tried) Act 1997</i> (Victoria)
Cr App R	Criminal Appeal Reports
Crim LJ	Criminal Law Journal
Cth	Commonwealth
DNA	Deoxyribonucleic acid
DPP	Director of Public Prosecutions
ER	English Reports
et al	and others
eg	for example
FLR	Federal Law Reports
HL	House of Lords
ibid	in the same place (as the previous footnote)
ie	that is
J	Justice (JJ pl)
JA	Appeal Justice
MCC	Model Criminal Code

MCCOC	Model Criminal Code Officers Committee
n	footnote
NESB	non-English speaking background
NSW	New South Wales
NSWCA	New South Wales Court of Appeal
NSWLR	New South Wales Law Reports
NSWLRC	New South Wales Law Reform Commission
NT	Northern Territory
NZLR	New Zealand Law Reports
OPP	Office of Public Prosecutions
para	paragraph
PRISM	Prosecution Recording and Information Systems Management
Qd R	Queensland Reports
Qld	Queensland
s	section (ss pl)
S Ct	Supreme Court (United States)
SA	South Australia
SASR	South Australian State Reports
SC Vic	Supreme Court of Victoria
sch	schedule
SCR	Supreme Court of Canada Reports
St R Qd	State Reports Queensland
Tas	Tasmania
UBCLR	University of British Columbia Law Review
UK	United Kingdom
Uni of Pitt LR	University of Pittsburgh Law Review
v	versus (said as 'and')
VCCA	Victorian Community Council Against Violence
VLRC	Victorian Law Reform Commission
vol	volume
VR	Victorian Reports
VSCA	Victorian Court of Appeal
WA	Western Australia
WLR	Weekly Law Reports

Executive Summary

SCOPE OF THE REVIEW

The terms of reference for the defences to homicide reference require the Commission to investigate the law of homicide and consider whether it would be appropriate to reform the existing defences or partial defences to homicide. As part of its review, the Commission has been asked to consider options for procedural reform and also whether plea and sentencing practices need to be made more flexible.

WORK ALREADY UNDERTAKEN

The Commission published an Issues Paper in March 2002. The Issues Paper outlined the current law in the area, identified the areas that would be the focus of the reference and raised some of the issues that the Commission would be investigating throughout the course of the project. It examined data drawn from a number of studies in order to give an overview of homicide as a social phenomenon. The Commission commissioned Professor Jenny Morgan to write an Occasional Paper *Who Kills Whom and Why: Looking Beyond Legal Categories*. The Occasional Paper summarised the Australian data on homicide in greater detail than in the Issues Paper and argued that social problems, rather than legal categories, best inform our thinking about law reform in this area.

CONSULTATIONS

The Commission has not yet undertaken wide ranging consultations on the reference. The Commission has held two information sessions, one for the general public and one for women's groups, organisations providing services to victim/survivors of domestic violence and the police. The Commission has had preliminary discussions with lawyers from the Victorian Aboriginal Legal Service, Victorian Legal Aid, Supreme Court Judges who deal with homicide cases and forensic psychiatrists who give evidence in mental impairment cases.

OVERVIEW OF OPTIONS PAPER

This Options Paper outlines the findings of the Commission's study of homicide prosecutions including what the study told us about the contexts in which homicide occurs and also the success rates of particular defences. The paper explains and discusses defences and partial excuses to homicide including self-defence, mental impairment, diminished responsibility and infanticide. The paper sets out a number of options for reform in relation to each defence as well as suggesting a number of procedural changes that could be implemented in place of or as well as reform to actual defences. Reforms to the law are discussed against the background of information about the contexts in which homicides occur in Victoria and the frequency with which particular defences are raised.

CHAPTER 2—DATA AND GENERAL STATISTICS

To obtain more information about the extent to which men and women who kill rely on particular defences, the comparative success for men and women in relying on these defences and the circumstances in which these defences are successfully raised, the Commission undertook a study of homicide prosecutions in Victoria that occurred between 1 July 1997 and 30 June 2001.

The sample selected included all cases that proceeded beyond the committal stage on a charge of murder, manslaughter or infanticide. Within the study 182 people were charged with homicide (153 men and 29 women). In many cases, due to the small number of accused, and in particular the small number of women, tests of statistical significance could not always be performed.

The following categories of homicides were used to classify our data:

- ‘spontaneous encounter’ homicides (for example pub brawls);
- ‘conflict resolution’ homicides (killings which resulted from a planned intention to use violence to resolve a dispute, for example a dispute about a debt);
- ‘originating in other crime’ homicides (for example killings in the context of an armed robbery);
- ‘sexual predation’ homicides (for example killing a victim after raping her);
- ‘homophobic killings’ (these include killings of people believed to be gay and killings argued to be in the context of an unwanted homosexual sexual advance);
- ‘sexual intimacy’ homicides (these include killings by partners or former partners because of jealousy or a desire to control the deceased, incidents involving the killing of sexual rivals and incidents where a person kill a violent partner or former partner);
- ‘child killings’ (the killing of children under 18 years old by their parents or step-parents);
- ‘other family member’ killings (including an adult or minor offspring killing a parent or step-parent, a parent killing adult offspring or a sibling killing another sibling);
- ‘mental impairment or mental illness’ resulting in homicide (this includes all incidents where mental impairment was raised, regardless of the relationship between the accused and deceased);
- ‘other killings’, which include accidents; and
- ‘miscellaneous’ killings where the motivation for the homicide is unclear or there is insufficient information to classify it.

In relation to the contexts in which homicides occur the Commission found as follows.

- Homicides are overwhelmingly committed by men (84.1% of accused were men).
- The largest category of homicides was those which occurred in the context of sexual intimacy. The majority of these involved men killing women.
- Conflict resolution homicides and spontaneous encounters (for example brawls in public places) were the next most common contexts.
- Both male and female accused were most likely to kill in the context of sexual intimacy. However, when men killed in this context it was most likely to be in circumstances of jealousy or control; whereas for women it was most likely to be in response to alleged violence that had been perpetrated against her by a male deceased.
- Sexual intimacy was the context in which women are most likely to be killed.
- Men were most likely to be killed as a result of conflict resolution.
- In about half the incidents of homicide in the context of sexual intimacy there were allegations of violence against the accused. In 95.5% of these cases the person killed was female.

- All spontaneous encounter killings involved men killing men and most involved the killing of an acquaintance or a stranger. The parties in these cases were usually affected by drugs and/or alcohol.
- All the child killings (six cases) were cases of fatal assault involving fathers or stepfathers.

In relation to pleas, the following points can be made.

- A considerable proportion of the people charged with homicide offences pleaded guilty to murder or manslaughter.
- A higher proportion of female accused than male accused pleaded guilty. Most women pleaded guilty to manslaughter.

In relation to homicide outcomes the following points can be made.

- When an accused was charged with a homicide offence the most likely outcome was a murder conviction. Men were slightly more likely than women to be convicted of murder.
- The conviction rate for murder has increased substantially since the 1980s, the period covered by the previous Law Reform Commission study. The acquittal rate is highest for people accused of spontaneous encounter homicides.
- When the deceased was a man, a manslaughter conviction is most likely, whereas where the deceased was a woman, a murder conviction is most likely.
- Accused charged with homicides in the context of sexual intimacy are far more likely to be convicted of murder than in any other context, except those who kill in the context of sexual predation (but our numbers are very small in the latter category).
- People accused of killing family members (including children) are most likely to be convicted of manslaughter. None were acquitted. In particular, those accused of killing children are more likely to be convicted of manslaughter than murder (although here, again, the numbers were very small).

The following points can be made in relation to the use of defences.

- Defences may be raised at a variety of stages in the prosecution process. Because the data are incomplete, we do not know what defences, if any, were raised at any stage of the prosecution for a large number of the deceased.
- The study looked at defences raised at any stage of the homicide prosecution process. Men and women tend to raise different defences. Men most often argued that they had no intention to kill or cause serious harm (which is not, strictly a defence), and provocation; whereas women most often raised denial of participation, and lack of intention to kill.
- Of the cases where a defence was known to have been successfully raised at trial, men most often raised lack of intention to kill, and provocation. The study could only identify two women who successfully raised defences at trial, and they succeeded with the defences of denial of participation, and lack of intention.
- In the context of spontaneous encounters, self-defence was raised successfully by three men, and lack of intention to kill by two. In the context of sexual intimacy, four men raised provocation successfully, and three successfully raised lack of intention to kill.

CHAPTER 3—PROVOCATION

Provocation is a partial defence to murder. The effect of successfully raising provocation is a verdict of manslaughter and a shorter sentence than would be imposed for murder. Provocation has developed as a way of providing some alternative to the death penalty, which was mandatory for murder in Victoria until 1975. Killings committed in anger in response to certain kinds of provocative conduct have historically been seen as less culpable than other kinds of killing and the defence of provocation developed around this concept.

For provocation to be raised the following elements must be proven:

- there must be sufficient evidence of provocative conduct;
- the accused must have lost self-control as a result of the provocation;
- the provocative acts must have been capable of causing an ordinary person to lose self-control and act like the accused.

Historically, provocative conduct required a ‘triggering incident’ that caused the accused to lose self-control. It is now possible for a jury to find that an incident that seems inoffensive on its own was, in fact, provocative due, for example, to an ongoing abusive relationship between the parties. It was once required that the loss of control be due to anger. This requirement has now been expanded to include loss of self-control due to fear or panic.

The ordinary person test in provocation requires assessment first of the gravity of the provocation and secondly whether the gravity was capable of making an ordinary person lose control in the same way the accused did. When assessing the gravity of the provocation the jury must regard the ‘ordinary person’ as having the relevant personal characteristics of the accused. When assessing whether the gravity was sufficient to cause the ordinary person to lose self-control, however, the jury must not take any of the personal characteristics into account other than the age of the accused.

The Commission’s study showed that where a matter proceeds to trial, provocation is one of the most commonly argued defences. It is also clear that, in general, it is men who raise the defence. In addition it is clear that provocation is most frequently raised in homicides in the context of sexual intimacy.

Some of the key criticisms of provocation are these.

- Provocation is an anachronistic defence. It is no longer necessary, because factors that may diminish culpability can be taken into account when a person is sentenced for an offence.
- Provocation developed at a time when uncontrolled male anger was socially acceptable. Men who kill women because they are jealous or because the woman is leaving should be convicted of murder rather than manslaughter.
- Provocation is gender biased. It is still framed in a way that makes it difficult for women who are responding to violence to argue provocation successfully.
- The ordinary person test is flawed. It provides no way of differentiating between those values that the law should tolerate and those that it should not.
- A provocation defence can be fabricated. It is difficult to prove that an accused was not provoked when there are no witnesses to rebut that assertion.

The Commission sets out and discusses a number of options for change in relation to provocation.

RETAIN THE DEFENCE

Some of the key reasons to retain the defence of provocation include the following.

- Provocation reflects a necessary hierarchy of culpability. Those who kill after having been provoked are less culpable than those who kill in a premeditated way. This should be reflected in the law.
- Provocation can help women who kill in response to domestic violence. Self-defence is often not available to women in these circumstances.
- Provocation allows a compromise between conviction for murder and acquittal. If provocation is abolished, juries may acquit some accused who should have been held criminally liable.

REFORM PROVOCATION

AMEND THE DEFINITION OF THE CURRENT TEST

There are a number of ways in which this could be done; some are listed here.

- Remove the need for a triggering incident and the requirement that the action be sudden. The triggering incident requirement disadvantages women who may not respond immediately to situations of domestic violence. One way around this would be to broaden the defence by making it clear that there need not be a triggering incident and that the reaction need not be sudden, as long as it is provoked;
- Define 'ordinary person'. This could mean specifying that the ordinary person is not sexist, racist or homophobic and might address the current difficulty the defence has in differentiating between 'good' and 'bad' provocation;
- Abolish the ordinary person test and make provocation entirely subjective. Then the jury would simply be asked whether the accused with all of his or her particular characteristics was provoked into killing in the circumstances.

LIMIT THE CIRCUMSTANCES IN WHICH PROVOCATION IS AVAILABLE AS A DEFENCE

Instead of amending the definition, another possibility would be to exclude particular circumstances from the scope of the defence. Circumstances that might be excluded are:

- where a defendant alleges provocation where the deceased has left attempted to leave or threatened to leave a sexual relationship;
- where a defendant alleges provocation because of suspected or confessed infidelity;
- where a defendant alleges provocation due to a non-violent homosexual advance.

REQUIRE THE JURY TO ASSESS EXPLICITLY THE ACCUSED'S CULPABILITY

This would leave the jury to make the determination as to whether the provocation was sufficient to reduce the culpability from murder to manslaughter.

INCORPORATE AN EQUALITY ANALYSIS INTO THE TEST

This would involve modifying the law so as to ensure that it is compatible with the right to equality. This could be done in a number of different ways, but would essentially involve limiting the use of

provocation to circumstances that do not involve breaches of rights to equality. This limitation would target appeal to provocation in cases involving racism, sexism or homophobia.

CHANGE THE LAW OF EVIDENCE

Reforms of the law of evidence could help to address some of the problems in relation to provocation.

- Abolish the common knowledge rule. Currently, the rules of evidence prevent parties from calling evidence on matters of ‘common knowledge’. This can lead to juries making decisions based on stereotypical views about how people from particular ethnic backgrounds react to provocation. Abolishing the common knowledge rule would allow evidence to be brought to rebut such stereotyping.
- Introduce compulsory defence disclosure. Provocation is open to fabrication, since it is often not possible to verify whether there was provocative conduct. Currently the defence is not required to disclose intention to raise provocation. Requiring the defence to disclose in advance its intention to raise provocation might give the prosecution time to prepare evidence to rebut the assertion of provocative conduct.

INTRODUCE PROCEDURAL CHANGES

- Judges’ bench books could include suggested directions for use in instructing juries in relation to provocation. There could be model directions for cases involving domestic violence or homosexual advance.
- Provide judicial education on matters of violence against women, racism, sexism and homophobia, and how they may arise in cases of provocation or self-defence.

ABOLISH PROVOCATION

This option is based on the argument that no amount of reform to the defence of provocation will resolve the many problems with the defence. The defence is structurally biased against women; provocation is not an appropriate indication of culpability; and violent loss of self-control is never excusable. If the defence is completely abolished it will be necessary to consider whether the circumstances that constituted the provocation should be taken into account at sentencing. This will depend upon the reason for abolishing provocation. If the defence is abolished because provocative conduct should be seen as a mitigating factor rather than a separate defence, it will clearly be necessary to take provocative conduct into consideration at the sentencing stage. If, on the other hand, the defence is abolished because it is seen to be inherently gender biased, then, arguably, it should not be taken into account in sentencing and judges could be instructed not to take provocative conduct into account.

If provocation is abolished some consideration will also need to be given to the possibility that defence counsel will instead argue that the accused did not intend to kill or cause serious injury to the deceased. An argument of lack of intention could be based on the assertion that the accused was so overcome by anger that he or she did not know what he or she was doing. One possible way of combating this would be to restrict the use of extreme anger as the basis for an argument of lack of intent.

CHAPTER 4—SELF-DEFENCE

Self-defence is a complete defence to homicide. Successfully raising the defence results in a complete acquittal. Historically, self-defence arose out of the regulation of duels and other forms of combat. It is a defence specifically developed for circumstances in which men fought one another.

The test for self-defence is as follows:

The question to be asked in the end is quite simple. It is whether the accused believed upon reasonable grounds that it was necessary to do what he or she did.

Zecevic v DPP (Vic) (1987) 162 CLR 645, 661 (Wilson, Dawson and Toohey JJ)

Factors that will be taken into account in assessing whether the accused's belief was reasonable include the immediacy of the threat, the proportionality of the response and the availability of alternative options.

Unlike provocation, few criticise the rationale behind self-defence. The main criticism of the current defence relates to its scope. It is argued that the defence is structured in such a way as to exclude women. The Commission's study into homicide prosecutions confirms this. Men far more commonly raise self-defence, and they are far more successful in raising the defence. This has led to the defence being seen as gender biased. The Commission has focused in generating options for reform which meet this criticism.

Where women kill in response to domestic violence, assessments relating to the imminence of the threat, the proportionality of response and the availability of alternatives operate as a barrier for women, and women who raise self-defence are seen as being unlikely to succeed.

The imminence, proportionality, and availability of alternative requirements fail to recognise the nature of violent relationships.

The law has developed over recent times to take into account to some extent the effects of long-term domestic abuse on women. Battered woman syndrome, has evolved as a way of explaining women's response to domestic violence. Battered woman syndrome is based on the theory that ongoing domestic violence involves a 'cycle of violence' that women find it hard to break out of because of 'learned helplessness'—women come to believe that whatever they do, they cannot change their situation, so they make no attempts to break out of the cycle of violence. Evidence of 'battered woman syndrome' can now be used as a means of explaining to the jury why the accused acted in the way she did and why she may have reasonably believed it was necessary to kill her partner.

Those who are in favour of the existing defence of self-defence observe that it is a flexible defence and has been generously interpreted in recent times. The possibility of including evidence of battered woman syndrome further expands the circumstances in which the defence can be used. Those who criticise the existing defence highlight the difficulty women continue to experience in raising it in contexts of domestic violence.

The Commission suggests a number of options for reform focused on providing alternatives that recognise the particular context of domestic violence.

EVIDENTIARY REFORMS

CHANGE THE LAW OF EVIDENCE

Social Framework Evidence

It is argued that battered woman syndrome evidence medicalises women's experience, creates a stereotypical view of the battered woman and is not ultimately helpful in explaining why she killed. It may be more valuable to introduce evidence that explains to the jury the realities of domestic violence. This is known as 'social framework evidence' and could include evidence including:

- the general dynamics of abusive relationships;

- the cycle of violence;
- the complex reasons women stay in abusive relationships;
- why some women do not report violence; and
- why a woman may have to plan to kill in order to protect herself.

The aim of this evidence would be to remove potential sources of error in the fact finding process, such as misconceptions about the nature of domestic violence and the response patterns of women in violent relationships.

Admissibility of Evidence

Currently there are evidentiary barriers to the admission of particular evidence including ‘social framework evidence’. These would need to be removed if women are to be able to admit certain evidence. One way to do this would be to specify in the *Evidence Act 1958* that the history of domestic violence is relevant in such cases.

Expert Evidence

Some expert evidence is currently inadmissible if it is classified as ‘common knowledge’. This can work as a barrier for women because it may prevent juries hearing expert evidence about the dynamics of domestic violence. It may, therefore, be desirable to specify that domestic violence is not within the jury’s common knowledge. Alternatively, it may be necessary to introduce domestic violence as a particular field of expertise for the purposes of providing expert evidence.

CLARIFYING THE CURRENT LAW

Below are some examples of how the current law might be clarified to make it more accessible to women who kill in response to domestic violence.

- Define when it is reasonable to believe that fatal force is necessary. Include information for juries about situations in which a woman might believe fatal force to be necessary in the context of domestic violence.
- Introduce the notion of ‘inevitable harm’ rather than ‘imminent’ harm to reflect the reality of women’s responses in situations of domestic violence.
- Clarify the law in relation to the ‘duty to retreat’ in self-defence such that a woman should not be required to leave her own home to escape violence.
- Enumerate the specific factors to be taken into account—for example, the nature, duration or history of the relationship between the accused and the abuser, including prior acts of violence or threats, whether directed at the accused or at others.

AMENDING THE LEGAL TEST

There are two main options for reform of the legal test for self-defence.

- Make self-defence entirely subjective, so that the jury would simply be required to determine whether the accused honestly believed that their actions were necessary in the circumstances. The action need not actually have been necessary.
- Make self-defence entirely objective, so that the jury is asked to assess whether the accused’s actions actually were necessary.

INTRODUCE A NEW DEFENCE

Rather than attempting to change the existing defence of self-defence to accommodate situations in which women kill in response to domestic violence, it may be preferable to introduce a defence that deals specifically with such situations. Three possibilities are outlined.

- Battered woman syndrome model—rather than simply considering battered woman syndrome as a possible factor to be taken into account in assessing self-defence, it may be possible to introduce a separate defence of battered woman syndrome.
- Self-preservation model—rather than focusing on a psychiatric ‘syndrome’, this model focuses on the accused’s belief in the need to protect herself.
- Coercive control model—looks at the accused’s need to free him or herself from the circumstances of coercive control. The defence targets the instrumental use of domestic violence to control women and the possible need to escape such control through the use of lethal force.

A NEW PARTIAL DEFENCE

Because there may be circumstances in which the use of lethal force was not justified, despite the existence of domestic violence, it may be necessary to introduce a new partial defence—so that manslaughter rather than murder is the outcome in such situations:

- mistaken self-defence—for cases where the accused genuinely believed that her or his actions were necessary, but that belief was mistaken;
- excessive self-defence—for cases where the need to use force is not mistaken, but fatal force is unnecessary;
- culpable homicide—this would specifically target the issue of unreasonable beliefs and allow a manslaughter verdict in cases where an accused honestly believed the threat to be so dire as to require killing, but that belief was based on unreasonable grounds.

PROCEDURAL REFORMS

It may be that it is not the defence itself, but its application in practice that causes most of the problems particularly for women. If this is the case procedural reforms may be the most effective reforms to consider. The following are some examples of procedural reforms.

- Charge screening and prosecutorial guidelines—currently for a variety of reasons women may plead guilty rather than raise self-defence. There could be guidelines requiring the police to consult with the OPP in cases involving women killing in response to domestic violence.
- Judges charge to the jury—Judges could be required to provide information to the jury about domestic violence. Alternatively a model jury instruction could be added to the judges’ bench book.
- Education—of the judicial and the legal profession about domestic violence.

CHAPTER 5—PEOPLE WITH IMPAIRED MENTAL FUNCTIONING WHO KILL

The defence of mental impairment is available to those accused that can show the following:

- that they were suffering from a mental impairment;

- the mental impairment affected them in such a way that they either
 - did not know the nature or quality of what they were doing; or
 - they did not know that it was wrong (these are referred to as the M’Naghten elements).

The effect of successfully raising the defence of mental impairment is most likely to be a custodial supervision order for a period of at least 25 years. The defence was introduced by the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (CMIA) and replaces the common law defence of insanity. However, the new defence still retains the same requirements which existed at common law—the so-called ‘M’Naghten elements’—and is consequently very restrictive in its application. There were only 10 cases in which mental impairment was raised in the Commission’s study, despite the fact that there were clearly many more accused who were suffering from some kind of mental impairment. There is, arguably, some scope to extend the defence and make it more flexible. The arguments in favour of reform to the existing defence include the following.

- The current defence is too narrow and accused people with mental conditions may consequently have no defence available to them.
- The meaning of ‘mental impairment’ is undefined and therefore unclear.
- The M’Naghten elements of the defence do not reflect current medical understanding of mental illness—some would argue that people can understand what they are doing and that it is wrong, but be sufficiently mentally impaired to reduce their culpability.
- The defence of mental impairment requires excessive reliance upon experts to explain and interpret the defence for the benefit of juries.
- The consequence of a finding a person not guilty by reason of mental impairment is a 25 year custodial supervision order in a hospital. This operates as a disincentive to relying on mental impairment. Some mentally ill accused may prefer to plead guilty or take the chance of an acquittal.

LEAVING THE LAW UNCHANGED

The principal reasons to leave the law as it currently is, are as follows.

- It is impossible to define mental impairment precisely.
- Leaving mental impairment undefined makes the defence more flexible.
- The current defence may be conceptually problematic, but it is well understood by the psychiatric and legal professions and it works well in practice, so for this reason it should be left unchanged.
- The criminal law also allows for the medical treatment of mentally ill offenders, which makes reform of the defence unnecessary.

REFORMULATE THE DEFENCE OF MENTAL IMPAIRMENT

With these issues in mind, a number of options for reform of the defence of mental impairment are outlined. These are:

- excusing persons from criminal responsibility if they cannot control their behaviour (introducing a volitional element to the defence);

- modifying the M’Naghten elements of the defence;
- abolishing the M’Naghten elements and introducing a new mental condition defence;
- including a definition of mental impairment; and
- introducing a new defence of diminished responsibility.

DIMINISHED RESPONSIBILITY

Diminished Responsibility is a partial defence to murder. Diminished responsibility is a defence which has less strict requirements than that of mental impairment. It was introduced in a number of jurisdictions to widen the defences available to people who kill because of their mental condition. In order to succeed in a defence of diminished responsibility an accused must be able to prove:

- that he or she was suffering from an abnormality of mind;
- that the abnormality of mind arose from a specified cause; and
- that the abnormality of mind substantially affected the accused in a specified way.

The effect of raising diminished responsibility in the jurisdictions in which it currently exists is a verdict of manslaughter, although in England there is provision for extended prison sentences in cases where this is deemed appropriate.

The Commission’s study revealed that in 69 of the 182 cases, the person charged with homicide was suffering from a mental condition that did not amount to a mental illness sufficient to form the basis of a mental impairment defence. Among the mental conditions diagnosed were depression, psychotic illness and personality disorder, all of which could form the foundation of a defence of diminished responsibility.

The Commission identifies a number of arguments in support of the introduction of diminished responsibility.

- Diminished responsibility provides an intermediate defence for those with mental conditions falling short of mental impairment.
- If provocation is retained, then diminished responsibility should be introduced for the sake of fairness and consistency. It is unjust that someone can be excused for uncontrolled behaviour due to anger but not for uncontrolled behaviour due to a mental illness.
- Diminished responsibility provides an alternative defence for women in contexts where they kill in response to domestic violence.
- Diminished responsibility could replace infanticide and possibly also automatism.
- Diminished responsibility is preferable to taking the mental condition of the accused into account at sentencing.

There are, of course arguments against the introduction of a defence of diminished responsibility in Victoria.

- The defence is not necessary—the mental condition of accused can be taken into account at sentencing.
- If provocation were abolished its defects would be retained by the introduction of diminished responsibility.

- The defence is too broad and consequently it may be abused.
- Expanding the defence of mental impairment is preferable to introducing diminished responsibility.
- People with personality disorders will be able to raise diminished responsibility. This produces inappropriate sentencing outcomes.
- Diminished responsibility pathologises women rather than looking at the causes of female violence in relationships.
- In many cases manslaughter will be an inappropriate outcome for people who succeed in raising diminished responsibility—the defence does not take into account the treatment needs of some of the people who raise the defence.

If the defence is introduced, there will need to be careful consideration given to how the defence is formulated. The commission has suggested a number of options:

- a broad formulation, based on the English model;
- a narrow formulation, which limits the application of the defence by:
 - including a more precise definition of ‘abnormality of mind’, or
 - excluding particular conditions from the definition of ‘abnormality of mind’—for example personality disorder or particular kinds of depression; and
- developing better options for dealing with people who succeed in raising diminished responsibility.

PROCEDURAL CHANGE

In addition to legal reform, the Commission also suggests possible changes to procedure. Currently, most cases where an accused pleads not guilty by reason of mental impairment result in a hearing by consent, where a jury is empanelled and the prosecution and the defence agree that the accused committed the murder and that the accused should be found not guilty by reason of mental impairment. The trial in this case is unnecessary. One means of removing the need for this trial would be to introduce a new plea of ‘guilty but mentally impaired’—this would obviate the need for a trial and would allow the matter of disposition to be dealt with immediately. Alternatively, there could be special judge alone hearing by consent in cases of mental impairment.

Another possibility would be to introduce a separate specialist body to determine mental condition and disposition in cases of mental impairment. Queensland has just such a body—the Mental Health Court, which is constituted by a Supreme Court judge assisted by two psychiatrists. The Court only hears matters when no facts are in dispute. It makes determinations in relation to all cases involving mental impairment and determines whether the person was of unsound mind; whether the person was of diminished responsibility; and whether the person was unfit for trial.

Having a separate process gives explicit recognition that this particular area is one in which medical expertise plays a special role. The Court also allows for the mentally ill to be dealt with in a more humane, treatment focused way.

CHAPTER 6—INFANTICIDE

Infanticide is available where it can be shown that a child under 12 months was killed by the child's natural mother at a time when the balance of her mind was disturbed owing either to the effects of childbirth or of lactation. Infanticide differs from other defences in that it is also an offence; that is the mother of a child who kills that child can either be charged with the offence of infanticide or raise the defence of infanticide to a charge of murder. There were no cases of infanticide in the study undertaken by the Commission, so the Commission drew to a large extent upon what other studies have shown about the contexts in which children are killed by their parents.

The principal criticisms of the defence are as follows.

- The medical basis for the defence is now widely questioned. Most sources seem to indicate that mental disturbance, including postnatal depression, is often the consequence of a more complex array of factors including the socio-economic background of the mother, her support networks and the effects upon her of the transition to parenthood.
- The defence is only available to women.
- The current defence does not correspond with what is currently known about the circumstances in which children are killed.
- The onus of proof in relation to infanticide is confusing.
- There is no requirement that the mental disturbance affecting the mother should be connected to the killing.

The options in relation to infanticide are as follows.

- Retain the defence of infanticide as it currently exists.
- Reformulate the defence of infanticide:
 - minimally—changing the existing legislation so that the mother's disturbance of mind can be due to circumstances following from childbirth rather than to childbirth or lactation;
 - moderately—including the above minimal change, but also clarifying the onus of proof, the mental element for the offence and extending the age limit to 10 years of age; or
 - comprehensively—restructuring the defence entirely to apply both to men and women in primary carer roles and, when assessing criminal responsibility, to take into account a range of factors including the primary carer's social and economic circumstances, mental health and education, and the social implications of the child's birth for the primary carer.
- Abolish the defence of infanticide and introduce the defence of diminished responsibility.

CHAPTER 7—A NEW APPROACH

The last chapter of the Options Paper summarises the major problems with the existing defences and poses the following questions.

- How can we make defences more reflective of situations in which women kill?
- To what extent should we expect and excuse male violence?
- How should we deal with parents who kill their children?
- How do we limit defences based on mental conditions?

- When should extreme emotion be an excuse for killing?

It is suggested that the existing conceptual framework for explaining the difference between existing defences, that of justification and excuse, may be unsatisfactory for assessing culpability and it provides no clear answers to these questions.

A new approach called the ‘reasons approach’ is outlined as a possible solution. The reasons approach allows us to look beyond the act and the circumstances of the act to assess why the person killed and to make judgments about the values and views that drove the accused’s decision to act. Criminal offences reflect minimum standards of socially acceptable behaviour. The reasons approach assesses the extent to which a person’s behaviour departed from those standards of behaviour. A reasons approach would rank different kinds of excuses—‘complete’ and ‘partial’ excuses which would recognise different levels of culpability.

The approach would also require the introduction of a new standard—that of the ‘normal socially responsible person’.

This alternative is suggested as a way of looking at assessing culpability which is potentially fairer and more transparent. Value judgments already occur in the assessment of culpability. This approach allows this to happen explicitly and according to agreed standards.

To introduce such an approach we must consider:

- defining clearly what is meant by the ‘normal socially responsible person’;
- defining what constitutes a partial excuse, and deciding whether this decision should be left to a jury; and
- deciding whether particular circumstances should be excluded in assessing culpability.

The potential problems with the reasons approach include:

- the difficulty in determining the difference between good and bad reasons;
- the possibility that this approach may expand partial excuses for murder;
- the difficulty in deciding who should make decisions about reasons, and how they should be guided; and
- the problem of taking into account individual circumstances.

In addition to all of the above mentioned problems, there is also the problem that this approach does nothing to clarify culpability in relation to people with mental illnesses.

Questions

CHAPTER 3: PROVOCATION

1. Should the defence of provocation be retained?
2. What is the most appropriate rationale for the defence of provocation, if it is to be retained?
3. Should the defence of provocation require there to be a specific triggering incident?
4. Should the defence of provocation require a sudden response?
5. Should the first limb of the ordinary person test be abolished?
6. Should the accused's background be taken into account in determining his or her power of self-control?
7. Should the 'ordinary person' be defined? If so, how?
8. Should the ordinary person test be abolished, in favour of a completely subjective test?
9. If provocation is to be retained as a defence:
 - (a) should conduct in the absence of the accused be able to amount to provocation?
 - (b) must the provocative conduct have been committed by the victim?
 - (c) should it be available in circumstances where it is 'self-induced'?
10. Are there any other technical areas of the law of provocation that should be clarified?
11. Should the circumstances in which provocation may be raised be limited? If so, what limitations should be imposed?
12. Should the jury be given the power to assess explicitly the culpability of the accused in provocation cases?
13. Should an equality analysis be incorporated into the defence of provocation? If so, how should this be done?
14. Should the 'common knowledge' rule be abolished?
15. If so, what restrictions, if any, should be placed upon the introduction of evidence in provocation cases?
16. Should an accused be required to disclose in advance her or his intention to raise the provocation defence?
17. Should relevant information be incorporated into judges' bench books? If so, what kind of information should be provided?
18. Are there any other ways in which provocation should be reformed, including procedural reforms?
19. Should the defence of provocation be abolished?
20. If provocation is abolished as a defence, should it be removed as a relevant circumstance for the sentencing judge to take into account in determining the accused's sentence?

21. Should people be precluded from relying on extreme anger or rage as a defence to either the physical or mental elements of murder?

CHAPTER 4: SELF-DEFENCE

22. In light of recent developments in the law of self-defence, is there a need for further reform?
23. Is the use of social framework evidence preferable to the use of battered woman syndrome evidence?
24. Should the law specify that evidence about a history of abuse is relevant and admissible in a determination of self-defence?
25. Should the law specify that social framework evidence is relevant and admissible in a determination of self-defence?
26. If so, should there be a general provision about the relevance of such evidence, or should the provision specify the particular issues that are of relevance?
27. Should the law specify that an understanding of domestic violence is not within the jury's 'common knowledge', and that evidence explaining such information is admissible at trial?
28. Should the law specify that the study of domestic violence is an 'area of expertise'?
29. Should the law specify the people qualified to give evidence about domestic violence? If so, who should be included?
30. Are there any other rules of evidence that pose particular problems for women who kill in response to domestic violence successfully relying upon self-defence? If so, how should these problems be addressed?
31. Should Victoria adopt the model for self-defence proposed by the Model Criminal Code Officers' Committee?
32. Should the law specify that it is reasonable to believe that fatal force is necessary if the threat of serious injury or death is inevitable or unavoidable?
33. Should the law clarify that there is no duty to retreat from one's home?
34. Should the law clarify particular circumstances in which self-defence should not be automatically excluded?
35. If the law clarifies particular circumstances in which self-defence should not be automatically excluded, which of the following situations (or any others) should be specified?
 - (a) That the accused was responding to a history of personal violence against himself or herself or another rather than a single isolated attack.
 - (b) That the accused had not pursued options other than the use of force.
 - (c) That the accused used a weapon against an unarmed person.
 - (d) That the killing was planned.
 - (e) That the accused killed via an agent.
 - (f) That the accused was responding to a sexual assault.
 - (g) That the accused acted in anger.
36. Should a list of factors be enumerated to be taken into account in relevant cases? If so, what factors should be listed?

37. Should the test for self-defence focus solely on whether the accused believed their actions were necessary?
38. Should the test for self-defence focus solely on the necessity of the accused's acts?
39. Should a new defence be introduced for women who kill in response to domestic violence, or is it preferable to reform the current law?
40. Should a 'battered woman syndrome' defence be introduced?
41. Should a defence focusing on 'self-preservation' be introduced?
42. Should a defence of 'coercive control' be introduced? If so, should the terms of the defence outlined above be amended in any way?
43. Are there any other possible defences that should be considered?
44. Should there be a partial excuse for acts committed in mistaken self-defence?
45. Should excessive self-defence be reintroduced? If so, how should the defence be framed?
46. Should a culpable homicide offence be introduced?
47. Should a pre-charge screening process be introduced in relation to women who kill in response to domestic violence? If so, how should this process work?
48. Should prosecutorial guidelines be introduced in relation to women who kill in response to domestic violence? If so, what should be included in these guidelines?
49. Should judges be required to provide information about domestic violence to the jury?
50. If judges be required to provide information about domestic violence to the jury, what is the most appropriate way to achieve such a reform? For example, should there be a preamble, which judges are required to read in relevant cases, or should a model jury instruction be included in their bench books?
51. If judges are required to provide information about domestic violence to the jury, what information should they be required to give?
52. What educative steps could be taken to provide a proper understanding of the interrelationship between self-defence and domestic violence?

CHAPTER 5: PEOPLE WITH MENTALLY IMPAIRED FUNCTIONING WHO KILL

53. What need, if any, is there to expand the current defence of mental impairment?
54. Is the current cognitive test an appropriate one?
55. If the defence is changed, how should it be changed:
 - (a) by introducing a volitional element?
 - (b) by reformulating the M'Naghten elements?
 - (c) by replacing the M'Naghten elements with a new mental condition defence?
56. Does the current lack of definition of mental impairment cause uncertainty?
57. Should the defence of mental impairment include a definition of 'mental impairment'?
58. If a definition of 'mental impairment' is introduced should it be broad and general like the Western Australian definition or based on diagnostic criteria like those that used to exist in the ACT and those suggested by the Butler Committee?

59. Are there any alternative definitions of mental impairment that would be preferable?
60. Should personality disorders be included within the definition of mental impairment?
61. Should depression ever form the basis of a partial defence to murder?
62. If depression can provide the basis for a partial excuse of diminished responsibility, how should the law distinguish between killings where depression should be a relevant consideration and circumstances where it should not?
63. If diminished responsibility is introduced, should it be restricted to people with an intellectual disability, or be more broadly defined?
64. Should general indicators of mental instability short of precise diagnoses be included in a definition of diminished responsibility? If not, how might they be excluded from a definition of the defence?
65. If diminished responsibility is introduced in Victoria should it apply to people with personality disorders?
66. Should psychosis induced by long term excessive drug or alcohol abuse be accepted as a basis for a mental condition defence?
67. What should the outcome be for offenders who succeed in raising diminished responsibility?
68. Should automatism be available as a 'defence'?
69. If automatism is retained should there be legislated restrictions as to when it can be argued?
70. Should a new plea of 'guilty but mentally impaired' be introduced?
71. If 'by consent' hearings are not replaced with a plea of 'not guilty by reason of mental impairment, should by consent hearings be heard by a single judge rather than by a jury?
72. Should a Mental Health Court similar to that available in Queensland be introduced in Victoria?

CHAPTER 6: INFANTICIDE

73. Should the defence of infanticide be removed because medical knowledge has changed since its introduction?
74. If the defence of infanticide is retained, should it be modified to reflect current medical understanding about the potential effects of child-bearing on mothers?
75. Should the defence of infanticide be extended to apply to fathers, defacto parents, adoptive parents or foster parents? How should we distinguish between the application of the defence to some carers but not to others?
76. Should the personal circumstances of a mother be taken into account when considering cases of infanticide?
77. How should the law distinguish between circumstances that are relevant and those that are not?
78. Should the age limit for infanticide be extended beyond one year? If so, what should the age limit be?
79. Should there be another defence in addition to infanticide and mental impairment, such as diminished responsibility, to cover situations where parents kill their whole family as a result of depressive illness?

80. Should the defence of infanticide be abolished?
81. Alternatively should it be modified in one of the ways specified above?

CHAPTER 7: A NEW APPROACH

82. Instead of retaining the existing defences to homicide, would it be preferable to enumerate reasons that would allow a person who kills to be excused from criminal liability?
83. If a reasons centred approach is adopted, how should it work?
 - (a) By defining clearly what constitutes a partial excuse?
 - (b) By enumerating or excluding reasons that can be considered the basis for a defence?
 - (c) By defining clearly who the normal socially responsible person is?
 - (d) Some combination of these?
84. If we determine culpability using the reasons approach, who should be responsible for that determination—judge or jury?
85. If we do not use the reasons approach, is there an alternative approach to defences that would address some of the problems outlined in this Options Paper?

Chapter 1

Introduction

THE PURPOSE OF THIS OPTIONS PAPER

1.1 On 21 September 2001, the Victorian Law Reform Commission received a reference to examine the law concerning defences and partial excuses to homicide and to make recommendations for reform. In asking the Commission to report on this issue, the Victorian Attorney-General, the Honourable Rob Hulls MP, noted that

defences and partial excuses to homicide raise difficult moral questions. Different members of the community are likely to have very different views on these issues...Some people have argued that the laws of provocation and self-defence have not changed enough to keep up with changing social values. For example, the laws of provocation or self-defence have been criticised for excusing or condoning male patterns of aggression or of perpetuating stereotypes about a person's race, religion or sexual preference.¹

1.2 The Attorney-General's comments reflect widespread criticism in recent years of the law concerning defences to homicide in Victoria. In particular, it has been argued that the current law condones male violence against women but fails to deal fairly with women who kill men in the context of prolonged domestic violence and abuse.

1.3 The purpose of this Options Paper is to promote discussion of possible reforms. We discuss the defences and partial excuses to homicide that are currently recognised under Victorian law and compare them with the defences and partial excuses that are available in other jurisdictions. We examine how the law is operating in practice and suggest a number of ways in which defences or partial excuses to homicide could be changed. We then set out a series of questions which are intended to provide guidance to those who want to comment on these options.

WHAT IS HOMICIDE?

1.4 Homicide means the killing of one human being by another. The context in which a homicide is committed influences the police charges that may be laid against a person who is accused of killing. This Options Paper focuses on the two main charges that may be laid when someone is accused of killing another person, namely murder and manslaughter.

1.5 In Victoria, these offences are governed by the common law and are not defined in legislation. Murder is the most serious form of homicide. In order to be convicted of murder, an accused person must be found to have intended to kill or cause grievous bodily harm (serious injury),² or to have had knowledge that death or grievous bodily harm was a probable consequence of their

Common law

A body of law which comes from cases decided by judges, rather than from laws made by parliament.

1 Office of the Attorney-General, Law Reform Commission to Review Provocation and Self-Defence Laws, Media Release (23 September 2001) available from <http://www.dpc.vic.gov.au/domino/web_notes/newmedia.nsf>.

2 *Pemble v The Queen* (1971) 124 CLR 107.

conduct.³ In certain situations a person who kills another person intentionally may have a defence, which means they should not be convicted of murder. The various defences are discussed below.

1.6 Manslaughter is a less serious category of homicide. It does not require the same level of intention (to kill or cause grievous bodily harm) or knowledge (that death or grievous bodily harm was a probable consequence of the conduct) as murder. Persons can be convicted of manslaughter if they commit a dangerous or negligent act that causes death. Persons who kill intentionally may be convicted of manslaughter rather than murder if they have a ‘partial excuse’ such as provocation. We discuss these partial excuses below.

1.7 If a woman kills her child under the age of 12 months, she may be charged with infanticide⁴ instead of murder or manslaughter. As well as being an offence, infanticide can operate as a defence to a charge of murder. A woman who is charged with murder may plead infanticide, and be found guilty of the lesser charge.⁵ We examine infanticide because it is both an offence and a defence and because this defence may be raised in similar situations to defences such as diminished responsibility, which are discussed below.⁶

1.8 There are a number of other homicide offences. For example, a person who unintentionally causes the death of another while committing a violent crime may be charged with ‘unintentional killing in the course or furtherance of a crime of violence’.⁷ A person who kills someone by driving dangerously may be charged with ‘culpable driving causing death’.⁸ Because the defences and partial excuses examined in this Options Paper are usually relevant only to murder and manslaughter, we do not discuss these other homicide offences.

DEFENCES AND PARTIAL EXCUSES TO HOMICIDE

1.9 The offences of murder, manslaughter and infanticide reflect a hierarchy of culpability. The seriousness and stigma attached to each of these offences vary, as does the possible maximum penalty. For example, people who commit manslaughter are generally seen as less morally blameworthy than people who commit murder and the maximum penalty for manslaughter is lower than the maximum penalty for murder,⁹ although the actual sentence received by an offender will depend on the circumstances of the case.

1.10 The defences and partial excuses to homicide that are discussed in this Options Paper also reflect ideas about relative culpability. The common law has always recognised that in some cases the circumstances in which a killing occurred were such that the killing was justified—that it was not wrong to kill in the particular situation. In such situations, persons accused have a defence, which entitles them to a complete acquittal.

3 *R v Crabbe* (1985) 156 CLR 464.

4 *Crimes Act 1958* s 6(1).

5 *Crimes Act 1958* s 6(2).

6 Another offence is ‘unintentional killing in the course or furtherance of a crime of violence’. It is not discussed in this Options Paper.

7 *Crimes Act 1958* s 3A.

8 *Crimes Act 1958* s 318. Note that mere bad driving would not be sufficient for a charge of culpable driving causing death. A person must drive in a way that falls far below a reasonable standard of care.

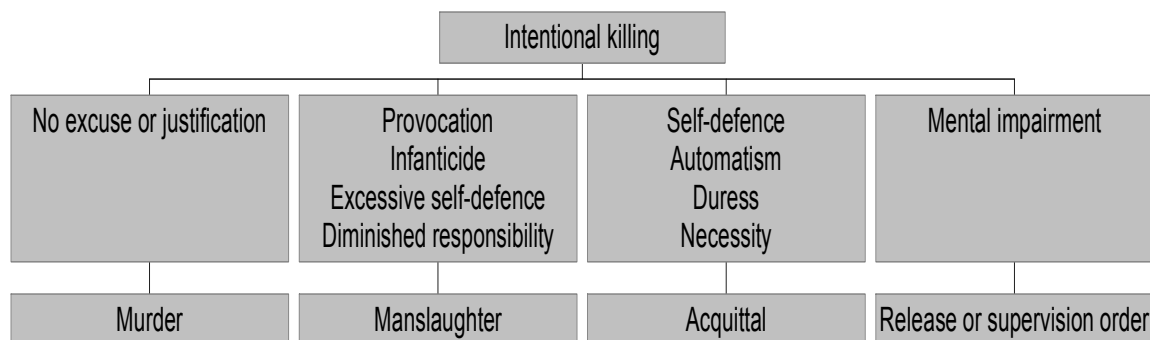
9 See below para 1.24.

1.11 The common law recognises self-defence as a complete defence to homicide. Across Australia, other defences have been created or extended by legislation. In Victoria, mental impairment¹⁰ is recognised as a defence by the *Crimes (Mental Impairment and Unfitness To Be Tried) Act 1997*. Duress (or necessity) may be a defence to manslaughter.¹¹ The ‘defence’ of automatism applies where the behaviour of the accused was automatic or unwilled (for example, if the accused person was sleepwalking). Technically, automatism is not a defence, but instead negates one of the elements required for the offence to be proven, that is, that the behaviour was voluntary. However, because the result of showing that the accused was acting in an automatic or unwilled fashion is the same as successfully using a true defence such as self-defence—complete acquittal of the accused—we treat it as a ‘defence’ for the purposes of this Paper.¹²

1.12 In other cases, it is accepted that it was wrong for the accused to kill (that is, the homicide was not justified) but that in the particular circumstances the accused should not be held fully responsible. In other words, the accused has a ‘partial excuse’ to homicide. Unlike a defence, which leads to **Acquittal** complete acquittal of the accused, a partial excuse reduces the culpability of the accused from murder to manslaughter (see Figure 1). Partial excuses that are currently recognised in Australian law include provocation, infanticide,¹³ excessive self-defence¹⁴ and diminished responsibility.¹⁵ At present, Victorian law does not recognise the partial excuses of excessive self-defence or diminished responsibility. Although there is technically a difference between a partial excuse and a true defence, they are often all simply called ‘defences’. Throughout this Paper, unless there is a specific need to differentiate between partial excuses and true defences, we refer to them all as ‘defences’.

1.13 This Options Paper examines self-defence, provocation, infanticide and ‘state of mind’ defences such as mental impairment, automatism and diminished responsibility.

FIGURE 1: POSSIBLE DEFENCES WHERE THERE IS AN INTENTION TO KILL



10 Unlike other defences which automatically result in an acquittal of the accused, a finding of not guilty because of mental impairment may result in the accused being released unconditionally, or may lead to a judge making a custodial or non-custodial supervision order: *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* ss 23(b), 26. See Chapter 5 for further discussion.

11 While the situation is unclear, it seems that currently duress and necessity are complete defences to any criminal offence except for murder and, perhaps, attempted murder: *R v Harding* [1976] VR 129; *R v Gotts* [1992] 2 AC 412: see Chapter 5.

12 For a more detailed discussion of automatism, see Chapter 5.

13 As noted above, infanticide is an offence as well as a defence: see above para 1.7.

14 Within Australia, the doctrine of excessive self-defence currently only exists in South Australia and New South Wales: *Criminal Law Consolidation Act 1935* (SA) s 15(2); *Crimes Act 1900* (NSW) s 421.

15 While the defence of diminished responsibility can act to reduce murder to manslaughter in the Australian Capital Territory, New South Wales, the Northern Territory and Queensland, it is not currently available in Victoria.

INTERACTION BETWEEN OFFENCES, DEFENCES AND SENTENCING

1.14 The discussion above shows that there are three ways in which the law and the legal process may differentiate between levels of culpability for homicide.¹⁶

- At various points during the legal process, a decision will be made about the offence with which the person should be charged or should stand trial. Such decisions will take account of the circumstances in which the killing occurred, although they may also be influenced by other factors such as the strength of the evidence and whether the accused is prepared to plead guilty.
- People who stand trial for murder can raise defences or partial excuses during the course of the trial, which may result in a jury acquitting them or finding them guilty of the less serious offence of manslaughter (or in appropriate cases, infanticide).
- The actual sentence given to an offender can vary, depending on the circumstances of the case. For example, a person convicted of murder, who has killed for financial gain, may receive a different sentence from a person convicted of murder who has killed out of an unreasonable fear for his or her own safety.¹⁷ The sentence reflects the judge's view of the culpability of the offender.

CHARGING DECISIONS

1.15 Culpability will be reflected in the offence with which the person is charged. When a suspected homicide occurs, the police conduct an investigation. At the same time, the death must be reported to the State Coroner, who will conduct a formal public hearing, called an inquest, in order to determine the cause of the death. If the police believe that a homicide has occurred, they can file a charge against the alleged killer in the Magistrates' Court. The charge that is laid will depend on the circumstances in which the killing allegedly occurred. A person who appears to have killed intentionally, without any justification, will probably be charged with murder. A person who appears to have killed unintentionally may be charged with manslaughter. A different maximum penalty applies to these offences.

1.16 Once a charge has been filed, the Magistrates' Court must conduct a hearing, known as a

Nolle prosequi

To enter a *nolle prosequi* is to discontinue a prosecution after the accused has been committed at the Magistrates' Court to stand trial.

committal hearing, to determine whether there is sufficient evidence to put that person on trial. If the Magistrate decides that there is sufficient evidence for the accused to be committed to trial on the particular charge,¹⁸ the Director of Public Prosecutions (DPP) will normally present the person for trial on that charge.¹⁹ However, in some

situations the DPP can decide that the prosecution should not continue (this is normally done by entering a *nolle prosequi*) or that the person should be presented for trial on a different charge. For

16 A chart showing the legal process for dealing with homicide is set out in Appendix 1.

17 An accused person whose fear was reasonable would be able to rely on self-defence: see Chapter 5.

18 The magistrate who conducts the committal proceeding is also likely to be a coroner. If, in a particular case, the committal proceedings end before the coronial inquest has been completed, the magistrate is able to turn the committal proceedings into a coronial inquest (having either released or committed the accused to trial) and to adopt the evidence given at the committal for the purposes of making the relevant coronial findings: Richard Fox, *Victorian Criminal Procedure* (2000) 141.

19 If the person is not committed for trial and further evidence becomes available, or the DPP believes the magistrate has made an error, the DPP has power to directly present the accused for trial.

example, the person may originally be charged with murder, but may be presented for trial for manslaughter, because of the evidence heard at committal.

1.17 The accused may decide to plead guilty to the offence on which he or she is presented. Alternatively, plea negotiation may occur between the accused and the prosecuting authorities. For example, in a case where it is not clear whether the accused person intended to kill the deceased, the accused may agree to plead guilty to manslaughter. If the accused person pleads guilty to murder, a plea and sentencing hearing will be held in the Supreme Court to determine the sentence. For manslaughter or infanticide, the plea and sentencing hearing will be held in the County Court.

1.18 An accused person who does not plead guilty, will go to trial. In Victoria, trials for murder and attempted murder must be conducted in the Supreme Court.²⁰ Other homicides, such as manslaughter, infanticide and culpable driving causing death may be tried in the County Court. All of these offences must be heard by a judge and jury—it is not possible to have the matter heard by a judge alone. At the trial, the role of the prosecutor is to prove to the jury, beyond reasonable doubt, every element of the offence. The prosecutor can call on witnesses to appear in court and can question them. The accused person's lawyer can seek to raise doubts about the proof of an element of the offence, for example, about whether the accused intended to kill the victim. The accused person (the 'defendant') cannot be required to give evidence or to answer questions, but may choose to do so. The accused's lawyer can call witnesses and can cross-examine witnesses called by the prosecutor.

DEFENCES OR PARTIAL EXCUSES

1.19 The law also takes account of differences in culpability for homicide through defences or partial excuses. At the trial, the defence lawyer may seek to raise evidence of a particular defence or partial excuse, such as self-defence or provocation. If there is evidence of a defence or partial excuse, the prosecutor must disprove it beyond reasonable doubt. As we have seen, the partial excuse of provocation can reduce the offence from murder to manslaughter, thus reducing the maximum penalty faced by the offender.

ROLE OF JUDGE AND JURY

1.20 It is important to understand the roles that the judge and jury play in deciding whether a person is guilty of the homicide offence for which they are on trial or for which they have a defence or partial excuse. The role of the judge is to ensure that the trial is conducted fairly. For example, the judge must prevent evidence that the law does not treat as relevant from being placed before the jury.

1.21 After all of the evidence has been put before the jury, the prosecutor and the accused person's lawyer each give a final address to the jury in which they sum up their case. The judge then addresses the jury, summarising the evidence and the prosecution and defence cases, explaining the relevant law and how this law applies to the evidence that has been put to the jury.

1.22 It is the jury's role to decide whether the accused is guilty of the offence with which he or she has been charged. The jury goes to the jury room to consider its verdict in private. If the charge is murder, the jury can return with a verdict of guilty or not guilty of murder, or one of a number of alternative verdicts. Depending on the circumstances, these include manslaughter, infanticide, attempted murder or being an accessory to murder.

SENTENCING

1.23 The judge, in determining the appropriate sentence, may take into account degrees of culpability for homicide.

1.24 Once the accused has been convicted, the sentencing hearing takes place before the judge alone. The prosecutor provides information such as whether the offender has any prior convictions and whether there were any aggravating circumstances surrounding the offence. The offender's lawyer then directs the judge's attention to any mitigating factors. The maximum penalties for the various homicide offences are set out in the *Crimes Act 1958*.

TABLE 1: MAXIMUM PENALTIES FOR HOMICIDE OFFENCES

Offence	Maximum Penalty
Murder	Life imprisonment
Manslaughter	20 years imprisonment
Infanticide	5 years imprisonment

1.25 The maximum penalty:

- provides sentencers (judges and magistrates) and the public with a guide to the relative seriousness of the offence;
- sets a limit on the sentencer's discretion when punishing a person for that offence; and
- warns potential offenders of the maximum 'price' that they will pay if they commit that offence.

POLICY ISSUES ABOUT CULPABILITY

1.26 The law deals with culpability in laying charges, in the course of the trial, and in sentencing. In this Options Paper, we consider the interaction between these three ways of dealing with culpability and discuss how the law should take account of differences in culpability. For example, we consider whether the offence or defence of infanticide should be retained for women who kill young children. We also consider the circumstances in which a person should be able to rely on particular facts to raise a defence so that the jury decides the matter, and which factors should be left to the judge to take into account in the sentencing process. For example, should provocation be a matter for the jury to decide, or should this partial excuse be abolished and the fact that the accused killed because of provocation be left to the judge to take into account when sentencing? What is the appropriate role for juries in such cases?

OUR APPROACH

1.27 In March 2002, the Commission published an Issues Paper, which outlined the relevant law and identified the issues we would be examining in the course of this reference. We also published an Occasional Paper, *Who Kills Whom and Why: Looking Beyond Legal Categories*, written by Associate Professor Jenny Morgan, which brought together information from empirical studies of homicide in Australia.

DATA COLLECTION

1.28 We commissioned Associate Professor Jenny Morgan to write the Occasional Paper because we believed that proposed reforms should be based on a clear understanding of the factual context of homicide and of how the defences actually operate in practice. The Commission has consistently stated

the view that law reform is only likely to be effective if it is based on a clear understanding of the social problem it is seeking to address. For example, we believe that in considering criticisms of the current law and possible reforms to defences, it is important to obtain information about the extent to which men and women who kill rely on provocation and self-defence, the comparative success for men and women in relying on these defences, and the circumstances in which these defences are successfully raised.

1.29 To obtain more detailed information about these matters, the Commission undertook a study of homicide prosecutions in Victoria that occurred between 1 July 1997 and 30 June 2001. The results of this study are set out in Chapter 2.

ADVISORY COMMITTEE

1.30 An Advisory Committee was constituted to provide the Commission with access to relevant expertise in preparing this Paper. The Committee comprises police, members of the legal profession and the judiciary, academics, the Deputy Chief Psychiatrist and the Policy Officer from the Federation of Community Legal Centres, who has particular expertise in this area. The Committee met to discuss an outline of the Options Paper and individual members commented on drafts. Following the publication of this paper, the Advisory Committee will be consulted about the next stage of the reference.

INFORMATION SESSIONS AND PRELIMINARY CONSULTATIONS

1.31 The Commission has not yet undertaken wide-ranging consultations on the range of options set out in this Paper. At this stage of the project, we consider that it is important to inform relevant individuals and groups about the current law and give them an opportunity to express some preliminary views. We organised a number of meetings with a range of organisations to provide information, including:

- women's groups, organisations providing services to victims or survivors of domestic violence and police, to provide information about how the law responds to homicides where there has been a history of domestic violence; and
- a public meeting at the Melbourne Town Hall.

Both of these meetings included presentations about the current law, the circumstances and context in which homicides occur and criticisms that have been made about how the law works in practice.

1.32 We also undertook some preliminary consultations including:

- a meeting with the Victorian Aboriginal Legal Service on the implications of possible changes to defences for Indigenous people;
- meetings with experts on mental impairment issues, including psychiatrists who are frequently called as expert witnesses in homicide cases;
- a meeting with the Violence Against Women Working Group of the Federation of Community Legal Centres;
- a meeting with Supreme Court judges who sit in homicide cases; and
- a meeting with lawyers at Victoria Legal Aid.

1.33 In the next stage of the reference, we will be using this Options Paper as the basis for more detailed consultation about possible changes to the law.

STRUCTURE OF THIS PAPER

1.34 Chapter 2 of this Paper explains the findings of the Commission's study of the outcomes of prosecutions in Victoria between 1 July 1997 and 30 June 2001. It describes the characteristics of victims and accused, the context and circumstances in which homicides typically occur, the charging process, and the defences that are raised by people accused of homicide. Data from this study also provide the basis for discussion of particular defences in the chapters that follow.

1.35 Chapter 3 examines the defence of provocation and explains some limitations on its application, which may be particularly relevant to women who kill violent partners. It looks at how this defence operates in practice and puts forward some options for reform.

1.36 Chapter 4 examines self-defence and again examines its relevance to cases where the accused has previously been the victim of domestic violence. It also puts forward options for reform.

1.37 Chapter 5 examines existing and possible defences based on 'impaired mental functioning', including mental impairment, diminished responsibility and automatism, and considers options for reform. Infanticide, which could also be seen as raising 'mental impairment' issues is discussed in Chapter 6.

1.38 Although Chapters 3–6 consider reforms to particular defences that either currently exist in Victoria or apply in other parts of Australia, it is important to consider how these defences interact. We have also considered the possibility of introducing a new defence or defences, based on a new way of thinking about culpability. These issues are discussed in Chapter 7.

1.39 All of the Chapters in this Options Paper contain questions which are intended to provide a framework for discussion of the present law and guidance to those who wish to make submissions to the Commission.

Chapter 2

Data and General Statistics

INTRODUCTION

2.1 Law reform is only likely to be effective if it is based on a clear understanding of the social problem that it is seeking to address. In our *Defences to Homicide: Issues Paper* we argued that it was necessary to understand the context in which homicides take place, and the ways in which they are currently dealt with by the legal system, before it is possible to make appropriate recommendations for change.²¹

2.2 The Issues Paper discussed a number of empirical studies which examined homicide as a social problem,²² and investigated homicide prosecutions.²³ We noted, however, that there was a lack of available data, especially in relation to prosecution outcomes and indicated our intention to collect and analyse such data as part of this reference. In this Chapter we present some preliminary results of our analysis.²⁴ This data should be read in conjunction with the overview presented in *Who Kills Whom and Why: Looking Beyond Legal Categories*.²⁵

WHAT DID THE COMMISSION'S STUDY EXAMINE?

2.3 Our study examined prosecutions of Victorian²⁶ homicide incidents that occurred between 1 July 1997 and 30 June 2001. The sample selected involved all cases which proceeded beyond the committal stage²⁷ on a charge of murder, manslaughter or infanticide.²⁸ Any matters which had not yet proceeded to a sentencing hearing by 15 January 2003 were excluded from our sample. Matters that

21 See eg, Issues Paper para 2.2; See also the Occasional Paper published by the Commission by Jenny Morgan, *Who Kills Whom and Why: Looking Beyond Legal Categories* (2002).

22 Victorian Law Reform Commission, *Defences to Homicide*, Issues Paper (2002) Chapter 2.

23 Ibid Chapter 9.

24 Due to the time taken to collect this data, it was not possible to comprehensively analyse this data prior to the publication of the Options Paper. We hope to be able to release more detailed findings from our analysis at a later stage.

25 Above n 21.

26 Our sample therefore differs from a number of other studies, such as the Australian Institute of Criminology's National Homicide Monitoring Program, which examines the context of homicide rather than the prosecution of homicides. Jenny Mouzos, *Homicidal Encounters: A Study of Homicide in Australia 1989–1999* (2000) covers homicides occurring across Australia and includes cases which were not prosecuted, such as homicide-suicides and unsolved cases.

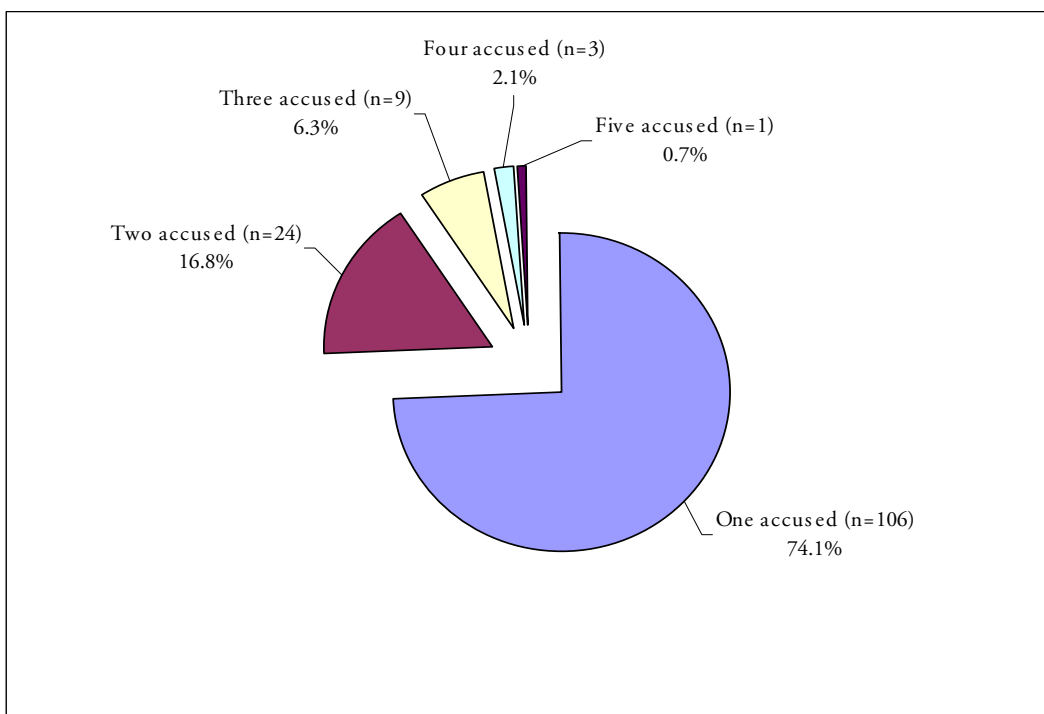
27 Before someone charged with a serious criminal offence can be put on trial, a committal hearing must be held to determine whether there is sufficient evidence. We excluded from our study any cases where a person was initially charged with a homicide-related offence, but there was insufficient evidence to proceed beyond this stage.

28 There were no persons charged with the offence of infanticide over the period considered. We did not examine cases involving culpable driving charges or cases involving manslaughter by suicide pact or assisted suicide. Cases prosecuted on the basis of manslaughter by gross negligence have also been excluded. Two cases where the accused pleaded guilty to manslaughter by gross negligence have been included as they were initially prosecuted for either murder or manslaughter.

had proceeded beyond the sentencing stage, but were awaiting appeal, were included in our study, as there was sufficient information about the trial outcome.²⁹

2.4 There were 143 incidents of homicide in the relevant period, only two of which involved more than one victim. Graph 1 shows that 74.1% of incidents involved a single accused.³⁰ One hundred and ninety-eight people were charged in relation to these incidents, however only 182 of these had murder or manslaughter charges beyond the committal stage. The remaining 16 people were either charged with lesser offences such as assisting the offender or had their homicide charges dropped to a lesser offence at the committal stage.³¹ Our study focused on these 182 homicide accused. This emphasis on prosecutions meant that our study did not include murder-suicide cases; that is cases where the accused killed someone else³² (for example a domestic partner or a child) and then killed themselves before being sentenced.³³

GRAPH 1: NUMBER OF ACCUSED PER HOMICIDE INCIDENT ST1



Base: Percentages are based on all homicide incidents (N=143), the number of accused in each incident includes all 198 people charged in relation to the incidents (the 182 homicide accused and the 16 accused not charged with homicide offences). If the number of accused are added together, the total is 198.

-
- 29 At 15 January 2003, 21 cases in our sample were still on appeal. If there had already been a successful appeal and a retrial was ordered and completed prior to 15 January 2003, the data collected related to the retrial.
- 30 Two incidents had two victims. In each of these incidents, the victims had very similar characteristics (age, gender and relationship to accused).
- 31 These 16 people are only discussed in relation to whether a homicide accused had co-offenders, thus they have been included in Graph 1 above.
- 32 Throughout this Chapter we refer to accused people 'killing' another person. Until the person pleads guilty or is convicted of an offence this is only an allegation.
- 33 Thus our data does include one case where the accused committed suicide after being convicted and sentenced.

DATA SOURCES AND THEIR LIMITATIONS

2.5 There were three main sources of data relied upon in the study: the Australian Institute of Criminology's (AIC) National Homicide Monitoring Program data (NHMP), files kept by the Office of Public Prosecutions (OPP), and publicly accessible documents available on the Internet.³⁴

DEMOGRAPHIC INFORMATION

2.6 The demographic data in our study, for example information on the characteristics of deceased and accused, was mainly based on the NHMP, which was established by the AIC in 1990. It provides quantitative information on all homicides throughout Australia, collected each year by the AIC from the relevant police organisations. Information is collected on a wide number of variables, including the age, gender and racial appearance of the accused and deceased, the location of the homicide and the weapon used.³⁵ The Commission was provided with the NHMP data for Victoria for the relevant period, and data considered relevant to the study was extracted.³⁶

2.7 This data has some limitations.³⁷ In particular, it should be noted that a large amount of this information was collected by the police within a short period of the homicide being reported. It is possible that the police were not fully informed about particular matters at the time that the information was recorded. In addition, some of the variables such as 'racial appearance of the accused' are reliant on the individual police officer's perception, and so may not be entirely accurate.

THE PROSECUTION PROCESS

2.8 Relying on the NHMP to provide relevant demographic data,³⁸ the Commission examined the OPP files for these cases in order to extract information about the prosecution process.³⁹ OPP files can contain a variety of different documents. They may include transcripts of the trial, documentation of any plea offers, any judgments or rulings made in the course of the trial, as well as reports on the accused by psychiatrists or psychologists. These documents were read by a team of three research assistants, and the relevant information inserted into a database prepared especially for this study.⁴⁰

2.9 In some cases important documentation, such as the judge's sentencing remarks, were missing from the OPP files. Where this was the case, searches of publicly accessible data sources, such as

34 The Commission would like to thank the AIC and the OPP for their cooperation and assistance throughout the course of this project.

35 For a full list of variables collected and results from previous years, see Jenny Mouzos, *Homicidal Encounters: A Study of Homicide in Australia 1989–1999* (2000) 4–8.

36 We note that, due to privacy concerns, the names of the parties involved have been protected. The Commission will only provide results in a de-identified form.

37 On this point, see Jenny Mouzos, *Quality Control in the National Homicide Monitoring Program (NHMP)* (2002).

38 Occasionally, in the course of examining a particular OPP file, some inconsistencies between the OPP data and the AIC data were discovered. In such a case the OPP data was used as it was based on more detailed information.

39 We note that there were two files that we could not obtain. Some information about these matters was able to be obtained from our other data sources.

40 The Commission would like to thank Sanya Reid Smith, Hilary Little and Ramanan Rajendran for their work on this project and Bob Powell for his assistance in the preparation of the database.

AustLII,⁴¹ were made, in an attempt to find the required information. This allowed many of the gaps to be filled.⁴²

WHAT INFORMATION DID THE STUDY COLLECT?

2.10 The information collected included the following:

- demographic information about the accused and deceased, including age, gender, racial appearance, country of birth and employment status;
- any allegations of domestic violence between the accused and the deceased;
- information about the context of the homicide;
- details of any psychological assessments of the accused;
- details about the prosecution process, such as what charges were originally brought against the accused, what charges they were ultimately presented upon, and whether they pleaded guilty or proceeded to trial;
- details of any defences raised by the accused, both prior to and at trial; and
- the outcome of the proceedings and the success or otherwise of any defences run.

There were difficulties collecting some of this information, which are discussed under the relevant headings below.

2.11 In its analysis, the Commission sought to build a picture of the perpetrators and the contexts of homicide in Victoria. The main purpose of our study was to find information with which to inform our discussion of defences to homicide to assist us in developing options for changing the law, and which would address some of the major issues in relation to who kills whom and why. In this Options Paper we report information which is relevant to this discussion, although there is much more that could be reported as a result of the study.

CHARACTERISTICS OF ACCUSED AND DECEASED

2.12 Our data shows that homicide is a gendered crime. As in earlier Australian studies,⁴³ our research showed that men were much more likely to kill than women. Of the 182 people charged with homicide beyond committal, 153 (84.1%) were men and 29 (15.9%) were women.⁴⁴ By comparison, in Mouzos's study of Australian homicides over a 10 year period, approximately seven out of eight homicide accused

41 See <<http://www.austlii.edu.au>>.

42 Despite this, there were still a number of occasions in which the required information could not be collected, due to the absence of particular documentation. Of particular concern is the fact that the OPP files often do not contain full transcripts of the trial. This can cause problems for the collection of information about defences: see below paras 2.83–2.84.

43 For an overview see Jenny Morgan, *Who Kills Whom and Why: Looking Beyond Legal Categories* (2002) 7–9.

44 Due to the small number of female accused, extreme caution must be used when interpreting the results of our data analysis. While we undertake some analysis on sub-samples of the 29 women, there are often too few women in the tables to draw strong conclusions, so that some of the analysis that follows is only illustrative of possible trends. Comparisons to larger studies are used wherever possible to assist interpreting the meaning of the findings.

were male.⁴⁵ Similarly in the study of homicide prosecutions between 1981 and 1987, undertaken by the former Law Reform Commission of Victoria,⁴⁶ 86.8% of accused were male.

2.13 Men were also more likely to be killed than women. In our sample, there were 145 homicide deceased.⁴⁷ Eighty-five (58.6%) of the deceased were male. There were also a significant number of female deceased (60 or 41.4%).⁴⁸ **st12**

2.14 Homicides were usually committed by a person acting alone (74.1% of 143 incidents).⁴⁹ In our sample, 76 of the 182 accused (41.8%)⁵⁰ committed the offence with a co-accused.⁵¹ Women were more likely to have co-accused than men.⁵² Only 12 of the 29 female accused (41.4%) acted alone, compared with 94 (61.4%) of the male accused.⁵³ **st 2 & 3**

2.15 The main characteristics of accused and deceased are set out in Table 2 below.

45 See eg, Jenny Mouzos, *Homicidal Encounters: A Study of Homicide in Australia 1989–1999* (2000) 51.

46 Law Reform Commission of Victoria, *Homicide Prosecutions Study*, Appendix 6 to Report No. 40 (1991) 12.

47 Two of the 143 incidents included two deceased.

48 Based on 145 deceased.

49 See Graph 1 above.

50 See Appendix 2 Table 1: Gender of deceased by gender of accused and number of accused involved in homicide incidents.

51 Co-accused includes homicide and non-homicide accused.

52 Chi-square is significant at <0.05. Pearson's Chi-square was used to test statistical significance and the level of statistical significance was set at a minimum of 0.05. Throughout this report, Chi-square significance levels are only reported on tables that achieve statistical significance. See Appendix 2 for further information regarding tests of statistical significance. **st3**

53 See Appendix 2 Table 1.

TABLE 2: CHARACTERISTICS OF THE HOMICIDE ACCUSED AND DECEASED⁵⁴

Characteristic	Number of accused	% of accused ⁵⁵	Number of deceased	% of deceased
Males	153 st5	84.1%	85 st12	58.6%
Females	29 st5	15.9%	60 st12	41.4%
Caucasian appearance ⁵⁶	163 st6	89.6%	129 st13	89.0%
Born in Oceania (including Australia, New Zealand and the Pacific islands) ⁵⁷	130 st7	71.4%	99 st14	68.3%
Median age males	151 st8	30 years ⁵⁸	76 st15	33.5 years ⁵⁹
Median age females	28 st8	26 years	58 st15	33.5 years
Employed	57 st9	31.3%	59 st16	40.6%
Unemployed, actively seeking work ⁶⁰	84 st9	46.2%	24 st16	16.6%
Known history of prior convictions: at least one conviction for prior offences ⁶¹	111 st10	61.0%	16 st17	11.0%
Affected by alcohol at the time of the homicide ⁶²	69 st11	37.9%	48 st19	33.1%

Base: All homicide accused and deceased where information was available.

Note: This Table should be read as follows. Of the accused, 153 or 84.1% were male.

GENERAL OBSERVATIONS

2.16 In our study

- most accused and deceased appeared to be Caucasian;⁶³ [st6](#)
- most accused and deceased were born in Australia, New Zealand or the Pacific Islands [st7](#) & [14](#); and
- a notable proportion of both accused⁶⁴ and deceased were reported to be affected by alcohol at the time of the incident.⁶⁵ [st11](#) & [st19](#)

54 There were 182 homicide accused and 145 deceased.

55 Percentages are of all cases where information was available.

56 As noted above, this is not an entirely reliable figure, as it is based on a police perception of the accused's appearance.

57 The other main area of birth was Europe (9.9%) [st7](#).

58 Based on 179 accused where specific age was known, as only the broad age groups were available for three accused.

59 Based on 136 deceased where specific age was known, as only the broad age groups were available for the other deceased.

60 This does not include people who were not working for a variety of reasons, for example those who were retired, on leave, disabled, sole parents, engaged in domestic duties, students, or were children too young to work or study.

61 It is possible that a police check for prior convictions may not have been done in relation to the deceased in all cases. It will usually have been done in relation to the accused, which may explain the higher percentage of accused recorded as having prior convictions.

62 A number of accused (25.8%) were also affected by drugs. In total, just over half (50.5%) of accused were affected by drugs or alcohol or both at the time of the homicide. However 'drugs' includes prescription drugs at any dose (as well as marijuana, amphetamines, heroin, cocaine-crack, LSD/acid, ecstasy/MDMA, Valium, Rohypnol and glue/paint/petrol sniffing/chroming).

63 Above n 56.

64 Above n 62.

65 Male deceased were significantly more likely to be affected by alcohol than were female deceased (Chi-square is significant at <.05). [st20](#)

THE ACCUSED

2.17 The main characteristics of the accused were as follows.

- The median age for male accused was 30 and for female accused 26.⁶⁶ The oldest accused was 82 years old and the youngest accused was 14 years old. [st8](#)
- Only 57 (31.3%) of the accused were in paid employment at the time of the homicide, with 84 (46.2%) actively seeking work.⁶⁷ [st9](#)
- Many of the accused (61.0%) are known to have had at least one conviction for prior offences, generally in relation to property or drug-related offences or assaults.⁶⁸ [st10](#)

THE DECEASED

2.18 The main characteristics of the deceased were as follows.

- The median age for male deceased was 35. For female deceased it was 39.⁶⁹ The oldest deceased was 84 years old and the youngest deceased was six weeks old.⁷⁰ [st15](#)
- Fifty-nine of the deceased (40.6%) were employed, with another 24 (16.6%) unemployed and actively seeking work.⁷¹ [st16](#)
- A lower proportion of deceased than of accused (11.0%) were known to have had prior convictions. [st17](#)

THE TYPICAL HOMICIDE OFFENDER

2.19 The characteristics of people accused of homicide in our study are similar to findings in other studies. For example, in relation to the high unemployment rates of accused, Jenny Mouzos found that most accused were not in paid employment at the time of the homicide (74.4% of male accused, 87.8% of female accused).⁷² Similarly, the study of homicide prosecutions by the former Law Reform Commission indicated that accused were more likely than deceased to be unemployed.⁷³ Our data presents the image of a typical homicide accused as an unemployed, drunken male.⁷⁴ While this may be an accurate reflection of many of those who kill, it must be remembered that it is a generalisation and that people who kill come from a wide variety of backgrounds.

66 Based on 179 accused where specific age was known. Only the broad age groups were available for three accused. See Appendix 2 Table 2 for a full breakdown of age of the accused.

67 Above n 60.

68 Male accused were significantly more likely than females to have at least one prior conviction. (Chi-square is significant at <0.05). [st10](#)

69 See Appendix 2 Table 3 for a full breakdown of age of the deceased.

70 For those whose age was known.

71 Above n 60.

72 Jenny Mouzos, *Homicidal Encounters: A Study of Homicide in Australia 1989–1999* (2000) 57–9 based on definitions in n 21.

73 Law Reform Commission of Victoria, *Homicide Prosecutions Study*, Appendix 6 to Report No. 40 (1991) 21 which uses a base of accused-deceased pairs for this calculation.

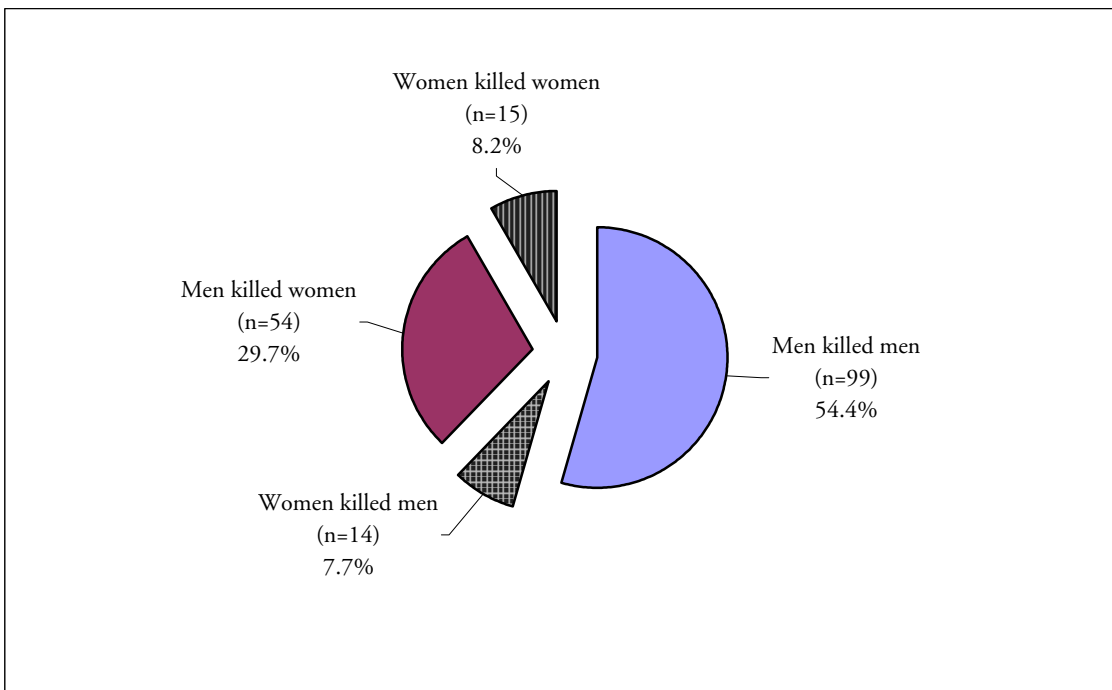
74 Technically speaking, this is a picture of those prosecuted for homicide charges. As noted above, our sample did not include homicide-suicide cases, non-homicide accused or unsolved cases. It is possible that the picture presented may differ slightly if such cases are also taken into account.

WHO KILLED WHOM?

2.20 Graph 2 shows that:

- when men kill they are most likely to kill other men;
- the next most common gender combination was men killing women; and
- in the much smaller number of cases when women killed, they were as likely to kill women as men.

GRAPH 2: WHO KILLED WHOM **ST4**



Base: All homicide accused (N=182).

Note: There were 145 deceased killed by 182 accused. Therefore multiple counting of deceased occurs in the graph above. There were two incidents involving two deceased, but in each incident the deceased were of the same gender, so this does not affect the accuracy of the graph.

2.21 As we explained in 2.14 male accused⁷⁵ are more likely to have acted alone than female accused.⁷⁶ Women were nearly equally likely to kill men and women whether they killed alone or as part of a group.⁷⁷ By contrast, male accused were slightly more likely to kill men than female accused were when they were acting alone⁷⁸ and were far more likely to kill other men when they were acting as part of a group.⁷⁹ Similar patterns can be found in previous studies.⁸⁰

⁷⁵ All our analysis of male accused refers to men presented for trial on homicide offences.

⁷⁶ All our analysis of female accused refers to women presented for trial on homicide offences. Refer to Appendix 2 Table 1.

⁷⁷ 'Group' includes homicide and non-homicide co-accused. See note to Graph 1 above. 50% of sole female accused killed men (n=6) and 47.1% of female accused who acted as part of a group, killed men (n=8).

⁷⁸ 54.3% of male accused, when acting alone, killed males when acting alone. See Appendix 2 Table 1.

⁷⁹ 81.4% of male accused who acted as part of a group killed men (n=48). See Appendix 2 Table 1.

⁸⁰ Above n 46 12–13.

CHILD KILLINGS

2.22 Table 3 shows that there were 11 deceased under the age of 18 in our study. Seven of these were killed by a family member [st22](#). All of these seven incidents involved a male accused killing a boy.⁸¹ This is probably a reflection of the limited length of our study, which looked at homicides over a four year period. Studies over a longer period have shown that the killing of children by family members is the only type of homicide in which women are as likely as men to be the perpetrators.⁸² In the Law Reform Commission of Victoria study ‘[t]he accused was most commonly female for children under 8’.⁸³

TABLE 3: RELATIONSHIP BETWEEN THE AGE OF THE DECEASED AND THE GENDER OF THE ACCUSED⁸⁴
[st21](#)

Age of deceased	Male accused		Female accused		Total accused	
	n	%	n	%	n	%
<1	2	1.3%	0	.0%	2	1.1%
1-9	4	2.6%	0	.0%	4	2.2%
10-14	1	.7%	0	.0%	1	.5%
15-17	3	2.0%	1	3.4%	4	2.2%
18 years and older	143	93.5%	28	96.6%	171	94.0%
Total	153	100.0%	29	100.0%	182	100.0%

Base: all homicide accused (N=182)

Note: There were 143 homicide incidents involving 145 deceased killed by 182 accused. Therefore multiple counting of deceased occurs in the table above.

2.23 The majority of homicides involved intra-racial killings. That is, when Caucasians killed they most often killed Caucasians. When people of other racial appearance killed they most often killed people of the same racial appearance.⁸⁵ [St23](#)

RELATIONSHIP

2.24 While the relationship between the accused and deceased is important, it is not always the motivation or primary context for the killing. For example a daughter may kill her mother because she is mentally impaired. This section examines the relationship between the parties, paras 2.37–2.62 discuss the context of the killing.

ACCUSED

2.25 As Graph 3 shows, the deceased was usually known to the accused.

- No women killed strangers. Only 26 of the 182 accused (17.0%)—all of whom were men—were charged with killing strangers.⁸⁶ [St24](#)

81 See paras 2.60–2.61 for further discussion of these incidents.

82 See for example Jenny Morgan, *Who Kills Whom and Why: Looking Beyond Legal Categories* (2002) 17; Christine Alder and Kenneth Polk, *Child Victims of Homicide* (2001) 3.

83 Above n 10, although this used a base of accused-deceased pairs.

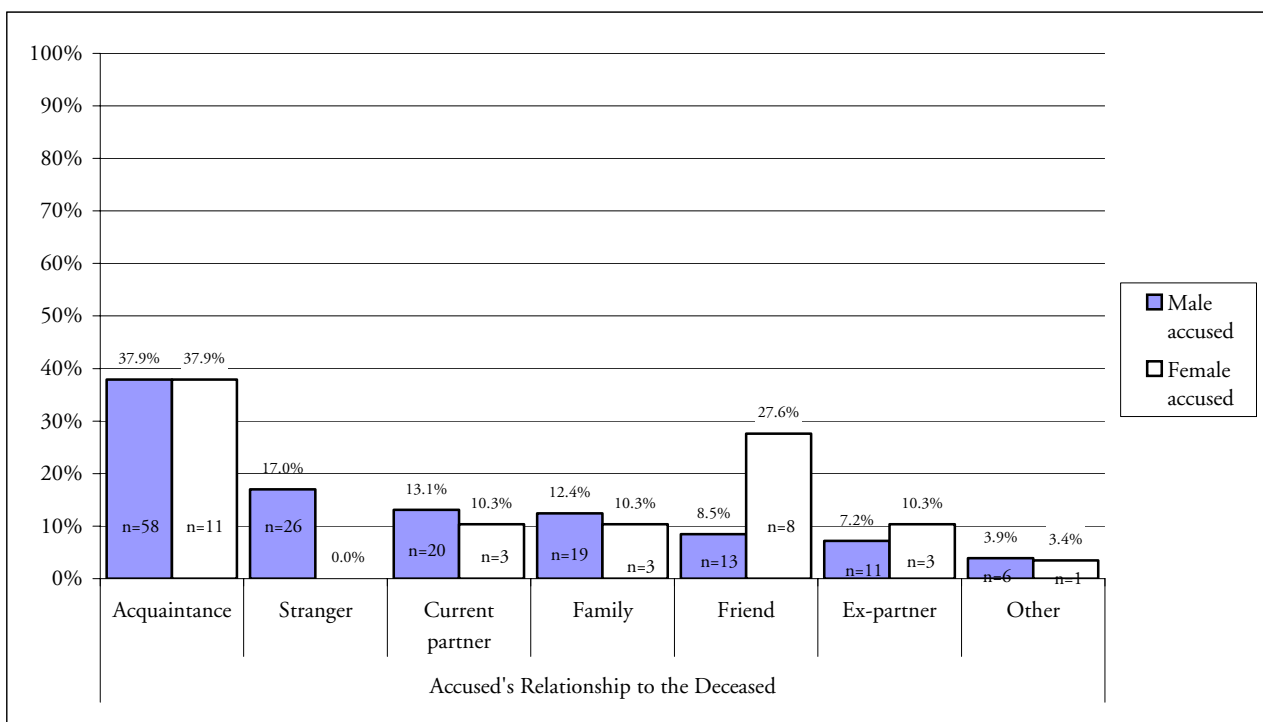
84 For example 2.0% of the male accused killed children aged 15–17 years old and 2.2% of all accused killed children aged 15–17 years old.

85 Of the 163 offenders with Caucasian appearance, 153 killed victims of the same appearance. Appearance is as classified by the police, see above n 56.

- Most commonly the accused and deceased were friends or acquaintances⁸⁷ (90 or 49.5% of accused).⁸⁸ **St24a**
- A notable proportion of accused were charged with killing their partner⁸⁹ or ex-partner (20.3%) **st24**.⁹⁰ As we will see below, many of these killings involved men who killed their female partners or ex-partners. As we discuss in Chapter 3 this has important implications for the partial excuse of provocation.

2.26 The fact that 17.0% of men killed strangers, while no women did, is relevant to the law of self-defence. This is discussed in Chapter 4 below.

GRAPH 3: RELATIONSHIP OF MALE AND FEMALE ACCUSED TO DECEASED



Base: All homicide accused

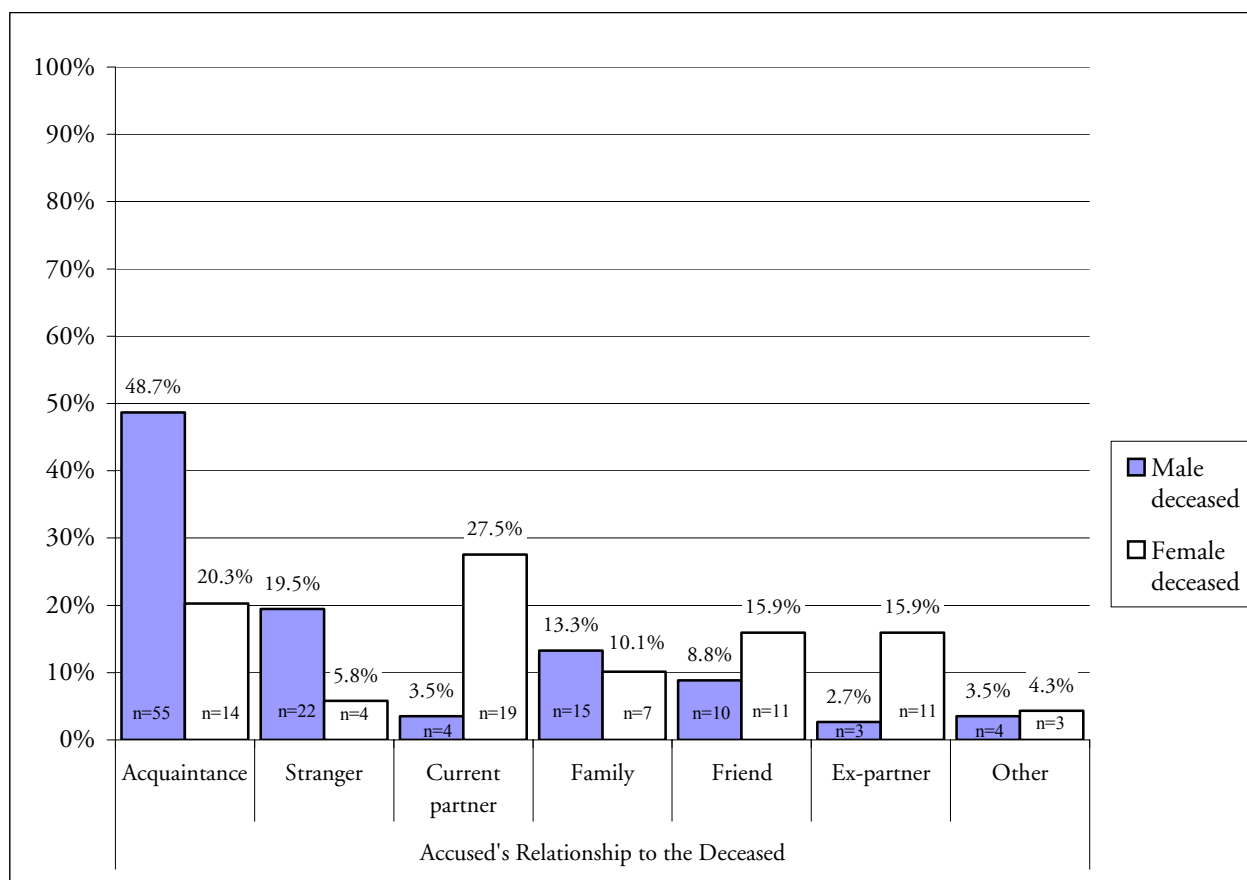
- 86 'Strangers' includes acquaintances of less than 24 hours. Two of these 26 homicide accused were acquaintances of the deceased for less than 24 hours before the killing, the other 24 homicide accused were strangers to the deceased.
- 87 'Acquaintances' includes neighbours, gang members and employer/ex-employer-employee relationships.
- 88 This number, but not the percentage is depicted on the Graph, as the Graph refers to percentages of males and females. Our study showed a higher proportion of homicides falling into this category than in J Mouzos, *Homicidal Encounters: A Study of Homicide in Australia 1989–1999* (2000) Table 5, 68. When we redistribute our data in accordance with the Mouzos study's classifications (six sexual rivals we classified as 'acquaintance' and one sexual rival we classified as 'defacto' become 'other'; one employee/employer case moves from 'friend/acquaintance' to 'other'), we still have a greater proportion of friend/acquaintance cases and fewer strangers. This is probably mainly due to the 8.7% in the unknown category in the Mouzos Study being redistributed in ours (unknown = 0%) as we had access to more detailed information. Approximately 11% of the incidents in the Mouzos study were unsolved murders (p.51) so nothing was known about the accused-deceased relationship.
- 89 This includes spouses, defactos, girlfriends/boyfriends, extra-marital lovers and homosexual partners.
- 90 Not all of these were motivated by sexual intimacy, see para 2.24 and n 125.

Note: Two incidents of homicide involved two deceased and multiple accused. Relationship is only recorded for one deceased in each of these incidents. However, in incidents where multiple deceased are recorded, they each have the same relationship to the accused. That is, in one incident both the deceased were strangers to the accused and in the other incident, both deceased were friends of the accused.

DECEASED

2.27 Graph 4 shows that women were most likely to be killed by their partner or ex-partner (43.4% of female deceased), while only 6.2% of men were killed by a partner or former partner.⁹¹ **St25** Only 5.8% **st25a** of women were killed by strangers, compared with 19.5% of men.⁹² Similar patterns are apparent in other studies.⁹³

GRAPH 4: RELATIONSHIP OF MALE AND FEMALE DECEASED TO ACCUSED **st25**



Base: All homicide accused.

Note: As a number of incidents involved multiple accused killing one deceased, in order to reflect all the accused-deceased relationships, the base used is homicide accused. This means some deceased will have been counted more than once. For example if three men killed a woman, that woman would be counted three times in the graph above. This graph should be read as follows: nearly half of male deceased (48.7%) were acquaintances of the accused.

91 Chi-square is significant at <.001. **st25**

92 Chi-square is significant at <.001. **st25a**

93 See for example Law Reform Commission of Victoria, *Homicide Prosecutions Study*, Appendix 6 to Report No. 40 (1991) 16–17 which uses a base of accused-deceased pairs for this calculation.

2.28 Family and partner homicides are also more likely to involve single accused; whereas friend, acquaintance and stranger homicides more often involve multiple accused.⁹⁴

THE RELEVANCE OF DOMESTIC VIOLENCE

2.29 Our study considered the extent to which there was a history of domestic violence prior to the homicide incident, particularly in homicides in the context of sexual intimacy.⁹⁵ We use the term ‘domestic violence’ to refer to ‘violence [which] happens in the family. It includes any behaviour which causes damage to another person (the damage may be physical, sexual, emotional, financial) or which causes someone to live in fear. It includes damage to property and threats to damage a person, pets or property.’⁹⁶ A ‘history of domestic violence’ was only recorded as existing where it was alleged that the violence involved the parties to the homicide.⁹⁷ Domestic violence committed by one party that was committed in the past against a non-relevant third party was not included.

2.30 It is widely recognised that domestic violence is under-reported.⁹⁸ In addition, the accused is likely to contest allegations that he or she was previously violent to the deceased, and other evidence on this matter may not be available.⁹⁹ This made it impossible for the Commission to accurately determine the truth about whether domestic violence existed in these incidents or not. The study recorded allegations made at any stage of the prosecution¹⁰⁰ about acts of domestic violence committed by either the accused or the deceased prior to the homicide incident.

2.31 Thirty-one of the 182 homicide accused (17.0%) were alleged to have been violent in a domestic context **st26**, see Table 4 below. This violence generally occurred in the context of parent–offspring relationships¹⁰¹ or sexual intimacy (discussed in paragraphs 2.56–2.57 below). Twenty-eight of these domestic violence allegations involved male accused. Twenty-two involved domestic violence by a male accused against a female deceased and six by a male accused against a male deceased.¹⁰² Of the 31 accused alleged to have been violent, 23 killed in the context of sexual intimacy.¹⁰³ **St28**

94 See Appendix 2 Table 4.

95 For issues relating to the collection of data on domestic violence, see paras 2.29–2.33.

96 Domestic Violence and Incest Resources Centre, *What’s in a name? Definitions and Domestic Violence? Family Violence? Violence Against Women?* Discussion Paper 1 (1998) 9. See also Women’s Domestic Violence Crisis Service, *What’s Love Got To Do With It?: Victorian Women Speak About Domestic Violence*, Annual Report 2001-2002 (2003) 8.

97 This can include violence directly involving the accused and deceased, violence involving children of the accused or deceased, or violence involving the accused or deceased which is directly relevant to the homicide (such as violence directed by the deceased at his ex-partner, leading her new sexual partner to kill the deceased).

98 Australian Bureau of Statistics, *Women’s Safety Australia*, Catalogue 4128.0 (1996) 29. This survey only examined the reporting rates of women 18 years and older who had suffered violence by a man. However, the survey showed that women who experienced violence by a current partner were least likely to report the incident to police.

99 As the only other witness is often the deceased who can no longer give evidence.

100 And were noted in the information available to us.

101 See chapter 6 paras 6.19–6.40 for description of the contexts in which parents were alleged to have killed their children. Adult offspring also killed their parents, see para 2.62.

102 The six allegedly violent men who killed males included five fathers who killed their sons or stepsons, all of whom were under six years old and one man who killed his ex-girlfriend’s new partner.

103 See paras 2.56–2.57 for further discussion of domestic violence in the context of sexual intimacy.

TABLE 4: ALLEGATIONS OF DOMESTIC VIOLENCE AGAINST THE ACCUSED—GENDER OF DECEASED BY GENDER OF ACCUSED ST27

Gender of deceased	Male accused	Female accused	Total accused
	n	n	N
Male	6	0	6
Female	22	3	25
Total	28	3	31

Base: All homicide accused where the accused is alleged to have been violent toward the deceased (N=31).

In addition, Table 5 shows that there was an alleged history of domestic violence against 14 of the 145 victims (9.7%) st30.¹⁰⁴ In 10 of these 14 homicides, the deceased was male.

TABLE 5: ALLEGATIONS OF DOMESTIC VIOLENCE AGAINST THE DECEASED—GENDER OF THE DECEASED BY GENDER OF THE ACCUSED ST30

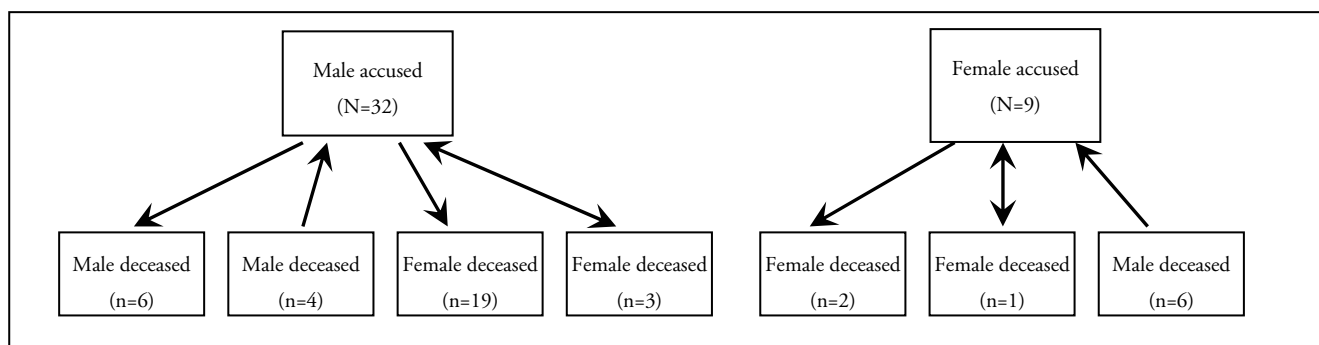
Gender of accused	Male deceased	Female deceased	Total deceased
	n	n	n
Male	4	3	7
Female	6	1	7
Total	10	4	14

Base: All homicide accused where the deceased is alleged to have been violent toward the accused (N=14).

Note: This table should be read as follows: Among four male accused where the deceased was also male, there were allegations of domestic violence against the deceased.

2.32 The Chart below shows the gender of both accused and deceased against whom domestic violence allegations were made and who killed whom. Of the 32 male accused who had prior allegations of domestic violence against them, 22 men killed women. Ten male deceased had allegations of domestic violence against them.

FIGURE 2: ALLEGATIONS OF DOMESTIC VIOLENCE AGAINST ACCUSED AND DECEASED BY GENDER OF ACCUSED AND DECEASED ST31



Arrows show the direction of the alleged prior domestic violence.

104 This does not necessarily mean that the accused were motivated to kill by this alleged domestic violence by the deceased, see para 2.53 below.

2.33 General observations about cases involving domestic violence are set out below. Note that this summary does not include cases in the context of sexual intimacy. Domestic violence in the context of sexual intimacy is dealt with below at paras 2.56–2.57

EXAMPLES OF CASES INVOLVING DOMESTIC VIOLENCE (OTHER THAN SEXUAL INTIMACY)

In some cases the homicide occurred where there had been a previous history of violence by the accused against the deceased. This included cases where:

- five male accused killed their young sons;
- one male accused killed his sister; and
- one mentally impaired woman killed her mother.

In other cases the homicide was committed by the person who had allegedly been suffering from violence at the hands of the deceased. This included cases where:

- three adult sons killed their fathers;
- one father killed his mentally impaired son;
- one mentally impaired woman killed her husband; and
- two girls killed a male family member.

In one remaining case a mentally impaired woman killed her mother and both parties had allegedly been violent towards each other.

PLACE AND MEANS OF KILLING

2.34 Most homicides occurred in the home of the accused or the deceased (63.0% of 143 incidents).¹⁰⁵ **St32**

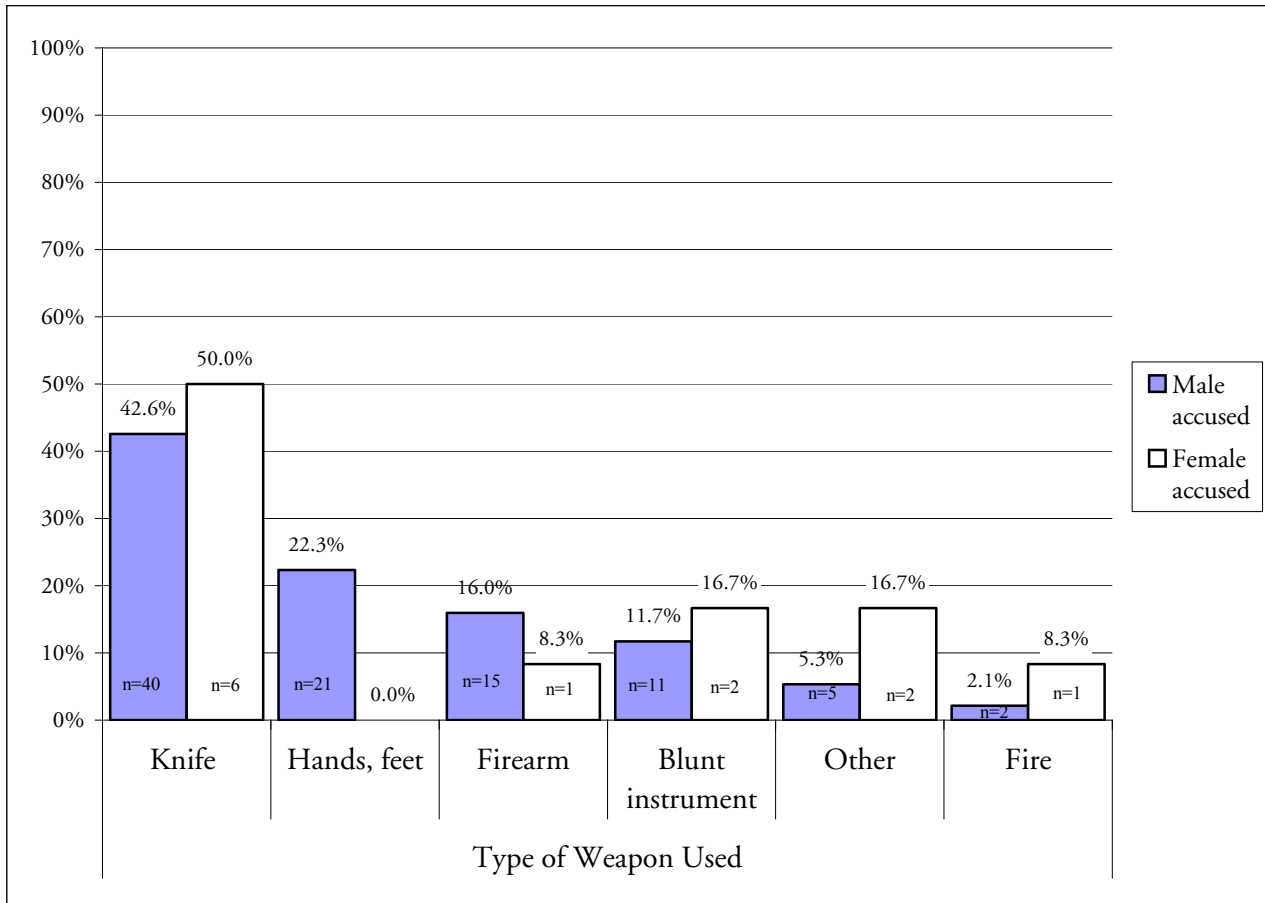
USE OF WEAPONS BY ACCUSED

2.35 Graph 5 shows that the use of weapons differed according to the gender of the accused. All female accused who acted alone used a weapon other than their hands and feet. Nearly one quarter (22.3%) of male sole accused used their hands and feet. This may be important when considering the proportionality of force in relation to self-defence: see Chapter 4.¹⁰⁶

105 Based on 143 incidents.

106 Extreme care must be taken in interpreting this information as the number of female accused is very small.

GRAPH 5: TYPE OF WEAPON USED BY MALE AND FEMALE SOLE ACCUSED¹⁰⁷ ST33A



Base: All homicide accused in incidents involving a single offender and single victim (N=106).

HOW THE DECEASED WERE KILLED

2.36 Most victims were killed by a weapon (80.7%) **st34** other than the accused’s hands or feet.¹⁰⁸ The most commonly used weapon was a knife or other sharp instrument (40.7%), followed by firearms (17.2%) or a blunt instrument (13.8%). In 19.3% of incidents the homicide was committed by using hands and/or feet.¹⁰⁹

107 Based on 106 incidents (94 male accused and 12 female accused) involving single accused and single victims. Information on the weapon used was imported from the AIC data. Only the primary weapon causing death was recorded in relation to the victim. That is, although more than one weapon may have been used, only the weapon that was considered responsible for the death of the victim was included. This method of data collection limits our knowledge about multiple types of weapons that may have been used in the homicide. In addition, where multiple accused were indicated, it is unknown whether all or some accused used the weapon (or indeed a variety of weapons). Therefore this analysis has been undertaken only for homicides involving a single accused and a single deceased and the results cannot be extrapolated to incidents involving multiple accused. ‘Knife’ includes other sharp instruments.

108 Based on 145 victims. See Appendix 2 Table 6 gender of deceased by weapon used. These proportions might change if homicide-suicides were included.

109 The types of weapons used on male and female deceased were remarkably similar except in the case of firearms. One fifth of men (20.9%) were killed by a firearm compared with only about one tenth of women (11.9%). See Appendix 2 Table 6.

THE HOMICIDE CONTEXT

2.37 In examining possible reforms to homicide defences it is important to understand the circumstances in which homicides typically occur. In the *Defences to Homicide: Issues Paper* we outlined Professor Polk's method of categorising homicides.¹¹⁰ During the course of this study we met with Professor Polk to discuss the application of his scheme to our project. After consultation with him we decided to use his typology of homicides with some minor modifications.

2.38 The following categories of homicides were used to classify our data:

- 'spontaneous encounter' homicides (for example, pub brawls);
- 'conflict resolution' homicides (killings that resulted from a planned intention to use violence to resolve a dispute, for example, a dispute about a debt);
- 'originating in other crime' homicides (for example, killings in the context of an armed robbery);
- 'sexual predation' homicides (for example, killing a victim after raping her);
- 'homophobic killings' (these include killings of people believed to be gay and killings argued to be in the context of an unwanted homosexual sexual advance);
- 'sexual intimacy' homicides (these include killings by partners or former partners because of jealousy or a desire to control the deceased, incidents involving the killing of sexual rivals and incidents where a person kills a violent partner or former partner);
- 'child killings' (the killing of children under 18 by their parents or step-parents);¹¹¹
- 'other family member' killings (including an adult or minor offspring killing a parent or step-parent, a parent killing adult offspring or a sibling killing another sibling);
- 'mental impairment or mental illness' resulting in homicide (this includes all incidents where mental impairment was raised, regardless of the relationship between the accused and deceased);¹¹²
- 'other killings' including accidents; and
- 'miscellaneous' killings where the motivation for the homicide is unclear or there is insufficient information to classify it.¹¹³

2.39 Homicides were categorised by reference to the nature of the incident, rather than the characteristics of the particular accused or the relationship between the accused and deceased. For

110 See Issues Paper para 2.8.

111 There is a difference between relationship (para 2.25–2.27) and context. Only minors killed by their parents or step-parents could be classified as occurring in the context of child killings (so the father who killed his adult son is classified as a parent-child relationship, but not a child killing context). Not all minors killed by their parents or step-parents were classified as child killing contexts. One incident where a stepfather killed his 15-year-old stepson is classified as miscellaneous as the motivation for the homicide is not clear. An incident where a child was killed by a stranger would be classified by the context it best fit (for example sexual predation).

112 This is because mental impairment is treated as overriding everything else. For example where a mentally impaired wife kills her husband, it is classified as a homicide occurring in the context of mental impairment, rather than sexual intimacy.

113 This was more likely to arise in Polk's initial study, because it examined all homicides reported to the coroner and thus includes unsolved murders.

example, an incident where a man killed his cousin was classified as a homicide originating in other crime, even though they were family members, because he was accidentally killed while trying to help the accused carry out arson.¹¹⁴

2.40 Each homicide was treated as having a primary context, even though some of the people involved may have had different motivations for committing the crime. For example, in one incident a man killed his ex-girlfriend with the assistance of his brother and one of the deceased's friends. Although the deceased's friend was involved in the homicide due to a desire to take revenge on her friend for previous actions, the main cause of this homicide was seen to be the ex-boyfriend's jealousy. This homicide (and for all the accused in it) was therefore classified as a homicide in the context of sexual intimacy, rather than a conflict resolution homicide.

2.41 There were sometimes complexities in deciding which category a particular incident fell into because evidence of the circumstances in which the homicide occurred was often contested. In the end, a decision was made about the likely circumstances in which the homicide took place, based on the evidence available.¹¹⁵

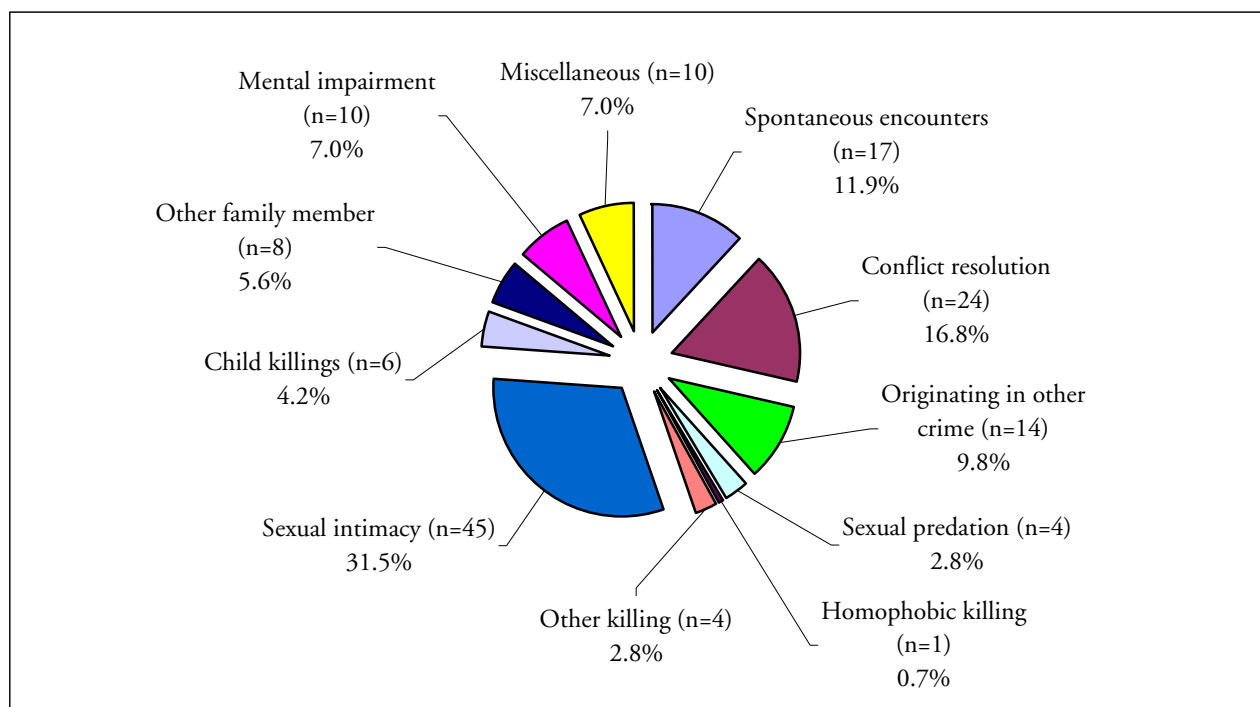
2.42 A decision was then made, based on the factual circumstances, about which category the homicide properly belonged to. In many instances this was a simple decision, but in some cases a matter could possibly fall within a number of categories. In such borderline cases, the researcher would make a determination based on the category with which it had the most characteristics in common. A summary of the facts was then provided to Professor Polk, so that he could also make a determination. In each case, the decisions made by the researcher and Professor Polk coincided.

2.43 Graph 6 sets out the context in which prosecuted homicides occur. It shows that homicides occurring in the context of sexual intimacy were the largest category (31.5% of incidents).¹¹⁶ Conflict resolution homicides were the next most common (16.8%), followed by spontaneous encounters (11.9%), homicides originating in other crimes (9.8%) and homicides involving children and other family members (9.8%).

114 See para 2.60 and n 125.

115 We note that this determination was not based on the trial outcome. For example, a case that seemed clearly to be related to a dispute over drugs, but for which the accused was acquitted due to a lack of evidence, would still be classified as a 'conflict resolution homicide'. In some cases there was simply not enough evidence to provide for even a best guess, in which case the incident was classified as 'facts unknown' and put in the miscellaneous context category.

116 These figures are based on the number of incidents, not the number of accused involved in the incidents.

GRAPH 6: BROAD CONTEXT OF THE HOMICIDE INCIDENT

Base: All homicide incidents (N=143).

Note: Percentages are of incidents, for example 11.9% of incidents were in the context of spontaneous encounters. 'Miscellaneous' includes mysterious killings where insufficient facts are known to define the context. 'Other killings' includes accidents (for example, from playing with guns or consensual bondage sex) and a work-related spree killing.

2.44 These results broadly reflect those found in Polk's original study.¹¹⁷ Homicides in the context of sexual intimacy remain the most common context, while the categories of homicide originating in other crimes and family intimacy homicides occur in roughly the same proportions.¹¹⁸ There are still a small proportion of 'miscellaneous' incidents which defy categorisation.

2.45 In Polk's study spontaneous encounters comprised the second largest category, while in our study conflict resolution homicides were the second largest category. Some of this difference may be due to classifying homicides that would have been treated as arising out of spontaneous encounters in Polk's original study as conflict resolution homicides in this study.

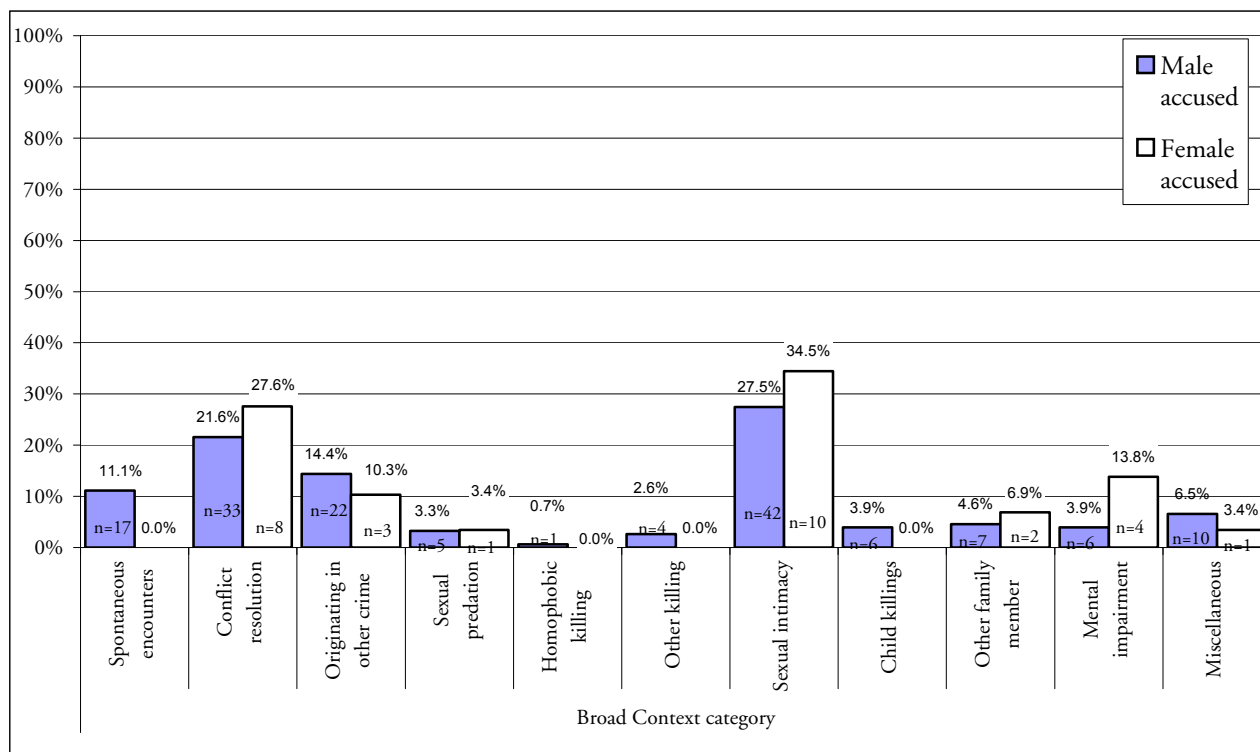
2.46 Graph 7 shows that the contexts in which homicides occur differs substantially according to the gender of the accused. None of the 29 women committed for trial for homicide offences were accused of killing in the course of spontaneous encounters [st36](#). By contrast 17 of the 153 men (11.1%) were

117 Kenneth Polk, *When Men Kill: Scenarios of Masculine Violence* (1994) 22–6.

118 It should also be noted that Polk's study was based on coroner's files, while our study covered only homicide prosecutions. In Polk's study percentages falling into particular categories are percentages of victims, while in the VLRC study they were calculated as percentages of homicide incidents. This makes it misleading to compare the actual percentages falling into particular categories in the two studies. In addition classifications of homicides were refined in consultation with Polk. Some types of homicides which would have been treated as spontaneous encounter homicides in Polk's original study were treated as conflict resolution homicides in our study. This was because in Polk's original study if the accused had a history of ill-will towards the deceased and then killed the deceased when they met at a pub, it would be classified as a spontaneous encounter because it erupted spontaneously. However in our study greater weight was given to the history of interactions between the parties and so even though it occurred spontaneously, such an incident would be classified as occurring in the context of conflict resolution in our study.

said to have done so. For both male and female accused, the most common context was homicides in the context of sexual intimacy, but women were proportionately more likely to commit homicides motivated by mental impairment than men.¹¹⁹ This is discussed in Chapter 5.

GRAPH 7: CONTEXT IN WHICH MALE AND FEMALE ACCUSED KILL¹²⁰ st36 & 37



Base: All homicide accused. (N=182)

Note: Unusually, the child killings in this study were all of boys under 6 years old by their fathers or stepfathers. However, these numbers are small and should be treated with caution. See para 2.61 below. The female accused who killed in the context of sexual predation was assisting a male accused. It was the male accused who sexually assaulted the deceased.

2.47 Gender differences are even more apparent in homicides involving single accused as opposed to multiple accused st38. While the number of women discussed here is small, it is the relative proportions that are of interest. Women, as single accused, most often killed in the context of sexual intimacy (50.0%, n=6) compared with male single accused (35.1%, n=33). In addition, one third of women (33.3%, n=4) killed in the context of mental impairment. A very small proportion of men (6.4%, n=6) killed in this context.

2.48 We noted in the Issues Paper¹²¹ that homicides in the context of sexually intimate relationships and spontaneous encounter homicides are highly relevant for the purposes of this reference, because defences such as self-defence and provocation arise in many of the incidents in these categories. This was borne out in our study.¹²² The other main categories that are of relevance to a discussion of defences

119 However caution must be used with interpretation of these results as the numbers are very small.

120 Often the context can be classified multiple ways, see paras 2.39–2.42 and n 112. Thus the mental impairment category includes five adult offspring killing a parent and two accused killing their other family members (partners).

121 See Issues Paper paras 2.9–2.11.

122 See below paras 2.89–2.93.

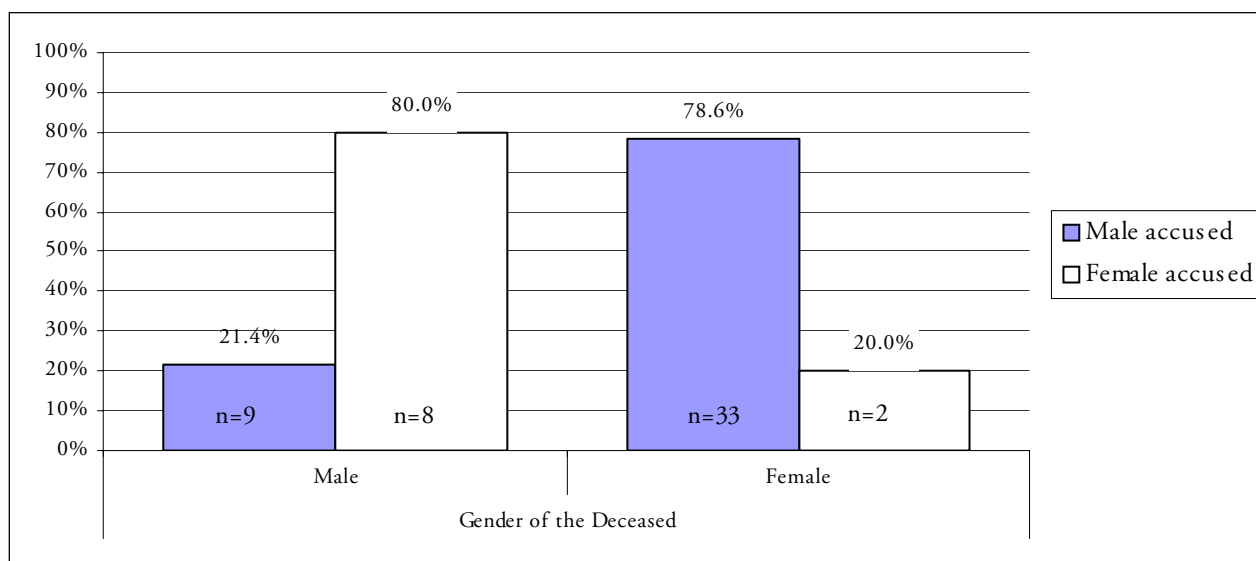
to homicide are child and other family member killings, which can also raise defences of provocation, self-defence or infanticide.

2.49 Defences such as self-defence and provocation are much less relevant to other categories of homicide, such as homicides originating in other crimes and conflict resolution homicides.¹²³ For example, self-defence is only likely to arise when such killings ‘go wrong’, and the person intending to carry out the killing is killed by the intended victim.¹²⁴ The use of defences in such instances will generally not raise complex policy issues. As a consequence, we will not examine these categories in any depth. The remainder of this section will focus only on those areas of relevance to this reference.

HOMICIDES IN THE CONTEXT OF SEXUAL INTIMACY

2.50 As we have seen, sexual intimacy was the most common context in which both men and women killed. However many more men than women killed in this situation. Forty-two male and 10 female homicide accused killed in the context of sexual intimacy.¹²⁵ Graph 8 shows that in general the accused killed a person of the opposite gender, although there were some exceptions.

GRAPH 8: SEXUALLY INTIMATE HOMICIDES—WHO KILLED WHOM ST39



Base: All homicide accused in the context of sexual intimacy (N=52). As context is based on incident, all the accused in that incident will be counted in the sexual intimacy category.

Note: This graph should be read as follows: of the 10 women who killed in the context of sexual intimacy, eight killed men and two killed women.

2.51 Polk’s earlier research showed that when men killed women partners or former partners in the context of sexual intimacy they were usually motivated by jealousy or a desire to control the deceased, for example by preventing her from leaving him. ‘A common and persistent statement of accused in

123 Even though there were more conflict resolution homicides than spontaneous encounter homicides in our sample.

124 The most commonly raised defences for both conflict resolution homicide and homicides originating in other crimes were lack of intention and denial of participation of the accused. Self-defence and provocation were raised in less than 10% of these cases.

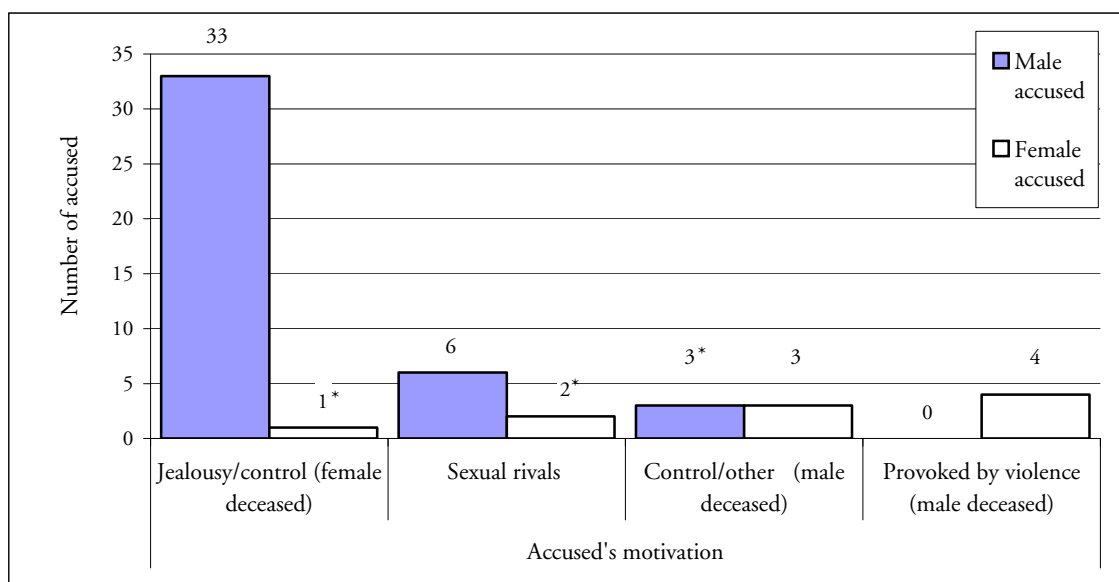
125 Three more accused killed their partners, but the primary context was not sexual intimacy (two were in the context of mental impairment and one was in the context of other killing).

such instances was “If I can’t have her, no one will.”¹²⁶ Such incidents often involved a pattern of prior violence over a long period. When men killed men in the context of sexual intimacy the deceased was most often a sexual rival.

2.52 Polk also comments that in the less common scenario of a woman killing a male partner or ex-partner the woman’s violence is often a consequence of prior male violence. Women rarely kill as the result of jealousy or a desire to prevent the man from leaving, although they may occasionally kill as the result of ‘a spontaneous flare-up’ or as a desire to rid themselves of an unwanted partner.¹²⁷

2.53 Graph 9 shows that our study revealed similar patterns to those in the Polk study. When men killed in the context of sexual intimacy it was most likely to be in circumstances of jealousy or control (33 or 78.6% of the men) whereas when women killed it was most likely to be in response to alleged violence by the male deceased (four women or 40.0%).¹²⁸ **St 39**

GRAPH 9: SEXUAL INTIMACY HOMICIDES—MOTIVATION OF MALE AND FEMALE ACCUSED **ST 39**



Base: All homicide accused in the context of sexual intimacy. (N=52)

Note: Co-accused in cases involving multiple offenders.

This graph should be read as follows: 33 male homicide accused, who killed in the context of sexual intimacy, killed women because they were jealous of them or wanted to control them.

*The one woman who killed in the context of men being jealous/controlling of women was one of three accused in the incident described in para 2.40. The three men who killed men in the context of control/other were helping wives kill their husbands. One woman who killed in the context of male sexual rivals was one of four accused involved in an incident in which a man killed his male sexual rival.

2.54 This difference in the circumstances in which men and women killed is particularly relevant to our discussion of defences to homicide. In particular, men who killed women in circumstances of jealousy or control often raised the defence of provocation,¹²⁹ while killings in response to violence may

126 Polk, above n 117, 23. At least one accused in our study actually wrote this in a number of text messages he sent to his ex-girlfriend before killing her, Case No. 2001299.

127 Ibid.

128 Homicides can occur against a background of domestic violence, where it appears that the immediate motivation for the killing was something other than the domestic violence. Where the alleged violence by the deceased only occurred at the time of the homicide, it is not classified as a case having a history of domestic violence.

129 See para 2.89 below.

have raised the issue of self-defence. We discuss such homicides, and their gendered nature, in Chapters 3 and 4 below.

2.55 Our analysis of these incidents also showed that sexual intimacy is the context in which women are most likely to be killed. Of female deceased 55.0% were victims of homicides in the context of sexual intimacy [st 40 & 41](#). It is of particular concern that an examination of these incidents reveals that at least 14 men killed women when they left, or threatened to leave, the relationship.¹³⁰ These killings have been termed ‘separation assaults’, and are also discussed in Chapters 3 and 4. By contrast, men are most likely to be killed as a result of conflict resolution homicides (24.7%) [st40& 41](#).

DOMESTIC VIOLENCE IN SEXUAL INTIMACY CASES

2.56 Forty-five people were killed in the context of sexual intimacy [st 40](#). There were allegations of domestic violence against the accused in relation to 22 of these victims, 21 of whom were women [st 43](#) (20 of these 21 women were killed by men). Such a context of violence should be taken into account in considering reform of provocation and self-defence, as discussed in Chapters 3 and 4.

2.57 Six of the 14 homicides in which there was an allegation of domestic violence by the deceased were also homicides in the context of sexual intimacy [st 44](#).¹³¹



EXAMPLES: Domestic Violence in the Context of Sexual Intimacy

- One male accused who had allegedly previously been violent towards the deceased killed his ex-girlfriend’s new boyfriend.
- Eighteen men who had allegedly previously been violent towards the deceased killed women in the context of sexual intimacy.
- In three incidents in the context of sexual intimacy, both the male accused and the female deceased had allegedly been violent before.¹³²
- One woman who had allegedly been violent towards the deceased before killed her ex-boyfriend’s new girlfriend.
- Three women killed men who had allegedly previously been violent towards them in the context of sexual intimacy.

SPONTANEOUS ENCOUNTER HOMICIDES

2.58 In our study 17 of the 182 accused (9.3%) killed in spontaneous encounters.¹³³ All of these homicides involved men killing men. These results coincide with Polk’s study, which found that such

130 There were 15 separation assault incidents, in two of these incidents the victims were male (the new partners of the accused’s wife or ex-girlfriend). Two of the 15 incidents had multiple accused. (One incident involved two brothers and their female friend killing the ex-girlfriend of one of the brothers; the other involved two men killing the new boyfriend of the accused’s ex-girlfriend.)

131 In total, 20 of the 52 homicide accused in the context of sexual intimacy involved allegations of domestic violence where the accused was violent toward the deceased and three involved allegations where the deceased was violent toward the accused. A further three of the sexual intimacy cases involved allegations of prior domestic violence by both the deceased and the accused against one another. See also para 2.31 and n 132.

132 As noted above, any allegations of domestic violence were recorded, regardless of whether there was evidence supporting them. Thus in at least two of the three cases in which male accused alleged their female partners had been violent towards them, only the female partners had ever been seen with injuries from physical domestic violence. Judges often commented that it was easy for the accused to allege the deceased had been violent as the deceased cannot argue back.

homicides were overwhelmingly a male phenomenon.¹³⁴ In general, these homicides involved the killing of an acquaintance or a stranger. The parties were usually affected by alcohol or drugs **st 46**.¹³⁵

2.59 There may be a need to reform the law in this area. It has been argued that the law of self-defence developed in relation to these kinds of homicides, and continues to be mainly applicable in such circumstances. The fact that such homicides are generally committed by men has been seen by some as an indication of the law's gender bias.¹³⁶ This is particularly the case given the fact that spontaneous encounter homicides often involve men killing strangers. We have seen that women rarely kill those who are unknown to them.

HOMICIDES IN THE CHILD AND FAMILY CONTEXTS

2.60 There were 22 people killed by family members other than their partners or ex-partners **st 47**. This section only discusses the 14 of these 22 homicides which were classified as occurring in the child or family contexts.¹³⁷ The other eight people killed by family members were classified under different contexts.¹³⁸

CHILD KILLINGS

2.61 Six¹³⁹ of these 14 homicides were classified as child killings **st 48**. All of these were incidents of fatal physical assaults of boys under six years old. Three were killed by their fathers and three were killed by their stepfathers. There were no incidents of women killing young children in our sample. In this respect our study is atypical.¹⁴⁰ Five of these six children had injuries from alleged prior domestic violence. These six child killings are discussed in detail in Chapter 6.

HOMICIDES IN THE FAMILY CONTEXT

2.62 Eight of these 14 homicides were classified as occurring in a family context **st 48**.¹⁴¹ Table 6 shows that seven of these eight homicides involving other family members were committed by men, the other was committed by two female children.¹⁴² Some of these incidents, particularly those involving children or adults killing their parents, are discussed in relation to provocation in Chapter 3.

133 See Graph 6.

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

135 The accused was under the influence of drugs or alcohol in at least 15 of the 17 spontaneous encounter homicides. In one case the accused was not drunk or under the influence of drugs and in one case it was not known whether this was the case. The deceased was also under the influence of drugs or alcohol in 15 of these 17 cases. **St 46** There was only one case in which neither the accused or the deceased was influenced by drugs or alcohol. See n 62 for definition of 'drugs'.

136 See eg, paras 4.17–4.18.

137 8.2% of all homicide accused killed in child or family contexts. Context is based on incident, so in the one family context homicide with multiple accused, only one of the accused was related to the deceased but both accused were included in this percentage calculation, see also n 144.

138 These other contexts were mental impairment (five people), originating in other crime (one person: deceased was killed by a fireball accidentally caused by the deceased, his cousin and a friend), miscellaneous (one person: man killed his stepson while allegedly cleaning his gun) and sexual intimacy (one person: man killed his stepdaughter whom he had been allegedly sexually assaulting).

139 Although seven people aged under 18 were killed by family members, one of these incidents where a man killed his stepson was classified as occurring in a miscellaneous context, see n 138 above.

140 Above n 82.

141 Other than child killings (see para 2.61) or sexual intimacy (see paras 2.50–2.57).

142 Above n 143 and 144.

TABLE 6: KILLINGS IN THE FAMILY CONTEXT AND GENDER OF ACCUSED

Relationship	Male accused	Female accused	Total accused
	n	n	n
Child killing step-parent ¹⁴³	0	1	1
Parent killing adult child	1	0	1
Adult child killing parent /grand-parent	5	0	5
Adult siblings	1	0	1
Other ¹⁴⁴	0	1	1
Total	7	2	9

Base: Homicide accused in the context of family killings (n=9)

Note: "Adult child" refers to those aged 19 years and older, "Child" refers to those aged 18 years and younger.

THE PROSECUTION PROCESS

CHARGES

2.63 This section examines the prosecution process.¹⁴⁵ It describes the original charges against the 182 homicide accused in our study and identifies the charges on which they pleaded guilty or were presented for trial.

2.64 Table 7 shows that the vast majority of those in our study were originally charged with murder.¹⁴⁶ A higher proportion of men (94.8%) than of women (89.7%) were originally charged with murder. Only nine people (six men and three women) were originally charged with manslaughter. Two people were originally charged with other offences.¹⁴⁷

PRESENTMENTS

2.65 Not all those originally charged with murder were presented for murder. In some incidents the prosecuting authority reduced the charge to manslaughter because they believed a murder conviction was unlikely. Alternatively, the accused in some incidents offered to plead guilty to a lesser charge. If this offer was accepted by the OPP, the accused was presented on that lesser charge.

Presentment

A presentment is a written accusation of the crime made by the DPP against the accused person(s). Generally, the DPP will make a decision following committal about whether there is sufficient evidence for the prosecution's case. If there is, the DPP or Crown Prosecutor will prepare and sign a presentment.

2.66 Table 7 shows that in our study:

- of the 171 people originally charged with murder, by the time of presentment 50 people had their charges reduced to manslaughter, pleaded guilty to manslaughter or were disposed of in some other way;¹⁴⁸

143 This is the only multiple accused incident in the family context, the other accused was the friend of this accused.

144 This accused was one of two accused who were friends. The other accused was the stepdaughter of the deceased.

145 See Chapter 1 and flow chart in Appendix 1 for an explanation of the prosecution process.

146 The two accused who were charged with, presented on and convicted of two counts of murder have been included with murder throughout.

147 These original charges were both arson causing death but manslaughter charges were added before trial. (The two accused in this incident had caused a fatal fire.)

148 For example nolle prosequis.

- one hundred and four male accused and 17 female accused were presented on murder charges (66.5% of all homicide accused);¹⁴⁹
- forty-four men and 12 women were presented on manslaughter charges (30.8% of homicide accused);
- three male accused were presented on other charges (1.6% of all homicide accused);¹⁵⁰ and
- nolle prosequis were entered for two men (1.1% of all homicide accused).¹⁵¹

A higher proportion of women (41.4%) than of men (28.8%) were presented for manslaughter. This may reflect the different contexts in which men and women kill,¹⁵² as well as the fact that a higher proportion of female homicide accused plead guilty to manslaughter than male homicide accused.

TABLE 7: CHARGES AND PRESENTMENTS FOR MALE AND FEMALE ACCUSED ST 49

		Male accused		Female accused		Total accused	
		n	%	n	%	n	%
Original charge	Murder	145	94.8%	26	89.7%	171	94.0%
	Manslaughter	6	3.9%	3	10.3%	9	4.9%
	Other	2	1.3%	0	.0%	2	1.1%
	Total	153	100.0%	29	100.0%	182	100.0%
Presentment charge ¹⁵³	Murder	104	68.0%	17	58.6%	121	66.5%
	Manslaughter	44	28.8%	12	41.4%	56	30.8%
	Other	3	2.0%	0	.0%	3	1.6%
	Nolle prosequi entered during directions hearing	2	1.3%	0	.0%	2	1.1%
	Total	153	100.0%	29	100.0%	182	100.0%

Base: All homicide accused (N=182)

PLEAS

2.67 Instead of going to trial, a person may choose to plead guilty for a variety of reasons, including the possibility of receiving a reduced sentence. As Table 8 shows,¹⁵⁴ a considerable proportion of people

149 This includes one accused who offered to plead guilty to felony murder during the trial.

150 Details of the three other charges:

One accused originally charged with manslaughter pleaded guilty to recklessly causing serious injury after presentment but before trial. One of three accused initially charged with murder in relation to an incident pleaded guilty to aggravated burglary between presentment and trial, see n 159.

The third accused was presented on murder charges and intentionally and recklessly causing serious injury, but the murder charge was dropped before trial. The accused was found not guilty by reason of mental impairment of intentionally and recklessly causing serious injury.

151 See Chapter 1 para 1.16 for an explanation of nolle prosequis.

152 See paras 2.46–2.47.

153 This may understate the number presented on murder because where a plea of guilty to manslaughter was accepted before the trial, we recorded the presentment charge as manslaughter, even if the actual presentment was still for murder. This was because in these situations the OPP did not always replace the presentment for murder with a new one for manslaughter.

charged with homicide offences (69 or 37.9% of the 182 accused) pleaded guilty to murder or manslaughter.¹⁵⁵

2.68 A higher proportion of female homicide accused (12 or 41.4% of 29 accused) than of male homicide accused (57 or 37.3% of 153 accused) pleaded guilty to a homicide offence. Only one of the 12 women who pleaded guilty, pleaded guilty to murder, compared with 19 of the 57 men who pleaded guilty. Eleven of the 12 women who pleaded guilty did so to manslaughter. Decisions by women to plead guilty are discussed in some detail in Chapter 3.

TRIAL

2.69 Accused who do not plead guilty go to trial.¹⁵⁶ Table 8 shows that of the 104 men presented for murder (Table 7), 85 went to trial on murder. Of the 17 women presented for murder, 15 went to trial. The majority of those going to trial were on charges of murder (92.4% of men going to trial were presented on murder, 88.2% of women going to trial were presented on murder). A higher proportion of women than men pleaded not guilty by reason of mental impairment,¹⁵⁷ although the numbers are very small. This is discussed in Chapter 5.

TABLE 8: PLEAS AND CHARGES AT TRIAL FOR MALE AND FEMALE ACCUSED ST 50

		Male accused		Female accused		Total accused	
		n	%	n	%	n	%
Successful plea	Guilty murder	19	31.1%	2	8.3%	20	27.4%
	Guilty manslaughter	38	62.3%	10	91.7%	49	67.1%
	Nolle entered ¹⁵⁸	2	3.3%	0	.0%	2	2.7%
	Guilty other ¹⁵⁹	2	3.3%	0	.0%	2	2.7%
	Subtotal	61	100.0%	12	100.0%	73	100.0%
Presentment charge	Murder	85	92.4%	15	88.2%	100	91.7%
	Manslaughter	6	6.5%	2	11.8%	8	7.3%
	Other	1	1.1%	0	.0%	1	0.9%
	Subtotal	92	100.0%	17	100.0%	109	100.0%
	Total	153	100.0%	29	100.0%	182	100.0%

Base: All homicide accused. (N=182) Note: successful pleas are those accepted prior to trial.

154 This includes two accused who pleaded guilty to manslaughter by gross negligence (having been charged with murder or manslaughter). These are included with manslaughter in outcomes and sentences.

155 Accused who pleaded guilty at some stage during the trial were counted as pleas, as the trial was not completed.

156 Of the 182 accused, 109 (59.9%) proceeded to trial. This includes accused who pleaded not guilty by reason of mental impairment, see Chapter 5 for more detail.

157 This category includes accused who raised mental impairment or insanity. The distinction is discussed in paras 5.7, 5.22.

158 This is not a plea, but as it means the accused does not go to trial, it would be misleading to include it in the category of 'went to trial'.

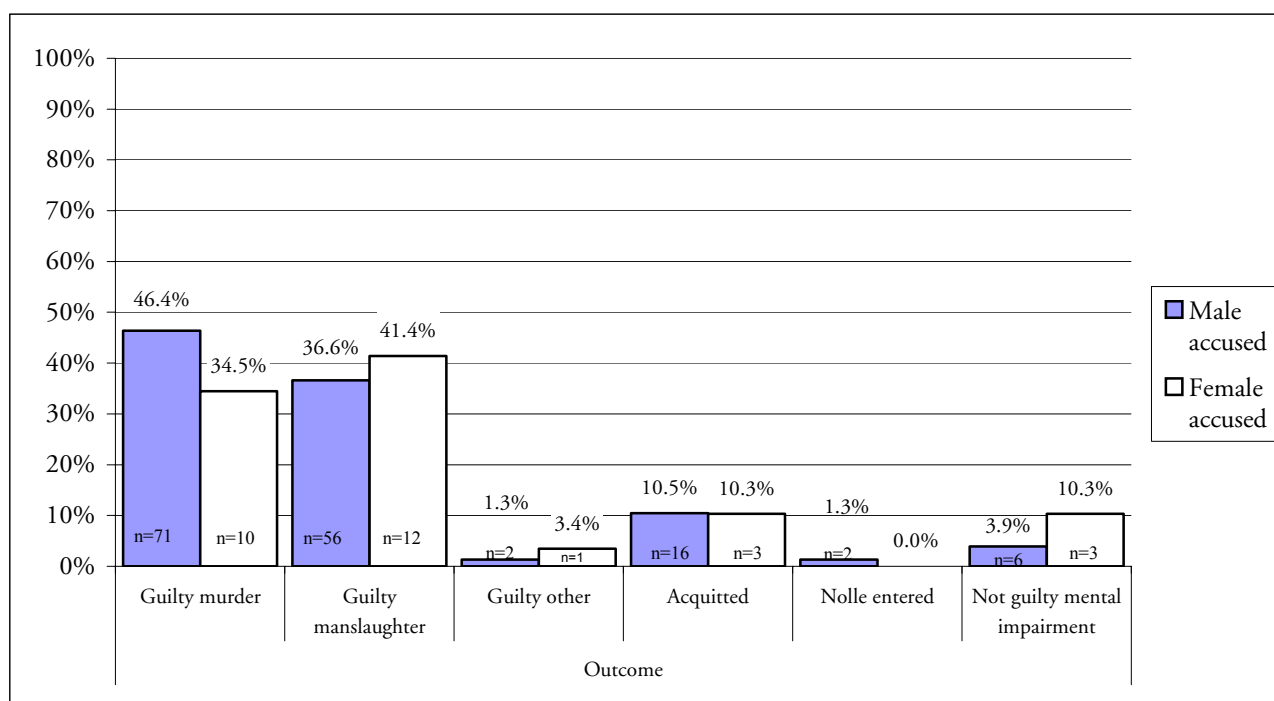
159 One homicide accused pleaded guilty to aggravated burglary, the other to recklessly causing serious injury, see n 150 above for more details.

OUTCOMES¹⁶⁰

ALL OUTCOMES (PLEAS AND TRIALS) FOR ACCUSED

2.70 When an accused was charged with a homicide-related offence, the most likely outcome was a murder conviction.¹⁶¹ Graph 10 shows that men are slightly more likely to be convicted of murder than women (46.4% of men compared with 34.5% of women). This is probably because women are more likely to plead guilty to manslaughter than men. Women in our study were also more likely to be found not guilty by reason of mental impairment¹⁶² than men, although the numbers in this category are very small.

GRAPH 10: ALL HOMICIDE CHARGE OUTCOMES FOR MALE AND FEMALE ACCUSED¹⁶³ ST 51



Base: All homicide accused, includes pleas and trials. (N=182)

Note: This graph should be read as follows: 46.4% of men charged with a homicide offence beyond committal were guilty of murder. It does not show the conviction rate for those who went to trial for murder.

TRIAL OUTCOMES FOR ACCUSED

2.71 Table 9 shows that of the 100 accused who went to trial for murder, 61 were convicted of murder, 18 of manslaughter and 12 were acquitted.¹⁶⁴ This may be compared with the study by the former Law Reform Commission of Victoria. In that study around a quarter of murder trials resulted in

160 This refers to the outcome at first instance unless there has been a retrial, in which case it refers to the retrial outcome, see n 29.

161 Reported for 44.5% of all accused.

162 This category includes accused who raised mental impairment or insanity. The distinction is discussed in paras 5.7, 5.22.

163 This is the outcome for the homicide charge and includes both pleas and trials.

164 One person was convicted of another offence (being an accessory to murder).

a conviction for murder, one third in a conviction for manslaughter and one third in an acquittal.¹⁶⁵ The conviction rate for those presented for murder seems to have increased substantially since the 1980s, the period covered by the earlier study. Of the eight people who were presented for trial for manslaughter in our study only one was convicted.¹⁶⁶

2.72 The outcome of the prosecution process (Graph 10) seems to differ depending on the gender of the accused. As we have seen, when outcomes for all accused (taking account of both pleas and trials) are considered, women are slightly less likely to be convicted of murder (34.5%) than men (46.4%). However in our study women (60.0%) who went to trial for murder had the same likelihood of being convicted of this offence as men (61.2%). It should be noted that only 15 women went to trial on murder charges.

TABLE 9: TRIAL OUTCOMES FOR MALE AND FEMALE ACCUSED ST 53

Presentment	Outcome	Male accused		Female accused		Total accused	
		n	%	n	%	n	%
Murder	Guilty murder	52	61.2%	9	60.0%	61	61.0%
	Guilty manslaughter	17	20.0%	1	6.7%	18	18.0%
	Guilty other ¹⁶⁷	0	.0%	1	6.7%	1	1.0%
	Acquitted	11	12.9%	1	6.7%	12	12.0%
	Not guilty mental impairment	5	5.9%	3	20.0%	8	8.0%
	Subtotal	85	100.0%	15	100.0%	100	100.0%
Manslaughter	Guilty manslaughter	1	16.7%	0	.0%	1	12.5%
	Acquitted	5	83.3%	2	100.0%	7	87.5%
	Subtotal	6	100.0%	2	100.0%	8	100.0%
Other	Not guilty mental impairment	1	100.0%	0	.0%	1	100.0%
	Subtotal	1	100.0%	0	.0%	1	100.0%
	Total	92		17		109	

Base: All homicide accused who went to trial (N=109)

EFFECT OF DECEASED'S GENDER ON OUTCOME

2.73 The gender of the deceased also seems to affect prosecution outcomes. Graph 11 shows that when the deceased was a man, a manslaughter conviction was most likely. More than two-fifths (43.4%) of the accused alleged to have killed men were convicted of manslaughter and 13.3% were acquitted. By contrast, where the deceased was a woman, 60.9% of accused were convicted of murder and only 5.8% were acquitted.

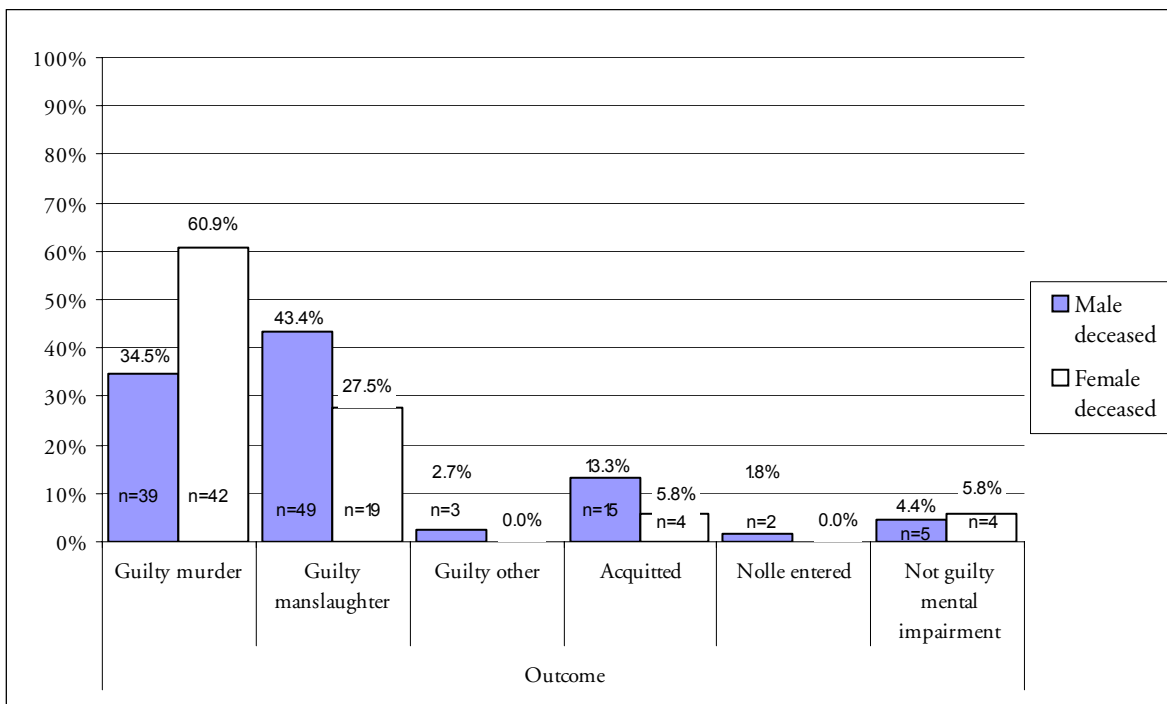
165 Law Reform Commission of Victoria, Law Reform Commission of Victoria, *Homicide Prosecutions Study*, Appendix 6 to Report No. 40 (1991) 66, which uses a base of accused-deceased pairs for this calculation.

166 Of course many more pleaded guilty to manslaughter, see Table 8 above.

167 She was found guilty of being an accessory to murder.

2.74 Similar outcomes are apparent at trial. Table 10 shows that nearly 80% of accused presented for murder were convicted of murder where deceased was a woman, compared with 50% of accused where deceased was a man.

GRAPH 11: ALL HOMICIDE CHARGE OUTCOMES FOR ACCUSED AND GENDER OF DECEASED¹⁶⁸



Base: All homicide accused, includes pleas and trials. (N=182)

Note: This graph should be read as follows: 34.5% of accused charged with a homicide offence beyond committal were guilty of murder of a male deceased. It does not show conviction rate for those who went to trial for murder.

168 This is the outcome for the homicide charge and includes both pleas and trials.

TABLE 10: TRIAL OUTCOMES FOR MALE AND FEMALE DECEASED¹⁶⁹ st 55

Presentment	Outcome	Male deceased		Female deceased		Total deceased	
		n	%	n	%	n	%
Murder	Guilty murder	31	50.0%	30	78.9%*	61	61.0%
	Guilty manslaughter	14	22.6%	4	10.5%	18	18.0%
	Guilty other	1	1.6%	0	.0%	1	1.0%
	Acquitted	11	17.7%	1	2.6%	12	12.0%
	Not guilty mental impairment	5	8.1%	3	7.9%	8	8.0%
	Subtotal	62	100.0%	38	100.0%	100	100.0%
Manslaughter	Guilty manslaughter	1	20.0%	0	.0%	1	12.5%
	Acquitted	4	80.0%	3	100.0%	7	87.5%
	Subtotal	5	100.0%	3	100.0%	8	100.0%
Other	Not guilty mental impairment	0	.0%	1	100.0%	1	100.0%
	Subtotal	0	.0%	1	100.0%	1	100.0%
Total	Guilty murder	31	46.3%	30	71.4%	61	56.0%
	Guilty manslaughter	15	22.4%	4	9.5%	19	17.4%
	Guilty other	1	1.5%	0	.0%	1	.9%
	Acquitted	15	22.4%	4	9.5%	19	17.4%
	Not guilty mental impairment	5	7.5%	4	9.5%	9	8.3%
	Subtotal	67	100.0%	42	100.0%	109	100.0%

Base: All homicide accused who went to trial (N=109), there is double counting of victims in order to record the outcomes for all accused. Of male deceased (n=31), 50.0% had an accused who was convicted of murder when presented on murder.

*Chi-square is significant at <0.05%.

EFFECT OF CONTEXT ON OUTCOME

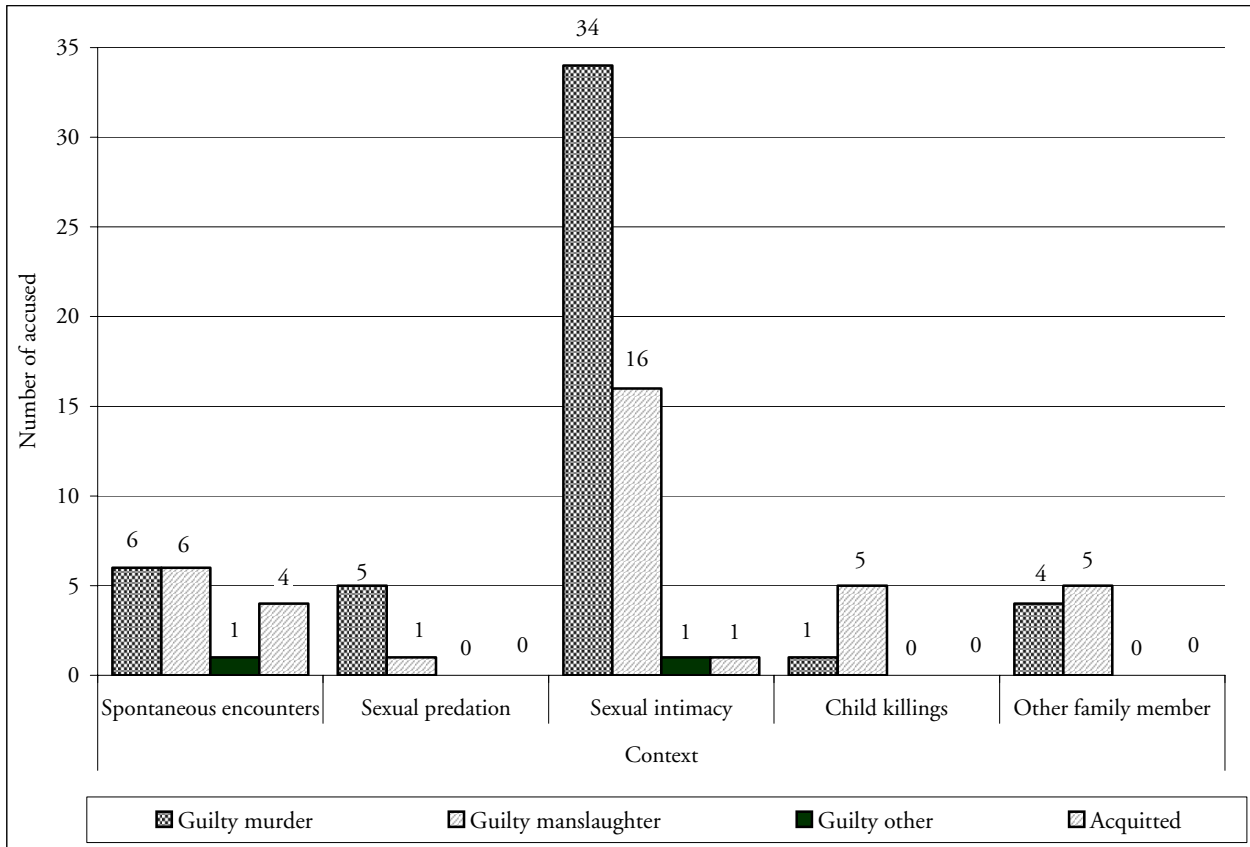
2.75 Prosecution outcomes also differ according to the context of the homicide. Graph 12 shows that accused charged with homicides in the context of sexual intimacy are far more likely to be convicted of murder than in any other type of killing, except those who kill in the context of sexual predation.¹⁷⁰ Of the 52 accused charged with homicide in the context of sexual intimacy, 34 were convicted of murder. Accused charged in this context are also highly unlikely to be acquitted. Only one man was acquitted in relation to sexual intimacy killings, and no women.

2.76 The acquittal rate is highest for people accused of spontaneous encounter homicides. Four of the 17 people charged in this context were acquitted. Those who kill in the family context are most likely to be convicted of manslaughter (5 out of 9 people charged in this context). Those accused who killed in the child context were far more likely to be convicted of manslaughter than murder. No person accused of killing in the child or family contexts was acquitted.

169 Eight accused who killed men had their pleas of guilty to murder accepted.

170 In the context of sexual predation the numbers are very small. Five of the six accused were convicted of murder.

GRAPH 12: POSSIBLE EFFECT OF CONTEXT ON OUTCOME **ST 57**



Base: All homicide accused in the contexts of spontaneous encounters, sexual predation, sexual intimacy, child and other family killings only (N=90), includes pleas and trials.

SENTENCES¹⁷¹

2.77 Sentences are affected by many factors,¹⁷² making it difficult to generalise accurately. The median sentence for those convicted of murder in our study was 18 years, compared with six years for those convicted of manslaughter.¹⁷³ Sentencing statistics published by the Department of Justice show

171 This section only examines sentences at first instance unless there was a retrial, in which case the retrial sentence was used, see n 29. Unless specified otherwise, the figures on sentences are based on the maximum sentence for the homicide offence for the 140 accused who received custodial sentences whether at trial or after pleading guilty. This figure excludes the six accused sentenced to life imprisonment, the nine accused found not guilty because of mental impairment (see Chapter 5) the four accused given non-custodial or suspended sentences and the 21 accused who were not convicted of homicide offences (ie those who were acquitted, for whom nolle prosequi were entered, or who were convicted of lesser charges such as recklessly causing serious injury).

The only offenders to be convicted of multiple counts of murder received life sentences and so are not included in the median calculations.

172 Richard Fox and Arie Freiberg, *Sentencing: State and Federal Law in Victoria* (2nd ed, 1999) 181.

173 Appendix 2 Table 8. These figures underestimate the actual maximum sentences for two reasons: life imprisonment cases have been excluded (see n 171) and where the offender has been convicted of multiple offences (for example murder and theft) the total effective sentence will be longer than these homicide sentences if the sentence for each offence is to be served consecutively.

that the median sentence for murder has increased over recent years.¹⁷⁴ Women received slightly shorter sentences than men over our four year study. The median sentence for men convicted of murder was 18 years, compared with 17 years for women.¹⁷⁵ Similarly, the median sentence for men convicted of manslaughter was six years, compared with 4.5 years for women.¹⁷⁶

2.78 The sentence also seems to be affected by the gender of the deceased. When men were convicted of murdering men, the median sentence was 17 years, compared with 18 years for murdering women.¹⁷⁷ The median sentence in relation to men convicted of manslaughter was the same regardless of whether the victim was a man or a woman (six years).¹⁷⁸ Women actually received a higher median sentence when convicted of murdering women (18 years) than of murdering men (15 years).¹⁷⁹ Female accused also received a slightly higher median sentence when convicted of manslaughter in relation to killing women (5.5 years) than men (4.0 years).¹⁸⁰

2.79 The context of the homicide seemed to have a limited effect on sentences. The small numbers of accused who killed in some contexts makes it difficult to generalise. Of the main contexts, those convicted of murder in the context of sexual predation and sexual intimacy received the highest median sentences (19.5 and 19 years respectively). Murder convictions in other categories such as spontaneous encounters, conflict resolution and originating in other crime all had a median sentence of 17 years. The median sentence for the five people convicted of murder in the context of child and other family killings was shorter (13 years).¹⁸¹

2.80 The median sentence of accused convicted of manslaughter did not differ according to context (6 years for all contexts) except that there was a slightly higher median for child and other family killings (7.5 years).¹⁸²

2.81 The numbers of women who kill in situations other than sexual intimacy are too small to make valid gender comparisons. In the context of sexual intimacy the median sentence for male accused was 18 years and 14 years for women. In conflict resolution contexts the median for men was 15 years and 10 years for women.¹⁸³

2.82 One interesting result in relation to sentencing is that those who were convicted of murder at trial were likely to receive a slightly lower median sentence (17 years) than those who pleaded guilty to

These figures may overestimate the period actually spent in detention because non-parole periods (the minimum term) have not been considered here.

The inclusion of the two accused who pleaded guilty to manslaughter by gross negligence did not affect the median sentence for manslaughter as one received a maximum sentence for the offence of six years and the other four years.

174 Court Services, Department of Justice, *Victorian Higher Courts, Sentencing Statistics 1997/98 to 2001/2*, Vol 2 (2003) 174, 178. These showed a median maximum murder sentence for defendants convicted of murder and sentenced to a term of imprisonment in 2001–2 of 20 years and for defendants convicted of manslaughter and sentenced to imprisonment in 2001–2 of five years and eight months.

175 Appendix 2 Table 8.

176 Appendix 2 Table 8.

177 Appendix 2 Table 8.

178 Appendix 2 Table 8.

179 Appendix 2 Table 8.

180 Appendix 2 Table 8.

181 Appendix 2 Table 13.

182 Appendix 2 Table 13.

183 Appendix 2 Table 13.

murder (18.5 years) **st 58**. This seems contrary to the requirements of the *Sentencing Act 1991*, which requires a guilty plea to be taken into account in determining the appropriate sentence. It is possible, however, that this result is referable to the nature of the homicides which led to guilty pleas. There was no difference in median sentences for those who went to trial and were convicted of manslaughter or those who pleaded guilty. Both received a median sentence of 6 years.¹⁸⁴

USE OF DEFENCES

DATA LIMITATIONS

2.83 As part of this study we attempted to collect information on the defences raised in the course of the prosecution. Sometimes this was made clear from correspondence between the OPP and defence counsel. In other instances evidence of the relevant defences could be gleaned from the trial transcript, particularly if there was a transcript of the parties' closing addresses or the judge's charge to the jury. In a few instances information about the defences relied upon could be obtained from other documentation, such as the record of police interview, the judge's sentencing remarks or rulings made throughout the course of the trial.

2.84 As noted above, however, the documentary information in the files varied from incident to incident, and in a large number of instances there was no specific information about the defences that were raised.¹⁸⁵ Alternatively, while there may have been information about one particular defence that was raised, the information may not have been sufficient to exclude the possibility that it was raised in conjunction with other defences. This is a particular problem in relation to the defences of provocation and lack of intention,¹⁸⁶ which are often raised in conjunction with each other. Where there is a verdict of manslaughter it may not be possible to determine which of these defences was successful.

2.85 As a result, the information collected about defences is far from complete. Where a defence was clearly raised, that has been noted. Where it was clearly stated that the defence was not raised, or where the circumstances were such that such a defence could not have been raised,¹⁸⁷ that has also been recorded. In terms of the success of defences raised, conclusions have also been drawn based on the outcome. For example, if a conviction was recorded, self-defence was seen to be unsuccessful, for it would have resulted in an acquittal. Similarly, if there was a murder conviction, provocation was treated as unsuccessful.

2.86 In all other prosecutions, if there is any doubt about whether a defence was raised, or whether it was successful, it has been recorded as 'unknown'. This leads to the unsatisfying consequence that in reporting our results, we necessarily understate the number of times in which particular defences have been raised. We are hoping to be able to reduce this level of uncertainty prior to publishing a more detailed analysis of our results, by speaking to the parties involved in the cases.

184 Appendix 2 Table 8.

185 Most files did not include transcripts of the jury charge nor defence counsel's closing address.

186 Lack of intention is not technically a defence, but is an element of the offence. For the sake of simplicity, however, it is treated as a defence in this Chapter: see Chapter 3 for a more detailed discussion of lack of intention.

187 For example, it is not possible to raise the defence of infanticide for incidents where the deceased is 12 months old or over.

DEFENCES RAISED

2.87 Defences may be raised at a variety of stages in the prosecution process.¹⁸⁸ For example, they may be raised during the initial police interview or at the committal hearing. Alternatively, they may not be raised until trial. In some incidents, while it may have been suggested at an early stage that a particular defence was going to be run, this may not have occurred because of a change of strategy or because a guilty plea was entered. As far as possible, we have tried to reflect this process by the use of two main variables. The first looks at whether defences were ever raised at all, while the second looks at defences that were actually raised at trial. We note once again, however, that there is a high proportion of ‘unknown’ cases in our sample, due to limitations in the data.¹⁸⁹

DEFENCES RAISED AT ANY STAGE OF THE PROSECUTION

2.88 Table 11 shows that the most common known ‘defence’ raised at any stage during the prosecution process was different for men and women. Men are most frequently known to have raised the defence of lack of intention (47.9%),¹⁹⁰ followed by provocation (30.9%). Women are most often known to have raised the defence of denial of participation (41.7%)¹⁹¹ followed by lack of intention to kill (33.3%). Only three women could be identified as raising provocation and two as having raised self-defence at any stage, although it must be recalled that the number of women in the study was quite small.

2.89 Among male accused, the main defences raised in the context of sexual intimacy were provocation (15 cases) and lack of intention to kill (15 cases). Among men killing within a context of spontaneous encounter nine raised a defence of lack of intention while six reportedly raised self-defence.¹⁹² In conflict resolution contexts, the most frequent defence by males was denial of participation (8 cases) followed by lack of intention (6 cases).¹⁹³ Among men killing in a family context, four raised provocation as a defence.¹⁹⁴

188 Intoxication, denial of participation and lack of intention are not technically defences. However because the result of successfully raising these is the same as successfully using a true defence it is included as a ‘defence’ for the purposes of this Paper.

189 See above paras 2.83–2.86.

190 As noted above, lack of intention is not actually a legal defence, but rather goes towards disproving the elements of the offence. For the sake of simplicity, however, it will be treated as if it were a defence throughout this paper.

191 Denial of participation includes arguments that a someone else committed the offence, statements of ‘I didn’t do it’, formal alibis (‘I didn’t do it and here is proof that I was somewhere else’) and circumstantial cases where it cannot be proved the accused committed the offence or there is insufficient evidence.

192 Appendix 2 Table 10.

193 Appendix 2 Table 10.

194 Appendix 2 Table 10.

TABLE 11: DEFENCES RAISED AT ANY STAGE OF THE PROSECUTION BY MALE AND FEMALE ACCUSED

Defence raised	Male accused		Female accused		Total accused	
	n	% of accused	n	% of accused	n	% of accused
Lack of intention to kill/no recklessness	45	47.9%	4	33.3%	49	46.2%
Provocation	29	30.9%	3	25.0%	32	30.2%
Denial of participation	20	21.3%	5	41.7%	25	23.6%
Self-defence	19	20.2%	2	16.7%	21	19.8%
Intoxication of accused	10	10.6%	0	.0%	10	9.4%
Mental impairment ¹⁹⁵	6	6.4%	4	33.3%	10	9.4%
Other	9	9.6%	0	.0%	9	8.5%
Total defences	138		18		156	
Total accused raising a defence	94	100.0%	12	100.0%	106	100.0%

Base: All homicide accused where a defence could be identified (N=106). There are 76 homicide accused for whom it is unknown what defences, if any, they raised at any stage of the prosecution, see above paras 2.83–2.86.

Note that there are 159 defences for these 106 accused as some accused raised more than one defence.

Percentages are based on accused. Thus 10.6% of male accused raised intoxication as a defence at some stage of the prosecution. Due to the multiple possible defences for each accused, percentages add up to more than 100%.

DEFENCES RAISED AT TRIAL

2.90 Table 12 shows a similar pattern applies to defences raised at trial. The only women who raised known defences at trial did so in the contexts of sexual intimacy and mental impairment.¹⁹⁶

TABLE 12: DEFENCES RAISED AT TRIAL BY MALE AND FEMALE ACCUSED

Defence	Male accused		Female accused		Total accused	
	n	% of accused	n	% of accused	n	% of accused
Lack of intention to kill/no recklessness	40	48.2%	3	27.3%	43	45.7%
Provocation	24	28.9%	3	27.3%	27	28.7%
Denial of participation	19	22.9%	4	36.4%	23	24.5%
Self-defence	17	20.5%	2	18.2%	19	20.2%
Mental impairment	6	7.2%	4	36.4%	10	10.6%
Intoxication of accused	7	8.4%	0	.0%	7	7.4%
Other	7	8.4%	0	.0%	7	7.4%
Total defences.	120		16		136	
Total accused raising a defence	83	100.0%	11	100.0%	94	100.0%

Base: All homicide accused who went to trial and for whom a defence could be identified at trial (N=94). There are 15 homicide accused who went to trial, but it is unknown what defences they raised, see paras 2.83–2.86.

Note that there are 136 defences for these 94 accused as some accused raised more than one defence. Percentages are based on accused. Thus 8.4% of male accused raised intoxication as a defence at trial. However due to the multiple possible defences for each accused, percentages add up to more than 100%.

195 This category includes accused who raised mental impairment or insanity. The distinction is discussed in Chapter 5 paras 5.7, 5.22.

196 Of the 10 female accused (see Graph 7) in the context of sexual intimacy, seven went to trial. See Appendix 2 Table 11 for the defences these seven women raised. All of the women who raised mental impairment as a defence at trial, did so in the context of mental impairment. The four female accused in the context of mental impairment (see Graph 7) went to trial, but only three of them raised mental impairment (amongst others) as a defence.

SUCCESSFUL DEFENCES

2.91 Table 13 sets out the contexts in which men and women successfully raised defences at trial. Of the 94 accused (83 men and 11 women) where a defence was known to have been raised at trial, only 39 (34 men and five women) were known to have been successful. The defences which were most frequently successful for men were lack of intention to kill (10 men) and provocation (seven men).

2.92 Men with successful defences killed in all contexts except sexual predation, homophobic killings and other killings.¹⁹⁷ It will be recalled that the two contexts of homicide we are focusing on are spontaneous encounters and sexual intimacy. In the context of spontaneous encounters, three men were known to have successfully raised self-defence and two men successfully raised lack of intention to kill. In the context of sexual intimacy, four men successfully raised provocation, three men successfully raised lack of intention to kill and one man succeeded with another defence¹⁹⁸. The five women with successful defences succeeded with mental impairment or insanity (3 women), denial of participation (one woman) and lack of intention (one woman). The latter two accused were classified in the context of sexual intimacy.

2.93 The use and success of the various defences are discussed in more detail in later Chapters.

TABLE 13: SUCCESSFUL DEFENCES RAISED AT TRIAL AND THE HOMICIDE CONTEXT¹⁹⁹

Successful Defences ²⁰⁰	Spontaneous encounters	Conflict resolution	Originating in other crime	Sexual predation	Homophobic killing	Other killing	Sexual intimacy	Child killings and other family member	Mental impairment	Misc.	Total defences
	n	n	n	n	n	n	n	n	n	n	n
Denial of participation	0	4	1	0	0	0	1 ²⁰¹	0	1	0	7
Lack of intention to kill /no recklessness	2	2	1	0	0	0	4 ²⁰²	1	1	0	11
Intoxication	0	0	0	0	0	0	0	0	0	0	0
Insanity/mental Impairment	0	0	0	0	0	0	0	0	0	9 ²⁰³	9
Provocation	0	0	0	0	0	0	4	3	0	0	7
Self-defence	3	1	0	0	0	0	0	0	0	0	4
Other	0	0	2	0	0	0	1	0	0	0	3

Base: All homicide accused who went to trial and for whom a defence could be identified at trial (N=39 accused and 41 defences).

Note that there are more defences than the 94 accused as some accused raised more than one defence. In two of the 39 accused who successfully raised defences at trial both lack of intention and self-defence were nominated as being successful. It was unclear from the information available which defence was ultimately successful.

197 Appendix 2 Table 9. However some of these contexts had very few incidents, see Graph 6 above.

198 This appeared to be that the jury did not accept that the prosecution had proved beyond reasonable doubt on the facts that the accused was in fact responsible for the death.

199 The female homicide accused who raised defences successfully are annotated on Table 13. The other successful defences raised were by men.

200 The total number of successful defences in Table 13 (N=41) does not correspond with those in Table 12 (N=136). Defences raised at trial, but not reported in Table 13, include 81 known unsuccessful defences and 55 defences where the outcome was unknown.

201 This was a female homicide accused.

202 One of these was a female homicide accused.

203 Three female homicide accused were in this group.

Chapter 3

Provocation

BACKGROUND

3.1 In Chapter 1, we explained that people charged with murder can raise a number of different defences. Perhaps the most controversial of these is the defence of provocation.²⁰⁴ In Chapter 2, we noted that provocation was raised in the study conducted by the Commission by at least 27 of the 100 accused who proceeded to trial,²⁰⁵ making it one of the most frequently used defences.²⁰⁶ This Chapter will focus on the defence of provocation. It begins by explaining the foundations of the defence, followed by an examination of the legal requirements. We then focus on the use of provocation in practice, before exploring some of the criticisms of the doctrine. The Chapter also examines the options for reform.

WHAT IS PROVOCATION?

3.2 Prior to 1975, the death penalty was mandatory in Victoria if a person was found guilty of murder. Given the harsh consequences of such a sentence, over time, the courts came to differentiate between killings considered by the law to be deserving of such a penalty, and those to be treated more leniently. For example, killings in the context of self-defence were considered to be justifiable, and resulted in the accused being acquitted and set free rather than being sentenced to death.

3.3 Other killings with which the law had some sympathy were killings committed in anger in response to a particular kind of provocative conduct. Historically, this was limited to four contexts: killing in response to a grossly insulting assault; killing a person seen attacking a friend or relative; killing to free a person who had been unlawfully deprived of their liberty; and a man killing his wife and/or her lover if they were caught in the act of adultery.²⁰⁷ While the killing was not considered to be completely justified in any of these contexts, it was seen to be excusable in the circumstances, due to

204 Technically, provocation is a partial excuse rather than a defence. For the sake of simplicity, however, we will refer to it as a defence throughout this Options Paper.

205 See Chapter 2, Table 11. It may have been raised in an additional 18 matters and also formed the basis of at least one plea to manslaughter.

206 The most frequently raised defence was lack of intention, see Tables 11–13, Appendix 2 Tables 10, 11.

207 On the development of the doctrine of provocation, see Jeremy Horder, *Provocation and Responsibility* (1992).

provocation. As a result, instead of being convicted of murder, the accused was convicted of manslaughter. There was no mandatory death penalty for those convicted of manslaughter.

3.4 The law has retained the defence of provocation, which reduces the charge from murder to manslaughter, if the killing was committed in response to particular kinds of provocative conduct. This has an important impact on the sentence the accused will receive. The maximum sentence for murder in Victoria is life imprisonment.²⁰⁸ By contrast, the maximum sentence for manslaughter is 20 years imprisonment.²⁰⁹

3.5 It is important to note that while we still retain a defence of provocation, it has changed over time. When it was first developed as a defence in the sixteenth and seventeenth centuries, the notion of ‘honour’ was of great importance to society. ‘Men of honour’ were expected to behave in a particular way in order to defend this honour. If insulted or attacked, they were expected to ‘cancel out’ the affront by retaliating in some way. An ‘angry’ response was expected, and the failure to produce such a response was considered cowardly.

3.6 In the past, an ‘angry’ response did not consist of merely ‘lashing out’ at the provocateur. In fact, anger was considered to be a reasonable and rational response in the circumstances. ‘Far from being seen in terms of the deadly sins, it was...thought that there were circumstances in which, guided by the influence of reason, one positively ought to be angry, just as one sometimes ought to be afraid, compassionate, or whatever.’²¹⁰ At that time, the person who was provoked had to determine the degree of the insult, and make a moral judgment about the appropriate retributive response. Too great a level of retribution would not be considered excusable, while too little retribution would be a sign of cowardice. It was only if the anger was properly directed, in the appropriate circumstances, that the law would consider reducing the offence to manslaughter. Jeremy Horder calls this ‘anger as outrage’, and argues that it was the original basis of the defence of provocation.²¹¹

3.7 Over time, the defence of provocation changed from being based on this idea of ‘anger as outrage’ to being about ‘anger as loss of self-control’. The justification for having a defence in these circumstances is no longer that the accused acted with an appropriate level of retaliation given the circumstances. Instead, provocation is generally justified on the basis that the accused could not properly control their behaviour in the circumstances. We now see anger as ‘unseating reason’ rather than being in accordance with it. This is why provocation is now seen to be a ‘concession to human frailty’. The courts seem to believe that people suffer from a ‘wave’ of anger, which overcomes their capacity to behave in a normal law-abiding fashion in certain circumstances.

3.8 It is important to understand the historical foundations of the defence of provocation when considering any reforms. This is not only because the justifications for retaining the defence will differ

208 *Crimes Act 1958* s 3.

209 *Crimes Act 1958* s 5. See below para 3.31 for a discussion of sentencing in cases involving the provocation defence.

210 Jeremy Horder, *Provocation and Responsibility* (1992) 40.

211 See also Debbie Kirkwood, *Women Who Kill: A Study of Female Perpetrated Homicide in Victoria Between 1985 and 1995* (PhD Thesis, Monash University, 2000) 211–13.

depending on how it is conceptualised,²¹² but also because the consequences will differ depending on the basis for the defence.²¹³

WHAT IS THE LEGAL TEST FOR PROVOCATION?



CASE STUDY 1

David and Catherine were married, but their relationship had broken down. On the morning of the homicide, Catherine called her adult daughter, Kylie, to come to her house quickly, because they were having an argument and David had 'gone crazy'. By the time Kylie arrived, Catherine was dead. David had hit her on the head with a drill, gone to the garage, got a piece of wire and strangled her with it.

At the trial, a number of people gave evidence that David had abused Catherine in the past. This included evidence of him punching her in the face, perforating her eardrum, as well as bugging her telephone conversations, following her when she went out, and threatening to harm her if she didn't 'behave' herself. Catherine had left David on a number of occasions, sometimes telling people she felt unsafe and needed to hide from him. David gave uncorroborated evidence that the abuse was always in response to Catherine's violence—that she had hit him in the face and thrown things at him. He admitted bugging her telephone calls, but claimed to have overheard plans Catherine was making to kill him.

David alleged that on the day of the homicide, Catherine had told him that he was 'pathetic compared to her new boyfriend', that he would be 'surprised if he knew where she'd been rooting', and that he 'didn't know how good it felt to hold a real man'. He also alleged that Catherine had teased him about his stutter. He said that he was trying to get past her (while holding the drill), that he tripped and fell, accidentally hitting her with the drill. He then remembered grabbing her throat, but could not remember anything further. His defence counsel claimed that he was provoked into killing her. This argument was accepted by the jury, who convicted David of manslaughter. He was sentenced to 6 years imprisonment, with a minimum of 3½ years.²¹⁴

212 For example, it is very different to argue that we should have a defence of provocation because an angry response is justifiable in certain circumstances than to argue that we need the defence because people cannot control their behaviour when they are angry.

213 For example, arguing that provocation is necessary because people *cannot* control their behaviour when angry has different consequences to arguing that while people can control their behaviour, it is understandable that they *did not* control their behaviour in particular circumstances. If people *cannot* control themselves, arguably they should have a complete defence available to them. If it is simply the case that they understandably *did not* control themselves, a partial excuse may be more appropriate: on this point, see below paras 3.115–3.120.

214 The facts of this case study are based on Case Number 1998002 in the Commission's Homicide Prosecutions Study. We note that the 'facts' of our case studies are never entirely clear; they will vary according to the party who is telling or interpreting them. Our reading of the 'facts' comes from reading the Office of Public Prosecutions files, court transcripts and sentencing remarks, where available. Where a particular party has presented one version of the facts, we use the word 'alleged'. On the issue of varying interpretations of facts, see Jenny Morgan, 'Critique and Comment: Provocation Law and Facts: Dead Women Tell No Tales, Tales Are Told About Them' (1997) 21 *Melbourne University Law Review* 237.

3.9 Before the jury can reduce a charge of murder to manslaughter on the grounds of provocation, they must be satisfied that the following three requirements have been met:²¹⁵

- there must be sufficient evidence of provocative conduct;
- the accused must have lost self-control as a result of the provocation; and
- the provocation must be such that it was capable of causing an ordinary person to lose self-control and act in a manner that would encompass the accused's actions. It must be such as could cause an ordinary person to form an intention to inflict grievous bodily harm or death.

PROVOCATIVE CONDUCT

3.10 Historically, there has been a requirement that there be an identifiable 'triggering' incident or series of incidents that caused the accused to lose self-control.²¹⁶ In the seventeenth century, the classical triggering incident was a man seeing his wife committing adultery.²¹⁷ In Case Study 1, Catherine's alleged insults could be regarded as the relevant triggering incident.

3.11 The requirement of a triggering incident has been reduced to some degree in recent years with the emphasis being placed on the cumulative effect of all the circumstances leading up to the accused's loss of control. This includes the background and history of the relationship between the accused and the victim. It is now possible for a jury to find that an incident that seems inoffensive on its own was, in fact, provocative due, for example, to an ongoing abusive relationship between the parties.²¹⁸ In Case Study 1, David also relied on this broader ground, claiming that the turbulent nature of the relationship, and Catherine's previous behaviour towards him, which included hitting him and throwing plates at him, contributed to his loss of self-control.

LOSS OF SELF-CONTROL

3.12 The second requirement of the test is that the accused must have lost self-control as a result of the provocative conduct. Originally, this loss of self-control had to be the result of anger. It has now been expanded to include loss of self-control due to fear or panic.²¹⁹ Historically, it was also necessary for the killing to occur suddenly or immediately after the provocative conduct, in order to show such a loss of self-control. This is no longer the case.²²⁰ However, evidence of a 'cooling-off period' between the provocative conduct and the homicide will be a factor that the jury can consider in determining whether there really was a loss of self-control, or whether the killing was planned.

215 *Masciantonio v The Queen* (1995) 183 CLR 58, 66.

216 *R v Croft* [1981] 1 NSWLR 126, 140.

217 *R v Maddy* (1672) 1 Ventris 158; 86 ER 108.

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

219 *Van den Hoek v The Queen* (1986) 161 CLR 158, 168.

220 *Parker v The Queen* (1964) 111 CLR 665, 679.

THE ORDINARY PERSON TEST

3.13 The final element of the test is whether the provocation was such that it was capable of causing an ‘ordinary person’ to lose self-control and act in a manner that would encompass the accused’s actions.²²¹ There are two aspects to this test, namely:

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

3.14 In assessing the gravity of the provocation, the jury must consider what would be the ‘ordinary person’s’ perception of the gravity of the provocative conduct. For the purpose of determining this, the ‘ordinary person’ is regarded as having any relevant personal characteristics of the accused.²²² Relevant characteristics may include age, sex, race, ethnicity, physical features, personal attributes, personal relationships or past history.²²³ It does not include ‘exceptional excitability or pugnacity or ill-temper’,²²⁴ but may include ‘mental instability or weakness’.²²⁵ In Case Study 1, for example, the jury would need to determine how grave an ‘ordinary’ 33-year-old white Australian male, who had a stutter, would have found Catherine’s alleged comments.

3.15 Having assessed the gravity of the provocation, the jury must then assess whether provocation of that level of gravity could have caused an ‘ordinary person’ to lose self-control to such an extent that they could act in a manner like the accused. Could an ‘ordinary person’ form an intention to inflict grievous bodily harm or death in those circumstances?²²⁶ Unlike the question of gravity—for which the ‘ordinary person’ can have all of the relevant characteristics of the accused—in answering this question, no personal characteristics, apart from age, may be taken into account.²²⁷ Therefore, in determining whether an ‘ordinary person’ could have formed an intention to kill when provoked by insults with the gravity of those that David claimed Catherine had made, the jury should not take into account the fact that David was male or had a stutter. Members of the jury must simply ask themselves whether the ordinary adult could have reacted in such a way to provocation of that gravity. We discuss this aspect of the test in more detail below.²²⁸

DISCRETION NOT TO LEAVE PROVOCATION FOR THE JURY’S CONSIDERATION

3.16 Before looking at the use of provocation in practice, it is useful to understand the way defences are used in trials. It is the prosecution who bears the burden of proving the offence charged against the accused. For example, on a charge of murder, the prosecution must convince the jury, beyond reasonable doubt, that all the elements of the crime of murder have been proven. If the defendant’s

221 *Masciantonio v The Queen* (1995) 183 CLR 58, 66; *Stingel v The Queen* (1990) 171 CLR 312, 325–7.

222 *Stingel v The Queen* (1990) 171 CLR 312.

223 *Masciantonio v The Queen* (1995) 183 CLR 58, 67.

224 *DPP v Camplin* [1978] AC 705, 726.

225 *Stingel v The Queen* (1990) 171 CLR 312, 326.

226 *Masciantonio v The Queen* [1995] 183 CLR 58, 66.

227 *Stingel v The Queen* (1990) 171 CLR 312, 330–3.

228 See especially paras 3.83–3.87.

lawyers raise a particular defence, such as provocation, the prosecution must prove, beyond reasonable doubt, that the defence was not made out²²⁹.

3.17 In a typical trial, the prosecution will call their witnesses to give evidence and then the defence will call any defence witnesses. At the end of the trial, both the prosecution and defence summarise their cases to the jury in their ‘closing addresses’. The judge will then summarise the entire trial, and instruct the jury on its role. This will include giving the jury specific directions on how to deal with any defences raised.²³⁰ For example, if provocation is raised as a defence, the judge will explain the legal test for provocation to the jury, and explain exactly what it is they need to decide. The jury will then go away and make its decision.

3.18 The judge is not, however, required to instruct the jury on the defence of provocation every time it is raised by the defence. In fact, there are certain circumstances in which the judge has an obligation not to instruct the jury about the defence of provocation:

Provocation should be withdrawn from the jury where no reasonable jury, properly instructed and having regard to the version of events most favourable to the accused which is suggested by material in the evidence, could have failed to be satisfied beyond reasonable doubt that the killing was unprovoked in the relevant sense.²³¹

3.19 In other words, if the judge does not believe that the evidence could lead a reasonable jury to decide that the accused had been provoked into killing,²³² even if it were to believe everything the defence lawyers argued, he or she should not give the jury the option of returning a verdict of manslaughter due to provocation.²³³

3.20 This discretion of the judge not to leave provocation for the jury’s consideration has been used in a number of recent reported cases.²³⁴ In our sample of 27 cases in which provocation was raised at trial, the judge did not allow the jury to consider it on four occasions.

WHEN IS PROVOCATION USED?

3.21 In the Issues Paper and the Occasional Paper we noted that the Commission is committed to basing law reform on what is going on in practice, rather than basing it on abstract hypothetical situations.²³⁵ To this end, it is important to understand how the defence of provocation is currently

229 The prosecution do not need to meet this burden of proof in every case. The prosecution need only meet it if the defence have shown that there was ‘at least a reasonable possibility’ that the act of the accused was provoked. This is known as the ‘evidential burden’: *Youssef*(1990) 50 A Crim R 1, 3.

230 In fact, the defences do not have to have been explicitly raised by defence counsel. A judge who believes the facts support a particular defence that has not been raised, is under an obligation to instruct the jury on that defence: *Van Den Hoek* (1986) 161 CLR 158. In particular cases, defence counsel may not want to explicitly raise the defence of provocation, because it may conflict with the primary defence of self-defence. If the facts support provocation as well, however, the judge is obliged to leave it to the jury.

231 *R v Parsons* (2000) 1 VR 161, 164.

232 That is, provoked in the legal sense, as outlined above.

233 It should be noted that regardless of what the judge does or does not say to the jury it is able to return a verdict of manslaughter.

234 See for example, *R v Tuncay* [1998] 2 VR 19; *R v Parsons* (2000) 1 VR 161; *R v Leonboyer* [2001] VSCA 149; *R v Kumar* [2002] VSCA 139. But compare with *R v Thorpe* [1998] VSCA 13; *R v Abebe* (2000) 1 VR 49; *R v Bohay* (2000) 111 A Crim R 271.

235 Victorian Law Reform Commission, *Defences to Homicide* Issues Paper (2002) and Jenny Morgan, *Who Kills Whom and Why: Looking Beyond Legal Categories* (2002).

being used. Who is raising it as a defence? In what kinds of circumstances? How successful is it when raised? These are the issues we will examine in this section.

HOW OFTEN IS PROVOCATION RAISED?

3.22 We saw in Chapter 2 **Chapter 2 Table 9** that of our sample of 182 people charged with homicide offences,²³⁶ 109 chose to proceed to trial **Chapter 2 Table 12**.²³⁷ At least 27 of these people raised provocation as a defence at their trial.²³⁸ Twenty-four of these accused were male, and only three were female.

3.23 Provocation, however, is not only relevant to those cases where it is raised at trial. It also affects pleas and charging practices. For example, when an accused is charged with murder, they may claim, from a very early stage, that they were provoked. This claim can be taken into account by the prosecution, who instead of choosing to proceed to trial on a charge of murder, could instead proceed with a manslaughter charge, or accept a plea of guilty to manslaughter. The power to do so, however, is seen to be exceptional, as in most cases the issue is seen to be ‘best left to the determination of a jury entrusted with deciding whether, absent such a defence of provocation, the accused is guilty of murder’.²³⁹

3.24 In our study, provocation seems to have been raised in at least four cases where it was not relied upon at trial. In only one of these cases was a plea of guilty to manslaughter accepted on the basis of provocation.²⁴⁰ It is likely, however, that the possibility of the provocation defence being successfully used may also have influenced the Office of Public Prosecutions (OPP) to accept pleas of manslaughter in other cases that could not be clearly identified from our data. We will be investigating this issue in the next stage of the reference, when we examine our data in more detail.²⁴¹

IN WHAT CONTEXTS IS PROVOCATION RAISED?

3.25 Of the 24 men who raised provocation at trial in the study conducted by the Commission, half did so in the context of sexual intimacy (50%). This can be seen in Table 14 below.

TABLE 14: CONTEXT IN WHICH MALE ACCUSED RAISED PROVOCATION AT TRIAL²⁴² **ST 59**

Context of homicide	Male accused who raised provocation at trial
Homicide in the context of sexual intimacy	12 (50%)
Spontaneous encounter homicide	4 (16.7%)

236 A homicide offence is defined as murder, manslaughter or infanticide: see above para 2.3. Our sample also included 16 co-accused who were not charged with homicide offences.

237 In one case the possibility of relying on provocation was raised initially, but it is unknown whether it was relied upon at trial. For a discussion of pleas, see below paras 3.23–3.24 and 3.32–3.35.

238 Note that 18 more people may have raised provocation as a defence, as there were a number of cases in which we were unable to ascertain what defences were run.

239 *R v Kolalich* (1991) 173 CLR 222, 227–8.

240 In two of the cases the accused pleaded guilty to murder, while in the other case a plea of guilty to ‘unlawful and dangerous act manslaughter’ was accepted.

241 See also below paras 3.32–3.34.

242 These categories are based on research conducted for the Commission by Kenneth Polk: see para 2.36.

Homicide involving family members	4 (16.7%)
Conflict resolution homicide	2 (8.3%)
Homicide originating in other crime	1 (4.2%)
Other	1 (4.2%)

Base: All male accused who raised provocation at trial. (N=24)

3.26 Of the 12 homicides in the context of sexual intimacy, 11 involved men killing women in circumstances of jealousy or control, while the remaining case involved a man killing his sexual rival. It is important to note that of these cases, at least seven involved what Martha Mahoney calls a ‘separation assault’, that is, a homicide that takes place when a woman leaves, or attempts to leave, a relationship.²⁴³ The remaining five cases occurred either in the context of a custody dispute over children, or where the man was trying to ‘assert control over the behaviour of his partner through the use of violence’.²⁴⁴

3.27 This is to be contrasted with the three cases in which women raised the defence of provocation at trial. Two of these cases were also in the context of sexual intimacy. These were both cases in which women alleged they were responding to male violence. The remaining case involved a woman who suffered from a mental impairment killing a fellow resident of her nursing home [st 59](#).

HOW OFTEN IS PROVOCATION SUCCESSFUL?

3.28 Of the 24 men who raised provocation at trial in the study conducted by the Commission, eight (33.3%) were convicted of manslaughter [st 61](#), while 14 (58.3%) were convicted of murder.²⁴⁵ In seven of those eight cases where there was a conviction of manslaughter, it appears that the verdict was directly attributable to the defence of provocation, while in the eighth case it was uncertain whether the verdict was based on provocation or on the basis of the accused lacking the intention to kill in the circumstances.²⁴⁶

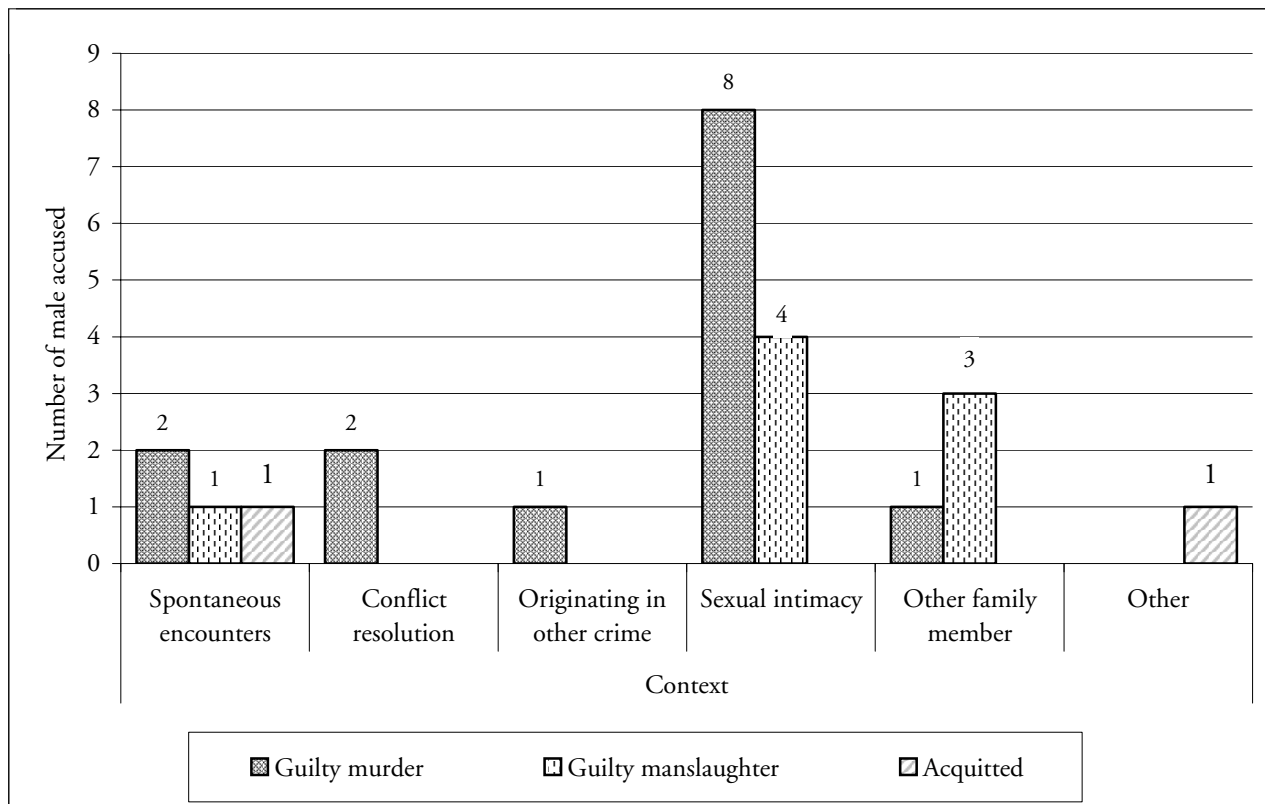
3.29 As noted above, provocation is raised by men in a variety of contexts. It seems, however, that certain contexts are more conducive to using the defence successfully (see Graph 13 below). Of the seven cases in which provocation was known to be successful, three involved the killing of family members, while the remaining four were in the context of sexual intimacy. The eighth case, in which it was uncertain whether the manslaughter plea was due to provocation or lack of intent, involved a spontaneous encounter. In all other cases where provocation was raised it was unsuccessful.

243 See below paras 3.49–3.52.

244 Kenneth Polk, *When Men Kill: Scenarios of Masculine Violence* (1994) 24.

245 Two were acquitted. Of the additional 18 cases in which provocation could have been raised as a defence, three resulted in manslaughter convictions.

246 Due to this uncertainty, the sentencing judge chose to treat the verdict as being based on a lack of intention. However, this does not mean the verdict was not based on provocation.

GRAPH 13: OUTCOMES WHERE MALE ACCUSED RAISED PROVOCATION AT TRIAL ST 62

Base: All men who raised provocation at trial. (N=24)

3.30 By contrast, none of the three female accused who raised provocation as a defence at trial were successful st 62. They were all convicted of murder. It is important to note, however, that the sample size of our study was very small. Were the sample size larger, there could be evidence of successful use of the provocation defence by women.²⁴⁷

PROVOCATION AND SENTENCING

3.31 We noted above that the most important consequence of the successful use of the provocation defence is reduction of the accused's sentence.²⁴⁸ The maximum penalty for a manslaughter conviction is 20 years imprisonment, compared with possible life imprisonment for murder. In our study, the median maximum sentence imposed for principal offence for the seven people convicted of manslaughter on the basis of provocation is six years. By contrast, the median sentence for those convicted of murder is 17 years st 60.²⁴⁹

247 See for example, Law Reform Commission of Victoria, *Homicide Prosecutions Study*, Appendix 6 to Report No. 40 (1991) paras 149–60, in which ten women used the defence of provocation. Of these ten women, six were convicted of manslaughter, three were acquitted and in the other a *nolle prosequi* was entered. None were convicted of murder.

248 Another important consequence is that the accused is not labelled a 'murderer': see below para 3.110.

249 This average does not include the six people sentenced to life imprisonment.

PROVOCATION AND PLEAS



CASE STUDY 2

Jason and Hannah were married for almost 60 years. It was alleged that Hannah was often aggressive towards Jason, making derogatory remarks. In particular, Jason claimed that she would often call him a 'mong', being short for 'mongrel bastard'. They had separated on a number of occasions, but had reconciled at the time of the homicide.

On the day of the homicide, Jason alleged that Hannah called out to him 'I've made a cup of tea for the mong'. When Jason went to get the tea, Hannah produced \$250, which she had taken from his desk. Jason claimed that he told her she had no right to take the money, and demanded it back. Hannah refused. Jason said that he then went to the front door, and found the keys to the car and house were missing. He asked Hannah for them back, but she said 'You're not getting nothing. You're just a mong.' Jason claimed he asked again, but Hannah ran out of the house.

Jason said that he then grabbed a kitchen knife, and chased Hannah out of the house. He again asked for his money and keys, and when Hannah refused he stabbed her five times. He then called the police, and told them that he had 'just snapped', and that he 'couldn't stand her any more'. Jason offered to plead guilty to manslaughter on the basis of provocation. His offer was accepted by the Office of Public Prosecutions. Jason was sentenced to a maximum of six years imprisonment, with a minimum of two years and eight months.²⁵⁰

3.32 We noted above that provocation can also form the basis of plea negotiations.²⁵¹ An accused can argue that they were provoked into killing, so should only be charged with manslaughter. An accused can offer to plead guilty to manslaughter on the basis of the provocation. The OPP can accept this offer, dropping any murder charge that may have been brought against the accused. This happened in Case Study 2 above. Jason did not have to raise evidence of provocation at trial; the OPP accepted that he had been provoked into killing Hannah, and that he should be sentenced accordingly.

3.33 This decision to accept a manslaughter plea on the basis of provocation is relatively rare. In our sample, Jason's was the only case in which a manslaughter plea was clearly accepted on this basis.²⁵² In a number of other cases, the OPP rejected the accused's plea on the grounds that the issue of provocation is more appropriately determined by a jury.

3.34 Patricia Easteal has looked at this issue in detail, comparing those cases where a plea was accepted to those where the accused was forced to go to trial. She could discern no pattern in these cases:

250 The facts of this case study are based on Case No. 2001265.

251 See para 3.23.

252 There were 48 other cases in which the OPP accepted a plea to manslaughter. In none of these cases was provocation the express basis for the plea. It is often difficult to determine the basis on which pleas have been accepted. It is possible that provocation may have been the reason for other pleas of manslaughter being accepted. The Commission will continue to examine this issue in the subsequent analysis of the data we have collected.

No variable seems to be the obvious difference. Premeditation? No, some of the manslaughters were acknowledged as premeditated. Means of killing? Again, no; some murders were less violent than the manslaughters and some of the latter showed less loss of self-control than some of the murders.²⁵³

The New South Wales Law Reform Commission, in commenting on Eastal's findings, concluded that whether or not a plea was accepted seemed to be a matter of discretion, which was often reliant on factors such as the attitude of the particular prosecutor and the degree of involvement of the victim's family.²⁵⁴

INTERPRETATION

3.35 It is clear from the figures outlined above that, where a matter proceeds to trial, provocation is one of the most commonly argued defences. It is also clear that, in general, it is men who raise the defence. Of the 27 cases in which provocation was argued, only three involved female accused **st 59**. Of those three, none were successful in using the provocation defence. This opens the defence of provocation to the charge of gender bias, which will be discussed below.

3.36 In addition, it is clear that provocation is most frequently raised in homicides in the context of sexual intimacy. As we saw above, of the 27 cases in which provocation was raised at trial, 14 involved homicides in the context of sexual intimacy. Looked at in another way, in the 38 trials involving homicides in the context of sexual intimacy, a defence raised at trial could be identified for 34 accused.²⁵⁵ Among these 34 accused, provocation, as well as lack of intention, were the most commonly raised defences (see Table 15 below). This means that any discussion of provocation must focus on this particular context.

TABLE 15: DEFENCES RAISED AT TRIAL FOR HOMICIDES IN THE CONTEXT OF SEXUAL INTIMACY²⁵⁶ **ST 59**

'Defences' raised at trial ²⁵⁷	Number of accused
Provocation	14
Lack of intention	14
Denial of participation	8
Self-defence	5
Other	2
Intoxication	1

Base: All homicide accused, in the context of sexual intimacy, who went to trial and a defence could be identified. (N=34)

253 Patricia Weiser Eastal, *Killing the Beloved: Homicide Between Adult Sexual Intimates* (1993) 173.

254 New South Wales Law Reform Commission, *Provocation, Diminished Responsibility and Infanticide*, Discussion Paper 31 (1993) para 3.91.

255 As seen in Chapter 2, only 109 accused in our sample proceeded to trial. Homicides in the context of sexual intimacy comprised the largest proportion of these matters.

256 The figures in this table exceed the total number of cases (34) due to the use of multiple defences in some trials.

257 We note, again, that technically a number of these are not 'defences'. For example, provocation is a partial excuse, while an accused who lacks the intention to kill or cause serious injury will not satisfy the definition of murder. For the sake of simplicity, however, they are referred to as defences throughout this Paper.

WHY REFORM PROVOCATION?

3.37 Provocation is one of the most strongly criticised defences in the criminal law. There have been calls for its abolition from a variety of different sources.²⁵⁸ Arguments against provocation include that:

- provocation is gender biased;
- the ordinary person test is flawed;
- provocation is homophobic;
- the defence is conceptually uncertain and lacks clarity;
- provocation is an anachronism; and
- provocation is open to easy fabrication.

Each of these arguments will be discussed in turn, followed by a discussion of some possibilities for resolving such issues.

GENDER BIAS



CASE STUDY 3

Maria and Albert were married for 11 years. Maria complained to a few friends and members of her family that Albert had been abusing her, so she had left him. Albert had difficulty accepting that the relationship was over, and hoped to get back together with his wife. He sought the help of her neighbours to watch her, to find out if she was seeing another man. This led to him to discover that she had started seeing a work colleague, Sam.

Albert became very jealous, and sought to have a meeting with Sam. Sam agreed to this, and during the course of their conversation it is alleged that Sam told Albert he was going away for the weekend with Maria, which the prosecution argued led Albert to believe she was being 'unfaithful' to him.

Following this meeting, Albert went to Maria's home. He alleged that when he got there he was subjected to a variety of taunts and abuse from Maria, telling him that he was no better than dirt, that he was a 'dickhead' and that Sam was much better and 'meatier' than him. He claimed that she pushed him in the face, and that he lost control. He said the next thing he knew she was lying on the floor dead. He had killed her with a hammer. Albert subsequently phoned Maria's mother, and told her that he loved Maria, that she 'can't leave me. [She] is my treasure and not even you as a parent can get [her] back from me.' Albert successfully raised the defence of provocation at trial, and was sentenced to eight years imprisonment with a minimum of six years.²⁵⁹

3.38 The main criticism made of the partial excuse of provocation is that it operates predominantly to excuse male anger and violence towards women. This gender bias is seen to manifest itself in two

258 See below paras 3.179–3.186.

259 The facts of this case study are based on Case No. 2000256.

ways. First, it is argued that the test is framed in such a way as to usually preclude women from its use. Secondly, it is claimed that the contexts in which provocation is used by men and women are also gendered. We will examine each of these arguments in turn.

3.39 The requirements of the provocation defence, which have developed in the context of men killing both other men and women, are said to be based on male aggressive responses to provocative conduct.²⁶⁰ A sudden violent loss of self-control in response to a particular triggering act, such as Albert's behaviour in Case Study 3, is seen to be the archetypal male response to provocative conduct. Despite changes that have been made over time,²⁶¹ it is argued that this test remains very difficult for women to use.

3.40 Thus, a woman who finds out that her husband is having an affair, but does not instantly react violently, instead killing him (or arranging for his death) at a later time, may find it difficult to avail herself of the defence.²⁶² Alternatively, a woman who has faced years of abuse, who finally kills her husband after a relatively 'trivial' issue, may find it difficult to show that she was provoked. The mere history of violence is not sufficient evidence of provocation. This will cause particular problems for women who fail to outwardly manifest signs of distress and irrationality consistent with the stereotype of someone who had 'emotionally over-reacted' to provocative conduct. The law's inability to allow women to use the defence in such circumstances is seen to be deeply problematic: '[a]ny argument that it is murder for a battered woman driven to desperation to kill her partner but only manslaughter for a man to do the same after discovering her committing adultery is offensive to common sense'.²⁶³

3.41 This failure of the law to view a history of violence in a relationship as constituting provocation for women who kill was noted by Debbie Kirkwood in her examination of female perpetrated homicide in Victoria between 1985 and 1995.²⁶⁴ She provided the example of the case of Marie Seddon, who arranged for her husband to be shot after a long history of domestic violence. In response to her defence counsel's claim that this violence should be classified as provocation, Murray J stated:

It is the strangest sort of provocation. It is not one you would find in the textbook, where as a result of ill-treatment a woman could leave home. Contrary to that, she engages people for a sum of money and they come and shoot him twice in the head when he is asleep in bed. That is the strangest sort of provocation I have heard of.²⁶⁵

3.42 The gender bias apparent here is seen to be related to the 'ordinary person' test. It is argued that because the defence of provocation arose in the context of drunken brawls and breaches of honour

260 See for example, Model Criminal Code Officers' Committee, *Fatal Offences Against the Person, Chapter 5 Discussion Paper* (1998) 89. See Debbie Kirkwood, *Women Who Kill: A Study of Female Perpetrated Homicide in Victoria Between 1985 and 1995* (PhD Thesis, Monash University, 2000) 1–32 for an interesting discussion of whether aggression is a male characteristic.

261 Such as the removal of the requirement for the response to be sudden, or allowing all of the circumstances to be taken into account in determining whether the conduct was provocative.

262 This kind of circumstance is not unlikely because, as the New Zealand Law Reform Commission notes, women 'are seldom in a position to respond to provocation with spontaneous violence, which is the strongest evidence of sudden loss of self-control': New Zealand Law Commission, *Battered Defendants, Victims of Domestic Violence Who Offend*, Preliminary Paper 41 (2000) 30.

263 Model Criminal Code Officers Committee of the Standing Committee of the Attorneys-General, *Model Criminal Code, Chapter 5, Fatal Offences Against the Person, Discussion Paper*, (1998) 91.

264 Debbie Kirkwood, *Women Who Kill: A Study of Female Perpetrated Homicide in Victoria Between 1985 and 1995* (PhD Thesis, Monash University, 2000) 209–10.

265 Cited in *ibid* 210.

between men, the sexless ‘ordinary person’ is in fact male.²⁶⁶ It has been argued that the ‘ordinary person’ that the jury has to consider in determining how the accused could have reacted bears little relevance to the kinds of reactions that women may have to provocation. Women are therefore excluded from the scope of the defence.

3.43 The argument that provocation is gender-biased is often supported by statistics which show that men rely on provocation far more often than women.²⁶⁷ This is partly because men kill more frequently than women, but it is also alleged to be due to the circumstances in which homicides take place. The circumstances in which women kill are often not seen to be conducive to raising provocation as a defence.

3.44 Contrary to this position, it is sometimes argued that, although men use the defence more often, when women use it they are more often successful. This was the conclusion of the former Law Reform Commission of Victoria. In their study provocation was raised at some point in the process by 65 men. Thirteen of them were convicted of murder.²⁶⁸ In contrast, while only 10 women raised the defence, none of them were convicted of murder.²⁶⁹ This was said to prove that the defence is not biased in favour of men.²⁷⁰ While these results were not replicated in our study,²⁷¹ this could have been because of the small size of our sample. It is possible that if the sample had encompassed more women who killed, a similar result would have been found.



CASE STUDY 4

Monique had known Michael for three to four months. She had stayed overnight in his room on occasion, and had had consensual sex with him at least once. On the night of the homicide, Monique was in Michael’s room. She alleged that he attempted to rape her. She further alleged that he had raped her in the past, which contributed to her reaction. Monique strangled Michael. At trial, Monique raised the defences of self-defence and provocation, based on the attempted rape. She also argued that she did not intend to kill Michael. Monique was convicted of murder.²⁷²

3.45 Even if women do use the defence more successfully than men when it is raised, it is argued that this does not prove that provocation is not gender biased. This is because such a result fails to take into account the context of the cases in which provocation is raised. This was argued by the New South Wales Law Reform Commission which stated that:

266 Elizabeth Sheehy, Julie Stubbs and Julia Tolmie, ‘Defending Battered Women on Trial: The Battered Woman Syndrome and Its Limitations’ (1992) 16 *Crim LJ* 369.

267 In our study, 24 men and only three women relied on provocation at trial.

268 Of the remainder, 42 were convicted of manslaughter, two were found not guilty by reason of insanity, six were acquitted and two were convicted of other offences: Law Reform Commission of Victoria, *Homicide Prosecutions Study*, Appendix 6 to Report No. 40 (1991) 77.

269 Six were convicted of manslaughter, three were acquitted and a *nolle prosequi* entered in the other case: *ibid* 76.

270 Law Reform Commission of Victoria, *Homicide Report* No 40 (1991) paras 164–8.

271 Only three women raised provocation as a defence at trial, of whom none were successful: see above para 3.27, 3.30.

272 The facts of this case study are based on Case No. 2000262.

It is...important to be aware of what lies behind these figures. The general pattern that emerges from the cases is that men use the provocation defence when they kill their partners or ex-partners in a jealous rage and that women use it...where they have been the victims of long term domestic abuse. The data treats these situations as commensurate—something which itself should be examined for gender bias.²⁷³

3.46 This allegation that the gendered nature of provocation is reflected in the contexts of the cases in which it is raised seems to be borne out in our study of homicide prosecutions. As noted above, overwhelmingly it was men who raised the defence, most often in the context of sexual intimacy. While there were some women who also raised provocation in this context (2 of 3), the nature of the provocative conduct was vastly different. This can be seen in a comparison of Case Studies 3 and 4. Case Study 3, like Case Study 1 discussed earlier, reflects the typical case in which provocation is raised. This often involves a man who has a previous history of violence against his partner,²⁷⁴ killing her when she attempts to leave him or does not 'behave' appropriately. The alleged provocative conduct in such cases, as seen in Case Studies 1 and 3, is often a verbal taunt or insult, perhaps accompanied by a trivial physical assault (such as pushing Albert in the face).

3.47 By contrast, in the few cases in which women raise provocation, it is generally alleged to be in response to serious violence, such as the attempted rape alleged by Monique in Case Study 4. Two of the three cases in which women raised provocation at trial involved allegations of serious violence. There were no cases in which a woman killed her male partner due to his threats to leave her, and no claims of provocation based simply on insults or trivial allegations of violence.

3.48 While our sample size is very small, particularly in relation to women who kill, these results are borne out in other research. For example Rebecca Bradfield, who examined spousal homicide cases in Australia between 1980 and 2000, found that:

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 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.²⁷⁵

273 New South Wales Law Reform Commission, *Provocation, Diminished Responsibility and Infanticide*, Discussion Paper 31 (1993) para 3.98. See also Jeremy Horder, who notes that 'superficial reflection on these bare statistics might lead one to suppose that it is easier for women than for men to 'get off' with manslaughter on the grounds of provocation when charged with murder. If one bears in mind, though, the very large percentage of women facing a murder charge in domestic homicide cases who have themselves been battered, something rarely true of men facing such a charge, it might be thought rather surprising that the proportion of women who are convicted of manslaughter is not much higher, compared with their male counterparts': Jeremy Horder, *Provocation and Responsibility* (1992) 187.

274 In our study, it was alleged that 11 of the 15 men who raised provocation (at any stage of the prosecution) in the context of sexual intimacy had previously been violent towards their partners [st 66](#).

275 Rebecca Bradfield, *The Treatment of Women Who Kill Their Violent Male Partners Within the Australian Criminal Justice System* (PhD Thesis, University of Tasmania, 2002) 145–6. It is important to note that the argument presented here is not that domestic violence excuses retaliatory violence, but rather that the defence is applied in a gendered way. It is argued that women are unable to avail

3.49 Of particular concern to those who focus on the disparate contexts in which provocation is raised is the fact that provocation is so often relied upon by men who kill their partners when they attempt to leave them—what Martha Mahoney calls ‘separation assaults’:

Separation assault is the attack on the woman’s body and volition in which the partner seeks to prevent her from leaving, retaliate for the separation, or force her to return. It aims at overbearing her will as to where and with whom she will live, and coercing her in order to enforce connection in a relationship. It is an attempt to gain, retain, or regain power in a relationship, or to punish the woman for ending the relationship. It often takes place over time.²⁷⁶

3.50 As noted above, in our sample, at least 17 men killed in such circumstances and one woman **st 65**. Of those accused, at least seven raised the provocation defence at trial,²⁷⁷ with 2 using it successfully **st 67**. These results are reflected in other jurisdictions as well. For example, the Judicial Commission of NSW, in examining sentenced homicides, found that in three of the five cases in which men killed their female partners and successfully raised provocation, the provocation was the fact that the woman had left or threatened to leave the relationship.²⁷⁸ This has led some people to question ‘how, in a supposedly “civilised” society, can the desire to leave a relationship constitute behaviour which would provoke anyone to kill?’²⁷⁹ The answer to this question is argued to be found in the gendered nature of the law, and its failure in particular to grapple with the problem of male anger and violence against women.²⁸⁰

3.51 It is argued that by reducing the crime of murder to manslaughter in such circumstances, ‘the most violent forms of patriarchal crimes are reduced to an infraction akin to an accident, or a negligent act. This legal characterization trivializes femicide, and signals our criminal law system’s tolerance of wife-assault.’²⁸¹ This may not be merely symbolic, but will have a real impact on women’s lives. It is seen to send a message to women that their lives are worthless. Some critics have stated that when these cases are published in the media, it often leads women to contact crisis centres, saying that their violent partners have threatened them with comments such as ‘you’ll be next’.

3.52 In addition to the impact that provocation decisions are argued to have on some women’s lives, provocation may also perpetuate the myth that spousal killings are about a ‘loss of control’. On the contrary, many commentators claim that anger can be a way of gaining control over women by

themselves of the defence because of the way in which it is constructed. See for example, New Zealand Law Commission, *Battered Defendants, Victims of Domestic Violence Who Offend*, Preliminary Paper 41 (2000) 3.

276 Martha Mahoney, ‘Legal Images of Battered Women: Redefining the Issue of Separation’ (1991) 90 *Michigan Law Review* 1, 65–6.

277 There may have been an additional 9 cases in which provocation was raised at trial.

278 Judicial Commission of New South Wales, *Sentenced Homicides in New South Wales 1990–1993, A Legal and Sociological Study* (1995) 47.

279 Adrian Howe, ‘Reforming Provocation (More or Less)’ (1999) 12 *Australian Feminist Law Journal* 127 130. Jenny Morgan notes that some judges will not leave provocation to the jury for consideration in such cases. She suggests that whether or not provocation is removed from the jury in these cases might depend on the particular reading of the facts. When provocation is left to the jury in these cases, the judge’s focus is on the ‘sexual’ behaviour, with the conduct viewed as being in the ‘heat of passion’. In those few cases where provocation is not left to the jury, the judge emphasises the ‘separation’ rather than the ‘sex’: Jenny Morgan, ‘Critique and Comment: Provocation Law and Facts: Dead Women Tell No Tales, Tales Are Told About Them’ (1997) 21 *Melbourne University Law Review* 237 248–9.

280 See for example, Rebecca Bradfield: ‘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.’ Rebecca Bradfield, *The Treatment of Women Who Kill Their Violent Male Partners Within the Australian Criminal Justice System* (PhD Thesis, University of Tasmania, 2002) 178.

281 National Association of Women and the Law, *Stop Excusing Violence Against Women, NAWL’s Position Paper on the Defence of Provocation*, (2000) 11.

instilling fear. Through a display of anger, men are able to make their partners ‘behave’, because failure to ‘behave’ will result in violence. This type of violence can be instrumental—a deliberate and conscious process, intended to ensure control over women. The defence of provocation conflicts with such an idea of violence as instrumental, relying as it does on the notion of a ‘loss of self-control’.²⁸² It is therefore seen to be a ‘very powerful tool used in justifying a husband’s dominance and control and in removing indignation about his resort to force in securing, maintaining and punishing challenges to his authority’.²⁸³

THE CULTURALLY RELATIVE ‘ORDINARY PERSON’



CASE STUDY 5

George was at a nightclub drinking with some friends. As they were leaving the club, George bumped into Ben, who was also leaving with a group of friends. George alleges that Ben called him a ‘motherfucker’, and that he reacted by punching Ben. They continued fighting outside, and at one point George hit Ben so hard Ben was lifted off his feet and fell to the ground, hitting his head. George then ‘stomped’ on Ben’s head, and left the scene. Ben was taken to hospital, but died with a fractured skull.

George was charged with murder. He argued that he didn’t intend to kill Ben, but had become very angry when Ben had called him a ‘motherfucker’. This was partly because of his close relationship with his mother, who had recently been ill, but also for reasons arising from his Serbian background. George obtained a report from a Professor of Slavic Studies, that showed how offensive such an insult would be to an 18-year-old man of George’s background.

George offered to plead guilty to manslaughter on the basis that he didn’t intend to kill Ben. This plea was accepted by the OPP. George was sentenced to serve three years in a Youth Training Centre.²⁸⁴

3.53 Another criticism of the provocation defence arises from the use of the ‘ordinary person’ test. We have seen above that in the first part of this test the jury must determine how grave the ‘ordinary person’ would have considered the provocative conduct to be.²⁸⁵ In this part of the test, the courts have said that the ‘ordinary person’ is to be regarded as having any relevant personal characteristics of the

282 See for example, Ibid 22–3. This point is often illustrated via the ‘Power and Control Wheel’, which describes the general dynamics of domestic violence by recognising the positioning of violence within a systematic attempt to maintain power and control. It ‘illustrates that violence is part of a pattern of behaviours rather than isolated incidents of abuse or cyclical explosions of pent-up anger, frustration, or painful feelings’: Ellen Pence and Michael Paymar, *Education Groups for Men Who Batter* (1993) 2. See also Rebecca Bradfield, *The Treatment of Women Who Kill Their Violent Male Partners Within the Australian Criminal Justice System* (PhD Thesis, University of Tasmania, 2002) 36–40.

283 R Emerson Dobash and Russell P Dobash, *Violence Against Wives* (1979) 45. A related argument is that provocation reinforces the mentality that violence is not the man’s fault, it is the fault of the woman who provoked him: Canadian Association of Elizabeth Fry Associations, *Response to the Department of Justice Re: Reforming Criminal Code Defences: Provocation, Self-Defence and Defence of Property*, (1998) 43; National Association of Women and the Law, *Stop Excusing Violence Against Women, NAWL’s Position Paper on the Defence of Provocation*, (2000) 21–2.

284 The facts of this case study are based on Case No. 1999268.

285 See above para 3.14.

accused.²⁸⁶ Relevant characteristics include age, sex, race, ethnicity and past history. Thus, in Case Study 5, it was argued that one of the reasons why George acted in the way that he did was because of his Serbian background. For some people, being called a ‘motherfucker’ would not be seen to be a very grave provocation. However, when George’s cultural and religious beliefs are taken into account, the provocation may be seen as being sufficiently grave to have led to his violent reaction.²⁸⁷

3.54 Courts look at the accused’s circumstances in this way because we live in a multicultural society, comprised of different people with different values and beliefs, and it is argued that the law must take those values and beliefs into account in determining a just response. If the ordinary person test does not take into account the ethnicity or ‘cultural’²⁸⁸ background of the accused, there is believed to be a danger that discrimination against minority groups may be concealed and perpetuated. This is because ‘objective’ standards of behaviour are predicated on the existence of a ‘community consensus’ about what constitutes ‘ordinary’ behaviour. However, where minority groups are not adequately represented either on juries or as judges, ‘objective’ standards may be determined exclusively by the values of the dominant culture.²⁸⁹

3.55 While there is little criticism of the desire of the law to promote religious and racial tolerance, this aspect of the test is criticised on a number of grounds. Some argue that the test is not capable of differentiating between those values and beliefs the law should and should not tolerate. For example, a person who has faced systemic racial discrimination for a long period of time may kill in response to a racist taunt. In such circumstances we may have sympathy with the accused’s actions, and believe this background should be taken into account in determining the gravity of the provocation.²⁹⁰ On the other hand, however, there is Jeremy Horder’s example of the white supremacist South African (Terreblanche), who believes that ‘coloured’ people should never speak to white men on any matter whatsoever unless spoken to first.²⁹¹ If a white man becomes enraged and kills a person for speaking to him in this way, we may believe that his background (including his racist beliefs) should not be taken into account in determining the appropriate offence. The current test, however, seems incapable of drawing such a distinction. It is argued that if the test applies to one of these situations, it will also, by necessity, apply to the other; there is no way of differentiating between them.²⁹²

3.56 This inability to draw appropriate boundaries around the use of ‘culture’ is seen to be a particular problem for women, due to the prevalence of patriarchal cultures around the world. It is argued that the idea of ‘culture’ is usually used by men who claim that it is acceptable for people from

286 *Stingel v The Queen* (1990) 171 CLR 312.

287 We note that, in fact, in this case a plea was accepted, not on the basis of provocation, but on the basis of lack of intention. Were this case to have proceeded to trial, however, it is very likely that provocation would have been argued, based on ‘cultural’ factors. It is possible, however, that such a defence would not have been successful, despite such cultural factors. While a jury may have accepted that George’s background would have made the provocation particularly grave, they may not have accepted that the ‘ordinary person’ could have lost self-control in response to provocation of that gravity.

288 The use of the term ‘culture’ is highly contested: see below paras 3.57–3.61.

289 Australian Law Reform Commission, *Multiculturalism and the Law* Report No 57 (1992) 183–4.

290 Some believe, however, that not even this accused is deserving of a defence. It is argued that while the taunt may symbolise a lifetime of oppression, the victim has not engaged in dangerous and illegal conduct and there is no ongoing, intimate relationship like there is for battered women. The accused has instead killed a relative stranger, who has not necessarily engaged in violence towards the accused. The accused should not be excused for this behaviour, despite the circumstances.

291 Jeremy Horder, *Provocation and Responsibility* (1992) 144.

292 It appears, however, that some judges believe the current law is capable of distinguishing between these two cases: see below paras 3.86–3.87.

their particular background to discipline women in certain circumstances.²⁹³ Such cases are seen to be far more frequent than those with which society may have some sympathy. It is argued that as such, the negative effects of this test outweigh the positive ones, and that it should be reformed.²⁹⁴

3.57 Others critique the entire notion of ‘culture’ that is used in this part of the test. For example, Jenny Morgan notes that it seems to rest on

an essentialised view of race or ethnicity, that is, the notion that there is one authentic experience of an ethnic identity for each ethnic group. It assumes too that we can know this ethnic identity or, at least, someone who can give expert evidence has the requisite knowledge, and, furthermore, that powers of self-control do vary as between different ethnic groups. I think all of these propositions are contestable and, at the very least, require some evidence for them. It could also be argued that while ostensibly directed in an anti-racist way they could be used to further racist arguments.²⁹⁵

3.58 In this passage, Morgan raises a number of problems with the ordinary person test. She claims that implicit within the test is the idea that there is one ‘authentic’ identity for each particular group that comes before the court. In other words, the test seems to rely on the fact that there is an ‘ordinary Serbian man’ against whom to judge George’s behaviour in Case Study 5 above. She argues that this is a myth—that there are many, varied experiences of any particular culture. Assuming there is one ‘true’ definition of a culture

leaves out of account that members of any ethnic group, as well as having an ethnicity, also have a class status, a sexual orientation, a particular physical ability, and, of course...a sex. Such a listing of aspects of identity is not meant to suggest that these characteristics can be separated out in a simplistic way. Rather, it is to emphasise that any useful description of the culture of an ethnic group will need to encompass the experience of all of its members, not just some.²⁹⁶

3.59 Morgan notes that this test, instead of achieving its avowed aim of providing equality before the law, may in fact further racist arguments.²⁹⁷ One of the reasons for this corruption of the test is seen to be its lack of acknowledgment of the diversity of different cultures. It is argued that stereotyping of the accused’s ‘culture’ is likely to be one of the consequences of requiring juries to determine how *the* ‘ordinary’ person of the accused’s particular ‘culture’ would have perceived the provocative conduct. There is seen to be a risk that judges and juries may draw on discriminatory generalisations about the cultures of minority groups of which they have little or no understanding. This is because they are put in a position of determining how the ordinary ‘Italian man’ or ‘Serbian youth’ would have behaved, yet

293 On this point, see below paras 3.62–3.63.

294 See for example, Jeremy Horder, who notes that incorporating cultural factors into the test ‘strikes a blow in the criminal law for racial and religious tolerance, by requiring jurors to suspend their prejudices. None the less, it seeks to do this in the wrong way by seeming to dictate that the jury should suspend commitments to fundamental liberal values such as racial and religious tolerance and freedom of expression and endorse moral agnosticism or cultural relativism, to the detriment of those liberal values. This is likely to involve, in cases such as the example given, an unacceptable compromise of moral integrity for judges who must direct juries and for juries themselves... By some means or another, a change must be made... It must be made clear that jurors need not invest themselves with the defendant’s characteristics where to do so would entail a morally or politically unacceptable compromise of liberal values such as freedom of expression and racial or religious tolerance’: Jeremy Horder, *Provocation and Responsibility* (1992) 145.

295 Jenny Morgan, ‘Critique and Comment: Provocation Law and Facts: Dead Women Tell No Tales, Tales Are Told About Them’ (1997) 21 *Melbourne University Law Review* 237 267.

296 Ibid 267.

297 See also Stanley Yeo, ‘Sex, Ethnicity, Power of Self-control and Provocation Revisited’ (1996) 18 *Sydney Law Review* 304.

they may have little independent knowledge of what such behaviour might entail, apart from general stereotypes that circulate in the community. Not only might this have consequences for the particular case before the court, but it may have broader implications for society, where it could feed into racist assumptions.²⁹⁸

3.60 It may be argued that this problem can be overcome by the use of expert witnesses. These people can provide the jury with information about the accused's particular 'culture', providing them with independent knowledge. In response, it is argued that this view again reflects the mistaken belief that there is only one particular experience within each 'culture', and that experts can know that experience. In fact, it is argued that 'there is no one "true" characterisation of a culture. It is certainly not the case that any two anthropologists will describe the same culture in the same way.'²⁹⁹ It is a person's position in and their experience of that culture, which will determine how it is described.

3.61 Some take this argument further, claiming that part of the problem is that 'it is the dominant group who controls the interpretation of what it means to take culture into account.'³⁰⁰ That is, not everything will be seen to fall within the rubric of 'culture', providing possible grounds for an excuse. Rather, it is only those aspects of culture that are to some extent understandable to the dominant group—usually by virtue of also being aspects of the dominant group's own culture—that will be recognised as 'culture' and allowed to be used in court. The dominant culture in Victoria is seen to be that of the Anglo-Celtic, heterosexual male.³⁰¹ It may be argued that this culture is willing to accept the possibility that foreign 'cultures' may be patriarchal, and that particular behaviour towards women is 'acceptable' in those cultures.³⁰² This is seen to cause a particular problem for women from those cultures, whose viewpoints are excluded.

298 For example, Morgan notes that people may ask questions such as "if Australians of Italian origin are more "hot blooded" would they make good politicians/lawyers/judges?" Jenny Morgan, 'Critique and Comment: Provocation Law and Facts: Dead Women Tell No Tales, Tales Are Told About Them' (1997) 21 *Melbourne University Law Review* 237 269–70.

299 Ibid 268.

300 Sherene Razack, 'What is to be Gained by Looking White People in the Eye? Culture, Race and Gender in Cases of Sexual Violence' (1994) 19 *Signs* 894, 896. See also Santo De Pasquale, "Provocation and the Homosexual Advance Defence: The Deployment of Culture as a Defence Strategy' (2002) 26 *Melbourne University Law Review* 110

301 On the 'culturalisation' or racism and sexism, see Santo De Pasquale, who surveys a number of cases raising the cultural defence and concludes 'that what counts as culture is predetermined by dominant, Anglo-Celtic standards': Ibid 134.

302 In fact, it is sometimes argued that the dominant culture finds the same attitudes towards women to be acceptable: 'The attribution to "ethno cultural communities" of the notion that "honour" may motivate femicide in the face of adultery is offensive and ought to be repudiated... It is insulting and erroneous to flag this behaviour as "ethno cultural", when it is identical to the defence used by white males to excuse and justify femicidal violence. The uncritical use of such concepts and language... contributes to systemic racism and should be eschewed vigorously': Canadian Association of Elizabeth Fry Associations, *Response to the Department of Justice Re: Reforming Criminal Code Defences: Provocation, Self-Defence and Defence of Property*, (1998) 43.



CASE STUDY 6

Lucio was born in Italy, and moved to Australia in 1973. He married Antonella in 1974. Antonella was of Italian background, but born in Australia. In 1996, Antonella began studying psychology at university. It was argued that this led to an increase in her assertiveness and independence. She began to refuse to do all the housework, and that if Lucio asked her to do a chore she would often reply 'you've got hands, you do it'.

Lucio found it difficult to deal with this new-found freedom, and the relationship deteriorated. Antonella left Lucio, and made it clear that their marriage was over. Lucio subsequently went to her house, with a knife. He confronted her in the front yard, and an altercation ensued, during which Antonella bit Lucio's finger. He stabbed her over 40 times and she died.

Lucio was charged with murder. He argued at trial that in Calabrian tradition, if a wife left her husband, the husband lost respect and experienced shame within the community. He claimed that this, in combination with Antonella biting his finger, provoked him into killing her. Lucio was convicted of murder and sentenced to 18 years imprisonment, with a minimum of 14 years.³⁰³

3.62 The interaction between the gender bias which may be built into provocation and use of 'culture' by the court is of particular concern to some commentators.³⁰⁴ Part of the problem is seen to arise from the fact that women from such 'cultures' are often not called to give evidence from their perspective, leading to a biased perspective of that 'culture'. The use of 'cultural' factors in these cases is seen to leave male privilege unchallenged, with perpetrators of sexual assault often using such factors to reduce their culpability or mitigate their sentences, at the expense of minority or Indigenous women.

3.63 It is argued that allowing such factors to be taken into account can lead to the accommodation of cultural claims about the use of domestic violence to discipline women and children.³⁰⁵ This is a particular problem given that the defence of provocation is most commonly raised by men who kill their partners in the context of sexual intimacy.³⁰⁶ When combined with the 'cultural defence' it becomes possible that controlling behaviour such as Lucio's could be seen as acceptable, in light of his religious and cultural origins. Although in this case Lucio was ultimately convicted of murder, it is possible that a different jury would have felt more sympathy towards his situation and instead convicted him of manslaughter.³⁰⁷

303 The facts of this case study are based on Case No. 1999287.

304 See for example, Jenny Morgan, 'Critique and Comment: Provocation Law and Facts: Dead Women Tell No Tales, Tales Are Told About Them' (1997) 21 *Melbourne University Law Review* 237.

305 See for example, New South Wales Law Reform Commission, *Provocation, Diminished Responsibility and Infanticide*, Discussion Paper 31 (1993) where it is argued that 'it is crucial to ensure that the recognition of diverse cultural practices do not operate to reinforce the assertion of male power over women' para 3.61.

306 See above paras 3.25–3.27.

307 See for example, *R v Dincer* [1983] VR 460 for an example of a case where cultural factors were used in such a way. We note, however, that *Dincer* was decided prior to the formulation of the current test. Under the current formulation, the accused must also have acted with an appropriate level of self-control (the second limb of the ordinary person test). It is possible that the use of this test, which does not incorporate 'cultural factors', would lead to a different result. This will depend, however, on how the current test is interpreted: see below paras 3.84–3.87.

UNWANTED HOMOSEXUAL ADVANCE



CASE STUDY 7

John and Mark had been friends for a short time. One day, Mark invited John to his house for a drink. They sat around watching television and drinking for a few hours, before an argument broke out. John alleged that Mark had placed his hand on John's thigh and touched his groin. He also claimed that three months prior to the incident, Mark had fondled his penis while he was asleep. He told Mark to stop, which he did. John alleged that Mark then told him that he had a small penis. John claimed that he then punched Mark in the face a few times, and left the house.

Mark went next door, bleeding badly from the face, and complained of being kicked and punched. He was taken to hospital, but lapsed into a coma and died four weeks later. John was charged with manslaughter and pleaded guilty prior to trial. He received a maximum sentence of five years imprisonment, with a minimum of three years.³⁰⁸

3.64 One of the arguments outlined above relates to the inability of the ordinary person test to differentiate between those values the law should tolerate, and those which it should not.³⁰⁹ It is argued that allowing all of the accused's characteristics to be taken into account can lead to the acceptance of prejudiced views as providing an excuse for lethal force.³¹⁰ Of particular concern to some critics is that one of the prejudices held by accused people, which may provide the basis for the successful use of the provocation defence, is homophobia. In arguing this point, critics point to the cases in which the argument concerning unwanted homosexual advance has been successfully used.³¹¹

3.65 Unwanted homosexual advance is not itself a legally recognised defence. It refers to the situation where an accused claims to have acted under provocation, in response to a homosexual advance made by another person.³¹² The argument is that a homosexual advance, such as in Case Study 7 above, may be seen by some people to be such a gravely provocative act that an ordinary person could have formed an intention to kill or cause serious injury in the circumstances.³¹³ Critics argue that this is

308 The facts of this case study are based on Case No. 2000235.

309 See above para 3.55.

310 This will depend on how the current law is interpreted: see below paras 3.84–3.87.

311 The term 'homosexual advance defence' is commonly used in the literature. We have chosen to use the term 'unwanted homosexual advance' instead. It is a preferable term because it emphasises the fact that this is not a 'defence' *per se*, but rather a subset of provocation. Another term that is sometimes used in this area is 'homosexual panic defence'. The New South Wales Attorney-General's Working Party noted that this term originated in the United States and 'is based on the theory that a person with latent homosexual tendencies will have an excessive and uncontrollably violent response when confronted with a homosexual proposition. The theory is premised upon "homosexual panic" as an insanity or diminished capacity defence.' The Commission believes that 'homosexual panic defence' has negative and unjustified connotations, in that it implicitly suggests that 'panic' may be a legitimate response to homosexuality: see Criminal Law Review Division, NSW Attorney-General's Department, *Homosexual Advance Defence: Final Report of the Working Party*, (1998) paras 2.2–2.3.

312 Ibid para 2.1.

313 See for example, *Green v The Queen* (1997) 191 CLR 334, in which the accused killed one of his 'best friends', after the latter touched the accused's side, bottom and groin area. This was seen to be particularly provocative to the accused, due to memories it triggered of his father sexually abusing his sister when she was a child. We note that in Case Study 7 a plea was accepted on the basis of a lack of intent to kill. Had this case proceeded to trial, however, it is likely that the homosexual advance defence would have been raised. In our study there were no other cases in which a person killed in these circumstances. This is to be contrasted with NSW, where during

homophobic,³¹⁴ particularly in light of the fact that there are few, if any, cases where a woman has killed a man in response to unwanted sexual advances and relied on a similar defence.³¹⁵

3.66 Concern about the use of the argument concerning unwanted homosexual advance must be considered in the broader context of violence against gay men and lesbians generally. The Australian Institute of Criminology has described the level of such violence in Australia as ‘disturbing’, and suggests that it is rising.³¹⁶ This indicates that there is a high level of prejudice against gay people within Australia. This prejudice can lead to problems with the defence of provocation, which relies on an ‘ordinary person’ test, because the ‘ordinary person’ may be one who is homophobic. As a result, violent responses to homosexual advances may be sanctioned. Alternatively, the jury’s own homophobia may influence its verdict, reducing murder in cases involving a violent response to a potentially non-violent homosexual advance to manslaughter.

3.67 One of the problems in this area may be the failure by the judiciary to explicitly differentiate between a sexual attack and a non-violent sexual advance.³¹⁷ While perhaps a sexual attack could properly ground the defence of provocation, it is argued that a non-violent sexual advance should never be seen as sufficiently provocative to lead to the use of lethal force. The failure to differentiate between attacks and advances may be ‘linked to biased community attitudes toward homosexuality, and notions about the protection of “male honour” and “masculinity”’.³¹⁸ ‘This is seen to be unacceptable in today’s society, because it ‘reinforces the notion that fear, revulsion or hostility are valid reactions to homosexual conduct’.³¹⁹

CONCEPTUAL UNCERTAINTY

3.68 As noted above, the foundations upon which provocation is based have changed over time. The test is no longer based on a notion of ‘anger as outrage’, according to which retaliation is deemed the most appropriate response in certain circumstances. Instead, provocation is now based on the idea of ‘anger as loss of self-control’. Exactly what this means, and why it should provide the basis for a defence to homicide, has come under increasing attack.

3.69 What does a ‘loss of self-control’ actually mean? There seem to be at least two possibilities. On the one hand, it may mean that people are completely incapable of controlling themselves and that they acted as a result of an ‘irresistible impulse’. On the other hand, it could mean that, while they could

1993–98 there were at least 13 incidents (involving 16 accused) where the unwanted homosexual advance was raised: Ibid ; see Stephen Tomsen, *Hatred, Murder and Male Honour: Anti-homosexual Homicides in New South Wales, 1980–2000*, Research and Public Policy Series No. 43, Australian Institute of Criminology (2002) for a detailed analysis of such homicides.

314 See for example, National Association of Women and the Law, *Stop Excusing Violence Against Women, NAWL’s Position Paper on the Defence of Provocation*, (2000) 15; Santo De Pasquale, ‘Provocation and the Homosexual Advance Defence: The Deployment of Culture as a Defence Strategy’ (2002) 26 *Melbourne University Law Review* 110.

315 In our sample, two women killed in circumstances where they alleged that men had made unwanted sexual advances towards them. In both cases they raised the defence of provocation at trial, but were not successful.

316 Gail Mason, *Violence Prevention Today No 2: Violence Against Lesbians and Gay Men*, Australian Institute of Criminology (1993) 2.

317 See Criminal Law Review Division, NSW Attorney-General’s Department, *Homosexual Advance Defence: Final Report of the Working Party*, (1998) referring to the majority judgments in *Green v The Queen* (1997) 191 CLR 334.

318 Attorney-General’s Department, New South Wales, *Review of the ‘Homosexual Advance Defence’*, Discussion Paper (1996) para 61.

319 Ibid para 57. It is for this reason that the New South Wales Attorney-General’s Working Party recommended that the law needed to be changed: ‘The retention of a partial defence based on a homicidal response to a non-violent homosexual advance cannot, in the opinion of the Working Party, be countenanced any longer’: Criminal Law Review Division, NSW Attorney-General’s Department, *Homosexual Advance Defence: Final Report of the Working Party*, (1998) 18.

have controlled themselves from behaving in a particular way, their resolve to do so was weakened in some way, and they instead gave into their desires. In other words, they suffered from a ‘weakness of will’.³²⁰

3.70 Each of these theories provides a different justification for the defence of provocation. For example, if one adopts the irresistible impulse theory, the defence would seem to be based on the idea that people should not be held criminally responsible for behaviour which they could not prevent. If they were so overwhelmed by the provocative conduct that they literally could not control themselves, there would seem to be little point in criminalising their behaviour.

3.71 If, instead, provocation is based on a weakness of will theory, any justification seems far more dependent on an examination of the circumstances of the case. It seems unlikely that we would want to provide a defence to all people who gave in to their desires. Instead, we would want to differentiate between those cases where individuals *understandably* gave into their desires and ‘lost control’.

3.72 So which of these theories grounds our current law of provocation? It is argued that neither of them do and that the test is conceptually incoherent. Case law in this area does not draw out such distinctions, relying instead on metaphors such as whether a person acted while their ‘blood was boiling’ or whether they ‘snapped’. It is argued that this conceptual confusion can be shown by an examination of the elements of the defence.

3.73 The test for provocation is seen to be inconsistent with the irresistible impulse theory for a number of reasons. First, provoked killings are seen to be ‘intentional’ killings. That is, the law acknowledges that the person intended to kill in the circumstances, but that they should be excused.³²¹ If people are truly incapable of controlling their behaviour, they would not be considered to have intentionally killed—their actions would instead be deemed involuntary.³²²

3.74 Secondly, if culpability is reduced because the accused was not capable of controlling his or her behaviour, why do we have an ordinary person test? What difference does it make whether the ordinary person could have behaved in the way the accused did? And why do we require provocative conduct? Shouldn’t the test simply be whether the accused killed when ‘out of control’?

3.75 In addition, it is argued that an accused acting on some kind of ‘irresistible impulse’, should be completely acquitted. If people genuinely had no control over their behaviour, why should they be at all criminally responsible? Why is the offence only mitigated in these circumstances?³²³

3.76 Some of these problems are overcome by the ‘weakness of will’ theory. Such a test makes more explicable the requirement of the ordinary person and the provocative conduct, because we are no longer looking at the question of loss of self-control, but rather at whether giving in to one’s desires, first, in those circumstances and, secondly, given that the circumstances constituted provocation, was understandable. The first part of this test— looking at the context, the circumstances—brings in the question of the provocative conduct. How bad was it? Why did the accused kill this person at this time?

320 See Jeremy Horder, *Provocation and Responsibility* (1992) for a number of other possibilities.

321 Joshua Dressler notes that ‘provocation not only causes anger, it motivates the actor to want to kill the provoker. Proof of adequate provocation does not negate intent. It magnifies it.’: Joshua Dressler, ‘Rethinking Heat of Passion: A Defense in Search of a Rationale’ (1982) 73 *Journal of Criminal Law and Criminology* 421, 462.

322 This is the defence of automatism: see below paras 5.179 Conversely, if a person intended to kill, it is not clear why his or her lack of self-control should matter: Criminal Law Review Division, NSW Attorney-General’s Department, *Homosexual Advance Defence: Final Report of the Working Party*, (1998) para 6.47.

323 Jeremy Horder, *Provocation and Responsibility* (1992) 119.

The second part of the test—was it understandable—is where the ordinary person test comes in. Can we (ordinary people) understand how the accused gave into her or his desires in these circumstances?

3.77 There are also, however, a number of problems with the weakness of will theory. If such individuals could control themselves, why should they have any defence available, given the serious nature of the harm? If, in other parts of the criminal law, little attention is paid to whether the accused's behaviour was understandable,³²⁴ why should it in this context? Isn't one of the roles of the criminal law to set appropriate levels of self-control, and to punish those who breach them? If we agree that a defence should be available in such circumstances, why do we require the act to be in anger (or even fear)? Why shouldn't a similar defence be available for acts based on other emotions, such as compassion or fear of future abuse?³²⁵

3.78 Some argue that both the irresistible impulse and weakness of will theories are insufficient to explain the provocation defence, because provocation is not really about loss of self-control at all. This is seen to be reflected in the fact that it is necessary for the provocative conduct to have come from the victim him or herself.³²⁶ If a person is told a particularly provocative piece of information, which causes them to lose control and kill someone else, why should they not have a defence available? It is hypothesised that this requirement stretches back to the origins of provocation, when part of the doctrine was based on victims 'deserving what they got'.³²⁷ It is sometimes argued that in fact this is what stands at the heart of provocation, and is what juries are ultimately deciding.³²⁸ In particular, this is seen to be the case in relation to situations involving unwanted homosexual advances, or women who are killed when leaving a relationship. These latter cases seem to involve 'specific cultural assumptions about unruly women being somehow blameworthy or partially deserving of their own deaths.'³²⁹ This seems contrary to the underlying basis of our current criminal law, which to protect all life equally.

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- 324 For example, the law currently does not allow for duress to be a defence to murder. In failing to allow such a defence, the law imposes a duty on people to potentially forfeit their own lives, rather than take another person's—a heroic conception of human behaviour. In this area, the law is willing to sacrifice compassion in the name of public policy.
- 325 Jeremy Horder argues that 'unless there is something morally thought to be mitigating about killing in anger in certain circumstances, there could be no more reason to have a defence to murder focused on provocation than there could be reason to have a defence focused on envy, lust or greed': Jeremy Horder, *Provocation and Responsibility* (1992) 194.
- 326 Similarly, the requirement that the provocation take place in the presence of the accused seems incompatible with an excuse-based model of provocation: see New South Wales Law Reform Commission, *Provocation, Diminished Responsibility and Infanticide*, Discussion Paper 31 (1993) para 3.28.
- 327 This distinction between provocation as being about a loss of self-control and provocation as being about the victim getting what they deserved is often expressed as the difference between provocation as 'excuse' and provocation as 'justification'. When provocation is treated as an 'excuse', its foundation is seen to be the abnormal mental condition of the accused which excuses their behaviour to some extent. By contrast, when provocation is treated as 'justified', its foundation is seen to be an appropriate response to the victim's behaviour. The historical development of the defence has been seen to lead to a confusion between these two bases for provocation: see for example, New South Wales Law Reform Commission, *Partial Defences to Murder: Provocation and Infanticide*, Report No 83 (1997) paras 2.15–2.17.
- 328 See for example, Adrian Howe: 'The cultural message of successful provocation pleas is that men may kill at the slightest provocation and that certain social groups, notably women and gay men, behave in ways which, in the view of the courts, provoke their own demise.': Adrian Howe, 'Reforming Provocation (More or Less)' (1999) 12 *Australian Feminist Law Journal* 127–131.
- 329 Santo De Pasquale, 'Provocation and the Homosexual Advance Defence: The Deployment of Culture as a Defence Strategy' (2002) 26 *Melbourne University Law Review* 110–117. This is seen by some to be a clearly historical phenomenon: 'By placing the focus on the victim's behaviour, the law capitalizes on historic Judaeo-Christian ideologies that blame women for the evils of mankind and that immunize men from responsibility for their behaviour. The plausibility of the provocation hypothesis in spousal femicide cases rests on sexist assumptions about female maliciousness and male vulnerability. It excludes the real context and dynamic of male domination and patriarchal violence': National Association of Women and the Law, *Stop Excusing Violence Against Women, NAWL's Position Paper on the Defence of Provocation*, (2000) 22–3.

3.79 This focus on the victim's behaviour is seen to be particularly problematic when considered from the point of view of the victim's family and friends. Instead of punishing the killer for murder, provocation is seen to devalue the life of the deceased. Victims' families often report feeling that 'justice' was not served in such cases, because the accused 'got away' with manslaughter.³³⁰ In addition, the structure of the defence, which requires the accused to prove that the victim was provocative, is argued to lead to 'victim-blaming' trials, which focus on the faults of the victim rather than the accused's actions in killing. This 'adds salt to the wound' for family and friends, as the deceased has not only been killed but has also been vilified.

3.80 The Commission's view is that it is important to fully explicate the foundations upon which provocation is based, otherwise there will be a lack of consistency in its development and application. Moreover, failing to properly understand its basis leads to problematic results, due to the use of metaphor. For example, we assume that a person who kills in 'hot blood' is less culpable than a 'cold-blooded' killer, but why is this the case? Do we really believe that a man who 'snaps' and kills his wife, after engaging in a long process of violence against her, is less culpable than a woman who has suffered prolonged abuse and plans to kill her abuser in 'cold blood'? It is arguable that there is no reason why people who kill in anger or fear, but still with intent, should be treated more lightly than people who kill only with intent.³³¹

3.81 One of the problems with such metaphors is that they are seen to often hide underlying cultural myths. For example, it is argued that part of the reason why a 'hot-blooded' killing may be seen to be excusable is because of a widely accepted cultural myth of 'romantic passion'. In books and movies we often see the man who is 'driven crazy' by love, lashing out at his lover who has betrayed him. Because the driving force is seen to be his excessive passion, his behaviour is considered excusable, when in other circumstances it may be seen as abhorrent. Some argue that it is precisely this myth which disadvantages women in their use of provocation, both because of their failure to be able to participate in the myth (women aren't driven crazy by love in the same way as men) as well as the fact that it excuses male violence towards them. In fact, it is argued that such 'upswellings' of passion are not the spontaneous expressions of emotion, but rather part of the process of violent control and domination, and should in no way be seen as excusable.³³²

3.82 The lack of a coherent basis to the defence of provocation has led some to argue for its abolition. If provocation is to be retained as a defence, it is vital to understand exactly why we would want such a defence, and to formulate the legal test accordingly.

LACK OF CLARITY

3.83 Closely related to the issue of conceptual uncertainty is the criticism that the current defence of provocation lacks clarity. In particular, the ordinary person test is seen to be confusing and difficult to apply. Juries are believed to have problems making the subtle distinctions between the ordinary person with all the characteristics of the accused in the first part of the test (determining the gravity), and the

330 See for example, Phil Cleary, who in commenting on the provocation manslaughter verdict handed down in the case involving his sister's killer stated that 'If justice had been done that day in the Supreme Court, my family would have walked away and done our best to get over her murder. Because all we got was injustice, Vicki's murder just wouldn't go away': Phil Cleary, *Just Another Little Murder* (2002) 5.

331 Criminal Law Review Division, NSW Attorney General's Department, *Homosexual Advance Defence: Final Report of the Working Party*, (1998) 23.

332 See above para 3.52.

hypothetical ordinary person in the second part of the test (determining the appropriate level of self-control). Even if they understand the test, it is argued that they have difficulty applying it. Justice Murphy argued that the test was so complex that the jury would ‘if not consciously, at least subconsciously dismiss such refinements and decide as they thought to be fair and just in the circumstances’.³³³ This lack of clarity in the law is seen to lead to inconsistencies in its application, causing some to argue that the test should, at the very least, be simplified.

3.84 This problem with the ordinary person test is not limited to juries. An examination of the case law shows what seems to be conflicting interpretations of the test by judges as well. There seems to be disagreement as to how the two limbs of the ordinary person test relate to each other. A strict reading of the test laid down in *Stingel*³³⁴ and *Masciantonio*³³⁵ seems to view the first part of the test (determining the gravity of the provocation) as a ‘rating’ system. The jury has to determine how serious the particular accused would have considered such provocative conduct. They may conclude, for example, that the provocation was very grave—say 8 out of 10 on a scale of gravity. The next part of the test requires them to determine whether the ‘ordinary person’ could have killed or caused serious injury in response to provocation at this level of gravity. The jury may decide that anything above 7 out of 10 could lead to such consequences for an ‘ordinary person’ (who in this part of the test does not have the accused’s characteristics), and that therefore the defence of provocation should be available.³³⁶

3.85 On this basis, such a test would seem to excuse Terreblanche, the example of the white supremacist in Jeremy Horder’s discussion.³³⁷ The jury would first have to determine how grave a provocation a person like Terreblanche would consider being spoken to by a person of colour to be. Given his personal characteristics, this is likely to be 8 or 9 on the scale. If anything above 7 can lead the ordinary person to kill or cause serious injury, Terreblanche should be able to rely on the provocation defence.

3.86 In fact, however, some judges have explicitly stated that a racist bigot would *not* be able to rely on the provocation defence. This was seen in the case of *Kumar*, where Eames JA stated that the ordinary person is not to be considered to be homophobic, sexist or racist, and so a racial bigot would

333 *R v Voukelatos* [1990] VR 1, 12. Stanley Yeo goes further in his criticism of this test, arguing that it is highly artificial to dissect the personality of the accused into how they would view the provocation and how they would react to it. He believes that no rational distinction can actually be drawn between those factors going to the gravity of the provocation and those relevant to self-control: Stanley Yeo, ‘Ethnicity and the Objective Test in Provocation’ (1987) *Melbourne University Law Review* 67. See also New South Wales Law Reform Commission, *Provocation, Diminished Responsibility and Infanticide*, Discussion Paper 31 (1993) para 3.56; Model Criminal Code Officers Committee of the Standing Committee of the Attorneys-General, *Model Criminal Code, Chapter 5, Fatal Offences Against the Person*, Discussion Paper (1998) 79.

334 *Stingel v The Queen* (1990) 171 CLR 312.

335 *Masciantonio v The Queen* (1995) 183 CLR 58.

336 Although the test is not usually described in this way, it seems to be how it is envisioned in passages such as the following: ‘[T]he gravity of the conduct said to constitute the provocation must be assessed by reference to relevant characteristics of the accused. Conduct which might not be insulting or hurtful to one person might be extremely so to another because of that person’s age, sex, race, ethnicity, physical features, personal attributes, personal relationships or past history. The provocation must be put into context and it is only by having regard to the attributes or characteristics of the accused that this can be done. But having assessed the gravity of the provocation in this way, it is then necessary to ask the question whether provocation of that degree of gravity could cause an ordinary person to lose self-control and act in a manner which would encompass the accused’s actions.’ *Masciantonio v The Queen* (1995) 183 CLR 58, 67 (Brennan, Deane, Dawson and Gaudron JJ).

337 See above para 3.55.

never be able to use the defence of provocation in response to a killing due to their racism.³³⁸ Judge Eames seems to be arguing that the question to be asked in the second part of the test is whether the ordinary person would have reacted to the *particular* provocation in that way, rather than provocation of such *gravity*.³³⁹ That is, instead of simply asking ‘could the ordinary person have responded to *provocative conduct* of 8 out of 10 gravity by forming an intention to kill or cause serious injury?’, the jury are required to ask ‘could the ordinary person have responded to *a person of colour speaking to them* with the intention to kill or cause serious injury, if they considered such conduct to be 8 out of 10 on the scale of gravity?’

3.87 Judge Eames’ test has the advantage of introducing current standards of behaviour into the ordinary person test. However, it can be argued that by focusing on the provocative conduct at the second stage of the test (determining the appropriate level of self-control), the entire purpose of the first part of the test (determining the gravity) is undermined. This is because any particular ‘cultural’ characteristics taken into account in determining the gravity of the provocation can be overridden by the jury’s idea of the hypothetical ‘ordinary person’ in the second part of the test. The jury may not believe that the ‘ordinary person’ could not react with lethal violence to provocation of such gravity, given the nature of the conduct (ignoring the particular cultural factors).

3.88 While it is not the role of the Commission to determine which of these interpretations of the test is ‘correct’, the point we are making here is that there are discrepancies in the interpretation of the test, which may lead to different results. If judges have difficulty in determining the meaning of the test, it is likely that juries, who are less familiar with the law, will also struggle. The Commission believes that the law should be clarified.



CASE STUDY 8

Malcolm and Kelly’s relationship had ended badly, and it was alleged that Malcolm had made a number of threats to kill Kelly. On the night of the homicide, Kelly was hiding from Malcolm at a friend’s house. Malcolm arrived with a knife, and broke into the house which had been bolted to prevent his entry. He confronted Kelly, who he alleged taunted him, telling him she’d been having sex with her friend (who was sleeping in another room at the time), and denigrating his sexual capacity. Malcolm alleged that he then lost self-control and killed Kelly. Malcolm successfully raised the defence of provocation.³⁴⁰

3.89 A similar problem arises in relation to the notion of ‘self-induced provocation’. Technically, the law in Victoria states that if people put themselves in situations where they are likely to be provoked, they cannot then rely on the defence of provocation to reduce the offence to manslaughter.³⁴¹ It is argued, however, that this aspect of the law is applied inconsistently. For example, Jenny Morgan argues that ‘many of the traditional provocation cases, even those where the defence succeeded, could (and

338 *R v Kumar* [2002] VSCA 139, para 112. For a discussion of the issue of the objective test, see Ian Leader-Elliott ‘Sex, Race and Provocation: In Defence of Stingel’ (1996) 20 *Criminal Law Journal* 72.

339 See also *Green v The Queen* (1997) 191 CLR 334.

340 Based on *R v Gardner* (1989) 42 A Crim R 279. In this case, the accused also killed Kelly’s friend. At trial he was not allowed to raise provocation in relation to the killing, but this was overturned on appeal.

341 *Edwards v The Queen* [1973] AC 648.

should) be read as cases of “self-induced provocation”. She points to the case outlined in Case Study 8 above, where it seems clear that Malcolm put himself in such a situation, by breaking into the house armed with a knife. Despite this, provocation was left to the jury for consideration.

3.90 It is argued that the law should be clarified in this area as well,³⁴² with the defence being clearly excluded in such cases:

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.³⁴³

ANACHRONISTIC DEFENCE

3.91 It is further argued by some that the defence of provocation is anachronistic, and should be abolished. This argument is based on the fact that provocation was developed at a time when the death penalty was mandatory for those convicted of murder. It was therefore necessary to provide an alternative outcome for those cases where the death penalty didn’t seem appropriate. Even after the death penalty was abolished, arguably provocation had a place, given that the punishment for murder was mandatory life imprisonment. Again, provocation provided judges and juries with some level of flexibility. Now that sentencing for murder is discretionary, however, the defence is seen to have no place in the law.

3.92 Some commentators argue that provocation in homicide cases should instead be treated as it is in all other areas of the law—as a mitigating factor in sentencing.³⁴⁴ A person should be convicted of murder, but the sentence should be reduced as a result of the provocation. To retain a distinction between murder and manslaughter on the basis of provocation is seen as inconsistent with other aspects of the law, as well as providing for unnecessary, costly and time-consuming trials before juries, on an issue which should simply be one of the factors for judges to take into account at the sentencing stage.

3.93 A related argument is that the law of provocation reflects antiquated societal values and mores that are no longer acceptable in a time when the use of violence is disdained. It is argued that people should be held responsible for their violent actions, even if they are not capable of self-control.

342 See for example, New South Wales Law Reform Commission, *Partial Defences to Murder: Provocation and Infanticide*, Report No 83 (1997) paras 2.106–2.110.

343 Rebecca Bradfield, *The Treatment of Women Who Kill Their Violent Male Partners Within the Australian Criminal Justice System* (PhD Thesis, University of Tasmania, 2002) 161. See also Ian Leader-Elliott, who argues 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’: Ian Leader-Elliott, ‘Sex, Race and Provocation: In Defence of Stingel’ (1996) 20 *Criminal Law Journal* 72 85.

344 See for example, Model Criminal Code Officers Committee of the Standing Committee of the Attorneys-General, *Model Criminal Code, Chapter 5, Fatal Offences Against the Person*, Discussion Paper (1998) 89.

In essence the defence legitimises anger. It sends out a clear message that where one kills in rage, a defence can be available, in contradiction to the premise of the criminal law that human beings can be expected to control their behaviour and be responsible for their actions. The legitimisation of anger raises the issue of whether the law should give anyone the right to kill another because they have been outraged. It is arguable that no definition of insult or wrongful act can justify someone killing another even at a point of human weakness. Although there are circumstances where it is difficult to maintain control, it is not impossible.³⁴⁵

3.94 This argument rejects the entire foundation of the provocation defence. Historically, the defence reflects a difference in culpability between provoked and unprovoked killers. This hierarchy of culpability is seen to be flawed for a number of reasons. For example, it is argued that those who believe that provoked killers are less culpable than unprovoked killers often mistakenly confuse provocation with lack of intention. That is, people will often claim that the provoked killer is not as 'bad' as the unprovoked killer, because they didn't really mean to kill in the circumstances. It is thought that things just 'got out of control', and someone ended up dead. The defence of provocation, however, only arises if there is already an intention to kill or cause serious injury. If there was not such an intention, then the accused would not be facing a murder conviction. In fact, in many provocation cases there clearly was such an intention, as indicated by the use of weapons. Cases in which provocation is raised often involve brutal, multiple stabbings or even the use of firearms, where there is clearly an intention to kill or cause serious injury.

3.95 It could be argued that the hierarchy of culpability upon which provocation is based relies on abstract concepts, rather than real cases. The 'hot-blooded killer' is contrasted with the 'cold-blooded killer', without explaining what these terms mean. Who is this 'cold-blooded killer' that is so much more culpable than the 'hot-blooded killer'? Is it simply people who kill for profit? Isn't the question as to whether they killed out of greed or to feed their families more relevant when determining their culpability than whether or not they lost self-control? Under closer scrutiny, would we say that those who plan to kill in order to feed themselves or their families are more culpable than men who kill their wives because they are having affairs, simply because the former planned their crimes?³⁴⁶

3.96 It is argued that the mere fact that a killing was provoked bears little relationship to the accused's culpability: 'Some [hot-blooded killers], perhaps even most, are morally just as culpable as their cold-blooded counterparts.'³⁴⁷ Other factors are seen to play a more important role in assessing the blameworthiness of a particular accused, such as their motivations for killing (for example, did they kill for profit, as the culmination of a pattern of violent control of their partners, or to escape abuse), or the vulnerability of the victim (for example, did they kill children).

3.97 A closely related argument, which is often relied on in calling for the abolition of provocation, is that provoked killers have an intention to kill, and therefore should be convicted of murder. 'The fact that the person who killed has lost self-control does not supply a sufficient reason, moral or legal, to distinguish such people from cold-blooded killers.'³⁴⁸ Unlike the previous argument, those raising this

345 Ontario Women's Directorate, *Reforming the Defence of Provocation*, (1994).

346 See for example, Model Criminal Code Officers Committee of the Standing Committee of the Attorneys-General, *Model Criminal Code, Chapter 5, Fatal Offences Against the Person*, Discussion Paper (1998) 89: 'Why is a husband who kills his wife because he found her committing adultery morally less guilty than a murderer?'

347 Ibid 105.

348 Law Reform Commission of Victoria, *Homicide*, Report No 40 (1991) para 156.

point do not necessarily believe that there is no difference between hot and cold-blooded killers. However, the question of whether or not the accused was provoked is not viewed as central to the issue of culpability. The more important question is seen to be whether or not the accused had an intention to kill. If there was such an intention to kill, as there is in provocation cases, the accused should be convicted of murder. Any other minor distinctions in culpability, such as whether or not the accused was provoked, should simply be taken into account at sentencing.

3.98 This is linked to the issue raised above³⁴⁹ as to why anger should continue to have a special status in the law, compared with other emotions such as compassion.³⁵⁰ While this is perhaps historically explicable, it is seen by some to be ‘deeply troubling, particularly because the emotions that drive men to kill their spouses have nothing noble about them. On the contrary, their anger is constructed on outmoded, sexist, and misogynist values’.³⁵¹ It is argued that killings in anger, particularly those killings in response to adultery or separation, are not deserving of a legal defence.³⁵²

EASY FABRICATION

3.99 Another criticism of provocation is that it is too easily fabricated and subject to abuse.³⁵³ It is seen as very easy for an accused to simply allege, in the police interview, provocation into the killing. Often this will be the only evidence of any provocation—there will be no independent witnesses or corroborating evidence (particularly if the provocative conduct did not result in physical injuries).³⁵⁴ Usually, the accused will not give evidence at a trial, so there will be no opportunity for cross-examination. This means that the jury will usually have to make a determination based on the written record of the police interview, weighed against any other evidence the prosecution can call.

349 See above para 3.74.

350 We note that the test has recently been expanded to also incorporate killings where the loss of self-control was due to fear or panic. However, it is argued that the test is still predominantly based on an ‘anger’ model: ‘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... The need for a ‘sudden and temporary loss of self-control’ at the 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. Even in New South Wales and the Australian Capital Territory where the requirement of suddenness has been removed, 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.’: Rebecca Bradfield, *The Treatment of Women Who Kill Their Violent Male Partners Within the Australian Criminal Justice System* (PhD Thesis, University of Tasmania, 2002) 164–5.

351 National Association of Women and the Law, *Stop Excusing Violence Against Women, NAWL’s Position Paper on the Defence of Provocation*, (2000) 25–6.

352 See for example, Rebecca Bradfield, *The Treatment of Women Who Kill Their Violent Male Partners Within the Australian Criminal Justice System* (PhD Thesis, University of Tasmania, 2002) 184–5: ‘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 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.’

353 See for example, Model Criminal Code Officers Committee of the Standing Committee of the Attorneys-General, *Model Criminal Code, Chapter 5, Fatal Offences Against the Person*, Discussion Paper (1998) 98–9.

354 See for example, Mason J (as he then was) in *R v Moffa* (1977) 138 CLR 601, 618: ‘A case of provocation by words may be more easily invented than a case of provocation by conduct, particularly when the victim was the wife of the accused.’

3.100 While this is obviously a problem in many areas of the criminal law, as there are often no eye-witnesses to a crime, it is seen to be of particular concern in the area of homicide, for two reasons. First, the person who is alleged to have been provocative is dead, and so cannot refute the charges. Secondly, as noted above, most of the homicides in which provocation is raised as a defence occur in the context of sexual intimacy, where men allege that their partners have been provocative in some way. These homicides are particularly private, with 76.5% occurring in either the accused's or victim's home.³⁵⁵ In such homicides, it is very unlikely that there will be any witnesses.³⁵⁶ The combination of these two factors leads to a particular risk of fabrication. As Jenny Morgan points out: 'dead women tell no tales, tales are told about them'.³⁵⁷

SHOULD PROVOCATION BE REFORMED?

3.101 We have seen above that provocation has been criticised from a number of perspectives. Despite this, there is little consensus about reform. A number of different options, each in response to one or more of the problems outlined above, have been suggested. In this section we will examine some of these options and pose some questions for consideration. We begin by looking at the arguments for retaining the defence of provocation, and the reasons for doing so. We then look at some of the ways in which provocation can be reformed, before finally considering the viewpoint of those who seek the abolition of the defence.

1 RETAIN THE DEFENCE

3.102 There are many people who argue that the defence of provocation should be retained, despite the problems outlined above.³⁵⁸ The reasons for this view include that:

- provocation reflects a necessary hierarchy of culpability;
- provocation can help women who kill in response to domestic violence;
- problems with the current defence are illusory;
- provoked killers are not 'murderers';
- decisions about culpability are most appropriately made by the jury;
- if provocation is abolished, there will be a risk of unjust acquittals; and

355 Provocation was raised as a defence in 17 incidents that occurred within the context of sexual intimacy. Of these, 13 occurred in either the victim's or accused's home [st 68](#).

356 This is in contrast to spontaneous encounters, which often take place in public. In our study, only two of the 17 spontaneous encounter homicides occurred in the accused's or victim's home. On this point, see also Kenneth Polk, *When Men Kill: Scenarios of Masculine Violence* (1994) 60–1 [st 69](#).

357 Jenny Morgan, 'Critique and Comment: Provocation Law and Facts: Dead Women Tell No Tales, Tales Are Told About Them' (1997) 21 *Melbourne University Law Review* 237. See also Phil Cleary, *Just Another Little Murder* (2002) who notes that evidence about women's fear is often excluded in these cases: 'A woman's fear isn't something men in wigs want to hear about in their courts. They call it hearsay. What they mean is, "dead women don't speak".' 39.

358 Those in favour of retaining provocation include Criminal Law and Penal Methods Reform Committee of South Australia, *Fourth Report: The Substantive Criminal Law*, (1977); Criminal Law Revision Committee, *Offences Against the Person*, Report No 14 (1980); House of Lords, *Report of the Select Committee on Murder and Life Imprisonment*, (1989); Law Reform Commission of Victoria, *Homicide*, Report No 40 (1991); New South Wales Law Reform Commission, *Partial Defences to Murder: Provocation and Infanticide*, Report No 83 (1997).

- abolishing provocation will lead to increased sentences.

We discuss each of these arguments briefly, then examine the underlying rationale of any decision to retain provocation as a defence.

A NECESSARY HIERARCHY OF CULPABILITY



CASE STUDY 9

When Simon was a child he was seriously abused by his father. This included being tied naked to an ant hill, so the ants could bite him, being beaten with an extension cord, being burnt with a red hot metal file, and being hung by the legs over hot ashes sprinkled with chillies so they would burn his eyes. The physical abuse stopped when Simon was 15, but he alleged that his father continued to emotionally abuse him for the next ten years. This included continually denigrating him, humiliating him in front of friends and colleagues and calling him racist names (Simon was Fijian).

Approximately a year prior to the homicide, Simon's parents separated. The separation was not amicable, and both parents tried to draw Simon into their arguments. On the night of the homicide, Simon was drinking whisky with his father, when his father told him that he was not going to let his mother get any of the proceeds from the sale of the family house. Simon claimed that this, in combination with the years of abuse, caused him to erupt. He grabbed a kitchen knife and stabbed his father. When that knife broke, he obtained another knife and stabbed his father again, killing him.

At trial, the defence claimed that Simon did not intend to kill his father. Alternatively, they claimed he was provoked by the years of abuse by his father, combined with the fact that, according to Fijian tradition, as the eldest son, Simon is expected to look after both of his parents, so he would have been particularly outraged by his father's refusal to give his mother any proceeds from the sale of the house. Simon was convicted of manslaughter on the basis of provocation, and sentenced to six years in prison, with a minimum of three years.³⁵⁹

3.103 Many commentators argue that provocation reflects a necessary hierarchy of culpability—that those who kill after having been provoked are less culpable than those who kill in 'cold blood', because their 'free will' was impeded to some extent by their anger. It is argued that this distinction should continue to be reflected in the offences for which people are convicted, regardless of the problems inherent in the defence.

3.104 In arguing this point, those who favour the retention of the provocation often raise examples, such as Case Study 9 above, in which the community may feel sympathy for the accused, and may believe that he should not be convicted of murder. If provocation is abolished, it is often argued that people like Simon will not have a viable alternative defence, and will consequently be penalised unfairly. For example, it would be quite difficult for Simon to argue successfully that he did not intend to kill his

359 The facts of this case study are based on Case No. 2000264.

father, as he stabbed him with two different knives.³⁶⁰ There was no element of self-defence in the killing either, as he had not been attacked. Currently, there is no defence of diminished responsibility in Victoria, nor was Simon suffering a mental impairment. This means that, in the absence of provocation, it is quite possible that Simon would have been convicted of murder. Yet, given the horrific abuse faced by Simon, and the continued bullying by his father, many people may consider such a conviction to be unjust.

WOMEN WHO KILL IN RESPONSE TO DOMESTIC VIOLENCE

3.105 The retention of provocation is seen as vital for the protection of women who kill in response to domestic violence.³⁶¹ As we will see in the next chapter, the current law of self-defence is often not available to women in such circumstances.³⁶² It is argued, however, that ‘women who kill in these situations often do so under strong mitigating circumstances which should be recognised by the law as reducing their culpability’.³⁶³ These women may currently be able to rely on the defence of provocation, to reduce the offence to manslaughter.³⁶⁴ If provocation was abolished, and self-defence continued to remain unavailable, these women may find themselves facing long prison sentences for murder.³⁶⁵

3.106 In response to this claim, it is argued by some that provocation is not an appropriate defence in such circumstances—that these killings are not really about anger (although anger may well be a part of it), but, rather, about self-protection. As such, self-defence, or a completely different defence which acknowledges such circumstances, would be more appropriate. Although it is acknowledged that self-defence may not currently be available to women who kill in response to domestic violence, it is argued that it would be more appropriate to reform the defence of self-defence, than to rely on the flawed defence of provocation.³⁶⁶

3.107 It is further argued that while provocation continues to exist as a defence, self-defence will never assist women who kill in such circumstances. This is due to a combination of factors, including the fact that, if provocation is available, women who kill in response to domestic violence commonly plead guilty to manslaughter, in order to avoid trial, and because they are likely to receive a reduced sentence for pleading guilty. In addition, defence counsel will often take the view that self-defence is not

360 Although it may be difficult, such an argument would not be impossible. It is possible for a seemingly intentional killing to lead to a manslaughter conviction on the basis of lack of intention.

361 See for example, Debbie Kirkwood, *Women Who Kill: A Study of Female Perpetrated Homicide in Victoria Between 1985 and 1995* (PhD Thesis, Monash University, 2000) 265.

362 See below 4.17–4.44.

363 New South Wales Law Reform Commission, *Partial Defences to Murder: Provocation and Infanticide*, Report No 83 (1997) para 2.141.

364 As noted above, however, these women may also be excluded from using provocation, depending on the circumstances of the killing: see above paras 3.39–3.43.

365 We note, however, that in our study there were no women who successfully relied on provocation **ch2, Table 13**. There were three accused who alleged that they had killed their abusive adult parents who successfully relied on provocation. However, as noted above, the majority of cases in which provocation was successfully raised were those in the context of sexual intimacy, where men killed their female partners.

366 See for example, the National Association of Community Legal Centres, Resolution 3 from the National Conference 2002, which recommends that the laws of self defence and the rules of evidence be reformed ‘to ensure that women who kill violent partners are able to effectively argue self defence’ and that the partial defence of provocation be reformulated to remove applicability to men’s violence in situations such as sexual jealousy and partner separation. ‘Provocation should not be abolished as a partial defence until self-defence is an effective defence for women who kill violent partners and in jurisdictions where murder convictions carry a mandatory life sentence.’: <<http://www.naclc.org.au/>>.

appropriate due to particular factors, such as the existence of planning associated with the killing, and will urge the accused to plead guilty to manslaughter. It is argued that this has inhibited the development of the law of self-defence, as there are few cases of precedential value for defence to rely on, and a lack of willingness to push the boundaries of the defence given the risk of conviction.³⁶⁷

PROBLEMS WITH THE CURRENT DEFENCE ARE ILLUSORY



CASE STUDY 10

Lyn and Shail were defacto partners. Throughout the course of their relationship, it is alleged that Shail had been violent towards Lyn. This eventually led Lyn to leave Shail, and move from Queensland to Melbourne. Shail tracked Lyn down, but Lyn would not allow him to live with her. On the morning of the homicide, Shail knocked on Lyn's door, asking that she let him in and give him breakfast. Lyn refused and called the police. Shail left, but returned a few hours later, again requesting food. Lyn again refused. Shail then obtained a piece of metal piping and a knife, broke into Lyn's house through a window, and stabbed her to death.

At his trial, Shail claimed he had been provoked. He said that he was raised in the Hindu religion, and that it was Hindu custom for women to cook for men. He said it was a shameful thing for a woman to refuse to do so. He further alleged that Lyn had insulted him and his family, calling them bastards and saying they were from a low caste, a particularly bad insult. The trial judge refused to leave provocation to the jury for consideration, and Shail was convicted of murder.³⁶⁸

3.108 Some of the advocates of retaining provocation deny that the problems outlined above actually exist. For example, it is sometimes argued that the defence is not gender-biased, as women are more often successful when they raise provocation than men.³⁶⁹ Alternatively, although the defence of provocation may lead to a reduced sentence for some men who kill in circumstances of domestic violence, this is argued not to be condoning violence. This is because the accused is not acquitted, but is convicted of manslaughter, which still has the potential for a significant penalty.³⁷⁰ It is further argued that while there may have been problems with provocation in the past, these have gradually been resolved over time, so that now the doctrine only operates in appropriate cases.

3.109 In positing this argument, the recent series of cases in which provocation has been removed from jury consideration are highlighted, such as Case Study 10 above.³⁷¹ In these cases, judges have held

367 See for example, Morgan, who notes that 'the abolition of provocation (at least in jurisdictions without the defence of diminished responsibility) could force defence counsel into pushing the bounds of the doctrine of self-defence as there would be little other choice of defence.' Jenny Morgan, 'Critique and Comment: Provocation Law and Facts: Dead Women Tell No Tales, Tales Are Told About Them' (1997) 21 *Melbourne University Law Review* 237 274.

368 The facts of this case study are based on Case No. 1999269.

369 But see above paras 3.28–3.30.

370 See for example, New South Wales Law Reform Commission, *Partial Defences to Murder: Provocation and Infanticide*, Report No 83 (1997) para 2.36. The Commission goes on to argue that such homicides 'do not fall within the worst category of unlawful homicide' and as such are deserving of a lesser penalty.

371 See for example, *R v Tuncay* [1998] 2 VR 19; *R v Parsons* (2000) 1 VR 161; *R v Leonboyer* [2001] VSCA 149; *R v Kumar* [2002] VSCA 139. But compare with *R v Thorpe* [1998] VSCA 13; *R v Abebe* (2000) 1 VR 49; *R v Bohay* (2000) 111 A Crim R 271. See also above para 3.20.

that, even on the most generous interpretation, the facts are such that juries could not reasonably find that accused have been provoked in the circumstances. Many of these homicides occurred in the context of sexual intimacy. It is argued that while in the past provocation may have been left to the jury in such cases, judges now have a much stricter view of the law, and will not allow ‘bad’ provocation cases to be left to the jury for consideration. Thus, although Shail tried to raise provocation, he was prevented from doing so, even though in the past he may have been successful. The fact that judges do not to leave provocation to the jury in some situations is considered to be evidence of the law’s ability to adapt to changing cultural circumstances.

PROVOKED KILLERS ARE NOT ‘MURDERERS’

3.110 Another argument in favour of the retention of provocation is that it is viewed as inappropriate to impose the stigma of a murder conviction on a person whose act is not as grave as that of a ‘murderer’. It is argued that the label ‘murderer’ should be reserved for the worst cases, and to convict provoked killers of murder would be to devalue the term. It would make murder convictions seem less serious, especially if those convicted of murder also had their sentences reduced by judges on the grounds of provocation.³⁷²

APPROPRIATE ROLE OF THE JURY

3.111 Others argue that important decisions about culpability are best made by the jury, which is comprised of twelve ‘ordinary’ people. If provocation were abolished and left to sentencing,³⁷³ it would fall on unrepresentative judges to make such decisions, which is argued to be inappropriate:

Juries are more representative of the community than judges, particularly in terms of ethnicity and gender.

Their input into making decisions concerning community standards is highly valued. Shifting the determination of provocation issues to the judge is to place it in the hands of a less desirable decision-maker.³⁷⁴

In addition, if a judge were to significantly reduce the sentence of a ‘murderer’ due to what they deem to be provocation, they could be subjected to harsh public criticism. It is argued that this could ultimately decrease public confidence in the judicial system.³⁷⁵ Judges are currently protected from such criticism to an extent, because the jury that makes the ultimate determination of culpability.

RISK OF UNJUST ACQUITTALS

3.112 It is also argued the provocation defence helps prevent unjust acquittals. If juries are presented with a stark choice between a murder conviction or an acquittal, they may choose to acquit in cases where they may feel some sympathy towards the accused due to the provocation. This is seen as being a particular risk in cases such as those involving unwanted homosexual advance, where jury prejudices

372 See for example, New South Wales Law Reform Commission, *Partial Defences to Murder: Provocation and Infanticide*, Report No 83 (1997) para 2.24.

373 Compare abolishing provocation both as a defence and as a sentencing consideration: see below paras 3.187–3.191.

374 Model Criminal Code Officers Committee of the Standing Committee of the Attorneys-General, *Model Criminal Code, Chapter 5, Fatal Offences Against the Person*, Discussion Paper (1998) 101.

375 See for example, New South Wales Law Reform Commission, *Partial Defences to Murder: Provocation and Infanticide*, Report No 83 (1997), which concluded that ‘it is essential to retain a separate partial defence to murder which permits the community, as represented by the jury, to make judgments as to an individual’s culpability for killing where there is evidence of provocation, in order [to] enhance public confidence in the criminal justice system and community acceptance of sentences’: para 1.15.

may play a part: 'It is not difficult to imagine a homophobic jury being tempted to return a perverse verdict of acquittal, even though satisfied that self-defence had been negated by the prosecution, if denied the "halfway house" of a conviction for manslaughter by way of provocation.'³⁷⁶ The Model Criminal Code Officers' Committee argues, however, that this problem could perhaps be overcome with a strong jury direction.³⁷⁷

INCREASED SENTENCES

3.113 Finally, it is argued by some that the result of the abolition of provocation would likely be that more people would be convicted of murder, with a substantially increased penalty.³⁷⁸ This is perceived to be a potential problem, as criminal laws are often seen to be applied in ways that reproduce systemic racism and the criminalisation of the poor. Abolition could have a profound impact on people who are already disadvantaged in our society. It is also possible that such a reform will lend weight to current law and order initiatives, which have been subjected to a high level of criticism.

3.114 This is viewed to be a particular problem in light of recent moves by some States to reintroduce mandatory sentencing for murder.³⁷⁹ The defence of provocation is seen as one way to avoid the inflexibility of such a scheme, particularly in cases where we may feel some sympathy for the accused.³⁸⁰ Given the risk of the reintroduction of mandatory sentencing, it is argued that provocation should not be abolished.

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QUESTION

1. Should the defence of provocation be retained?

RATIONALE OF THE DEFENCE

3.115 As noted above, there is some confusion over the conceptual underpinnings of the provocation defence. Is it about an 'irresistible impulse' or a 'weakness of will'?³⁸¹ Is it an 'excuse', which focuses on

376 Criminal Law Review Division, NSW Attorney-General's Department, *Homosexual Advance Defence: Final Report of the Working Party*, (1998) para 6.57.

377 Model Criminal Code Officers Committee of the Standing Committee of the Attorneys-General, *Model Criminal Code, Chapter 5, Fatal Offences Against the Person*, Discussion Paper (1998) 101. The Model Criminal Code Officers' Committee also notes that this argument does not stem from a defence of the rationale of the provocation defence: 'Rather, it is motivated by an expectation that some defendants will unjustly escape punishment. Therefore, although it illustrates a potential operational limitation to the abolition of provocation, it does not contend that hot-blooded killers should not be guilty of murder. The argument should not be placed on any higher footing than this.'

378 See for example, *Ibid* 101.

379 The Liberal Opposition in both Victoria and NSW have policies to introduce mandatory sentences for murder: see Kirsty Simpson 'Libs Vow Mandatory Sentencing Laws', *The Age* (Melbourne) 3 August 2003; The Law Society of NSW in '*New South Wales: the Convict State*' 2002 16. There are already mandatory sentences for murder in some other States. *Criminal Code Act 1899* (Qld) s 305; Criminal Code of the Northern Territory s 164; Criminal Code (WA) s 292.

380 Women who kill in response to violence are seen to be one such group of people. Given the unavailability of self-defence in such cases, mandatory sentencing for murder is seen to be particularly unfair. For example, the National Association of Community Legal Centres, Resolution 3 from National Conference 2002, recommends that 'Provocation should not be abolished, until self-defence is an effective defence for women who kill violent partners and in jurisdictions where murder convictions carry a mandatory life sentence.': <<http://www.naclc.org.au/>>.

381 See above paras 3.68–3.78.

the accused's mental state, or a 'justification', which looks at the victim's behaviour?³⁸² On what basis should we choose to retain such a defence?

3.116 While these questions may appear abstract, it is important to resolve them in order to determine how best to frame the defence. Particular consequences will flow from different understandings of the basis of the defence. For example, if the main rationale underlying provocation is that a person acting due to a loss of self-control is less culpable than a person who is not, then it should not matter whether the provocative conduct emanated from the victim. Any loss of self-control, no matter what the cause, should be sufficient to reduce culpability. It is only if the defence is reliant on some form of 'justification', that is, that the victim 'deserved what they got', that it should be necessary for the victim to have personally been provocative.

3.117 In looking at this issue, the New South Wales Law Reform Commission (NSWLRC) concluded that the excuse-based rationale was more convincing, although it determined that the loss of self-control must have been externally triggered. In coming to this conclusion, the Commission held that:

[T]o characterise the defence of provocation as a partial justification for killing is inconsistent with contemporary conceptions of civilised society, which does not approve of personal acts of retaliation or retribution as opposed to acts of self-defence. While the doctrine of provocation may have first developed at a time when violent reaffirmation of one's honour was in part accepted by society, social attitudes towards violent retribution have changed. Criminal law is now more concerned with the individual accused's mental state in committing an offence than with the external justifications for his or her actions. A contemporary model of provocation should therefore focus on the accused's lack of self-control rather than on whether or not the victim's wrongful conduct was deserving of retribution.³⁸³

3.118 In taking this position, the NSWLRC relied on the fact that, in our criminal justice system, culpability is assessed according to the accused's mental state in committing the offence. As a result, it was argued that factors which significantly affect that mental state should be recognised as reducing the accused's culpability for that action, despite the possible problems with the defence.³⁸⁴

3.119 While the NSWLRC clearly relied on an excuse-based model, which looks to the accused's mental state, we note that they did not define to what extent the mental state must have been affected, or in what way. What exactly do they mean when they say we should focus on the 'accused's lack of self-control'? As seen above, this is a contested issue, which needs to be further elucidated.

3.120 Contrary to the recommendation of the NSWLRC, Debbie Kirkwood suggests that if provocation is to be retained, a return to the idea of 'anger as outrage' may be preferable. As seen above, provocation was previously based on the idea that anger is a rational response to particular conduct, rather than a 'loss of self-control'.³⁸⁵ Such an approach is seen to be less disadvantageous to women than the current view of anger as 'unseating reason':

382 See above n 327.

383 New South Wales Law Reform Commission, *Partial Defences to Murder: Provocation and Infanticide*, Report No 83 (1997) para 2.19.

384 Ibid para 2.28.

385 See above para 3.6.

[W]omen demonstrate a greater degree of self-control in relation to expressing anger and violence. Acknowledging self-control in anger may be a better approach if women are more likely to kill for rational reasons (ie to protect themselves or because they are outraged, such as if a husband rapes a daughter). Women are less likely than men to kill in an uncontrolled violent outburst. Rational action and self-control should not be an impediment to a plea of provocation.³⁸⁶

In the Commission's view, if provocation is to be retained, it is important to clearly spell out its rationale.

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QUESTION

2. What is the most appropriate rationale for the defence of provocation, if it is to be retained?

2 REFORM PROVOCATION

3.121 Some people do not believe the law of provocation requires amendment. Others believe that while it is worthwhile retaining the defence for the reasons outlined above, it should be reformed to deal with some of the problems raised earlier in this chapter. There are a number of different ways in which this can be done, depending on the problem being addressed and the extent of reform believed necessary. Those which are addressed below include:

- amending the definition of the current test, for example by
 - removing the need for a triggering incident
 - abolishing the first aspect of the ordinary person test
 - expanding the self-control element of the ordinary person test
 - defining the 'ordinary person'
 - abolishing the ordinary person test
 - clarifying other minor issues, such as how to treat hearsay provocation;
- limiting the circumstances in which provocation is available as a defence;
- requiring the jury to explicitly assess the accused's culpability;
- incorporating an equality analysis into the test;
- reforming particular rules of evidence, including the common knowledge rule and compulsory defence disclosure; and
- making procedural changes.

3.122 We note that these options are by no means exhaustive. The Commission invites submissions detailing any other suggested alternatives.

386 Debbie Kirkwood, *Women Who Kill: A Study of Female Perpetrated Homicide in Victoria Between 1985 and 1995* (PhD Thesis, Monash University, 2000) 213.

AMEND THE DEFINITION

3.123 Some people argue that a number of the problems with the current defence can be resolved simply by amending the definition of provocation. This can be done in a variety of ways, in different combinations. Some of the options are outlined briefly below.

Remove the Need for a Triggering Incident



CASE STUDY 11

Barry and Sharon had been married for many years. Over the course of the marriage, Sharon alleged that Barry had been very violent towards her, having raped and hit her, sexually interfered with their children, and threatened to kill her. Barry was imprisoned for violent crimes, but even in prison it is alleged that he arranged to have Sharon watched by someone.

While Barry was in prison, Sharon started to have an affair with Tom. She was terrified that Barry would find out, and that he would kill her and the children when he was released from prison. Barry was to be released over Christmas for a day, and then permanently soon after. Sharon decided she would have to kill him. She formulated a plan to lure Barry to a deserted area, and for Tom to kill him. Tom agreed to carry out this plan, and killed Barry.

At her trial, Sharon claimed provocation, on the basis of the cumulative history of violence, and her fear of Barry's upcoming release. She was successful, and was convicted of manslaughter.³⁸⁷

3.124 Some argue that one of the problems with the current defence of provocation is the need for there to be a particular triggering incident, which is responded to in the 'heat of the moment'. This is seen to particularly disadvantage women, who may not respond immediately to a particular incident of violence.³⁸⁸ They will often have to artificially construct their stories around such an incident, which can lead to the jury doubting their credibility. While the strictness of the requirement has been reduced in recent years, with the accused able to focus on a cumulative history of provocation, in practice, the defence still seems to require a particular incident which caused the killing. In addition, the absence of a sudden response will probably lead the jury to conclude that the killing was in revenge, rather than a provoked killing.

3.125 Based on current Victorian law, Sharon would be very unlikely to succeed with a claim of provocation, because she planned the killing. This was not a 'sudden' response to a particular incident—she thought about the danger to herself and mapped out a way to respond to it. Such planning would be highly likely to prevent the defence of provocation from succeeding in Victoria.³⁸⁹

3.126 One way to get around this problem would be to explicitly broaden the defence, noting that there need not be a particular triggering incident, and the reaction need not be sudden—as long as it was provoked. This is the case in NSW and the ACT, where legislative changes have removed the requirement of 'suddenness'.³⁹⁰ The law now is simply 'concerned with...whether the killing was done

387 This case study is based on a NSW case. We note that the law in NSW is slightly different from that in Victoria, as discussed below.

388 See above paras 3.39–3.40.

389 However, see *Parker v The Queen* (1964) 111 CLR 665, 679 in which it was held that provocation should be left to the jury despite a lapse in time between the provocative conduct and the response, because 'a jury might well consider and would be entitled to consider that the deceased's whole conduct was such as might "heat the blood to a proportionable degree of resentment and keep it boiling to the moment of the fact"' (citing *East's Pleas of the Crown* (1803) 238).

390 In NSW, these changes were made in 1982, in response to recommendations made by a Government Task Force on Domestic Violence, which found that the defence was too restrictive in relation to women who kill in situations of domestic violence: New South Wales, Task Force on Domestic Violence, *Report of the New South Wales Task Force On Domestic Violence to the Honourable N*

whilst the accused was in an emotional state which the jury are prepared to accept as a loss of self-control.³⁹¹

3.127 In *Chhay*, Gleeson CJ went on to note that, under the NSW provisions, ‘a loss of self-control can develop even after a lengthy period of abuse, and without the necessity for a specific triggering incident’.³⁹² There is no need to point to a specific event—the mere history of violence can provide the content of the provocative conduct. If this were the law in Victoria, then as actually happened in NSW, Sharon may well be able to successfully rely on the defence of provocation.

3.128 On the one hand, this reform may make the defence more available to some women, resolving some of the issues raised by the alleged gender bias of the defence. On the other hand, such a reform could in fact make the problem of gender bias worse, by making the test more readily available to men. As noted above, there are far more cases in which men kill than women. Broadening the test is therefore more likely to advantage men than women, particularly in the context of sexual intimacy, in which most prosecuted homicides occur. In fact, in our sample there were no easily identifiable cases in which women who kill would be able to avail themselves of such a test, where they currently could not. There were a number of cases, however, in which it may have been possible for men to use an expanded defence.³⁹³

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QUESTIONS

3. Should the defence of provocation require there to be a specific triggering incident?
4. Should the defence of provocation require a sudden response?

Abolish the First Limb of the Ordinary Person Test

3.129 We saw above that the ‘ordinary person’ test currently has two aspects, or ‘limbs’. The first limb requires the gravity of the provocative conduct to be assessed from the view of the ‘ordinary person’ with the accused’s race, sex, personal characteristics, etc. The second limb requires the jury to consider whether provocation of that gravity could have provoked the ‘ordinary person’ into killing or causing serious injury. The ‘ordinary person’, for the purposes of the second limb, is simply an ‘ordinary person’ of the age of the accused.

3.130 One of the criticisms of the current doctrine is that imbuing the ‘ordinary person’ with the characteristics of the accused in the first limb of the test has lowered too far the standard of self-control sought by our society. That is, it can allow certain people to get away with violence in circumstances where society does not believe they should be able to, because of their particular ‘background’. In addition, we have seen that it is difficult to separate those cases where society may have some sympathy for the accused’s circumstances from those where it does not.³⁹⁴ Although some judges have dealt with

K Wran QC, MP, Premier of New South Wales (1981) Recommendation 24. On the history of the NSW provisions, see New South Wales Law Reform Commission, *Partial Defences to Murder: Provocation and Infanticide*, Report No 83 (1997) paras 2.4–2.6.

391 *Chhay* (1994) 72 A Crim R 1, 14.

392 *Chhay* (1994) 72 A Crim R 1, 13.

393 It is also argued that merely changing the definition will not fix the problem of gender bias, which is inherent in the structure of the defence: see below para 3.180.

394 See above para 3.64.

this issue by reading the law in a particular way,³⁹⁵ it is argued that a better solution may be to remove this element of the test completely.

3.131 This would result in a jury simply looking to see whether the ‘ordinary person’ would have been provoked to kill or cause serious injury in the circumstances, without reference to the particular characteristics of the accused. The only thing that they could take into account would be the accused’s age. This would lead to a particular level of culpability being set, which it is believed will not vary according to the background of the particular accused. It would be a general standard of self-control to which all adults would be expected to adhere.

3.132 While this may resolve some of the issues raised by the ‘ordinary person’ test, it does not seem to target the problems of gender bias in the law. This is particularly the case given that the ‘ordinary person’ is often argued to be the ‘ordinary man’, and so what are seen to be typical male reactions (for example, a sudden response in anger to alleged infidelity) will continue to be excused, while other responses, which may be equally valid (for example, planning a killing in order to avoid further abuse) will still be excluded. In addition, it is arguable that the defence *should* incorporate different cultural norms, to reflect the multicultural nature of our society, despite the problems with doing so. Removing any reference to these norms may disadvantage minority groups from having equal access to the law.³⁹⁶

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QUESTION

5. Should the first limb of the ordinary person test be abolished?

Expand the Self-Control Element of the Ordinary Person Test

3.133 In contrast to the argument presented above, some people argue that, in fact, the current ordinary person test is too restrictive and should be expanded. In particular, it is argued that the accused’s personal characteristics, including ethnicity and gender, should be taken into account in assessing the accused’s power of self-control as well as the gravity of the provocation.³⁹⁷ This argument is based on the idea that people of different backgrounds have different powers of self-control, and that it is appropriate to take this into account in a multicultural society.

3.134 Such a reform would not make the test entirely subjective. The accused would still be judged against a particular standard of behaviour. That standard of behaviour, however, will no longer simply be the hypothetical ordinary person of the accused’s age. Instead, the accused’s behaviour will be measured against the hypothetical ordinary person of the accused’s background. Individuals could still fall short of this standard if, for example, they were particularly bad tempered or easily angered, even for a person from a particular background.

3.135 One of the advantages of such a test is that it overcomes some of the artificialities and complexities of the current law. Juries will no longer be required to apply the accused’s characteristics in

395 See above paras 3.86–3.87.

396 Some of these issues could be resolved by defining the ordinary person or using an equality analysis, in conjunction with making the ordinary person test objective: see below paras 3.163–3.170.

397 See for example, New South Wales Law Reform Commission, *Partial Defences to Murder: Provocation and Infanticide*, Report No 83 (1997) para 2.64; *Masciantonia v The Queen* (1995) 183 CLR 58, 74 (McHugh J); Stanley Yeo, ‘Power of Self-Control in Provocation and Automatism’ (1992) 14 *Sydney Law Review* 3. This has been held to be the law under Exception 1 to s 300 of the *Indian Penal Code* as well.

one part of the test, but not in another part—a differentiation which is often argued to be very difficult, if not impossible to apply.

3.136 In rejecting such an expansion of the ordinary person test, however, the NSWLRC noted that ‘it is unclear how it could be established with any certainty that members of one group have a lower threshold for exercising self-control than others. There is a danger that any such assertion would involve speculation and ill-informed stereotyping’.³⁹⁸ The Commission also argued that it would be unfair for people to have a greater or lesser chance of success in using the defence depending on whether people of particular backgrounds can be shown to have a greater or lesser capacity for self-control.³⁹⁹ It further noted that the law should not apply different standards of criminal behaviour to people depending on their particular background.

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QUESTION

6. Should the accused’s background be taken into account in determining his or her power of self-control?

Define the ‘Ordinary Person’

3.137 Another way of addressing some of the criticisms of the current test would be to specify some of the characteristics of the ‘ordinary person’, rather than retaining the definition in its current loose formulation. For example, the ‘ordinary person’ could explicitly be defined not to be racist, sexist or homophobic.⁴⁰⁰ This could potentially address a number of the problems with the current test, such as its inability to differentiate between ‘good’ and ‘bad’ provocation (‘bad’ provocation could be excluded) and the gendered nature of the test (‘sexist’ uses of provocation could be excluded).

3.138 Such a reform could be done in two different ways. First, it could modify the existing test, by acting as a restriction on the first limb of the ‘ordinary person’ test. That is, the jury could be instructed that although they are to take the accused’s characteristics into account when determining the gravity of the provocation, they should not do so where it is the accused’s racism, sexism or homophobia that made the provocation more grave than the ‘ordinary non-racist, non-sexist, non-homophobic’ person would have found it to be. Thus, in Jeremy Horder’s example,⁴⁰¹ while, ordinarily, Terreblanche’s beliefs would be taken into account in determining how gravely he was provoked, because these beliefs are racist, they should be disregarded.

3.139 Alternatively, this test could be implemented in conjunction with the abolition of the first limb of the ordinary person test (see above). In such a case, the jury would simply have to determine whether

398 New South Wales Law Reform Commission, *Partial Defences to Murder: Provocation and Infanticide*, Report No 83 (1997) para 2.67. We note that one of the main proponents of the view that ethnicity should be taken into account in determining the appropriate level of self-control, Professor Stanley Yeo, has resiled from his viewpoint due to this argument: see Stanley Yeo, ‘Sex, Ethnicity, Power of Self-Control and Provocation Revisited’ (1996) 18 *Sydney Law Review* 304.

399 New South Wales Law Reform Commission, *Partial Defences to Murder: Provocation and Infanticide*, Report No 83 (1997) para 2.68.

400 We note that in *Kumar*, Eames JA specified that the ‘ordinary person’ is already required to be ‘non-racist, not homophobic, not anti-semitic, not anti-Catholic, not a misogynist’: *R v Kumar* [2002] VSCA 139, para 112. This was a minority judgment, however and is not necessarily reflective of the current law in Victoria. See above paras 3.83–3.88 on the inconsistent application of the ordinary person test.

401 See above para 3.55.

the ‘ordinary person’ could have been provoked to kill or cause serious injury in the circumstances, keeping in mind that the ordinary person is not racist, sexist or homophobic.⁴⁰²

3.140 Such an amendment was suggested by the NSW Attorney-General’s Department in their Discussion Paper on unwanted homosexual advance. They argued that ‘the “ordinary person” is an ideal which should “reflect the standard to which society wants its citizens and system of justice to aspire”’.⁴⁰³ As such, ‘a murderous reaction toward gay men should not be regarded as ordinary behaviour but as an exceptional characteristic of the accused’.⁴⁰⁴ According to such a reform, a non-violent homosexual advance would never be sufficient basis for a jury to find provocation.

3.141 While this test does seem to address a number of the problems with the current defence of provocation, it also raises new problems. In particular, it is difficult to know how such a test could be defined with sufficient clarity for a judge or jury to apply. What exactly is meant by ‘racist, sexist or homophobic’?

3.142 Even if these terms can be defined with sufficient clarity, it is possible that this will not solve all of the problems due to the likely ambiguity of cases. For example, in homicides in the context of sexual intimacy, where a man kills his wife due to a particular patriarchal ‘cultural’ belief, defence counsel will probably argue that the killing was about ‘religion’ or ‘culture’, not about sexism. This will lead to an entirely new field of contest, making trials longer and more expensive. To some extent this problem could be reduced by legislative clarity. In addition, over time, a body of legal cases would develop which would help define these terms, reducing this problem even further.

3.143 Such a reform also raises questions about the purpose of the provocation defence. As noted above, the main justification for the current form of the defence is that it is a ‘concession to human frailty’. As seen in our study, this frailty seems to most readily manifest itself in the context of sexual intimacy such as men getting jealous of their wives’ behaviour and killing them in an ‘upswelling of emotion’. If these cases are excluded, what type of cases will remain? Perhaps some of the homicides in the context of family, as noted above. However, is this grounds for retaining the defence? What will its underlying foundation have become? It will no longer be simply about loss of self-control, or even about an understandable loss of control. Perhaps it would become a defence based on an acceptable loss of control. If so, is there a problem with saying that some homicides are more acceptable than others?

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QUESTION

7. Should the ‘ordinary person’ be defined? If so, how?

Abolish the Ordinary Person Test

3.144 Instead of amending the ordinary person test, some argue that it would be preferable to remove the test entirely and make provocation a subjective defence. That is, the question should simply be whether the particular accused, with all of her or his personal characteristics, was provoked into killing

402 There is a third possibility, which follows Eames JA in applying the definition of the ‘ordinary person’ to the second limb of the test. However, given the confusion around the test, as noted in paras 3.83–3.88 above, this would probably require a reformulation of the defence to be properly applied. The two methods outlined above are arguably a simpler way of achieving the same result.

403 Criminal Law Review Division, NSW Attorney-General’s Department, *Homosexual Advance Defence: Final Report of the Working Party*, (1998) para 57, citing Robert B Mison, ‘Homophobia in Manslaughter: The Homosexual Advance as Insufficient Provocation’ (1992) 80 *Cal L Rev* 133.

404 Attorney-General’s Department, New South Wales, *Review of the ‘Homosexual Advance Defence’*, Discussion Paper (1996) para 57.

in the circumstances. This is seen to resolve many of the conceptual uncertainties of the provocation test, by making it clear that the defence should be available to anyone who was provoked and lost self-control, regardless of whether they *should* have lost such control.⁴⁰⁵ The loss of control diminishes the culpability. In addition, the objective element of the test is seen to be a legal abstraction, distracting the jury from focusing on the accused's social reality. We note that Ireland currently has a subjective test, although it is under review.⁴⁰⁶

3.145 One of the arguments against having an ordinary person test is that it unfairly imposes criminal liability according to an objective standard of behaviour. Although individuals may genuinely have lost self-control, the defence will not be available to them if they fall below the standard expected of the objective 'ordinary person'. This is said to be unfair and contrary to fundamental principles of criminal responsibility, according to which the accused's 'culpability is to be assessed on the basis of his or her subjective mental state',⁴⁰⁷ particularly in the context of a serious crime as murder. Imposing an objective standard may treat particular groups of people, such as those with intellectual disabilities, too harshly. It is therefore argued that the test should be entirely subjective.

3.146 While this may resolve some of the conceptual uncertainty and simplify the test, it is argued that making provocation subjective would be likely to exacerbate many of the other problems outlined above, in particular the problem of gender bias. It would make provocation available in far more circumstances, allowing mostly male accused to 'invoke an unlimited number of personal characteristics (nervousness, fear, intoxication, cognitive difficulties, and presumably culture, belief and values), to justify his reaction to the victim's "provocation"'.⁴⁰⁸ It is argued that having a subjective test 'may further legitimise patriarchal rage by allowing men to bring forth evidence of their jealous nature or misogynist beliefs in order to demonstrate that they were "provoked"'.⁴⁰⁹ In arguing for the retention of the objective test, Isabel Grant et al note that:

Even though the ordinary person test can be tilted in practice toward the needs of misogynists and racists, it at least has the potential to set a standard which could be used to reject the argument from such persons.⁴¹⁰

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QUESTION

8. Should the ordinary person test be abolished, in favour of a completely subjective test?

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- 405 The reason for this conceptual confusion is seen to be an irresolvable conflict between the rationale of the provocation defence (a concession to human frailty) and the rationale of the ordinary person test (the desire to maintain an objective standard of behaviour): Stanley Yeo, 'Power of Self-Control in Provocation and Automatism' (1992) 14 *Sydney Law Review* 3.
- 406 While the current Irish test is subjective, it does have an added proviso that the force used was not unreasonable or excessive, having regard to the gravity of the provocative conduct: *The People v MacEoin* [1978] IR 27, 34. This is currently under review by the Law Reform Commission of Ireland. A version of the subjective test was also recommended by the Law Reform Commissioner of Victoria in 1982: Law Reform Commissioner Victoria, *Provocation and Diminished Responsibility as Defences to Murder*, Report No12 (1982) para 1.24.
- 407 Model Criminal Code Officers Committee of the Standing Committee of the Attorneys-General, *Model Criminal Code, Chapter 5, Fatal Offences Against the Person*, Discussion Paper (1998) 79. See also New South Wales Law Reform Commission, *Partial Defences to Murder: Diminished Responsibility*, Report No 82 (1997) paras 2.51–2.53.
- 408 National Association of Women and the Law, *Stop Excusing Violence Against Women, NAWL's Position Paper on the Defence of Provocation*, (2000) 19.
- 409 Canadian Association of Elizabeth Fry Associations, *Response to the Department of Justice Re: Reforming Criminal Code Defences: Provocation, Self-Defence and Defence of Property*, (1998) 48.
- 410 Isabel Grant, Dorothy Chunn and Christine Boyle, *The Law of Homicide* (1994) para 6.20.

Other Issues

3.147 If provocation is to be retained, a number of other technical legal issues could also be addressed, in order to clarify the precise scope of the defence. These would include:

- whether conduct occurring in the absence of the accused should be able to amount to provocation (hearsay provocation);⁴¹¹
- whether the provocative conduct must be committed by the victim;⁴¹² and
- whether provocation should be available in circumstances where it is ‘self-induced’.⁴¹³

3.148 At present, the law in relation to each of these areas is unclear, and there seem to be conflicting judgments. It would therefore seem useful to clarify them, even if the remainder of the law is left unaffected. It seems important to determine the rationale behind retaining provocation,⁴¹⁴ because this will help determine the appropriate boundaries. For example, if provocation is seen to be about loss of self-control, it should not matter whether the conduct was committed by the victim or someone else, as long as the accused could not control him or herself. If the defence is based, to some extent, on just retribution, then it is important that it be the victim who has provoked the accused.

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QUESTIONS

9. If provocation is to be retained as a defence:

- (a) should conduct in the absence of the accused be able to amount to provocation?
- (b) must the provocative conduct have been committed by the victim?
- (c) should it be available in circumstances where it is ‘self-induced’?

10. Are there any other technical areas of the law of provocation that should be clarified?

LIMIT THE CIRCUMSTANCES

3.149 Rather than amend the definition of provocation, the defence could remain the same but particular circumstances could be excluded from its scope. This could be done either by requiring judges to remove provocation from the jury’s consideration in particular circumstances, or by directing the jury that they should not find that the defendant was provoked if the situation was one that was specified. The excluded circumstances could be tailored to tackle the problems outlined above.

3.150 Helen Brown has suggested that the defence explicitly be stated to be unavailable to the accused in three specific circumstances:

- (i) Where a defendant alleges provocation where the deceased has left, attempted to leave or threatened to leave an intimate sexual relationship

411 For a discussion of hearsay provocation, see New South Wales Law Reform Commission, *Partial Defences to Murder: Provocation and Infanticide*, Report No 83 (1997) paras 2.85–2.91.

412 See *Ibid* paras 2.92–2.101.

413 See *Ibid* paras 2.106–2.110; See also above paras 3.89–3.90.

414 See above paras 3.115–3.120.

- (ii) Where a defendant alleges provocation because of suspected, discovered or confessed infidelity
- (iii) Where a defendant alleges provocation due to a non-violent sexual advance.⁴¹⁵

3.151 Other possible circumstances in which provocation could be excluded might include:

- where the context is sexual intimacy or spousal homicide;
- where the homicide is based on racism;
- where the accused has engineered a confrontation with the deceased, such as if the accused has breached an intervention order.⁴¹⁶

3.152 Each of these restrictions is aimed at tackling a particular problem with the defence of provocation. Some of them tackle the issue of gender bias, while others tackle the problems that arise from the ‘ordinary person’ test, such as ‘cultural’ defence and unwanted homosexual advance.

3.153 While this approach has the benefit of specifically targeting some of the problems outlined above, sending a clear message that particular kinds of killing will not be tolerated, it also raises possible definitional difficulties.⁴¹⁷ For example, how do you define a homicide in the context of sexual intimacy in sufficiently precise legal terms? Do you limit it to spousal homicides for the sake of legal precision? If so, is it justifiable to treat spouses differently from defacto partners or girlfriends and boyfriends?

3.154 Even if these definitional problems can be overcome, it is likely that astute defence lawyers will be able to sidestep the issue by redefining the provocation in a way that allows it to fall within the scope of the defence. The facts of homicide cases are rarely simple, and can often be viewed in a variety of different ways.⁴¹⁸ Instead of a case being seen to be about an unwanted homosexual advance, it could be constructed as being about a physical assault or a reaction to a person’s childhood experiences.⁴¹⁹ When combined with possible jury prejudices (for example, homophobia), this may allow the legal test to be sidestepped, and a manslaughter verdict to be delivered.

415 Helen Brown, ‘Provocation as a Defence to Murder: To Abolish or to Reform?’ (1999) 12 *Australian Feminist Law Journal* 137 140; The NSW Attorney-General’s Working Party also recommended the legislative exclusion of a non-violent homosexual advance from forming the basis of the defence of provocation: Criminal Law Review Division, NSW Attorney-General’s Department, *Homosexual Advance Defence: Final Report of the Working Party*, (1998) para 6.7.

416 As noted above, such circumstances are already technically excluded from the scope of provocation, but it is argued that this aspect of the law is applied inconsistently: see above paras 3.89–3.90. Some claim it would be preferable to make this exclusion explicit. Such circumstances are specifically excluded from the scope of provocation in New Zealand, where the relevant legislation states that ‘no-one shall be held to give provocation to another by...doing anything which the offender incited him to do in order to provide the offender with an excuse for killing or doing bodily harm to any person’: *Crimes Act 1961* (New Zealand) s 169(5).

417 This will vary depending on which exclusions are adopted. For example, it may be easier to define ‘self-induced provocation’ than a ‘homicide in the context of sexual intimacy’. However, each of them will face some definitional problems. For example, what is the definition of ‘self-induced’? Does it apply only where the accused acts with premeditation or actual foresight that they will be provoked, or does it also apply to situations where the reasonable person would have known that they were likely to be provoked in those circumstances?

418 See for example, Jenny Morgan, ‘Critique and Comment: Provocation Law and Facts: Dead Women Tell No Tales, Tales Are Told About Them’ (1997) 21 *Melbourne University Law Review* 237.

419 See De Pasquale, who notes that ‘the charge that HAD is homophobic is invariably met with the response that a successful provocation defence is not the product of heterosexist reasoning, but rather some pseudo-psychiatric complaint—perhaps a “sexual abuse factor” or a “flashback”’: Santo De Pasquale, ‘Provocation and the Homosexual Advance Defence: The Deployment of Culture as a Defence Strategy’ (2002) 26 *Ibid* 110 139.

3.155 In addition, the exclusion of a broad range of circumstances may result in some cases that we may wish to be covered by the doctrine being excluded. For example, if spousal homicides were excluded, it would cover both men who kill their partners when they attempt to leave the relationship, as well as women who kill their partners in response to domestic violence. Many would argue that there should be some differentiation between these two circumstances. It is argued that legislative exclusion prevents proper consideration of the merits of each particular case.⁴²⁰

3.156 Finally, such an approach could be seen to undermine the basis of provocation, if it is seen as a concession to human frailty or about the loss of self-control in ‘understandable’ circumstances. Reacting in anger to an alleged infidelity, for example, is often cited as the most understandable form of provocation. We have seen that courts ‘understand’ such a reaction, and excuse it on the basis of human frailty. If such emotionally charged circumstances are removed from the scope of the defence, the exact function of the defence becomes questionable. What cases remain within its scope? On what basis are these circumstances more excusable than those that are excluded?

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QUESTION

11. Should the circumstances in which provocation may be raised be limited? If so, what limitations should be imposed?

REQUIRE AN EXPLICIT JURY ASSESSMENT OF CULPABILITY

3.157 One of the criticisms of the defence of provocation is that it is incapable of distinguishing between those cases where we may believe the accused should have a defence and those where we do not. One way to overcome such a difficulty would be to allow juries to make explicit determinations as to whether they think the cases before them are appropriate for the defence. That is, the test could be (i) that the accused was provoked into killing the deceased, and (ii) that the circumstances were such that the crime should be reduced from murder to manslaughter. This was the kind of test ultimately recommended by the NSWLRC in its report on provocation:

[T]he accused, taking into account all of his or her characteristics and circumstances, should be excused for having so far lost self-control as to have formed an intent to kill or to inflict grievous bodily harm...so as to warrant the reduction of murder to manslaughter.⁴²¹

3.158 One of the main advantages of this type of test is its simplicity. The current law in Victoria is criticised for being too complex. In particular, the two-stage ordinary person test, which requires the accused’s characteristics to be taken into account when determining the gravity of the provocation, but not when determining the response to that provocation, is seen to be artificial and difficult to apply. It is hypothesised that in fact juries do not draw on such nuanced understandings of the law, and in fact probably simply decide whether they think the accused was deserving of some kind of a defence. This test makes such a determination explicit.

420 This was the view of the NSWLRC when commenting on the proposal that non-violent sexual advances be excluded from the scope of provocation. They held that such an approach would impose unworkable restrictions upon the legislation and would automatically exclude certain cases from being considered on their merits: New South Wales Law Reform Commission, *Partial Defences to Murder: Provocation and Infanticide*, Report No 83 (1997) paras 2.116, 2.119.

421 Ibid . A similar recommendation was made by the former Law Reform Commission of Victoria: Law Reform Commission of Victoria, *Homicide* Report No 40 (1991) Recommendation 21.

3.159 In addition, it is argued that such a test is capable of distinguishing those cases which society believes should be excluded from the scope of provocation, such as the case of the white supremacist outlined above,⁴²² from those for which we believe there should be an excuse. This is because the decision as to what kind of behaviour is deserving of a defence is left to the jury, who are seen as appropriate arbiters of societal standards.

3.160 One of the problems with this approach, however, is that in its attempt to simplify the law, it has been 'pared down so much as to give the jury very little guidance. The jury are left to make a value judgment of a very large scale. This may actually make the situation...worse.'⁴²³ This is because, when making an open-ended value judgment, juries are likely to rely on their own cultural norms and prejudices. In Victoria, provocation cases are 'heard by juries of predominantly Anglo-Saxon-Celtic origin',⁴²⁴ so it is the norms and values of this culture that will likely influence them. It is often argued that some of the values held by an Anglo-Saxon-Celtic 'culture' include racism, sexism and homophobia and that if juries are given unfettered discretion to determine moral culpability, it is likely that they will simply reproduce these prejudices. This is because jurors will probably ask themselves, 'What would I have done in those circumstances?' without reflecting on their own personal biases.

3.161 This risk of prejudiced decisions is seen to be particularly strong in relation to issues such as homosexuality. This was noted by the NSW Attorney-General's Department, which criticised the NSWLRC's recommendation on the basis that, when assessing provocation, 'a jury might apply the standards of a prejudiced community, thus reflecting and perpetuating the idea that homosexual victims deserve the violence they receive'.⁴²⁵ Similar problems may arise when women are killed in the context of sexual intimacy, given the widespread cultural myth about the excesses of 'romantic passion' that exist in our society, according to which many people believe that a killing due to extreme jealousy may be excusable.

3.162 It may be argued that the jury are representatives of the community, and their views should form the basis of what we consider to be criminal, even if it does not coincide with the ideal situation.⁴²⁶ On the other hand, however, it can be argued that one of the roles of the criminal law is to set appropriate boundaries around people's behaviour, to ensure that they behave in ways that are acceptable to society. Allowing popular prejudices to influence determinations of culpability can undermine this role.

422 See above para 3.55.

423 Criminal Law Review Division, NSW Attorney-General's Department, *Homosexual Advance Defence: Final Report of the Working Party*, (1998) 17.

424 *Masciantonio v The Queen* (1995) 183 CLR 58, 73 (McHugh J).

425 Criminal Law Review Division, NSW Attorney-General's Department, *Homosexual Advance Defence: Final Report of the Working Party*, (1998) 17.

426 See for example, New South Wales Law Reform Commission, *Partial Defences to Murder: Provocation and Infanticide*, Report No 83 (1997) para 2.83: 'While we acknowledge that there may be general concern about jury trials, we consider it vitally important that juries remain central to the task of determining liability for serious offences.'

? QUESTION

12. Should the jury be given the power to assess explicitly the culpability of the accused in provocation cases?

AN EQUALITY ANALYSIS

3.163 Many of the issues outlined above relate to problems experienced by those who are, in some way, disadvantaged in our society. It may be possible to incorporate an equality analysis into the provocation test, in an attempt to ensure that legal rules operate without reinforcing systemic or historically discriminatory perspectives.⁴²⁷ That is, the law could be modified in such a way as to ensure that it is compatible with the right to equality.⁴²⁸

3.164 This could be done in a number of different ways:

- (i) *Inclusive test*: ‘Provocative conduct’ could be limited to conduct that undermines the accused’s equality rights (eg, racist taunts, crimes of homophobia, violence against women);
- (ii) *Exclusive test*: The defence could exclude alleged ‘provocative conduct’ that arose due to the deceased exercising their equality rights. Such a test could exclude, for example, the possibility of provocation based on infidelity or non-violent homosexual advance, on the basis that the deceased had a right to sexual autonomy;
- (iii) *Modification of the ordinary person test*: In determining how the ‘ordinary person’ may have reacted to the provocative conduct, behaviour motivated by stereotypes of sex, race, sexual orientation, age or disabilities would not be considered ‘reasonable’. The ‘ordinary person’ could be defined as having knowledge of equality rights and behaving consistently with these rights.⁴²⁹

3.165 It is argued that such an analysis could help lead the way through the problems of the ‘ordinary person’ test outlined above. That is, it may provide a way in which the accused’s beliefs, background and characteristics could be excluded if they are based on discrimination against disadvantaged groups, while still allowing the broader cultural context of racism, homophobia and sexism, as well as the gender, culture, ethnicity, race and sexuality of the accused to be taken into account where necessary.⁴³⁰

3.166 One advantage of this kind of reform is that it may help Victoria comply with some of Australia’s international obligations. The right to equality is set out in a number of international instruments, including the *Universal Declaration of Human Rights*, the *International Convention on Civil and Political Rights*, the *Convention on the Elimination of All Forms of Discrimination Against Women*, and the *Declaration on the Elimination of Violence Against Women*. Arguably the current law is in breach of this right, due to its detrimental impact on particular sections of society, including women. It is also potentially in violation of women’s rights to liberty of expression, association and movement, and the

427 This approach is based on a suggestion made by Associate Professor Jenny Morgan.

428 We note that, in Australia, there is no Bill of Rights guaranteeing each person a right to equality. There are, however, certain obligations under international instruments: see below para 3.166.

429 On this option, see also above paras 3.137–3.143.

430 See Nova Scotia Advisory Council on the Status of Women, *Response to Department of Justice Consultation Paper on Provocation, Self Defence and Defence of Property*, (1998).

right to life and to security of the person. Incorporating an equality analysis into the law would ensure that the law was not disadvantaging particular groups of people, which is in compliance with our international obligations.

3.167 Each of the three options above has its own strengths and weaknesses. For example, the first option is quite restrictive, and would severely limit the scope of the provocation defence. On the one hand it is arguable that this is a benefit, because it would reserve the use of the defence to those who ‘truly’ deserve a defence (that is, those who are disadvantaged, and fight back). On the other hand, however, this can be seen to be unduly restrictive, and may exclude from its scope other cases which are as deserving.

3.168 The second and third options are quite similar in effect, as they will exclude cases that breach the equality principle. The difference between them is, to some extent, a symbolic one. The second option simply states that equality-breaching behaviour cannot be seen to be provocative, regardless of the circumstances. The third option, while acknowledging that some people may be provoked by such behaviour, argues that the ordinary person would not react to such behaviour with lethal violence.

3.169 The main criticism of each of these options is lack of clarity. They each rely on notions of ‘equality’ that are foreign to Australian jurisprudence. Australia, unlike many other nations, does not have a bill of rights that includes the right to equality. There is therefore no history of interpreting what it means to be racist, sexist or homophobic. It is argued that this will leave the issue in the hands of judges or juries, who may not clearly understand the test they need to apply, or may not apply it consistently.⁴³¹

3.170 A further criticism of this kind of approach is that defence lawyers will be able to avoid any such restrictions, by simply rephrasing the provocative conduct in such a way that it is not seen to be about ‘racism’, ‘sexism’ or ‘homophobia’. For example, Santo De Pasquale notes that in a series of cases involving unwanted homosexual advance, the provocative conduct was seen to be due to a particular psychiatric illness of the accused, or a history of childhood abuse, rather than the accused’s homophobia.⁴³²

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QUESTION

13. Should an equality analysis be incorporated into the defence of provocation? If so, how should this be done?

*EVIDENTIARY REFORMS***The Common Knowledge Rule**

3.171 Some people argue that it would be possible to fix some of the problems with provocation through amendment of evidentiary rules. For example, there is a rule of evidence that precludes any

431 It should be noted that, although Australia does not have a bill of rights, there is a history of equality legislation, which could be drawn upon if this were the preferred option. For example, there is the Federal *Racial Discrimination Act 1975*, *Sex Discrimination Act 1984*, *Disability Discrimination Act 1992* and *Human Rights and Equal Opportunity Commission Act 1986*, as well as the Victorian *Equal Opportunity Act 1995*. In addition, Australia is a signatory to a number of conventions that incorporate the rights to equality and about which there is also jurisprudence that can be drawn upon, such as the *International Covenant on Civil and Political Rights*.

432 Santo De Pasquale, ‘Provocation and the Homosexual Advance Defence: The Deployment of Culture as a Defence Strategy’ (2002) 26 *Melbourne University Law Review* 110.

parties in a trial from calling evidence on matters of ‘common knowledge’. Giving evidence at trial about matters commonly known by the general community is seen to be unnecessary, because it is not seen to aid the jury in any way. This may be a particular problem in cases involving people from cultural backgrounds with which the jury may be unfamiliar, if information about that ‘culture’ is seen to already be within the jury’s ‘common knowledge’. They may somehow be expected to ‘know’ how such people would view the provocative conduct in question.⁴³³ In the absence of specific evidence, juries are likely to resort to stereotypes, which could be ill-informed. Similarly, in cases where women have killed in response to domestic violence, juries may be prevented from hearing evidence about the way in which women may respond to such violence. This can also lead to stereotypical or false assumptions, which could detrimentally affect women.

3.172 It has been suggested that one solution to this problem would be to abolish the ‘common knowledge’ rule.⁴³⁴ This would allow such evidence to be called at trial, in an attempt to debunk any stereotypes or myths about the particular accused. If this approach is adopted, a number of subsidiary issues, will also have to be addressed. These include questions about who should be allowed to give evidence, in what circumstances, and about what matters? Do we open the gates to any evidence whatsoever, or should it be limited to people with certain qualifications? If so, what qualifications are necessary?

? QUESTIONS

14. Should the ‘common knowledge’ rule be abolished?
15. If so, what restrictions, if any, should be placed upon the introduction of evidence in provocation cases?

Compulsory Defence Disclosure

3.173 We have seen above that one of the criticisms of provocation is that it is easy to fabricate. This is seen to be compounded by the fact that accused people are not required to disclose in advance their intention to raise the provocation defence.⁴³⁵ It is argued that this makes it more difficult for the prosecution to rebut spurious claims, especially as there is no requirement for the accused to give evidence at trial, so there may be no opportunity for cross-examination. It is argued that the danger of the defence of provocation being abused could be reduced by requiring the accused to disclose in advance any intention to rely on provocation at trial (‘compulsory defence disclosure’).

3.174 Such a reform may be seen as inappropriate, given the accused’s right to silence. Requiring information about the defence in advance is seen to breach this right. It is argued, however, that the general right to silence may be inappropriate in this area for three reasons:

First, evidence of provocation will often be a matter wholly within the accused’s knowledge. Secondly, it may be argued that, in cases where the defence of provocation is raised, the accused’s right to silence and

433 This is to be contrasted with the law in India, where courts admit evidence of experts such as anthropologists in order to aid the jury’s understanding of the cultural factors involved: New South Wales Law Reform Commission, *Provocation, Diminished Responsibility and Infanticide*, Discussion Paper 31 (1993) para 3.125.

434 For a more detailed discussion of the common knowledge rule and provocation, see *Ibid* paras 3.75–3.78.

435 In general, there is no requirement for such disclosure in criminal proceedings, although there are exceptions to the rule. For example, accused are required to disclose any evidence of an alibi that they intend to raise: *Crimes Act 1958* (Vic) s 399A.

presumption of innocence are not infringed by a requirement for defence disclosure, since admission of having committed the act in question is implicit in reliance on the defence. Lastly, it may be necessary to balance the interests of the accused with the interests of the general community in ensuring that adequate time is allowed for the accused's case to be properly tested by the prosecution.⁴³⁶

? QUESTION

16. Should an accused be required to disclose in advance her or his intention to raise the provocation defence?

PROCEDURAL REFORMS

3.175 One criticism of the current law of provocation is that it is too complex and difficult for juries to understand. It is argued that it would be possible to keep the test substantially the same, but to simplify the language to make it more explicable to juries. The difficulty with this suggestion is that it seems to be the concepts that are complex, rather than the wording of the test. What test might capture the kind of conduct that currently falls within the scope of the provocation doctrine, yet do so in a simplified manner?

3.176 One way of perhaps achieving such a change would be through the use of judges' bench books. These are reference books which have been designed as a working aid for judicial officers, particularly for new judges. They contain, among other things, suggested directions for use in instructing juries in criminal trials. This is intended to be an aid in the task of summing up in a jury trial. They are not mandatory, and not all judges use the recommended directions. It may be possible to include in these books a simplified version of the judge's direction to the jury, or even a written checklist to be provided to jurors in provocation cases.

3.177 For particular cases, such as those involving domestic violence or homosexual advance, it may also be possible to provide judges with a preamble or a model jury instruction to read.⁴³⁷ This was suggested by the NSW Attorney-General's Department in relation to cases raising unwanted homosexual advance. It was recommended that judges should give a direction that states that it is not for the jury to determine whether they think the behaviour of the victim is morally acceptable, but whether there is culpability on the facts. It suggested the following direction:

You may conclude that the deceased's (or alleged victim's) behaviour and sexual orientation do not accord with those which you regard as morally acceptable. It is therefore important that you remember that this is a Court of Law and not a court of morals. Prejudice and emotion must have no place in a court of law.

436 See New South Wales Law Reform Commission, *Partial Defences to Murder: Provocation and Infanticide*, Report No 83 (1997) para 2.159. The NSWLRC ultimately did not reach a decision on this issue, instead leaving it to be determined in the context of a broader review on the right to silence.

437 This could be done through legislation instead of through inclusion in the judge's bench book if desired. While it is rare for legislation to mandate directions to be given by judges in criminal trials, it does happen in some areas. For example, in sexual assault trials in which consent is an issue, judges must provide particular directions: *Crimes Act 1958 s 37* inserted by *Crimes (Rape) Act 1991 s 3* and further amended by *Crimes (Amendment) Act 1994 s 4*. The advantage of such a method is that it will ensure directions are given and that it will not be at the judge's discretion. On the other hand, it may lead to rigidity and the inappropriate use of directions. It is perhaps preferable to allow judge's the discretion to apply the direction when seen to be appropriate.

Everyone is equal before the law. So, on the question of sexuality, I direct you that a person's background is not of the slightest relevance. There should be no prejudice against the deceased (or alleged victim) or the accused on the basis of sexual orientation. You should decide the matters on the issues without prejudice and without empathy to the deceased (or alleged victim) or the accused.⁴³⁸

Similar suggestions have been made in relation to cases where women kill in response to violence. In such cases, judges could be required to give directions about the impact of domestic violence, and to dispel myths about gender and violence.⁴³⁹

3.178 At a broader level, it is sometimes argued that many of the problems outlined in this chapter are due to a lack of judicial and legal education. It may be possible to provide education to judges, prosecutors and lawyers on general issues of violence against women, racism, sexism and homophobia, and how they may arise in cases of provocation or self-defence. Similarly, it is argued that 'it is important to demystify notions that it is natural and acceptable for men to be violent. Judges need to be educated about these matters and the intersection of race and gender, in order to adequately inform juries.'⁴⁴⁰

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QUESTIONS

17. Should relevant information be incorporated into judges' bench books? If so, what kind of information should be provided?
18. Are there any other ways in which provocation should be reformed, including procedural reforms?

3 ABOLISH PROVOCATION

3.179 For many people, the problems with provocation cannot (or should not) be resolved. They see the defence to be flawed, due to one or more of the issues outlined above. Each of the potential reforms discussed in this chapter is seen to have its own difficulties, which for some are viewed as insurmountable. The most viable option is argued to be the abolition of provocation as a defence.⁴⁴¹ In this section we examine some of the arguments in favour of provocation's abolition, before turning to the question of how this will affect a judge's sentencing discretion.

438 Criminal Law Review Division, NSW Attorney-General's Department, *Homosexual Advance Defence: Final Report of the Working Party*, (1998) para 6.12.

439 Debbie Kirkwood, *Women Who Kill: A Study of Female Perpetrated Homicide in Victoria Between 1985 and 1995* (PhD Thesis, Monash University, 2000) 265–6.

440 Ibid 266.

441 Those in favour of the abolition of provocation include the Gibbs Report, the Model Criminal Code Officers' Committee of the Standing Committee of the Attorneys-General, the New Zealand Crimes Consultative Committee and the New Zealand Criminal Law Reform Committee. Other authors to favour the abolition of provocation include Matthew Goode, Jeremy Horder, Adrian Howe and Jenny Morgan.

PROVOCATION IS STRUCTURALLY BIASED

3.180 Some people argue that the entire concept of provocation is fundamentally gender-biased, and that no amount of tinkering with the defence will alleviate this problem.⁴⁴² The entire structure of the defence is seen as flawed, and cannot be fixed without changing the defence beyond all recognition. Although it may be argued that this could disadvantage some women who currently rely on the defence, the problems with the defence are seen to outweigh this risk, particularly given the small number of women who kill in circumstances that could amount to provocation. The effect such a gendered defence has on women is seen to be a far greater problem to be addressed.⁴⁴³

The options for reform of provocation risk making it easier for violent men to benefit from judicial compassion for their crimes of violence against women. Such proposals are incapable of guaranteeing the integrity and security of women: indeed, they would exacerbate women's actual vulnerability to male violence. They would have a discriminatory impact by heightening men's sense of entitlement and immunity for their patriarchal violence. They would represent a legislative normalization of violence as an acceptable human response in the face of difficult emotions with which all people must grapple, at one moment or another, in their lives.⁴⁴⁴

3.181 For others the problem is that provocation is inherently a 'cultural' defence, which will always succumb to either cultural domination by the majority or the problems of cultural relativism outlined above. Again the problem is argued to be structural, and no reform is seen as being capable of distinguishing between 'good' and 'bad' reasons to lose self-control. For example, it is argued that if you expand the defence so that it is more readily available to women who kill in response to violence (such as by removing the suddenness requirement), it will lead to the use of the defence by people in response to non-violent homosexual advances. It is argued that there is no way for a generalised legal test to be able to distinguish between homophobia and excusable violence.⁴⁴⁵ Given this problem, the only solution is seen to be the abolition of the defence.

PROVOCATION IS NOT AN APPROPRIATE INDICATION OF CULPABILITY

3.182 The justification behind the defence is seen as insupportable by others who favour its abolition. They argue that in formulating defences to homicide, it 'is essential to consider the values that the law is seeking to protect and the circumstances in which a person is permitted to use force, possibly fatal force, against another person. What types of killings are considered less blameworthy so as to warrant a partial or a complete defence?'⁴⁴⁶ It is argued that in today's society anger is not a legitimate excuse for the use of lethal violence. One of the aims of the criminal law is to enforce appropriate standards of self-

442 See, for example, Model Criminal Code Officers Committee of the Standing Committee of the Attorneys-General, *Model Criminal Code, Chapter 5, Fatal Offences Against the Person*, Discussion Paper (1998) 92: 'On this view, gender bias within the provocation defence is so entrenched that it can only be abolished by abolishing the defence itself. Extending the doctrine's operation by relaxing its requirements which are contrary to female patterns of behaviour does not circumvent the problem.' See also Stella Tarrant, 'Provocation and Self-Defence: A Feminist Perspective' (1990) 15 *Legal Service Bulletin* 147 150.

443 See above paras 3.38–3.52.

444 National Association of Women and the Law, *Stop Excusing Violence Against Women, NAWL's Position Paper on the Defence of Provocation*, (2000) 20. See also Allen, who notes 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": H Allen, 'One Law for all Reasonable Persons?' (1987) 16 *International Journal of Sociology of Law* 419, 429.

445 Rebecca Bradfield, *The Treatment of Women Who Kill Their Violent Male Partners Within the Australian Criminal Justice System* (PhD Thesis, University of Tasmania, 2002) 178–9.

446 Ibid 70.

control. Although anger is understandable, it is argued that people should be able to control their behaviour even while angry, and that to react with an intention to kill or cause serious injury is simply unacceptable, and should be classified as murder.⁴⁴⁷

Provocation ought no more to be regarded as inviting personal retaliation than a woman's style of dress invites rape. It is one thing to feel great anger at provocation; but quite another (ethical) thing to experience and express that anger in retaliatory form.⁴⁴⁸

3.183 This argument focuses on the fact that the provocation defence is usually justified by reference to a hierarchy of culpability. That is, provoked killings are seen to be deserving of a manslaughter conviction, because the accused is less culpable than an unprovoked killer. According to this argument, the view that 'hot-blooded' killings are less culpable than 'cold-blooded killings' is seen to be wrong. Culpability is not simply about the suddenness of the decision to kill. It is seen to involve a number of other issues, such as the reason for the killing, the circumstances of the killing, the nature of the victim, etc. Focusing simply on the question of 'provocation' to determine an appropriate hierarchy of culpability is seen as arbitrary and misguided, particularly in light of the fact that provoked killings are intentional. As such, the defence serves no useful purpose, and should be abolished. This was the conclusion reached by the Model Criminal Code Officers' Committee in recommending the abolition of provocation:

The desire to have a middle ground for *less culpable* (provoked) defendants does not seem to accord with the reality. This critical failure of the partial defence of provocation is not rectified by tightening its operation... The problems it poses arise directly as a consequence of its origins as a partial defence for violent behaviour. It is one thing to apply the doctrine in circumstances where the defendant's violence was in response to violence directed towards the defendant (as in the case of self-defence), but the partial defence is not so limited. With few technical exceptions, the partial defence applies to all provoked violence, regardless of how it was provoked. In failing to assess the validity of the reasons for the defendant's violence, the partial defence overlooks 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.⁴⁴⁹

VIOLENT LOSS OF SELF-CONTROL IS INEXCUSABLE

3.184 A similar argument put by some seeking the abolition of provocation is that there are more appropriate forms of response to extreme anger than violent retribution. Horder argues that, in our society, the proper demonstration of such anger would be 'righteous indignation'. Violent loss of self-control is seen as inexcusable:

From a judgment of wrongdoing flows both the feeling of 'heated blood' and a desire; but the desire is not the desire for retaliatory suffering... The righteously indignant person desires not retaliation, but to bring to the

447 See for example, Model Criminal Code Officers Committee of the Standing Committee of the Attorneys-General, *Model Criminal Code, Chapter 5, Fatal Offences Against the Person*, Discussion Paper (1998) 87: 'The main argument for abolishing the defence stems from this very fact: people who rely on provocation intend to kill. Why does the fact that the killing occurred when the defendant was acting out of control make a difference?'

448 Jeremy Horder, *Provocation and Responsibility* (1992) 194–5 and 197, where Horder argues that the link between feeling anger and the expression of that anger through retribution is ethically defensible.

449 Model Criminal Code Officers Committee of the Standing Committee of the Attorneys-General, *Model Criminal Code, Chapter 5, Fatal Offences Against the Person*, Discussion Paper (1998) 104–5.

attention of the wrongdoer (and/or others), in certain characteristic ways, the wrongdoing that has been done. The righteously indignant person seeks to negate wrongdoing by an open labelling of the wrongdoer as wrongdoer, rather than through retaliation as such.⁴⁵⁰

PROVOCATION CAN NEVER BE PROPERLY EXPRESSED IN LAW

3.185 Still others claim that the defence is conceptually confused and cannot be fixed in any meaningful way, because the ideas underlying it are not coherent. Even if they could be made coherent, others argue that the defence should be abolished because it is an anachronism and out of step with the rest of the law.⁴⁵¹ Alternatively, it is sometimes argued that while provocation *does* reflect an important distinction in culpability, it is not possible to satisfactorily reflect this distinction in the law.⁴⁵² It is believed that any test that attempts to provide a defence for those we wish to excuse will fall prey to the problems of complexity outlined above, which will ultimately undermine the purpose of the test due to the jury's inability to apply it consistently.⁴⁵³ It is seen as preferable to abolish the test entirely.

3.186 For those who believe that provocation is irredeemable, the solution seems clear—the defence should be abolished.⁴⁵⁴ This will prevent people from relying on such a flawed defence, and is seen to have the added advantage of simplifying the law. It will eliminate the problems with complicated jury charges, and avoid the inconsistent application of the law that currently occurs. It will also lead to a simplification of the distinction between murder and manslaughter, with intentional killings falling within the scope of murder, and unintentional killings being manslaughter.

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QUESTION

19. Should the defence of provocation be abolished?

SENTENCING DISCRETION

3.187 If the defence of provocation is abolished, it becomes necessary to consider whether the circumstances that constituted the provocation should be taken into account at sentencing. The answer to this question will differ depending on the reason why provocation is abolished. For example, if the decision to abolish provocation is based on the fact that it is an anomaly in the law, and should be treated in the same way that it is for every other criminal offence (as a mitigating factor only), clearly it should remain a factor to be taken into account at sentencing. The concept of a provoked killing is not attacked by this argument, and there is therefore no reason why killings 'in hot blood' should not be treated differently from 'cold-blooded murder'.

450 Jeremy Horder, *Provocation and Responsibility* (1992) 195–6.

451 See above paras 3.91–3.92.

452 See for example, Model Criminal Code Officers Committee of the Standing Committee of the Attorneys-General, *Model Criminal Code, Chapter 5, Fatal Offences Against the Person*, Discussion Paper (1998) 103: '[A]n entirely satisfactory result is not possible: a fully objective test operates harshly; a fully subjective test produces unacceptable results; a hybrid test incorporating both subjective and objective elements is internally incoherent and unacceptably complex.'

453 A similar justification was used by the High Court when it decided to abolish the partial excuse of excessive self-defence: *Zecevic v DPP (VIC)* (1987) 162 CLR 645.

454 But see below paras 3.187–3.195 on the question of provocation and sentencing.

3.188 On the other hand, if provocation is abolished because it is seen to be inherently gender-biased, or because killing in anger is no longer considered acceptable, then arguably it should also not be taken into account at sentencing. If sentences continue to be reduced for men who kill their partners in the context of sexual intimacy due to an alleged taunt, the reason for removing the defence would seem to be undermined.⁴⁵⁵ Instead, the sentencing judge could be instructed that the mere fact that a killing was provoked is not relevant to their determination of the appropriate sentence.⁴⁵⁶

3.189 For some, leaving provocation to sentencing is the ideal solution, as it provides judges with the flexibility to take the provocation into account when it is relevant, and to ignore it when it is not:

In place of the partial defence of provocation, with all its doctrinal defects, the sentencing process offers a flexible means of accommodating differences in culpability between offenders. Some hot blooded killers are morally as culpable as the worst of murderers. Some are far less culpable. The differences can be reflected as they are at present, in the severity of the punishment.⁴⁵⁷

3.190 Others argue that abolishing provocation as a defence, but then leaving it to a judge's discretion in sentencing, may in fact make matters worse. This is because of the way in which the sentencing process works. The sentencing process is not subject to the traditional protections given to an accused in a criminal trial.⁴⁵⁸ In addition, sentences have little precedential value, and are often unreported. As a result, the way that provocation is dealt with may vary widely from case to case, and may be more hidden from public view than is currently the case. This could be seen to effectively hide the issue of whether gendered violence continues to be condoned.⁴⁵⁹

3.191 In addition, some argue that judges may fall under an increasing level of public criticism if they had discretion to take provocation into account at the sentencing stage. Currently, it is the jury who decides whether a person is convicted of murder or manslaughter. The judge's role is then to sentence them accordingly. A certain range of sentences is expected for murder, and a lighter range for manslaughter. A judge who sentences a provoked killer who has been convicted of manslaughter to a

455 See for example, Adrian Howe, who argues that if provocation is abolished, but could still be considered at the sentencing stage, 'all the problems with the defence, especially the permission it gives for men to provide pathetic excuses for murder, will now be heard during sentencing. The stage is set for defence barristers to raise the same tired old narratives of excuse in their pleas in mitigation of sentence. It is a slight improvement that these male defendants will be properly convicted of murder, but that is not much of an achievement if provocation is able to raise its ugly head at the sentencing stage. The cultural message sent out by sentencing judges will now be: "provoked" killers deserve to be convicted of murder, but depending on the class of provoking victim, they do not deserve a long sentence. After all, these are the sort of victims who are said at law to have provoked their own demise.': Adrian Howe, 'Reforming Provocation (More or Less)' (1999) 12 *Australian Feminist Law Journal* 127 132. See also Jenny Morgan, 'Critique and Comment: Provocation Law and Facts: Dead Women Tell No Tales, Tales Are Told About Them' (1997) 21 *Melbourne University Law Review* 237 265.

456 See for example, Law Reform Commission of Canada, *Recodifying Criminal Law* Report 31 (1987). We note that, even if judges were not able to take account of the provocative conduct in determining an accused's sentence, provoked killers may still receive lighter sentences than those who kill in other contexts, such as homicides originating in the course of other crimes. This is because factors such as the one-off nature of the homicide, the lack of previous convictions and the remorse of the accused, will still be taken into account and these factors are likely to be different for the provoked killer than for the unprovoked killer.

457 Model Criminal Code Officers Committee of the Standing Committee of the Attorneys-General, *Model Criminal Code, Chapter 5, Fatal Offences Against the Person*, Discussion Paper (1998) 105.

458 See for example, *Ibid* 101.

459 See for example, Jenny Morgan, 'Critique and Comment: Provocation Law and Facts: Dead Women Tell No Tales, Tales Are Told About Them' (1997) 21 *Melbourne University Law Review* 237 276. Morgan also notes, however, that this may still be better than the current situation, insofar as the hidden nature of such decisions may limit the symbolic impact of those decisions—they may have less effect in reinforcing society's lack of punishment for those who are violent against women.

light sentence, which is questioned publicly, can point to the jury's verdict as the reason for the decision. If, however, the jury has convicted the accused of murder (because provocation was not available as a defence), but the accused in the sentencing hearing claims provocation, and believing this, the judge gives a light sentence, he or she is likely to come under attack for letting a 'murderer' off lightly.⁴⁶⁰ It has been suggested that this is a reason for retaining provocation as a defence. Alternatively, it may provide a reason for provocation to be removed from the judge's sentencing discretion at the same time as it is abolished as a defence.⁴⁶¹

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QUESTION

20. If provocation is abolished as a defence, should it be removed as a relevant circumstance for the sentencing judge to take into account in determining the accused's sentence?

LACK OF INTENTION

3.192 One of the possible consequences of abolishing provocation may be that defence counsel could instead argue that the accused didn't intend to kill the deceased or cause serious injury. They may argue that the accused was so angry, and so out-of-control, that they didn't know what they were doing. A person who does not intend to kill or cause grievous bodily harm (serious injury), or who did not have knowledge that death or grievous bodily harm was a probable consequence of his or her conduct, is not guilty of murder.⁴⁶²

3.193 If provocation were abolished, but extreme anger or rage was able to ground the 'defence' of lack of intention, it is arguable that the purpose of abolishing provocation would be undermined. In particular, such a reform would fail to properly address the issue of gender bias:

Male 'rage' in the context of intimate femicide is a product of social relations of women's oppression and men's sense of entitlement to control their female partners... [R]ecasting men's rage as a no intent defence is even more dangerous to women than the defence of provocation since it suggests that those people in a state of rage do not intend their actions, whereas the defence of provocation acknowledged the intention but excused it on 'compassionate' grounds.⁴⁶³

460 It is important to note, however, that sentencing processes in Victoria have recently been subject of a review, conducted by Arie Freiberg. His recommendations include the establishment of a Sentencing Advisory Council comprised of not only legally trained people, but also members of the police, victims groups, social policy groups and academics. The function of the Council would include conducting research into sentencing matters, gauging public opinion, providing information to the public and the judiciary and monitoring sentencing matters in general. It is hoped that this will introduce a more consultative element into the sentencing process. See Arie Freiberg, *Pathways to Justice: Sentencing Review 2002* (2002) 197–8.

461 See for example, Jenny Morgan, 'Critique and Comment: Provocation Law and Facts: Dead Women Tell No Tales, Tales Are Told About Them' (1997) 21 *Melbourne University Law Review* 237–276: 'If provocation were to be abolished, its abolition should be accompanied by a clear statement of the general irrelevance of sexual jealousy as a mitigating factor in sentencing.'

462 *Pemble v The Queen* (1971) 124 CLR 107. A person who commits an unlawful and dangerous act that causes death, but did not intend to kill or cause serious injury, may instead be convicted of manslaughter. See above 1.6.

463 National Association of Women and the Law, *Stop Excusing Violence Against Women, NAWL's Position Paper on the Defence of Provocation*, (2000) 45.

3.194 It is difficult to know, how to tackle this issue. It is not possible to remove an intention to kill or cause serious injury from the offence of murder—only those who intend to kill or cause serious injury deserve the label of murderer. One approach may be to limit the use of the ‘defence’ or lack of intention, by precluding reliance on extreme anger or rage as a defence to either the physical (*actus reus*) or mental (*mens rea*) aspect of murder.

3.195 In considering any possible reforms to lack of intention, however, it is important to be aware that some studies show that this ‘defence’ is currently the most frequent basis for a manslaughter conviction for women who kill their male partners.⁴⁶⁴ Women who kill in response to violence are often able to argue successfully that they didn’t intend to kill in the circumstances. Rebecca Bradfield sees this argument as a ‘defacto defence of “domestic violence”’.⁴⁶⁵ Given the problems such women face in relying on self-defence,⁴⁶⁶ it may be important to ensure that this possibility remains open to women.

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QUESTION

21. Should people be precluded from relying on extreme anger or rage as a defence to either the physical or mental elements of murder?

464 See for example, Rebecca Bradfield, *The Treatment of Women Who Kill Their Violent Male Partners Within the Australian Criminal Justice System* (PhD Thesis, University of Tasmania, 2002) 110.

465 Ibid 114.

466 See below 4.17–4.44.

Chapter 4

Self-Defence

BACKGROUND

4.1 Until 1975, the sentence for murder in Victoria was death. In order to avoid the imposition of such a harsh penalty, the courts differentiated between homicides considered by the law to be deserving of such a penalty, and those that should be treated in a more lenient fashion. We saw in the previous chapter that certain killings in anger were considered less culpable, reducing the crime to manslaughter. Those who killed in self-defence were also not seen as deserving of the death penalty.⁴⁶⁷

4.2 The defence of self-defence arose out of the regulation of duels and other forms of combat. It developed in the context of fights between two men, the traditional scenario being a bar-room brawl or one-off duel.⁴⁶⁸ It was believed that if a man was challenged to a fight, he had no choice but to defend himself. A violent response was seen to be justifiable and therefore the perpetrator was not considered responsible for the outcome of his actions.⁴⁶⁹ As a result, if self-defence was not disproved by the prosecution, it would result in a complete acquittal.⁴⁷⁰

4.3 In this chapter we examine self-defence in detail. We begin with a brief exploration of the legal test, before looking at how self-defence is operating in practice. We then consider some of the criticisms of the defence, focusing in particular on women who kill in response to domestic violence. The chapter includes some possible options for reform.

467 On the historical development of self-defence, see *R v Lawson and Forsythe* [1986] VR 515, 554–82 (Ormiston J).

468 Ian Leader-Elliott, 'Battered But Not Beaten: Women Who Kill in Self-defence' (1993) 15 *Sydney Law Review* 403, 405.

469 We note that self-defence operates more broadly than in the context of homicide. For example, it is also a defence to a charge of assault.

470 This is to be contrasted with the partial excuse of provocation, which was not seen to totally excuse the accused's behaviour, but merely provide a partial excuse. As a result, provocation only reduces the offence to manslaughter.

WHAT IS THE LEGAL TEST FOR SELF-DEFENCE?



CASE STUDY 12

Craig and Luke had a few drinks after work. They then went to a workmate's house and continued drinking throughout the evening. During the drinking session, Luke and Craig began arguing about who could drink the most. Initially this discussion was good natured, but over time it developed into a heated argument. They were asked to leave the house, as their behaviour was getting out of hand. Luke told Craig that he'd meet him outside so that they could fight it out. Luke left the house to wait for Craig. Craig then went to the kitchen, where he armed himself with a knife, and walked out the front door.

There were no witnesses to what happened next. At trial, Craig claimed that when he went outside, Luke ran at him to attack him. Craig then produced the knife and stabbed Luke. Luke died later that night. At his trial, Craig claimed he acted in self-defence. He was acquitted.

4.4 Unlike provocation, there are few rules limiting the scope of self-defence—it is largely a matter for the jury to decide on the basis of the evidence presented.⁴⁷¹ The High Court of Australia has defined the test for self-defence as follows:

The question to be asked in the end is quite simple. It is whether the accused believed upon reasonable grounds that it was necessary to do what he or she did.⁴⁷²

4.5 It can be seen from this test that self-defence contains an assessment of what the accused believed at the time of the killing (referred to as the subjective element), as well as a consideration of whether that belief was based upon reasonable grounds (referred to as the objective element). Once self-defence has been raised as a defence, it is up to the prosecution to prove beyond reasonable doubt that the elements of self-defence did not exist.⁴⁷³

4.6 This test is usually quite simple for the jury to apply.⁴⁷⁴ For example, in Case Study 12, the jury would first have to determine whether Craig believed it was necessary, in the circumstances, to stab Luke. When two people are involved in a fight, the answer to this question will usually involve a consideration of the level of violence and the threat faced by the accused. If there was a 'reasonable apprehension on the part of [the accused] of death or serious bodily harm',⁴⁷⁵ a jury may find that the accused believed a fatal response was necessary. In the absence of an apprehension of serious bodily harm, it would be unusual to find that the accused believed their actions were necessary. So in Case Study 12, the jury would have to examine the threat Craig faced from Luke, and determine whether he would have believed that it was sufficiently serious to require a lethal response.

471 *DPP Reference (No 1 of 1991)* (1992) 60 A Crim R 43, 46.

472 *Zecevic v DPP (Vic)* (1987) 162 CLR 645, 661 (Wilson, Dawson and Toohey JJ). Although we discuss 'self-defence in this chapter, a defence may also be available if a person is protecting another person, or property, from harm. The test to be applied in such cases is similar: did the accused believe upon reasonable grounds that it was necessary to do what he or she did?

473 However, the judge has a discretion not to leave self-defence for the jury's consideration. The judge has this discretion if any properly instructed jury, having regard to the version of events most favourable to the accused, would have been satisfied beyond reasonable doubt that the killing was not in self-defence.

474 This question is more complex in the case of women who kill in response to domestic violence: see below paras 4.17–4.26.

475 *Zecevic v DPP (Vic)* (1987) 162 CLR 645, 662.

4.7 In addition to determining whether Craig believed it was necessary, in the circumstances, to stab Luke, the jury must also determine whether that belief was based on reasonable grounds. In making this assessment, the jury do not look at what they would have done in the circumstances, or even how the hypothetical ‘reasonable person’ would have acted. Rather, the jury must examine what the accused him or herself might reasonably have believed in all the circumstances.⁴⁷⁶ In making this determination, the jury may take into account all of the facts within the accused's knowledge,⁴⁷⁷ the prior conduct of the victim,⁴⁷⁸ the relationships between the parties involved,⁴⁷⁹ and any excitement, affront or distress experienced by the accused.⁴⁸⁰

4.8 Therefore, in Case Study 12, the jury could consider any pre-existing history between Luke and Craig. Although, in ordinary circumstances, it may not seem reasonable for Craig to have killed Luke while they were fighting on the street, Luke may have had a history of prior violence, and may have been known to carry a gun. This may result in the jury being convinced that, in the circumstances, Craig's belief that it was necessary to kill Luke was reasonable. Alternatively, although the jury may believe that Craig genuinely feared serious injury from Luke, if Craig was significantly physically stronger than Luke, or better trained at fighting, and if Luke carried no weapons, the jury may find that Craig's belief was unreasonable. If this was their determination, they would not acquit Craig on the grounds of self-defence. In Case Study 12, the jury accepted that Craig's belief that it was necessary to stab Luke to defend himself was based on reasonable grounds, as Craig was acquitted.

WHEN IS SELF-DEFENCE USED?

HOW OFTEN IS SELF-DEFENCE RAISED?

4.9 Of the 109 people in our sample who proceeded to trial on homicide charges, at least 19 of raised self-defence at their trial **st 70**.⁴⁸¹ Seventeen of these accused were men, while only two were women. At least one other accused⁴⁸² raised the prospect of relying on self-defence at trial, but ultimately pleaded guilty to manslaughter instead of proceeding to trial.⁴⁸³ Although technically this plea cannot have been based on a claim to have acted in self-defence—as that would have resulted in an acquittal—the possibility of the accused successfully relying on self-defence at trial may have played a role in the Office of Public Prosecution's (OPP) decision to accept a plea.⁴⁸⁴

476 *Viro v The Queen* (1978) 141 CLR 88, 146 (Mason J); *Helmhout v The Queen* (1980) 49 FLR 1; *Conlon* (1993) 69 A Crim R 92 (SC NSW).

477 *R v Wills* [1983] 2 VR 201, 210 (Lush J).

478 *R v Keith* [1935] St R Qd 155, 177 (Webb J) (CCA Qld); adopted in *R v Muratovic* [1967] Qd R 15, 30 (Hart J) (CCA Qld).

479 *R v Hector* [1953] VLR 543.

480 *R v Wills* [1983] 2 VR 201, 211 (Lush J).

481 It is possible that 11 more people raised self-defence at trial, as there were a number of cases in which we were unable to ascertain what defences were run. In addition, it is possible that there were some people who killed in self-defence who did not fall within the scope of our sample as they were never prosecuted. The police have the discretion not to charge a person at all if they believe the circumstances clearly reflect a self-defensive act. This is because there is arguably little point in proceeding to trial if there is a strong likelihood of an acquittal. On the issue of charge screening, see below paras 4.202–4.211.

482 This accused was also male.

483 There was also one accused who raised the prospect of relying on self-defence at trial, but whom we are not certain actually did so.

484 The issue of pleas and self-defence is discussed in more detail below: see para 4.202.

IN WHAT CONTEXTS IS SELF-DEFENCE RAISED?

4.10 In contrast to provocation, which was overwhelmingly raised in the context of sexual intimacy,⁴⁸⁵ of the 17 men in our sample who raised self-defence at trial, the most common context was spontaneous encounters (29.4%).⁴⁸⁶ There was, however, a fairly even spread across a number of different contexts. This can be seen in Table 16 below.

TABLE 16: CONTEXT IN WHICH MALE OFFENDERS RAISE SELF-DEFENCE AT TRIAL **ST 71**

Context of homicide	Number of male accused who raised self-defence at trial
Spontaneous encounters	5
Conflict resolution homicides	4
Homicide in the context of sexual intimacy	3
Homicide originating in other crime	2
Homicide involving family members	1
Other	2

Base: All male accused who are to have raised self-defence at trial (N=17)

4.11 In comparison, both women who raised self-defence at trial did so in the context of sexual intimacy **st 71**.⁴⁸⁷ In each case, the accused alleged that she had been sexually assaulted by the deceased, and had responded with fatal violence. This can be contrasted with the three cases where men raised self-defence in the context of sexual intimacy. One of these involved a man who killed his wife with whom he was having marriage difficulties. He alleged that she attacked him with a knife and he killed her. The second involved a man who was caught vandalising his ex-wife's new home. He was caught by her new partner, whom he killed in the ensuing struggle. The third involved a man whose ex-wife was found dead at the bottom of her stairs. As part of his defence, the man claimed that she had attacked him.⁴⁸⁸

HOW OFTEN IS SELF-DEFENCE SUCCESSFUL?

4.12 Of the 17 men who raised self-defence at trial, six were acquitted **st 72** (35.3%).⁴⁸⁹ In four of these cases it seems clear that self-defence was the ground for the acquittal. In the other two cases, however, additional defences were also raised that could have led the jury to acquit the accused.⁴⁹⁰

4.13 Although self-defence was raised by men in a number of different contexts, it seems that it is most likely to succeed in the context of a spontaneous encounter. Four of the six acquittals occurred in

485 See above 3.25.

486 The one case in which a male accused raised self-defence but did not proceed to trial was also a spontaneous encounter.

487 The one case in which a female accused raised self-defence but did not proceed to trial involved the killing of a family member.

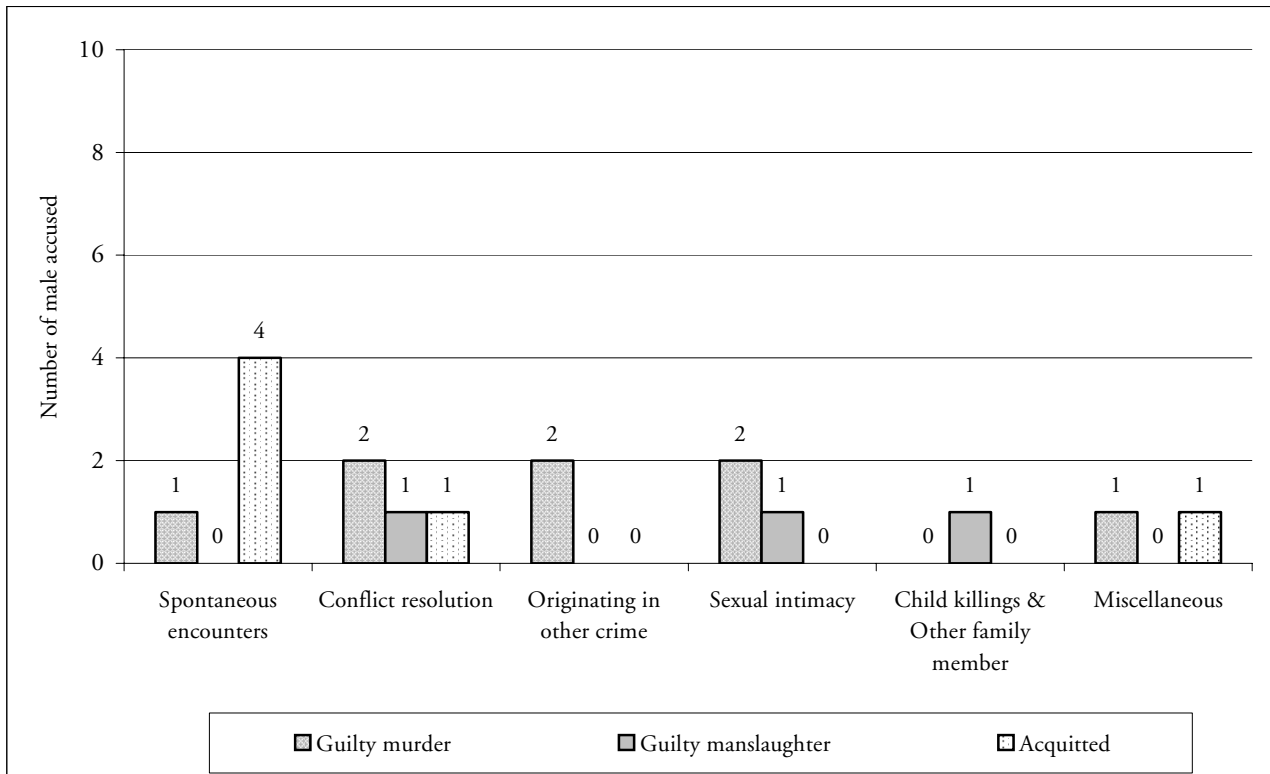
488 The man claimed that he did not kill her, but that if he had, it had been in self-defence.

489 Eight were convicted of murder and three were convicted of manslaughter. The manslaughter convictions were probably due to other defences, such as provocation, which were also raised at trial.

490 In one case the accused denied having committed the crime, but it was argued that if he had, it had been in self-defence. In the second case, there was an issue as to whether the accused's acts had caused the deceased to die.

that context (see Graph 14 below). None of the accused who raised self-defence in the context of homicides originating in other crimes or homicides involving family members were successful in its use.

GRAPH 14: TRIAL OUTCOMES FOR MALE ACCUSED RAISING SELF-DEFENCE AT TRIAL ST 73



Base: All male accused who are known to have raised self-defence at trial. (N=17)

4.14 By comparison, neither of the two women who raised self-defence at trial were acquitted st 73; they were both convicted of murder. We note, however, that our sample size is very small. It is possible that if it were larger, we would see the successful use of self-defence by some women. For example, in Rebecca Bradfield's study of 65 cases of women who killed their violent spouses across Australia between 1980 and 2000, self-defence was left for consideration in 21 cases. Of these, nine were acquitted on the grounds of self-defence.⁴⁹¹

INTERPRETATION

4.15 Unlike the defence of provocation, which has been attacked at its very foundations, there is little criticism of the rationale behind self-defence. Few, if any, argue that there should not be a defence for those who reasonably need to defend themselves or others with the use of lethal force.⁴⁹² The main

491 Rebecca Bradfield, *The Treatment of Women Who Kill Their Violent Male Partners Within the Australian Criminal Justice System* (PhD Thesis, University of Tasmania, 2002) 194. Bradfield notes that in fact the number of acquittals may be higher, as her sample was selected through cases that were reported, at some stage of the trial process. It is possible that some acquittals were never reported at any stage and so will not have fallen within her sample.

492 There are some, who argue that defence of property should never justify the use of lethal force. In this Options Paper, we focus on self-defence as it applies to the protection of people rather than property.

criticism of the current defence instead relates to its scope. It is argued that the defence is structured in such a way as to exclude women.

4.16 This exclusion of women from the use of self-defence can be seen to be reflected in the figures presented above. The figures show that self-defence is far more commonly used by men, and is more likely to be successfully used by men. This has led to the defence being seen to be gender-biased. This criticism of self-defence forms the basis of the remainder of this chapter. We note, that self-defence is a defence of general application, so that any reforms made to the law will be applicable to men as well as women. It is important to keep this in mind when considering particular options for reform.

WHY REFORM SELF-DEFENCE?

GENDER BIAS



CASE STUDY 13

Justin and Brian went out drinking with a group of friends. After drinking solidly throughout the evening, an argument broke out between them while waiting for a taxi outside the pub at the end of the night. Justin accused Brian of being a 'woman basher' due to a previous incident in which Brian had allegedly hit his girlfriend. During the course of the argument, Brian climbed into a taxi, but was pulled from his seat by Justin and two other men. It was alleged at trial that Justin and the others verbally abused Brian and pushed and shoved him. Brian alleged that in response he punched Justin in the head. Justin fell backwards to the bitumen and struck it head first. According to witnesses he appeared to be unconscious before he fell. Justin was treated in hospital where he was diagnosed with a fractured skull and bleeding into the brain. He underwent surgery but did not recover. At his trial, Brian claimed that he acted in self-defence. He was acquitted.

4.17 We saw above that self-defence developed as a defence in the context of fights between two men, such as bar-room brawls or one-off duels. To this day, self-defence seems most likely to be successful in such contexts. Five of the eight cases in which self-defence was raised and resulted in an acquittal occurred in the context of such spontaneous encounters. The facts of these cases are often remarkably similar, as can be seen in a comparison of Case Studies 12 and 13. In both cases men were drinking, and became argumentative. In both cases a fight broke out between them in public, with one ending up dead and in both cases self-defence was raised successfully.

4.18 This kind of situation is seen to inform the public's view as to what self-defence 'really' involves. Self-defence is seen to involve a single, isolated attack between two men of approximately equal strength, who are either strangers or acquaintances.⁴⁹³ It is this understanding of self-defence that is seen to be gender-biased.

4.19 One reason why this identification of self-defence with the 'bar-room brawl' scenario is seen to be gender-biased is because women rarely kill in such circumstances. 'Women who kill are more likely

493 See for example, Ian Leader-Elliott, 'Battered But Not Beaten: Women Who Kill in Self Defence' (1993) 15 *Sydney Law Review* 403; Helen Brown, *Beyond Battered Woman Syndrome: Reforming Self-Defence to Seek Justice For Women Who Kill* (MA Thesis, Monash University, 1996); Stella Tarrant, 'Provocation and Self Defence: A Feminist Perspective' (1990) 15 *Legal Service Bulletin* 147; Debbie Kirkwood, *Women Who Kill: A Study of Female Perpetrated Homicide in Victoria Between 1985 and 1995* (PhD Thesis, Monash University, 2000) 214.

than men to kill a family member or someone emotionally close to them.⁴⁹⁴ As a result, although the defence may technically be equally available to men and women, in practice the defence is seen as only being useful to men. This argument seems to be borne out in our study. Of the 29 women who killed, none of them did so in the context of a spontaneous encounter, and very few of them relied on self-defence at trial (N=2). By contrast, 17 men were charged in relation to spontaneous encounter homicides **st 36**. Of the 9 who proceeded to trial, five raised self-defence.

4.20 The converse argument is that when women do kill, they are likely to be excluded from the scope of self-defence due to its close identification with spontaneous encounters. Cases that deviate from this context may not be seen as ‘real’ cases of self-defence. This may be despite the fact that such killings were believed by the accused, on reasonable grounds, to be necessary in the circumstances. Our study showed that homicides in contexts other than spontaneous encounters rarely led to an acquittal on the basis of self-defence.⁴⁹⁵ Neither of the two women who raised self-defence at trial were successful in its use.⁴⁹⁶

4.21 It is important to note that those who claim that self-defence is gender-biased due to the practical exclusion of women from its use do not believe that the defence should be available in all cases in which women kill. Women kill in a wide variety of circumstances, not all of which raise the prospect of self-defence.⁴⁹⁷ Rather, the argument is that self-defence should be available to all people who have a reasonable fear for their own safety, and need to kill in order to protect themselves, instead of being limited to situations in which men often find themselves. It is argued that the need to use self-defensive force can arise in a number of contexts, and should not be confined to the masculine ‘bar-room brawl’ scenario.

494 Debbie Kirkwood, *Women Who Kill: A Study of Female Perpetrated Homicide in Victoria Between 1985 and 1995* (PhD Thesis, Monash University, 2000) 214. This claim has been borne out in a number of studies. See for example, Jenny Mouzos, *Homicidal Encounters: A Study of Homicide in Australia 1989–1999* (2000) 129, in which it was noted that ‘only 8 per cent of female homicide offenders killed a person who was not known to them, in comparison to approximately 17 per cent of male homicide offenders.’ In our study, while 17% of male accused killed ‘strangers’, no female accused did so.

495 See above para 4.13.

496 It should be noted that there could be a number of reasons for the lack of success of self-defence in these two cases. For example, the jury may not have believed the accused’s version of events.

497 This is particularly the case given the variety of circumstances in which women kill. In Mouzos’ study of 479 female-perpetrated homicides across Australia between 1989 and 2000, only 183 were classified as ‘intimate partner homicides’. Of these, only 56 were seen to be in response to violence: Jenny Mouzos, *When Women Kill: Scenarios of Lethal Self-Help in Australia 1989–2000* (PhD Thesis, University of Melbourne, 2003) 58, 111.



CASE STUDY 14

Helen was in a defacto relationship with Darren for 11 years. After three years the relationship deteriorated, and Darren began to verbally, mentally and physically abuse Helen and their two children. At one stage Helen took the children and moved to a women's refuge for a week. She obtained a restraining order against Darren, requiring him to move out of the house. She and the children moved back into the house. After about a week Darren began to visit the house again and eventually he moved back in. One night Darren went out with friends. He came home drunk and began to swear at Helen. At one point he yelled: 'I'll blow your fucking head off.' Darren kept a shotgun in the car. Darren then fell asleep. An hour later, while Darren was sleeping, Helen went to the car, got the shotgun, went back inside and shot him. The trial judge did not allow the jury to consider the possibility of self-defence.⁴⁹⁸

4.22 In particular, it is argued that women⁴⁹⁹ who kill in response to domestic violence⁵⁰⁰ should not be excluded from the scope of self-defence if they reasonably believed their actions were necessary in the circumstances.⁵⁰¹ In Case Study 14 above, Helen arguably deserves an acquittal as much as Craig or Brian in Case Studies 12 and 13. Due to the close association of self-defence with the bar-room brawl scenario, women like Helen may be excluded from its scope:

The structure of the laws of self defence and provocation reflect the experience of those who are *not* abused within an *intimate* relationship... Recognition of the specific experience of domestic violence—specifically relevant for women who kill—is absent in the structure of these laws.⁵⁰²

4.23 In particular, it is argued that the law is currently not willing or able to understand the context in which such killings take place, and how that context can give rise to the need for self-defensive action. This is because killings in response to domestic violence are seen to be vastly different from the spontaneous encounter homicides upon which self-defence law has traditionally been based:

[S]elf-defence law reflects a singular and narrow historical standard that arose out of the *barroom brawl* scenario. The law is designed to address a one-time confrontation among men. It assumes two relatively equal combatants with limited knowledge of each other in a single, short-term confrontation where both parties can see a clear beginning and end to the fray. It focuses on a single violent encounter where the combatants,

498 The facts of this case study are based on *R v Secretary* (1996) 86 A Crim R 119. On appeal, it was decided that self-defence should have been left to the jury in this case. A retrial was ordered and at the new trial Helen was acquitted.

499 A similar argument can be put in relation to men who kill in response to domestic violence. While such killings are not common, they do occur. For example, there are instances of male children who kill their abusive parents, or homosexual partners who kill in response to domestic violence. However, 'the overwhelming burden of violence is borne by women at the hands of men' [Australian Bureau of Statistics, *Women's Safety Australia*, Catalogue 4128.0 (1996)] and so throughout this chapter we will refer to women who kill their male partners.

500 For the purposes of this Options Paper we use the term 'domestic violence' to refer to 'violence [which] happens in the family. It includes any behaviour which causes damage to another person (the damage may be physical, sexual, emotional, financial) or which causes someone to live in fear. It includes damage to property and threats to damage a person, pets or property.': Domestic Violence and Incest Resource Centre, *What's in a Name? Definitions and Domestic Violence? Family Violence? Violence Against Women?* Discussion Paper 1, (1998) 9. See also Women's Domestic Violence Crisis Service, *What's Love Got To Do With It?: Victorian Women Speak About Domestic Violence*, Annual Report 2001–2002 (2003) 8.

501 The argument is not that any woman who suffers from domestic violence should be able to kill her abuser, but rather that the circumstances of domestic violence may in some cases lead to a fear of serious injury or death that may necessitate the use of fatal force. Throughout this chapter the term 'women who kill in response to domestic violence' is used to refer to such cases.

502 Stella Tarrant, 'Provocation and Self Defence: A Feminist Perspective' (1990) 15 *Legal Service Bulletin* 147.

knowing little about each other, evaluate the imminence of the situation and respond reasonably with only the force necessary to protect themselves from death or serious bodily harm in the moment. Unfortunately, battering is not this type of scenario. Battering generally involves two socially and physically unequal combatants with intimate knowledge of each other developed over a long period of time, participating in an ongoing, long-term confrontation where neither party can identify a foreseeable end. The battering cycle is one on-going, long-term confrontation, where violence slowly but surely becomes the primary control method.⁵⁰³

4.24 It is arguable that the history and context of the relationship needs to be taken into account in a proper determination of whether defensive force was necessary in the circumstances. This argument relies on an understanding of domestic violence as being ‘part of a pattern of behaviours rather than isolated incidents of abuse or cyclical explosions of pent-up anger, frustration, or painful feelings’.⁵⁰⁴ Self-defence may be a legitimate response to such a pattern of behaviours, even in the absence of a particular incident of abuse. It is arguable that the law is currently unable to properly take the context of domestic violence into account, and so is in need of reform.

4.25 It is not surprising that the law does not reflect the experiences of women who kill in response to domestic violence, given that ‘at the time self-defence law was evolving, battering was a legally tolerated and accepted activity’.⁵⁰⁵ Now that domestic violence is no longer considered acceptable, it is argued that the law should be amended to reflect such a change. In particular, women who need to kill for their own protection should not be penalised. While such killings are relatively uncommon, they do take place.⁵⁰⁶ For example, in Debbie Kirkwood’s examination of all female-perpetrated homicides in Victoria during 1985–95, 26 (30%) were alleged to be responding to violence or the threat of violence.⁵⁰⁷ Similarly, in Rebecca Bradfield’s study of the 76 cases in which women killed their spouses in Australia during 1980–2000, 65 (86%) of them showed evidence of a history of physical violence.⁵⁰⁸

503 Robbin S Ogle and Susan Jacobs, *Self-Defense and Battered Women Who Kill, A New Framework* (2002) 4.

504 Rebecca Bradfield, *The Treatment of Women Who Kill Their Violent Male Partners Within the Australian Criminal Justice System* (PhD Thesis, University of Tasmania, 2002) 38.

505 Robbin S Ogle and Susan Jacobs, *Self-Defense and Battered Women Who Kill, A New Framework* (2002) 3.

506 We note, however, that there were no such cases in our study. This is not surprising, given the low incidence of female-perpetrated homicides. As noted in Chapter 2, on average there are only 44 female-perpetrated homicides each year across the whole of Australia. While a significant proportion of these occur in the context of sexual intimacy, women do kill in a number of different circumstances: see Jenny Mouzos, *When Women Kill: Scenarios of Lethal Self-Help in Australia 1989–2000* (PhD Thesis, University of Melbourne, 2003). This means that the number of women who kill in response to violence will be very small. This does not, however, mean that the issue is insignificant. Laws in this area are seen to have a broad symbolic impact, as they are seen to be a reflection of our society’s response to the broader issue of domestic violence.

507 Debbie Kirkwood, *Women Who Kill: A Study of Female Perpetrated Homicide in Victoria Between 1985 and 1995* (PhD Thesis, Monash University, 2000) 91. Kirkwood’s study focused on 77 homicide incidents in the relevant period. There were 86 female offenders involved in these incidents, 26 of whom Kirkwood identified as responding to violence or the threat of violence from the deceased.

508 Rebecca Bradfield, *The Treatment of Women Who Kill Their Violent Male Partners Within the Australian Criminal Justice System* (PhD Thesis, University of Tasmania, 2002) 22. She notes that ‘in another two cases, there was evidence of physical violence by the woman’s male partner preceding the homicide. However, it was not possible to determine whether this was a “once-off” attack or if it formed part of a history of abusive treatment. In two further cases there had been a history of emotional abuse, however, there was no evidence provided of physical abuse.’ In Mouzos’ study ‘56 of the 183 female-perpetrated intimate partner homicides there was evidence that the women had been previously abused by their partners...and that the killing was in response to further violence.’: Jenny Mouzos, *When Women Kill: Scenarios of Lethal Self-Help in Australia 1989–2000* (PhD Thesis, University of Melbourne, 2003) 111.

It is argued that these women should not be excluded from the scope of self-defence simply by virtue of the context in which these killings occurred.⁵⁰⁹

4.26 There are three main issues which are seen to provide a barrier to women who kill in response to domestic violence successfully using self-defence: the immediacy of the threat, the proportionality of response, and the availability of alternative options.⁵¹⁰ Each of these factors relate to the requirement that the accused believe, on 'reasonable grounds' that her or his acts were 'necessary'. We discuss these issues below.

IMMEDIACY OF THE THREAT

4.27 Historically, self-defence was only available in cases where the killing occurred to prevent the imminent or immediate use of unlawful force, such as a physical attack during a pub brawl.⁵¹¹ If there was not a current, ongoing attack, self-defence was not seen to be relevant. This requirement has now been modified, and the threat of immediate harm is no longer a separate element of the law.⁵¹² Despite this change, however, the threat of imminent harm is often argued to still be a practical requirement for the successful use of self-defence:

[Self-defence] does not expressly require an immediate response to an imminent attack (or a perception of such an attack). However, the cases have consistently required such immediacy on the common sense basis that without it the killing cannot reasonably be characterised as a rational, necessary defence. Another way out could have been found or the danger could not have been serious.⁵¹³

4.28 This need to show that there was an imminent threat of harm is seen as a barrier for a number of women who kill in response to domestic violence. While some women who kill in such circumstances do so in response to a particular episode of violence (known as 'confrontational' cases),⁵¹⁴ such killings can also occur while the abuser has his back turned, or while he is asleep ('non-confrontational' cases), such as in Case Study 14.⁵¹⁵ It is in relation to these 'non-confrontational' cases that the requirement for the threat to be imminent is likely to be a problem.⁵¹⁶ It is arguable that in such circumstances there was no immediate threat of harm, and that therefore self-defensive force was not

509 The New Zealand Law Reform Commission argues that '[d]omestic violence does not justify or excuse retaliatory killing or wounding any more than does non-domestic violence. Generally, the law does not allow victims of violence to take the law into their own hands. In this respect, victims of domestic violence are no different. But the law recognises that there are extraordinary situations where retaliatory violence may be justified or excused. These situations give rise to the legal defences. If aspects of a defence work against battered defendants, that is not in itself evidence of unfairness. It would only be unfair if the motivation and circumstances of the offending fall within the reasons for allowing the defence, but the offenders are unable to avail themselves of the defence because of the way the defence is constructed.' New Zealand Law Commission, *Battered Defendants, Victims of Domestic Violence Who Offend*, Preliminary Paper 41 (2000) 3.

510 See eg, Patricia Weiser Easteal, 'Battered Woman Syndrome: What is "Reasonable"?' (1992) 17 *Alternative Law Journal* 220 221.

511 While there is a technical difference between an 'imminent' and 'immediate' threat of harm, this distinction is not relevant to the current discussion. The terms are therefore used interchangeably.

512 On the development of the law, see below paras 4.53–4.71.

513 Stella Tarrant, 'Provocation and Self Defence: A Feminist Perspective' (1990) 15 *Legal Service Bulletin* 147 148.

514 The need to show an imminent threat of harm will not be a problem for women who kill in 'confrontational' circumstances.

515 Wallace found that in 52% of cases where women killed their violent husbands it was in response to 'an immediate threat or attack by the victim'. The remaining 48% were 'non-confrontational cases': Alison Wallace, *Homicide: The Social Reality* (1986) 97.

516 Although we use the term 'non-confrontational' throughout this chapter to refer to killings which are not an immediate response to a particular episode of violence, it is possible to view even these killings as confrontational when the entire context of domestic violence is taken into account: see below para 4.38.

necessary. Women who attempt to raise self-defence in such circumstances are generally seen as being unlikely to succeed.

4.29 This seems to be borne out in Rebecca Bradfield's study. In five of the eight cases where self-defence was successfully relied upon, it was in a 'confrontational' situation. In two of the remaining three cases there was a specific threat to kill the accused before the abuser fell asleep or walked away. There was only one case in which self-defence was successfully relied upon where there was neither a confrontation nor a specific threat at the time of the killing. Bradfield concludes from this that 'the idea that a sleeping man with no threat on his lips could pose a threat does not fit easily with the traditional notions of self-defence'.⁵¹⁷

4.30 For some, this restriction of self-defence to 'confrontational' cases may be seen to be entirely appropriate. It is arguable that a complete acquittal should not result from a case where a sleeping man was killed. Self-defence is seen to be about the 'justifiable' use of force. It is arguable that, in the absence of the danger of immediate harm, the use of lethal force will never be justified. Killing in 'non-confrontational' circumstances may be seen to be more about revenge than self-defence. This has been the view of some courts:

A battered woman cannot reasonably fear imminent life-threatening danger from her sleeping spouse... We must... hold that when a battered woman kills her sleeping spouse when there is no imminent danger, the killing is not reasonably necessary and a self-defense instruction may not be given. To hold otherwise in this case would in effect allow the execution of the abuser for past or future acts and conduct.⁵¹⁸

4.31 For others, however, limiting self-defence to circumstances where there is a threat of immediate harm is seen to misunderstand both the foundations of self-defence and the nature of domestic violence. It is argued that acting with fatal force can be justifiable even where there is no threat of imminent or immediate harm, so long as the use of such force is necessary in the circumstances. While the imminence of harm is a factor to be considered, the key question is whether the acts were necessary.⁵¹⁹

4.32 To understand this argument, it is useful to think of the example of a hostage scenario. Assume that Bill was taken hostage by Douglas on Monday. Douglas threatens to kill Bill on Friday if the ransom is not paid. On Monday, the harm threatened is not immediate or imminent—it is still days away. It is arguable, however, that this should not prevent Bill from using fatal force to escape on Monday, if the opportunity arises. Lethal force may be necessary in the circumstances in order to prevent Bill from being killed, even though the harm is not yet imminent. He should not be required to wait until Friday, when the harm is imminent, before taking the opportunity to escape.⁵²⁰

517 Rebecca Bradfield, *The Treatment of Women Who Kill Their Violent Male Partners Within the Australian Criminal Justice System* (PhD Thesis, University of Tasmania, 2002) 211.

518 *State v Stewart*, 763 P.2d 572, 578–9 (Kan. 1988).

519 New Zealand Law Commission, *Battered Defendants, Victims of Domestic Violence Who Offend*, Preliminary Paper 41 (2000) 15.

520 A similar example is provided by Robert Schopp, who refers to two hikers in the desert. One threatens to poison the other's water supply during the night. While this will not kill him immediately, it will cause his death eventually. Schopp argues that it would be immediately necessary to prevent the poisoning, by lethal force if necessary, even though there is no imminent harm: Robert F Schopp, Barbara J Sturgis and Megan Sullivan, 'Battered Woman Syndrome, Expert Testimony and the Distinction Between Justification and Excuse' (1994) *University of Illinois Law Review* 45 66–7.

4.33 The distinction being drawn in this argument is between the ‘threat of immediate harm’ and the ‘immediate need to prevent a threat of harm’.⁵²¹ Often these two concepts will be interchangeable, because the threat of immediate harm will lead to an immediate need to prevent that harm from eventuating. This is the case in spontaneous encounters, where there is an immediate attack that needs to be defended against.

4.34 In rare cases, however, these two concepts diverge, and ‘force may be necessary now to prevent harm that will occur in the more distant future’.⁵²² This is the situation in the hostage case, where to prevent his death on Friday, Bill may have to act immediately on the Monday. This is also argued to be the case for some women who kill in response to domestic violence. Although there may not be an attack taking place at that point in time, it is argued that it may be necessary for these women to take immediate action to prevent future harm. For example, in Case Study 14 it is arguable that Helen had to kill Darren while he was asleep, to prevent him from killing her when he woke up. Requiring women to wait until an attack takes place is seen to be the same as sentencing a woman to ‘murder by instalment’.⁵²³ It is argued that ‘[s]ociety gains nothing, except perhaps the additional risk that the battered woman will herself be killed, because she must wait until her abusive husband instigates another battering episode before she can justifiably act’.⁵²⁴

4.35 One of the underlying causes of this problem is seen to be the identification of self-defence with the one-off confrontation. In order to fit within this paradigm, domestic violence is often constructed as a series of such one-off confrontations, each with an identifiable beginning and end.⁵²⁵ While this may aid those women who kill in direct response to a particular episode of violence, it creates problems for those who kill in ‘non-confrontational’ circumstances, as the threat of harm is seen to be ‘over’. This can be regarded as a misunderstanding of the dynamics of domestic violence. As noted in the previous chapter,⁵²⁶ domestic violence is seen to be about control. The violence is instrumental and cumulative—it is not a series of isolated attacks, but a pattern of behaviour.

4.36 It is argued that women involved in violent relationships learn to ‘read’ this pattern of behaviour, and gain an understanding of when violence is likely, and the expected extent of that violence. In cases where women have killed their violent partners, they often report a belief that on this occasion, the nature of the violence had changed. They ‘knew’ that if they did not kill on this occasion, they were going to be seriously injured or killed themselves. This is much like the knowledge of Bill the hostage, who ‘knows’ he will be killed if he doesn’t act immediately. Although there may not be an

521 Ibid 66.

522 Ibid 66.

523 *R v Lavallee* [1990] 1 SCR 852, 883.

524 M J Willoughby, ‘Rendering Each Woman Her Due: Can a Battered Woman Claim Self-Defense When She Kills Her Sleeping Batterer’ (1989) 38 *Kansas Law Review* 169 184.

525 See for example, Rebecca Bradfield, *The Treatment of Women Who Kill Their Violent Male Partners Within the Australian Criminal Justice System* (PhD Thesis, University of Tasmania, 2002) 212–3: ‘Domestic violence has usually been constructed as a series of discrete assaults, each having an identifiable beginning and end in order to fit within the law’s story of the self-defensive killing (the isolated and once-off attack). In the context of a violent domestic relationship, the problem (and the artificiality) arises from the need to isolate the parameters of any particular assault. For example, in *Secretary*, Mildren J considered that the issue was whether “the assault had been completed by the time the deceased fell asleep”, so that it could not be said that the accused was “defending that assault, but a different one—an anticipated assault which she feared may occur in the future”. If the assault was completed, then self-defence was not available, as the accused could not be said to be defending herself against a continuing assault.’

526 See above para 3.52.

‘imminent’ threat of harm, the harm is inevitable. Action taken in such circumstances is therefore argued to be taken in self-defence, despite the absence of an immediate threat of harm.

4.37 In fact, some commentators go further, and argue that at a particular point in time, a woman comes to be living in a permanent state of fear. In such circumstances, due to the cumulative effects of violence, there is no need to look for a particular attack, as there is a constant, continual fear of death or serious injury:

My argument is that women living in situations of severe domestic violence eventually reach the stage of living in constant absolute fear. They always know that at any time grievous bodily harm is likely to be inflicted upon them by their male tormentor if he is present... Courts need not look for a present and immediate attack from the man in such cases. If he was not actually attacking at the time, the woman always knows that he is just about to attack and her constant state of mind is that state of mind to which another person would shift if they suddenly found their life or physical safety threatened by another person.⁵²⁷

4.38 This argument has recently been adapted by Robbin Ogle and Susan Jacobs. According to them, severe domestic violence should be seen as a ‘slow homicidal process’.⁵²⁸ It is posited that at a particular point in abusive relationships, ‘the cycle simply vacillates from tension building to acute violence and back to tension building. From this perspective, there would be no non-confrontational periods in the relationship for the victim. For her, the relationship becomes a cycle of constant tension building with its climax in the next round of violence.’⁵²⁹ If such a perspective is adopted, the question of imminence of harm becomes irrelevant. The need for action may always be immediately necessary if future harm is to be prevented.

PROPORTIONALITY OF RESPONSE

4.39 Historically, it was necessary not only to show that the use of force was required, but that the force used was proportionate to the threat. The purpose of this restriction was to ensure that lethal force was only used when absolutely necessary, and not in response to trivial harms. It was not seen as justifiable to kill someone who was only threatening minor injury.⁵³⁰ As with the issue of imminent harm, the issue of proportionality is no longer a separate requirement of the law—it is simply a factor to be taken into account in determining whether the accused’s belief was reasonable. In practice, however, it can be quite an important factor, because a belief in the need to use force that is considered excessive may not be seen to be based on reasonable grounds.

4.40 While such a requirement seems appropriate, it can provide a barrier to the successful use of self-defence by women who kill in response to domestic violence. This will especially be the case for ‘non-confrontational’ killings, where the use of force against a man who is sleeping or has his back

527 Zoe Ratus, *There Was Something Different About Him That Day: The Criminal Justice System's Response to Women Who Kill Their Partners* (2002) 14.

528 Robbin S Ogle and Susan Jacobs, *Self-Defense and Battered Women Who Kill, A New Framework* (2002) Chapter 3. Ogle and Jacobs argue that ‘if battering can be seen as a long-term interaction involving multiple incidents with escalating levels of violence, it can be understood as a homicidal process requiring the victim to learn from each incident in the interaction and utilize that knowledge to survive as the interaction progresses.’ 59.

529 Ibid 52.

530 For a period of time, the use of excessive force could lead to the partial excuse of excessive self-defence. This partial excuse no longer forms part of Victorian law: see below paras 4.189–4.195.

turned can easily be constructed as disproportionate.⁵³¹ It can also be a problem in confrontational cases, for women in such circumstances will often use a weapon against an unarmed man.⁵³² Alternatively, they may be responding to an attack that is not be viewed as 'life-threatening', so the use of fatal force may be seen as excessive. For example, in Case Study 14, while Darren may have threatened Helen before falling asleep, this may not be seen to be sufficiently dangerous to require Helen's lethal response.

531 We note that this issue is related to that of the imminent threat of harm discussed above. A woman who kills a sleeping man may be excluded from the scope of self-defence either because the threat is not imminent, or because her use of force in the circumstances is disproportionate.

532 In Bradfield's study of women who killed their violent spouses during 1980–2000, every woman used a weapon: Rebecca Bradfield, *The Treatment of Women Who Kill Their Violent Male Partners Within the Australian Criminal Justice System* (PhD Thesis, University of Tasmania, 2002) 204. Mouzos found a similar result in her examination of the 56 cases where women killed abusive partners: 'In two-thirds of the cases where a woman killed an abusive intimate partner, a knife or some other sharp instrument (n=38) was used, followed by a firearm (n=12) and a blunt instrument (n=5). One female offender used accelerant to set fire to her victim.' Jenny Mouzos, *When Women Kill: Scenarios of Lethal Self-Help in Australia 1989–2000* (PhD Thesis, University of Melbourne, 2003) 112.

4.41 Viewing the question of proportionality in this way misunderstands the nature of domestic violence:

The danger envisaged by the defence of self defence is that embodied in a single, isolated, imminent or ensuing attack. If a woman kills her husband when he is unarmed or asleep it may therefore appear to be an aggressive not a defensive act. But the danger faced by women who are consistently and seriously abused is not that embodied in a single attack. It is the danger embodied in particular attacks as they are part of a *life of being abused* and the fear that accompanies that life. And this abuse is received from a position of *unequal* strength and from a position of disempowerment. From this standpoint, if a woman kills her husband when she is armed and he is unarmed, or when he is asleep, it may in fact be an attempt (conscious or non-conscious) to equalise their positions in the only way she knows how.⁵³³

4.42 According to this argument, self-defence is still associated with the traditional ‘bar-room brawl’ scenario, where two people of relatively equal strength fight in a one-off confrontation. In such circumstances the use of a weapon against an unarmed aggressor is unlikely to be necessary, and will properly be seen as the disproportionate use of force. However, the circumstances of domestic violence do not involve two equally powerful people involved in a one-off confrontation. In most cases, there is both a disparity of strength, as well as a history of abuse, that needs to be taken into account in determining the appropriate level of response.

4.43 When the circumstances of domestic violence are taken into account, it may in fact be reasonable for a woman to have used weapons against an unarmed man, even though ordinarily such use of force would be disproportionate. In arguing this point, it is sometimes noted that women do often try to fight back on ‘equal’ terms. However, due to a disparity in strength between most men and most women, combined with different methods of socialisation according to which men learn to use violence more effectively,⁵³⁴ it is likely that most women will be overpowered, and may face increased violence as a result. Even if there have been no attempts to physically fight back, the likely outcome of fighting on ‘equal’ terms may be obvious from the disparity in size and strength between the accused and her abuser. It is argued that this can lead women to the reasonable conclusion that it is not possible to engage with their abuser ‘on equal terms’, and the only way of effectively protecting themselves will be to use a weapon. In such circumstances, the use of weapons, even against an unarmed man, may be reasonable.

4.44 This argument can be extended to ‘non-confrontational’ circumstances as well. While it may be thought that the use of any force in such circumstances will always be disproportionate, given the absence of an immediate threat, we have seen above that it is argued that the circumstances of domestic violence may make the use of force in such circumstances necessary.⁵³⁵ It is argued that the history of abuse can lead a woman to ‘read’ cues of her abuser’s violence. She can come to know when he is likely to be violent, and the probable extent of that violence. If a woman believes that she is in danger of serious injury or death if she does not act immediately, and also knows that trying to engage on equal

533 Stella Tarrant, ‘Provocation and Self Defence: A Feminist Perspective’ (1990) 15 *Legal Service Bulletin* 147 149.

534 See for example, Ogle, who refers to a number of studies that note that ‘women are only rarely violent in our society because they are socialized not to be aggressive...Women are, however, socialized to fear the aggression of men who are strangers and to tolerate the aggression of men they know because a certain amount of aggression is both accepted and expected from men in our society.’: Robbin S Ogle and Susan Jacobs, *Self-Defense and Battered Women Who Kill, A New Framework* (2002) 72.

535 See above paras 4.27–4.38.

terms will lead to failure, it may not be unreasonable of her to use what might otherwise be seen as 'excessive' force. Using lethal force against a man who is sleeping, or has his back turned, may be the only way for such women to protect themselves, and it is argued that they should not be excluded from the scope of self-defence on the basis of an apparently disproportionate use of force. In our study, all women sole accused used weapons other than their hands or feet.⁵³⁶

ALTERNATIVE OPTIONS

4.45 Self-defence is generally seen to by the courts to be an option of last resort—it should only be used when absolutely necessary. One of the factors to be taken into account in determining whether self-defensive actions were necessary in the circumstances is whether any other options were available. The use of fatal force will not be considered justifiable if the accused had available safe alternative means of protecting him or herself.

4.46 This focus on the availability of alternative options can also create a barrier to the successful use of self-defence by women who kill in response to domestic violence. This is because it can be argued that the accused should have left the relationship or called the police, rather than killing her abuser. This is a particular problem in 'non-confrontational' cases such as Case Study 14, where it could be argued that Helen should simply have left the house while Darren slept, rather than killing him. The existence of such an option is seen to provide evidence that the use of self-defensive force was not reasonable in the circumstances.

4.47 It is argued that this focus on the mere availability of alternative options again shows a lack of understanding of the nature of domestic violence. The issue is not seen to be as simple as a woman 'deciding' to leave:

The question of whether a woman had reasonable grounds for perceiving that it was necessary to use lethal self help to deal with her perpetrator, in the hands of the average Australian Court, appears to become a focus on why the woman concerned did not terminate her relationship with the perpetrator. Presumably this is because of the erroneous, but very common assumption that leaving a relationship is always a safe and effective way for women to deal with domestic violence.⁵³⁷

4.48 This passage highlights the fact that while a woman may technically be able to leave a relationship, this will not necessarily protect her from harm. The Women's Domestic Violence Crisis Service of Victoria have noted that '[a] number of recent studies have suggested that when women leave a relationship, abuse may continue or even increase'.⁵³⁸ Given the risk of harm, or even death, upon separation, it may not be reasonable to expect a woman to pursue such options. To simply focus on the existence of the possibility of leaving, without providing further explanation about why such an option may not have been pursued, is seen to be inappropriate.

536 See para 2.35.

537 Julia Tolmie, 'Pacific-Asian Immigrant and Refugee Women Who Kill Their Batterers: Telling Stories that Illustrate the Significance of Specificity' (1997) 19 *Sydney Law Review* 472 490.

538 Women's Domestic Violence Crisis Service, *What's Love Got To Do With It?: Victorian Women Speak About Domestic Violence*, Annual Report 2001–2002 (2003) 9. In our own study, 14 men killed women when they left or threatened to leave the relationship. (see para 2.55). For a discussion of 'separation assaults', see Martha R Mahoney, 'Legal Images of Battered Women: Redefining the Issue of Separation' (1991) 90 *Michigan Law Review* 1. There are similar concerns in relation to intervention orders, although research in this area is equivocal. For a summary of research on intervention orders, see Regina Graycar and Jenny Morgan, *The Hidden Gender of Law* (2nd ed) (2002) 318–21.

4.49 The possibility that leaving a violent relationship may not prevent harm is not, the only reason alternative options may not have been pursued. A number of other factors are also seen to be relevant:

The focus on why a woman *didn't* leave a violent relationship...fails to address the fact that threats and violence may act to keep women in violent relationships. It fails to acknowledge what research demonstrates about the lack of assistance from police or other agencies for women who are the victim of domestic violence. And, importantly, it fails to acknowledge the limited opportunities for women attempting to leave violent relationships—the lack of affordable housing, child care, employment and the poverty which awaits many women and children who leave violent men.⁵³⁹

4.50 Each of the factors outlined above is seen to be relevant to the question of pursuing alternative options. It is argued that it is often not easy for a woman to leave a violent relationship, or call the police. Financial, emotional, cultural and structural issues can all play a role in determining what alternatives are practically viable.⁵⁴⁰

4.51 These factors may be compounded for women from Indigenous⁵⁴¹ and non-English speaking backgrounds. They may 'lack access to culturally appropriate information explaining that domestic violence is a crime in Australia, what their legal options for dealing with it are, and what support services they can enlist in that process... Assuming that they can overcome the barriers to access described above, many women from non-English speaking backgrounds find their linguistic, religious and cultural needs not understood or appropriately met... As a consequence such women can end up

539 Elizabeth A Sheehy, Julie Stubbs and Julia Tolmie, 'Defending Battered Women on Trial: The Battered Woman Syndrome and Its Limitations' (1992) 16 *Criminal Law Journal* 369 385. On this point, see also Stella Tarrant, 'Provocation and Self Defence: A Feminist Perspective' (1990) 15 *Legal Service Bulletin* 147 149; Rebecca Bradfield, *The Treatment of Women Who Kill Their Violent Male Partners Within the Australian Criminal Justice System* (PhD Thesis, University of Tasmania, 2002) 40–1; Patricia Weiser Easteal, 'Battered Woman Syndrome: What is "Reasonable"?' (1992) 17 *Alternative Law Journal* 220; Nan Seuffert, 'Battered Women and Self-Defence' (1997) 17 *New Zealand Universities Law Review* 292 316; Women's Coalition Against Family Violence, *Blood on Whose Hands? The Killing of Women & Children in Domestic Homicides* (1994) 51–69.

540 A lack of resourcing in this area is seen to be a particularly important factor. In the most recent Annual Report of the Women's Domestic Violence Crisis Service, it is noted that while they answer 72 calls per day, 74 calls per day are missed: Women's Domestic Violence Crisis Service, *What's Love Got To Do With It?: Victorian Women Speak About Domestic Violence*, Annual Report 2001–2002 (2003) 11. This creates the possibility that women who wish to utilise their resources are not able to and may remain in violent relationships. It is argued that such under-resourcing needs to be addressed in order to aid women leaving violent relationships prior to a homicide taking place. While such under-resourcing continues, it is also seen to be important to recognise this fact in considering whether alternative options were available to women who kill in response to violence.

541 Across Australia, there is an overrepresentation of Indigenous people as both offenders and victims of homicides in the context of sexual intimacy. For example, in Mouzos' study of female-perpetrated homicides between 1989–2000, she noted that 25.7% of intimate partner homicides involved an Indigenous offender and victim, 'despite Indigenous persons only accounting for about two per cent of the total Australian population': Jenny Mouzos, *When Women Kill: Scenarios of Lethal Self-Help in Australia 1989–2000* (PhD Thesis, University of Melbourne, 2003) 109. For a discussion of Indigenous people and the law of self-defence, see Julie Stubbs and Julia Tolmie, 'Battered Woman Syndrome in Australia: A Challenge to Gender Bias in the Law?' in *Women, Male Violence and the Law*, Julie Stubbs (ed) (1994).

feeling isolated and disorientated, or further violated and victimised.⁵⁴² Women from rural areas,⁵⁴³ or women with disabilities,⁵⁴⁴ may also faced increased difficulties.

4.52 It is argued that all of these factors should be taken into account in determining whether a woman's actions were reasonable in the circumstances.⁵⁴⁵ If a woman reasonably believed that leaving was not an option for her—due to her past failed attempts to do so, or a lack of faith in the system to support her if she does leave—it is argued that she should not be precluded from relying on self-defence simply because of her failure to pursue such options.

RECENT DEVELOPMENTS IN THE LAW: THE BATTERED WOMAN SYNDROME

4.53 Each of the problems outlined above can be seen to arise from the traditional perception that self-defence is about one-off violent confrontations such as the bar-room brawl. When there is only one confrontation in issue, factors such as whether the harm was imminent, or whether the response was proportionate, acquire a greater significance. We have seen, however, that the context of domestic violence is very different. Rather than being about a one-off confrontation between two parties of approximately equal strength, it is seen to involve a cycle of violence. It is arguable that this different context should be taken into account in determining whether self-defence is appropriate in the circumstances.

4.54 Over time, the law has developed so that it can, to some extent, recognise this broader context. There has been, for example, a reduction of emphasis on the need for there to be an 'immediate' or 'instantaneous' response to a threat.⁵⁴⁶ The law does now allow a focus on the whole context in which the killing takes place, rather than simply examining the final violent episode.⁵⁴⁷ This is what made it possible for Helen's lawyers, in Case Study 14, to argue that despite her delay in killing Darren, she still felt under threat when she killed him, and so should be able to rely on self-defence.

4.55 Such changes may not, however, be sufficient to overcome the barriers faced by women who kill in response to domestic violence. This is because simply allowing the whole context of the relationship to be considered may not be of any help if the jury does not understand the relevance of that context. Juries may be unaware of the nature of domestic violence, and how such violence may affect women. Even if they know that there was a prolonged history of abuse, if they do not understand what it means to be subjected to such abuse, and do not know how someone is likely to react to such abuse, they may

542 Julia Tolmie, 'Pacific-Asian Immigrant and Refugee Women Who Kill Their Batterers: Telling Stories that Illustrate the Significance of Specificity' (1997) 19 *Sydney Law Review* 472 497–8.

543 The Women's Domestic Violence Crisis Service note that 'there are not enough referral vacancies in the largest regions of Melbourne and refugees are not equally distributed across regions... While government policy is supportive of women staying in their homes where possible and, if not, staying in their communities where possible, the policy is difficult to achieve under the current physical structure and resourcing of domestic violence services in Victoria.' Women's Domestic Violence Crisis Service, *What's Love Got To Do With It?: Victorian Women Speak About Domestic Violence*, Annual Report 2001–2002 (2003) 22.

544 Difficulties faced by such women include finding accommodation to fit their specific needs and the possibility of highly dependent relationships with abusive carers. In addition, women with disabled children often return home due to the stress suffered by the child during relocation: Ibid 20.

545 See eg, Julia Tolmie, 'Pacific-Asian Immigrant and Refugee Women Who Kill Their Batterers: Telling Stories that Illustrate the Significance of Specificity' (1997) 19 *Sydney Law Review* 472.

546 See Simon Bronitt and Bernadette Mc Sherry, *Principles of Criminal Law* (2001) 297–8.

547 Despite these developments in the law, it is argued that issues such as imminence of harm and proportionality of response are still practical requirements: see above paras 4.27–4.44.

not believe that the accused felt it necessary to kill in those circumstances. For example, in Case Study 14, although the homicide can be placed within the context of Darren's abuse of Helen, the members of the jury may still not believe that Helen would have felt it necessary to kill Darren in those circumstances, as they may not understand the difficulties women face when they attempt to leave violent relationships.

4.56 One way of addressing this issue would be to provide juries with relevant information concerning the background circumstances leading up to the killing. In addition to allowing evidence of the context of the relationship to be introduced at trial, 'expert' evidence could also be given about the nature of domestic violence, and the effects such violence can have on women who kill. For example, such evidence could inform the jury of why a woman subjected to prolonged and repeated abuse may feel that she has no alternative but to remain in the relationship, or that survivors of domestic violence may be aware that they are at a very high risk of being killed by their partners when they are in the process of separating from them.⁵⁴⁸ Evidence of this kind, combined with evidence about the nature and extent of the violence to which the accused was subjected during the relationship, might assist the jury in deciding whether the accused believed on reasonable grounds that there was no other way to preserve herself from death or grievous bodily harm than by killing her abuser.

4.57 As a general principle, a judge must not allow expert evidence to be presented in court if it relates only to matters about which ordinary people are able to form a sound judgment, without needing the assistance of a person who has specialist knowledge and experience in the relevant area (the 'common knowledge' rule).⁵⁴⁹ In other words, experts cannot be called on to provide evidence about 'common' matters which the jury should already know about. In the past, this has meant that there have been doubts as to whether expert evidence about the typical patterns of domestic violence should be allowed to be presented to the jury, because it has been assumed that this is a matter about which jury members are sufficiently informed to make a sound judgment.

4.58 Partly in an attempt to overcome this restriction, defence lawyers have attempted to use expert evidence that shows that the accused was suffering from a condition known as 'battered woman syndrome'.⁵⁵⁰ This evidence has been introduced in some criminal trials⁵⁵¹ to help explain why a woman who has been involved in a 'cycle of violence' might believe, on reasonable grounds, that it was necessary to kill her abusive partner, even in cases where there was no immediate threat of violence.

4.59 The term 'battered woman syndrome' was first used by American psychologist Dr Lenore Walker.⁵⁵² Walker examined a number of cases of women who had been subjected to domestic violence, and argued that these cases involved a 'cycle of violence' which was characterised by three stages: tension building, the acute battering incident and loving contrition. She defined a 'battered woman' as one who had gone through the cycle at least twice.

548 See for example *R v Lavallee* [1990] 1 SCR 852, 871–2 (Wilson J).

549 *Clark v Ryan* (1960) 103 CLR 486, 491 (Dixon CJ).

550 We note that this syndrome is sometimes referred to as 'battered wife syndrome'. We prefer to use the term 'battered woman syndrome' to reflect the fact that those women who are subjected to domestic violence are not always married.

551 *R v Kontinnen* (1992) 16 Crim LJ 360; *R v Hickey* (1992) 16 Crim LJ 272–3. The use of battered women's syndrome evidence has now been accepted in all States and Territories: see Julie Stubbs and Julia Tolmie, 'Falling Short of the Challenge? A Comparative Assessment of the Australian Use of Expert Evidence on the Battered Woman Syndrome' (1999) 23 *Melbourne University Law Review* 709.

552 Lenore Walker, *The Battered Woman* (1979); *The Battered Woman Syndrome* (1984).

4.60 Walker hypothesised that this recurring cycle of violence promotes a predictable set of responses, including depression and decreased self-esteem. Walker also contended that women involved in a cycle of violence find it difficult to break out of the cycle because of ‘learned helplessness’: ‘Learned helplessness theory predicts that the ability to perceive your effectiveness in being able to control what happens to you can be damaged by some aversive experiences that occur with trauma.’⁵⁵³ In the case of women who have been subjected to prolonged domestic violence, it is suggested that they come to believe that whatever they do, they cannot change their situation. They ultimately come to accept their fate, making no attempts to break out of the cycle of violence.

4.61 This pattern of behaviour—depression, decreased self-esteem, learned helplessness—is what Walker called the ‘battered woman syndrome’.⁵⁵⁴ It has come to be accepted by the courts, and used to explain women’s behaviour when they kill in response to domestic violence. For example, in *Osland v The Queen*, psychological evidence was given as to ‘characteristic patterns of behaviour in relationships involving’ abuse.⁵⁵⁵ A psychologist called by the defence gave evidence that Heather Osland’s evidence of her relationship with her husband was consistent with it having been a battering relationship, and expressed the opinion that she ‘fitted within the battered wife syndrome’.⁵⁵⁶

4.62 The High Court has made it clear that the fact that a woman has been subjected to ongoing violence can be presented to the jury to help explain the accused’s behaviour, but that there is no special defence of ‘battered woman syndrome’.⁵⁵⁷ That is, it is not possible simply to show that a woman who killed her abuser was suffering from ‘battered woman syndrome’, and should therefore be acquitted. Instead, evidence of the abuse can be used as a means of explaining to the jury why the accused acted in the way she did, and why she may have reasonably believed it was necessary to kill her partner in the circumstances.

553 Lenore E A Walker, *The Battered Woman Syndrome* (2nd ed) (2000) 10. This theory is based on animal experimentation performed by Seligman: ‘Seligman and his colleagues discovered that when laboratory animals (usually dogs, in their early experiments) were repeatedly and noncontingently shocked, they became unable to escape from a painful situation, even when escape was quite possible and readily apparent to animals that had not undergone helplessness training.’: Ibid 116.

554 In *Osland v The Queen* (1998) 197 CLR 316, Dr Kenneth Byrne, Clinical Psychologist, gave evidence outlining other characteristics said to be a manifestation of the syndrome, including:

- a sense of shame and fear of telling others about the violence;
- reliving the experiences of violence, which may result in confused thinking when a woman is frightened;
- increased ‘arousal’, which makes women acutely aware of any signal from their partner;
- remaining in an abusive relationship, because a woman believes that if she leaves, the abuser will find her or other family members and take revenge.

In severe cases a woman may live in the perpetual belief that she will one day be killed by the other person: (1998) 197 CLR 316, 335–6 (Gaudron and Gummow JJ). We note that this understanding of battered women’s syndrome as a pattern of responses to violent behaviour is to be distinguished from the medical notion of a syndrome, which refers to a group of symptoms appearing together regularly enough to be regarded as having an underlying physical cause. See for example, Ian Freckelton, ‘Contemporary Comment: When Plight Makes Right—Forensic Abuse Syndrome’ (1994) 18 *Criminal Law Journal* 29.

555 *Osland v The Queen* (1998) 197 CLR 316, 335 (Gaudron and Gummow JJ).

556 *Osland v The Queen* (1998) 197 CLR 316, 335.

557 *Osland v The Queen* (1998) 197 CLR 316, 377–8 (Kirby J), 408 (Callinan J). Justice Kirby was critical of some aspects of the notion of a syndrome, but supported the admission of expert evidence on the general dynamics of abusive relationships. Justices Gummow and Gaudron said that ‘battered woman syndrome’ was a proper matter for expert evidence.

4.63 There are at least three ways in which battered woman syndrome evidence can explain a woman's actions.⁵⁵⁸ First, the idea that the accused can come to read 'subtle clues' of forthcoming violence can help explain why action was immediately necessary despite the absence of imminent harm. This is particularly the case if those subtle clues provide an understanding of the severity of the forthcoming violence. If the reading of such clues can be shown to have led the accused to a reasonable belief that she was about to be seriously assaulted or killed, it becomes arguable that it was necessary for her to act immediately despite the lack of apparent imminent harm.

4.64 Secondly, the notion of learned helplessness can address the question of why the accused didn't leave or pursue alternatives to the use of self-defensive force. If it can be shown that she believed that whatever she did she could not change her situation (short of killing her abuser), this may explain why defensive force was necessary, despite the apparent availability of alternative options.

4.65 Thirdly, the concept of learned helplessness can also address problems of credibility the accused may face:

Many cases involve such intense and prolonged patterns of abuse that many jurors may doubt the defendants' credibility. These jurors might conclude that the defendants must be exaggerating the abuse because no one would have remained in the relationship if such abuse had actually occurred. Such doubts might then lead the jurors to generally discount the defendants' testimony. Courts and commentators contend that expert testimony regarding the battered woman syndrome in general and learned helplessness in particular can correct this tendency to discount the defendants' testimony by enabling the jurors to understand that the defendants could have remained in these relationships for extended periods despite severe and frequent abuse. These witnesses explain that defendants who suffer learned helplessness either fail to perceive available alternatives to the relationships or are unable to exercise these options. Thus, learned helplessness supports the credibility of these defendants by rendering plausible their testimony that they remained in battering relationships for extended periods despite enduring severe abuse.⁵⁵⁹

4.66 Under the current law, such evidence can be presented at trial. So in Case Study 14, evidence could be presented to the jury to show that Helen had suffered from ongoing abuse, and that women in such situations often find it difficult to leave relationships due to 'learned helplessness'. This evidence could help to explain why Helen had stayed with Darren for eight years after the violence started, rather than leaving. It could also help to explain why Helen found it necessary to kill Darren in those circumstances. The jury's role, however, remains the same: they must determine whether Helen believed, upon reasonable grounds, that it was necessary to act in the way that she did.

4.67 These developments in the law have resulted in the acquittal of some women who have killed abusive partners. For example, in the case upon which Case Study 14 was based, although the trial judge originally ruled that the issue of self-defence did not arise and could not be put to the jury, on appeal the court held that self-defence should have been left to the jury. A re-trial was ordered and Helen was acquitted at her second trial on the basis of self-defence.⁵⁶⁰ However, there have also been

558 For a more detailed discussion of this issue, see Robert F Schopp, Barbara J Sturgis and Megan Sullivan, 'Battered Woman Syndrome, Expert Testimony and the Distinction Between Justification and Excuse' (1994) *University of Illinois Law Review* 45 52–3.

559 Ibid 52–3.

560 (1997) 18(2) *The Legal Reporter: Criminal Law* 7.

cases where women who have killed their abusers have not been acquitted on the basis of self-defence, despite the introduction of battered woman syndrome evidence.⁵⁶¹

RETAIN THE STATUS QUO?

4.68 We have seen above that the test for self-defence is very flexible. The question is simply whether the accused believed upon reasonable grounds that it was necessary to do what they did. While historically it may only have been seen as reasonable to act in self-defence in ‘pub-brawl’ confrontations, it is arguable that the test is sufficiently broad to accommodate other contexts in which self-defence may be considered appropriate, including women who kill in response to domestic violence. This is especially seen to be the case given recent developments in the law, such as the reduction in emphasis on the imminence requirement, and the use of battered woman syndrome evidence. These developments in the law, combined with the capacity of the law to adapt to new circumstances, may lead some to argue that the law is not actually in need of reform.

4.69 In arguing this point, it is possible to identify cases where women who have killed in response to domestic violence have been acquitted. For example, in Bradfield’s study of 65 women who killed their violent partners, nine were acquitted.⁵⁶² This is seen as evidence of the law’s capacity to deal with such killings appropriately. One of the acquittals arose in ‘non-confrontational’ circumstances, which could be taken as evidence that issues such as imminence of harm and proportionality of force no longer need to be considered barriers.

4.70 In response, it could be argued that a large number of such women continue to be convicted of murder or manslaughter. For example, in Bradfield’s study, 56 of the 65 women who killed their violent spouses were not acquitted. These results may be seen to be evidence of the law’s continuing gender bias, despite the developments in the law, showing the need for further reform.⁵⁶³

4.71 In reply, those advocating the retention of the status quo may argue that such cases are not evidence of the law’s gender bias, but rather of the fact that self-defence was not appropriate in the circumstances. Not all women who kill in response to domestic violence are seen as deserving of an acquittal—self-defence should only be available if fatal force was necessary. The failure to successfully rely on self-defence may have been due to the fact that belief in the need to kill was not reasonable, despite the existence of domestic violence. For example, in *Osland* the high level of pre-planning was seen as evidence that this was a ‘revenge’ killing, rather than an act that was reasonably believed to be necessary in the circumstances.⁵⁶⁴ The current test is seen to set appropriate boundaries to determine which cases should fall within the scope of self-defence, and which should be excluded from its scope.

561 See for example, *Osland v The Queen* (1998) 197 CLR 370–2. For a detailed critique of the battered woman syndrome see below paras 4.78–4.84.

562 Rebecca Bradfield, *The Treatment of Women Who Kill Their Violent Male Partners Within the Australian Criminal Justice System* (PhD Thesis, University of Tasmania, 2002) 194. See also above para 4.14. See Julie Stubbs and Julia Tolmie, ‘Falling Short of the Challenge? A Comparative Assessment of the Australian Use of Expert Evidence on the Battered Woman Syndrome’ (1999) 23 *Melbourne University Law Review* 709 for a discussion of the use of battered women’s syndrome evidence across Australia.

563 To some, it is also an indication of the problems with the use of battered woman syndrome evidence: see below paras 4.78–4.84.

564 See for example, *Osland* per Kirby J: ‘The jury’s verdict in her case is fully explained by a conclusion, plainly open to the jury, that the appellant’s conduct was premeditated and effected with “calm deliberation” and “detached reflection” rather than reasonably necessary to remove further violence threatening her with death or really serious injury.’; *Osland v The Queen* (1998) 197 CLR 316, 382. It has been argued that this approach misunderstands the nature of domestic violence, where such planning may be necessary to escape death

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QUESTION

22. In light of recent developments in the law of self-defence, is there a need for further reform?

OPTIONS FOR REFORM

4.72 Despite recent developments in the law, it is arguable that there is still need for reform. As noted above,⁵⁶⁵ there are still a number of women who kill in response to domestic violence who cannot successfully rely on self-defence. While some may argue that this is because the circumstances do not justify the use of the defence,⁵⁶⁶ others believe that some of these cases are valid cases of self-defence. The continued inability of women who kill in response to domestic violence to successfully rely on self-defence is seen as evidence of the law's gender bias, which needs to be addressed.

4.73 In the remainder of this chapter we discuss a number of possible ways in which the law could be reformed. We have divided our discussion into six different sections, according to the nature of the reforms suggested. In section 1 we look at evidentiary reforms, focusing on the possible introduction of social framework evidence. In section 2 we consider ways in which the current law can be clarified. We discuss codifying the law, specifying when it is reasonable to believe fatal force is necessary, and enumerating factors to be taken into account in determining whether the accused acted in self-defence. Section 3 investigates the possibility of actually changing the law. We examine the possibilities of making self-defence either a purely subjective or objective test.

4.74 In sections 4 and 5 we consider whether it may be desirable to introduce a new defence. Section 4 focuses on the possibility of creating a new complete defence specifically targeted at women who kill in response to domestic violence, while in section 5 we look at introducing a new partial excuse, such as mistaken or excessive self-defence. In section 6 we examine some possible procedural reforms, including charge screening and jury directions.

1 EVIDENTIARY REFORMS

4.75 It is often argued that while the law of self-defence is technically capable of taking into account the circumstances of domestic violence in determining whether self-defence should be available to women who kill, it does not do so in practice. In particular, it is arguable that while the law may be able to handle the 'simple' confrontational cases, it continues to struggle with 'non-confrontational' killings. This problem is argued to be 'not so much a problem with the doctrinal shape of the law on self-defence as the way it is applied in individual cases. Such offenders have difficulties in getting the circumstances surrounding their killings realistically appraised by the agents of the criminal justice system.'⁵⁶⁷

or serious injury: see below n 624; Debbie Kirkwood, *Women Who Kill: A Study of Female Perpetrated Homicide in Victoria Between 1985 and 1995* (PhD Thesis, Monash University, 2000) 114–17, 241–4.

565 See above para 4.70.

566 See above para 4.71.

567 Elizabeth A Sheehy, Julie Stubbs and Julia Tolmie, 'Defending Battered Women on Trial: The Battered Woman Syndrome and Its Limitations' (1992) 16 *Criminal Law Journal* 369 394.

4.76 We saw above that one way of responding to this issue is through the use of evidence. The problem may be that members of the jury do not properly understand the nature of domestic violence, and the impact it can have on those involved. If the dynamics of domestic violence can be made sufficiently clear to the jury, then they may be able to apply the law to achieve an appropriate outcome.

4.77 It was for this reason that battered woman syndrome evidence was introduced into trials. It was believed that the use of such evidence could explain a number of relevant factors to the jury, who would then be more equipped to address the question of self-defence. While this use of battered woman syndrome has been applauded for making clear that the broad context of domestic violence is relevant to the application of self-defence, the battered woman syndrome has recently come under wide-ranging criticism on a number of fronts. In the next section of the chapter we briefly look at some of these criticisms, and consider a possible alternative. We then look at some broader issues relating to evidence law in general.

CRITIQUE OF THE BATTERED WOMAN SYNDROME

4.78 The main objection to the battered woman syndrome is that it ‘medicalises’ women’s responses to domestic violence.⁵⁶⁸ Under this analysis, the reactions of women who kill their abusive partners are seen as irrational, and therefore in need of a medical or psychiatric explanation. Contrary to such an understanding of domestic violence, it is argued that, in fact, women’s reactions in the circumstances are completely rational:

Recently, battered women who have killed their abusers have begun to speak out, along with their advocates, about the battering victim’s homicidal actions as part of a realistic and reasonable survival response rather than a psychological problem... This position essentially asks us to think about battering homicides as part of a long-term survival process rather than a psychological aberration or a one-time overreaction based in spite or revenge. Battering victims and their advocates believe that battered women who have killed their abusers do not need a psychological excuse for their actions but rather are justified in proactively, lethally defending themselves in a homicidal process.⁵⁶⁹

4.79 According to this argument, women who have been subjected to domestic violence are in imminent danger. They risk being murdered if they attempt to leave their partners. They may have previously attempted to leave, and been coerced into returning. They may have tried to fight back, or sought police intervention, only to face increased violence. As a consequence, they reasonably determine that their only way of protecting themselves is through the use of lethal force. This rational determination in the circumstances is seen to be ignored by battered woman syndrome evidence, which mainly focuses on women’s mental state.⁵⁷⁰

4.80 This medicalisation of women’s actions is seen as having a number of detrimental flow-on effects.⁵⁷¹ For example, it is argued that by requiring a psychiatric ‘expert’ to explain a woman’s actions,

568 See, for example, Ibid 384–5; Nan Seuffert, 'Battered Women and Self-Defence' (1997) 17 *New Zealand Universities Law Review* 292 296, 303; Julia Tolmie, 'Pacific-Asian Immigrant and Refugee Women Who Kill Their Batterers: Telling Stories that Illustrate the Significance of Specificity' (1997) 19 *Sydney Law Review* 472 509; Patricia Weiser Eastale, 'Battered Woman Syndrome: What is "Reasonable":' (1992) 17 *Alternative Law Journal* 220 222.

569 Robbin S Ogle and Susan Jacobs, *Self-Defense and Battered Women Who Kill, A New Framework* (2002) 6.

570 It should be noted that battered women's syndrome does not solely focus on the accused's mental state. It does focus on the cycle of violence, as well as the accused's reaction to it.

571 See for example, Elizabeth A Sheehy, Julie Stubbs and Julia Tolmie, 'Defending Battered Women on Trial: The Battered Woman Syndrome and Its Limitations' (1992) 16 *Criminal Law Journal* 369 384–5; Nan Seuffert, 'Battered Women and Self-Defence'

this implicitly reinforces the notion that she lacks credibility. It constructs her reactions as rare and ‘abnormal’, and beyond the perception of the ordinary juror. It is seen as reinforcing the idea that domestic violence is an individual issue, and a woman’s response to it is pathological. It is argued that in fact domestic violence is a very common occurrence,⁵⁷² and given all of the circumstances in which such violence takes place—social, cultural, financial and structural—women’s reactions are quite normal, and do not need psychiatric explanations.

4.81 It is further argued that this focus on battered woman syndrome ‘can distort the legal issues as the parties dispute whether the defendant suffered from the syndrome rather than disputing the justification for her use of defensive force’.⁵⁷³ The important question is seen to be whether the accused’s acts were reasonably believed to be necessary, not whether the accused was suffering from a particular psychological condition:

Expert testimony regarding depression, decreased self-esteem, learned helplessness, or other psychological characteristics of the defendant does not show the defendant’s ‘reasonableness’. Such testimony may assist the jury in understanding the defendant, but it does not inform them regarding the events and information that would lead the jurors to the inference of necessity, enabling them to understand her corresponding inference as reasonable. The evidence required to establish the defendant’s reasonable belief in the necessity of deadly force must demonstrate the pattern of battering and the lack of available legal alternatives to defensive force, rather than the presence of the battered woman syndrome.⁵⁷⁴

Where the focus is on the syndrome, rather than the necessity of battered women’s acts, this may have the additional undesirable consequence of making juries reluctant to acquit women whom they see as having a ‘psychological disorder’.⁵⁷⁵

4.82 Other problems with the battered woman syndrome include the fact that it can create a new stereotype of the typical ‘battered woman’, who is passive and demoralised. If a particular accused does not fit into this stereotype, she may face difficulties at trial. For example, if she has fought back or tried to extricate herself, her ultimate actions in killing her abuser may not be seen as reasonable, because she has not evinced an appropriate level of ‘learned helplessness’. It has been suggested that lesbians, Indigenous women, women from non-English speaking backgrounds, women with disabilities and women with criminal histories may be particularly disadvantaged, as they may react in different ways to that expected of the ‘normal’ battered woman:

[Battered woman syndrome] is most likely to assist middle-class white women who fit society’s image of the ‘good’ victim. It has been argued that deviations from this image, by race, class, or activities such as drinking, gambling, or displaying anger at the abuser, are likely to be held against the woman accused.⁵⁷⁶

(1997) 17 *New Zealand Universities Law Review* 292; Julia Tolmie, ‘Pacific-Asian Immigrant and Refugee Women Who Kill Their Batterers: Telling Stories that Illustrate the Significance of Specificity’ (1997) 19 *Sydney Law Review* 472–303.

572 A study conducted by the Australian Bureau of Statistics in 1996 found that 23% of women who had been married or in a defacto relationship experienced violence by a partner at some time in their relationship: Australian Bureau of Statistics, *Women’s Safety Australia*, Catalogue 4128.0 (1996).

573 Robert F Schopp, Barbara J Sturgis and Megan Sullivan, ‘Battered Woman Syndrome, Expert Testimony and the Distinction Between Justification and Excuse’ (1994) *University of Illinois Law Review* 45–46–7.

574 *Ibid* 87.

575 See for example, Helen Brown, *Beyond Battered Woman Syndrome: Reforming Self-Defence to Seek Justice For Women Who Kill* (MA Thesis, Monash University, 1996) 80.

576 Nan Seuffert, ‘Battered Women and Self-Defence’ (1997) 17 *New Zealand Universities Law Review* 292–296, 327–8. See also Julie Stubbs, ‘Battered Women Syndrome, Advancing Women’s Interests or Reinforcing Orthodoxy’ (1996) *Women Against Violence: An*

4.83 Finally, the battered woman syndrome has been attacked as lacking in scientific support.⁵⁷⁷ It is also seen to lack explanatory force in relation to women who kill, for while the notion of 'learned helplessness' may explain why a woman does not leave a relationship, it does not explain why a woman eventually decides to take action and kill her abuser.⁵⁷⁸ It has been argued that it 'would be more consistent with the theoretical and empirical foundations of learned helplessness theory to contend that battered women who do not kill their batterers suffer learned helplessness and that battered women who kill their batterers differ from those who do not precisely because those who kill do not suffer learned helplessness.'⁵⁷⁹

4.84 These criticisms, and others, have led to calls for a reappraisal of the use of 'expert' evidence in these cases. While there is a generally acknowledged need for some evidence to be provided to tackle the myths and stereotypes of domestic violence that abound in our society, it is argued that battered woman syndrome is not the most appropriate way of achieving this goal. The introduction of more general 'social framework evidence' is seen to be preferable.⁵⁸⁰ Such evidence is argued to be capable of explaining the relevant issues without relying on a psychological syndrome. The use of such evidence is discussed below.

WHAT IS SOCIAL FRAMEWORK EVIDENCE?

4.85 In a number of recent publications it has been suggested that while battered woman syndrome evidence may be of some use, the introduction of broader contextual evidence about the nature of domestic violence would be more valuable to women who kill in response to domestic violence. Such evidence, which focuses on the realities of domestic violence as well as looking at the accused's reactions, has come to be known as 'social framework evidence'.⁵⁸¹ It could include evidence on any of the following matters:⁵⁸²

Australian Feminist Journal 5 8; Julia Tolmie, 'Pacific-Asian Immigrant and Refugee Women Who Kill Their Batterers: Telling Stories that Illustrate the Significance of Specificity' (1997) 19 *Sydney Law Review* 472 511; Canadian Association of Elizabeth Fry Associations, *Response to the Department of Justice Re: Reforming Criminal Code Defences: Provocation, Self-Defence and Defence of Property*, (1998); Julie Stubbs and Julia Tolmie, 'Battered Woman Syndrome in Australia: A Challenge to Gender Bias in the Law?' in *Women, Male Violence and the Law*, Julie Stubbs (ed) (1994) 211.

577 Walker's study has been criticised for relying on self-report survey data elicited from a self-selected sample, with no control group. It is also seen to lack proper statistical analysis to test for the significance of some findings. There is also seen to be a lack of clear support in the data for the conclusions drawn: Ian Leader-Elliott, 'Battered But Not Beaten: Women Who Kill in Self Defence' (1993) 15 *Sydney Law Review* 403; Robert F Schopp, Barbara J Sturgis and Megan Sullivan, 'Battered Woman Syndrome, Expert Testimony and the Distinction Between Justification and Excuse' (1994) *University of Illinois Law Review* 45 54–6.

578 See, for example, Katherine O'Donovan, 'Defences for Battered Women Who Kill' (1991) 18 *Journal of Law and Society* 231; Elizabeth A Sheehy, Julie Stubbs and Julia Tolmie, 'Defending Battered Women on Trial: The Battered Woman Syndrome and Its Limitations' (1992) 16 *Criminal Law Journal* 369 384–5; Ian Leader-Elliott, 'Battered But Not Beaten: Women Who Kill in Self Defence' (1993) 15 *Sydney Law Review* 403; Helen Brown, *Beyond Battered Woman Syndrome: Reforming Self-Defence to Seek Justice For Women Who Kill* (MA Thesis, Monash University, 1996) 43; Julia Tolmie, 'Pacific-Asian Immigrant and Refugee Women Who Kill Their Batterers: Telling Stories that Illustrate the Significance of Specificity' (1997) 19 *Sydney Law Review* 472 511.

579 Robert F Schopp, Barbara J Sturgis and Megan Sullivan, 'Battered Woman Syndrome, Expert Testimony and the Distinction Between Justification and Excuse' (1994) *University of Illinois Law Review* 45 58. See also Elizabeth A Sheehy, Julie Stubbs and Julia Tolmie, 'Defending Battered Women on Trial: The Battered Woman Syndrome and Its Limitations' (1992) 16 *Criminal Law Journal* 369. This argument is based on the fact that in the original study of learned helplessness conducted on dogs, researchers found it virtually impossible to retrain the dogs to take any action directed at reducing their discomfort. This is seen to lead to the conclusion that battered women who develop learned helplessness will never leave their relationship or take an action to alter their situation.

580 See below paras 4.85–4.87.

581 See, for example, Julie Stubbs and Julia Tolmie, 'Falling Short of the Challenge? A Comparative Assessment of the Australian Use of Expert Evidence on the Battered Woman Syndrome' (1999) 23 *Melbourne University Law Review* 709; Rebecca Bradfield, *The Treatment of Women Who Kill Their Violent Male Partners Within the Australian Criminal Justice System* (PhD Thesis, University of Tasmania, 2002); Holly Maguigan, 'Battered Women and Self-Defense: Myths and Misconceptions in Current Reform Proposals'

- the general dynamics of abusive relationships;
- the ‘cycle of violence’ and the complex reasons women stay in relationships with violent men;
- the alternative options the accused had attempted to use, and the reasons she had not attempted others;
- why some women do not report violence and the barriers to disclosure;⁵⁸³
- the ability to read subtle clues in order to perceive imminent danger, and the reasonableness of fear in such circumstances;
- the issue of timing—for example, that women often use passivity as a defence, but when they do react aggressively it may not always be when they are under immediate threat;
- the increased vulnerability women face upon separation from their abuser;
- the social and economic factors that affect women who have been abused, and the psychological effects of battering and separation violence;
- cultural or racial issues which may be relevant in the particular case;
- the coexistence of certain behaviours and battering, such as the use of drugs and alcohol;⁵⁸⁴
- the use of violence by women—that many battered women fight back;⁵⁸⁵
- why a battered woman may have to plan to kill in order to protect herself;
- reactions of battered women after committing the homicide—that some women panic and hide the body or lie to police.

(1991) 140 *University of Pennsylvania Law Review* 379; Robbin S Ogle and Susan Jacobs, *Self-Defense and Battered Women Who Kill, A New Framework* (2002); Elizabeth Schneider, 'Resistance to Equality' (1996) 57 *University of Pittsburgh Law Review* 477; Zoe Rathus, *There Was Something Different About Him That Day: The Criminal Justice System's Response to Women Who Kill Their Partners* (2002) 7–8.

582 Stubbs and Tolmie provide a similar list of factors that should be admissible in such cases:

- what was the nature and extent of the violence that the defendant suffered in the relationship?
- how many times had the defendant called the police and what was the result?
- had the defendant tried to enlist the protection of the criminal justice system or other agencies and what was the result?
- how many times had the defendant tried to leave?
- if the defendant returned, what were the factors that influenced that decision?
- did the defendant have a safe and affordable place to go?
- how had the abuser responded to other efforts at self-protection in the past?
- had the abuser intimated what he or she might do to the defendant in the future?
- was there anything about the defendant's cultural circumstances that made it particularly difficult to detach from the abuser, negotiate the relationship or seek outside help?

Julie Stubbs and Julia Tolmie, 'Battered Woman Syndrome in Australia: A Challenge to Gender Bias in the Law?' in *Women, Male Violence and the Law*, Julie Stubbs (ed) (1994) 194.

583 This will be particularly important if the prosecution claims the accused is exaggerating the violence.

584 One of the problems faced by women who attempt to rely on self-defence is that their own behaviour may be seen to be 'violent', or not in conformity with the stereotypical 'helpless' battered woman. It is argued that there is no typical 'battered' woman and one of the coping mechanisms of such women may include the use of drugs and alcohol, profane language, or even dealing in drugs. It is seen to be important to explain this fact to the jury, so that they don't automatically exclude self-defence for a particular accused due to her lack of stereotypical behaviour.

585 This may help explain other witnesses' evidence that the woman was 'the violent one' or was 'also violent'.

4.86 The aim of such evidence would be to remove potential sources of error in the fact-finding process, such as misconceptions about the nature of domestic violence and the response patterns of women in violent relationships. Each of the issues outlined above are seen as relevant to the central question in self-defence cases—whether the accused reasonably believed her actions were necessary. It is argued that such broadly contextual information is of greater use to women who kill in such circumstances than evidence which simply focuses on their psychological condition:

In providing evidence of the general dynamics of domestic violence, or the impediments that may prevent battered women leaving a violent relationship, or the impact of cultural and/or racial factors, the witness is not asked to ‘diagnose’ the accused as a sufferer of BWS (or any other medical/psychological condition), nor is the witness necessarily proffering an opinion on the particular circumstances of the case. Rather, the witness is providing general evidence in relation to observable trends in violent relationships: the structural impediments to leaving; the dangers attendant on separation; and the general dynamics of domestic violence.⁵⁸⁶

4.87 So in the case of a ‘non-confrontational’ homicide, such as Case Study 14, Helen could provide evidence of the past history of abuse. It could be shown that previous attacks have involved serious injury, and so it may be reasonable for her to believe that new attacks would also involve such a danger. An examination of the history of the relationship could provide a number of reasons she did not feel able to leave the relationship, by showing, for example, that she had faced increased violence when she had attempted to leave in the past. This could be combined with evidence that shows that there is, in fact, a great danger to women such as Helen when they do leave violent relationships. Further evidence could be given that her ability to read Darren’s behaviour led her to fear grave violence upon his waking. It is argued that in such a case there is no need for Helen to argue that she suffered from battered woman syndrome, because the combination of all of this social framework evidence already ‘provides her with a basis to believe that...she can prevent the batterer from causing her serious bodily injury only by exercising deadly force’.⁵⁸⁷

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QUESTION

23. Is the use of social framework evidence preferable to the use of battered woman syndrome evidence?

ADMISSIBILITY OF EVIDENCE ABOUT DOMESTIC VIOLENCE

4.88 In the section above, we saw that a number of people argue that evidence about a history of domestic violence, as well as social framework evidence to explain the dynamics of domestic violence, should be introduced in relevant trials. In this section we look at whether there are any barriers to the admission of such evidence, and if so what steps would need to be taken to enable its use at trial. In doing so, we look at a number of rules of evidence, including rules about relevance and the use of expert witnesses. It has been argued that these rules ‘function to silence women and disadvantaged groups by

586 Rebecca Bradfield, *The Treatment of Women Who Kill Their Violent Male Partners Within the Australian Criminal Justice System* (PhD Thesis, University of Tasmania, 2002) 317.

587 Robert F Schopp, Barbara J Sturgis and Megan Sullivan, ‘Battered Woman Syndrome, Expert Testimony and the Distinction Between Justification and Excuse’ (1994) *University of Illinois Law Review* 45 74.

excluding expert evidence describing ‘normal’ behaviour, by extracting the individual from her context and culture, and by narrowly defining the factors which influence behaviour’.⁵⁸⁸

Relevance

4.89 One of the general principles of evidence law is that only ‘relevant’ information should be admitted into trial. While this seems obvious—we would not want trials dragging on for weeks while irrelevant evidence was heard—it can create difficulties for women who kill in response to domestic violence. It can do so in two ways. First, the history of abuse may not be seen to be relevant to the particular point in issue. This will especially be the case if the trial judge identifies self-defence with one-off violent confrontations. If a woman kills her abuser, the judge may rule that the only thing of relevance is whether she was actually under attack at the time. The cumulative history of violence, which may have led the accused to kill her partner while he was asleep or had his back turned, may not be seen to be relevant. If such a determination is made, evidence of the history of abuse may not be given at trial, which may lead the jury to a distorted picture of the crime.

4.90 Secondly, even if evidence about the accused’s particular history of abuse is seen to be relevant, evidence about the general dynamics of domestic violence may not be seen to be relevant. A judge may believe that evidence about the social and economic factors that affect battered women will not have any bearing on the case and should not be allowed to be presented at trial. This may have the unintended consequence of jury members relying on myths and stereotypes about domestic violence when making their determination.

4.91 One of the reasons the battered woman syndrome was first used at trial was to address this issue of relevance. Factors such as the history of abuse are obviously relevant to determining whether a woman suffers from such a syndrome, and evidence about the syndrome is seen as relevant in determining whether the accused believed, on reasonable grounds, that her acts were necessary in the circumstances. As a result, both the history of abuse and broader contextual information will be admissible in battered woman syndrome cases.

4.92 The situation may be somewhat different if social framework evidence is to be relied upon instead. As such evidence does not go towards showing that the accused suffered from a particular psychological syndrome, it may not be viewed by some judges as relevant. It is possible that they will reject all such evidence, or they may allow some of the factors outlined above to be introduced at trial, but not others. Given this possibility, it may be desirable to legislatively address this issue.

4.93 One way to overcome the first problem (the relevance of the history of abuse) would be to specify that the history of domestic violence is a relevant fact in such cases.⁵⁸⁹ This is the case in Queensland, where section 132B(2) of the *Evidence Act 1977* (Qld) states that ‘[r]elevant evidence of the history of the domestic relationship between the defendant and the person against whom the offence was committed is admissible in evidence in the proceeding.’ A similar provision could be introduced into Victorian law. In introducing such a provision, however, criticisms of the Queensland law should be borne in mind. In particular, it is argued that the particular Queensland provision is redundant, in that it specifies that ‘relevant’ evidence of domestic violence is to be admissible. If the

588 D Martinson, M MacCrimmon, I Grant et al, ‘A Forum on *Lavallee v R.*: Women and Self Defence’ (1991) 25 *UBCL Rev* 23 37.

589 Another way to do this would be to specify that specific contextual factors *must* be taken into account in a determination of the issue of self-defence: see below paras 4.129–4.134.

evidence is 'relevant', it will already be admissible, despite section 132B(2).⁵⁹⁰ It may be possible to avoid this particular problem, however, by specifying the types of evidence that will be admissible.⁵⁹¹

4.94 It is arguable, however, that such a legislative amendment is unnecessary. Whether or not the accused suffered from a history of domestic violence is arguably relevant to a determination of the accused's belief in the necessity of her acts, even if battered woman syndrome is not relied upon. As such, the current rules of evidence are already capable of allowing such information to be considered, and may not need to be reformed.⁵⁹² While they may not be consistently applied, it is arguable that it is better to leave the law as it is, and simply argue for the relevance of the matter at trial. If such evidence is deemed inadmissible, an appeal could be sought, which would clarify the status of such evidence.

4.95 In response, it could be claimed that requiring parties to argue for the relevance of such evidence, and even potentially to appeal any unfavourable decision, would be a long and costly experience. While legislative clarification may be technically unnecessary, it may be desirable to avoid any such confusion, and make clear that such evidence is relevant, thereby avoiding any legal argument over admissibility. This may have the additional symbolic consequence of ensuring that self-defence does not remain solely identified with 'pub-brawl' scenarios, by clarifying that the entire history of the relationship is of significance. This may encourage trial lawyers and judges to consider the relevance of domestic violence in these cases.

4.96 In addition, while such a reform addresses the issue of the relevance of the history of abuse, it does not address the relevance of social framework evidence. Even if a provision like the Queensland provision was inserted into Victorian law, a judge could still exclude evidence about the general dynamics of domestic violence. It may also be necessary to legislate that such information is also relevant and admissible.

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QUESTIONS

24. Should the law specify that evidence about a history of abuse is relevant and admissible in a determination of self-defence?
25. Should the law specify that social framework evidence is relevant and admissible in a determination of self-defence?
26. If so, should there be a general provision about the relevance of such evidence, or should the provision specify the particular issues that are of relevance?

590 Zoe Rathus, *Rougher Than Usual Handling, Women and the Criminal Justice System, A Gender Critique of Queensland's Criminal Code and the Review Process Initiated by the Queensland Government with Particular Reference to the Draft Criminal Code Bill, 1994* (2nd ed) (1995) 139.

591 For example, a list of factors such as that outlined above in para 4.85 could be specified to be relevant. Alternatively, the factors outlined in para 4.131 below could also be addressed in terms of evidentiary admissibility rather than substantive elements of the law.

592 See for example, *Osland v The Queen* (1998) 197 CLR 316, 376: '[T]here is considerable agreement that expert testimony about the general dynamics of abusive relationships is admissible if relevant to the issues in the trial and proved by a qualified expert.' (Kirby J).

Expert Evidence

4.97 We have seen above that under the current law it is possible to call ‘experts’ to give evidence on issues about which juries may have a limited understanding.⁵⁹³ There are particular rules governing the use of such evidence, that focus on the kind of evidence which can be given and who should be allowed to give it. We discuss these rules and their impact on women who kill in response to domestic violence below.

The Common Knowledge Rule

4.98 In our discussion of battered woman syndrome evidence we noted that there is a general rule of evidence that information which is viewed as already being within the jury’s knowledge is not admissible at trial. This is known as the ‘common knowledge rule’.⁵⁹⁴ For example, it is unlikely that evidence that the sun is hot would be allowed to be introduced at a trial, because it is within the jury’s ‘common knowledge’. The reasoning behind this rule is that allowing witnesses to give evidence on such matters would be a waste of time and money. It is not a special area of expertise that requires the assistance of an expert witness.

4.99 One of the potential problems faced by women who kill in response to domestic violence is that it is arguable that evidence about the dynamics of domestic violence is also within the jury’s ‘common knowledge’. Given the large numbers of people in our society who have experienced such violence, a judge may conclude that the jury will already understand its nature and not need to be provided with any additional information. This is seen to be a particular problem for women who kill, because although domestic violence is widespread, its dynamics and how it can affect a person’s behaviour seem to be little understood.⁵⁹⁵ Instead, people’s views about domestic violence may be influenced by myths and stereotypes. These myths—such as the belief that a woman can simply leave a violent relationship—are seen as potentially damaging to a woman’s case. ‘Expert evidence’ is seen to be necessary in order to challenge such stereotypes and properly inform the jury about the nature of such violence and its consequences.

4.100 This issue has been addressed in cases involving battered woman syndrome evidence, because the syndrome is not seen to be something within a jury’s ‘common knowledge’. As such, psychiatrists and psychologists are free to give evidence about the nature of the syndrome and its effects on women. It is possible, however, that social framework evidence, which does not address a particular psychiatric syndrome, but simply looks at the dynamics of domestic violence, will not be treated in this way. Such evidence may be viewed as ‘common knowledge’ and excluded from trial.

4.101 As with the issue of relevance, it is uncertain whether this will be the case. It is arguable that such evidence is not within a jury’s ‘common knowledge’ and so will already be admissible under current laws. If this is the case, there may be no need for reform. On the other hand, it is arguable that, given the risk of exclusion of such evidence, it may be preferable to specify legislatively that a complete understanding of domestic violence is not within the jury’s ‘common knowledge’, and that evidence explaining such information is admissible at trial.

593 See paras 4.56–4.57.

594 See above para 4.57; For a detailed discussion of the common knowledge rule, see Ian Freckelton and Hugh Selby, *The Law of Expert Evidence* (1999) Chapter 6.

595 There are several studies which indicate that despite significant community education campaigns, there is still very limited understanding of domestic violence: see for example, Women’s Domestic Violence Crisis Service, *What’s Love Got To Do With It?: Victorian Women Speak About Domestic Violence*, Annual Report 2001–2002 (2003) 7.

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QUESTION

27. Should the law specify that an understanding of domestic violence is not within the jury's 'common knowledge', and that evidence explaining such information is admissible at trial?

Area of Expertise and Qualifications of Experts

4.102 Even if the context of domestic violence is considered to be relevant and not within the jury's 'common knowledge', questions arise about what kind of evidence can be given, and who is able to give such evidence. There is a general principle that only suitably 'qualified' experts can give evidence in relation to an 'area of expertise'.⁵⁹⁶ The nature of the qualifications required will vary depending upon the particular area of expertise. For example, only medical practitioners will be able to give evidence about medical issues, while lawyers can give evidence about legal issues.

4.103 These rules can create problems for women who kill in response to domestic violence in two ways. First, it is possible that the court may not view domestic violence as an 'area of expertise'. The study of domestic violence may not be seen as having sufficient 'scientific rigour' to be classified in such a way. This is not an issue in the case of battered woman syndrome evidence, for the court has accepted battered woman syndrome as an area of expertise. It may be a problem in relation to social framework evidence, however, which is not specifically focused upon a psychological condition, but examines the entire area of domestic violence.

4.104 Secondly, even if domestic violence is seen to be an 'area of expertise', the court may have difficulty determining who is qualified to give evidence. This is not a problem in relation to evidence in relation to battered woman syndrome, because psychiatrists and psychologists are seen to be suitably qualified to give evidence about the accused's mental state.⁵⁹⁷ If social framework evidence were to be preferred, however, what witnesses would be seen to have appropriate qualifications to give evidence in court?

4.105 It is arguable that neither of these requirements should cause problem for the introduction of social framework evidence, and that the law is not in need of reform. There is seen to be ample evidence of research, publications and courses of study to demonstrate that domestic violence is an area of specialised knowledge. There are a number of independent studies that form an established body of research.⁵⁹⁸ Similarly, those who work in the field are argued to be 'experts', and should be allowed to give evidence. This could include people with extensive histories of working with women who have experienced domestic violence, or in research. It could also include social workers, women who work at refuges, community educators, criminologists or sociologists.⁵⁹⁹

596 For a detailed discussion about these rules, see Ian Freckelton and Hugh Selby, *The Law of Expert Evidence* (1999) Chapter 4.

597 This is actually considered a problem with the use of battered women's syndrome evidence, for psychiatrists can be very expensive and in Australia the number of psychiatrists qualified to give such evidence may be limited. This may make it very difficult, if not impossible, for an accused to procure such evidence, particularly if she is reliant upon legal aid. In our study, at least 59.3% of those charged with homicide offences relied on legal aid at some point in the course of their trial. This problem could perhaps be overcome through the use of social framework evidence, which could open up a broader pool of 'experts' to call at trial.

598 Rebecca Bradfield, *The Treatment of Women Who Kill Their Violent Male Partners Within the Australian Criminal Justice System* (PhD Thesis, University of Tasmania, 2002) 313.

599 See for example, Elizabeth A Sheehy, Julie Stubbs and Julia Tolmie, 'Defending Battered Women on Trial: The Battered Woman Syndrome and Its Limitations' (1992) 16 *Criminal Law Journal* 369 393; Nan Seuffert, 'Battered Women and Self-Defence' (1997)

4.106 Despite these assertions about the ‘respectability’ of domestic violence research, however, it is possible that some courts may still choose to exclude such general information as lacking a scientific basis. Freckelton has noted that the courts are now starting to apply the expertise rule with increasing rigour.⁶⁰⁰ If the introduction of social framework evidence is seen to be desirable, it may be necessary to specify that the study of domestic violence is an area of expertise, and to also specify who is qualified to give such evidence.⁶⁰¹

? QUESTIONS

28. Should the law specify that the study of domestic violence is an ‘area of expertise’?
29. Should the law specify the people qualified to give evidence about domestic violence? If so, who should be included?

OTHER EVIDENTIARY RULES

4.107 While the rules relating to relevance and the use of expert evidence have been identified as the main issues in this area, some commentators have identified problems with other areas of evidence law. For example, Bradfield notes that rules about hearsay and prior inconsistent statements can act to exclude certain evidence that may indirectly corroborate the accused’s allegations of physical abuse.⁶⁰² We would welcome any submissions about whether these rules, or others, do pose a particular problem for women who kill in response to domestic violence, and ways that these issues could be overcome.

17 *New Zealand Universities Law Review* 292–328. Another possible approach to this issue would be to argue that the evidence provided is evidence of ‘experience’ rather than ‘opinion’. The restriction relating to the qualification of experts only applies to ‘opinion’ evidence. People with extensive practical experience can give evidence of their experiences, even if they have no formal qualifications: *Weal v Bottom* (1966) 40 ALJR 436.

600 Ian Freckelton, ‘Contemporary Comment: When Plight Makes Right—Forensic Abuse Syndrome’ (1994) 18 *Criminal Law Journal* 29.

601 Rathus has suggested the following model that incorporates a number of the factors discussed above:

‘In any criminal proceedings involving an “assault offence” where the defendant and the person assaulted are or have been in a domestic relationship in which abuse has occurred, evidence of the nature, duration and extent of the abuse is relevant...

Expert testimony concerning the nature and effect of domestic violence is relevant in such cases to assist the court in understanding the behaviour, beliefs or perceptions of the defendant.

A witness should be qualified to testify as an expert witness based upon his or her knowledge, skill, experience, training or education.

Domestic relationships about which such testimony should be admissible include persons who are or have been spouses or defacto partners, persons who are or have lived ordinarily in the same household as each other (other than merely as co-tenants or boarders), persons who are or have been relatives or persons who are or have had an intimate personal relationship with each other.’: Zoe Rathus, *Rougher Than Usual Handling. Women and the Criminal Justice System, A Gender Critique of Queensland’s Criminal Code and the Review Process Initiated by the Queensland Government with Particular Reference to the Draft Criminal Code Bill, 1994* (2nd ed) (1995) Recommendation 27.

602 Rebecca Bradfield, *The Treatment of Women Who Kill Their Violent Male Partners Within the Australian Criminal Justice System* (PhD Thesis, University of Tasmania, 2002) Chapter 7. See also Julia Tolmie, ‘Pacific-Asian Immigrant and Refugee Women Who Kill Their Batterers: Telling Stories that Illustrate the Significance of Specificity’ (1997) 19 *Sydney Law Review* 472–487–8; Julie Stubbs and Julia Tolmie, ‘Battered Woman Syndrome in Australia: A Challenge to Gender Bias in the Law?’ in *Women, Male Violence and the Law*, Julie Stubbs (ed) (1994) 195.

?

QUESTION

30. Are there any other rules of evidence that pose particular problems for women who kill in response to domestic violence successfully relying upon self-defence? If so, how should these problems be addressed?

2 CLARIFY THE CURRENT LAW

4.108 We have noted above that the current law of self-defence is very broad and is potentially capable of providing a defence for women who kill in response to domestic violence. We have also seen, however, that despite this technical capacity of the law to deal with such circumstances, in practice it may not do so. In the previous section it was suggested that one way of addressing this issue would be to reform the laws of evidence. It is arguable, however, that such an approach may not be sufficient to resolve all of the issues outlined earlier in this chapter. Instead, it may be preferable to clarify the precise scope of self-defence, to make clear its applicability in such circumstances.

4.109 In this section we examine a number of ways in which the law can be clarified. We begin by looking at a simple codification of the law. We then look at the possibility of defining when an accused reasonably believes her or his actions to be necessary. Following this, we investigate broader ways of clarifying the scope of the law. We look at the possibility of legislating circumstances that should not be excluded from the scope of self-defence, as well as examining factors that could be specifically taken into account in making a determination of the applicability of self-defence. Each of these approaches starts from the basis that the substantive law itself does not need amending—it is just a matter of clarifying how that law is to be applied.⁶⁰³

CODIFY THE LAW

4.110 One option would be for the law to remain substantively the same, but to codify it more precisely. This was the recommendation of the Model Criminal Code Officer's Committee, which suggested the following model:⁶⁰⁴

313.1 Conduct is carried out by a person in self-defence if

- the person believed that the conduct was necessary
 - to defend himself or herself or another person; or
 - to prevent or terminate the unlawful imprisonment of himself or herself or another person; ...and
- his or her conduct was a reasonable response in the circumstances as perceived by him or her.

4.111 This test makes some small modifications to the current law;⁶⁰⁵ it does not differ greatly. The test is still a generic one⁶⁰⁶ and contains a subjective and objective element.

603 In the following section we examine options for reforming the law itself.

604 Criminal Law Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code, Chapter 2, General Principles of Criminal Responsibility*, Final Report (1992) para 313. The model suggested contains a number of other provisions, but these have not been included as they relate to the broader application of self-defence and are not relevant to self-defence in the context of homicide.

605 In particular, the objective element differs slightly from the current model. Instead of requiring the accused's belief to be based on reasonable grounds, the proposed test requires the response to be reasonable in the circumstances as perceived by the accused. It is

4.112 Such an approach is seen to have the advantage of clarifying some of the uncertainties in the law, and making it simpler for the jury to understand. However, it may be considered unnecessary, given that the current law is already seen by many to be sufficiently clear and simple. In addition, such an approach does little to help women who kill in response to domestic violence and may in fact make it more difficult given its focus on the proportionality of response.⁶⁰⁷ It would be possible, however, to combine such a test with some of the other options outlined below that specifically address the barriers faced by such women.

? QUESTION

31. Should Victoria adopt the model for self-defence proposed by the Model Criminal Code Officers' Committee?

DEFINE WHEN IT IS REASONABLE TO BELIEVE THAT FATAL FORCE IS NECESSARY

4.113 We noted above that one of the main criticisms of the current law is that self-defence is too closely associated with the 'pub-brawl' scenario. While the current test provides scope for other kinds of self-defensive action to fall within the scope of the defence, little guidance is given. It is thus possible for prosecutors to argue that a woman who kills her violent partner wasn't 'really' acting in self-defence, particularly in 'non-confrontational' circumstances, because, for example, there was no threat of imminent harm. In the absence of any legislative guidance, a jury may be convinced to adopt such an approach to self-defence, despite the fact that they are not required to by the law.

4.114 One way to avoid this particular problem would be to provide the jury with some additional guidance, in the form of legislative definitions of some of the concepts relevant to the test. Some help could be given to assist in determining when a woman might believe, on reasonable grounds, that her actions were necessary. Two main areas have been suggested as appropriate fields for clarification: the issues of imminence of harm and the question of alternative options.

Inevitable Harm

4.115 We saw above that the issue of imminent or immediate harm can cause a particular problem for women who kill in response to domestic violence.⁶⁰⁸ It is sometimes assumed that lethal force will only be required where there is a threat of such harm. In fact, it was noted that the key issue under the current law is whether it was immediately necessary to act to prevent harm, regardless of whether the threat of harm was imminent or not. In most cases the threat of harm will need to be imminent in order for it to be immediately necessary to act with self-defensive force.

4.116 It would be possible to clarify this issue legislatively. A provision could be passed which specified that there need not be a threat of imminent or immediate harm in order for self-defence to be applicable. Instead, the law could specify that it is reasonable to believe that fatal force is necessary if the

difficult, however, to see how these two tests would differ in practice. It is highly likely that any conduct which falls within the scope of the current test would also fall within the scope of the proposed test and vice versa.

606 That is, it contains no specific references to the circumstances of women who kill in response to domestic violence.

607 Although, as noted above, this is unlikely to make any practical difference. A woman who is excluded under the MCCOC test due to the unreasonableness of her response is likely to be excluded under the current test for either not believing her acts were necessary, or for that belief not being based on reasonable grounds: see above paras 4.39–4.44.

608 See above paras 4.39–4.44.

threat of serious injury or death is *inevitable* or ‘unavoidable in the sense that the accused could not otherwise guarantee her or another’s safety, rendering defensive violence necessary’.⁶⁰⁹

4.117 Such a reform may be seen as unnecessary, given that imminence of harm is no longer a separate requirement of the law. However, although the current test may be able to deal with this issue, in practice there is still some confusion. Defining the issue in terms of inevitable, rather than imminent, harm is seen to have the advantage of focusing the court’s attention on the history of violence rather than the final incident. While the final incident would remain relevant—as it forms part of the entire history of the relationship—it would become clear that the jury could look beyond that incident. It would also make clear the relevance of evidence of the violent relationship, as it would provide important background information as to why the accused may have believed danger was inevitable, despite the lack of imminent harm. In addition, judge’s jury directions could be drafted to help explain to the jury how danger can be inevitable, even if not imminent.⁶¹⁰ This would be of particular assistance to women who kill in non-confrontational situations.

4.118 It could also be argued that such a reform might broaden the scope of self-defence too far. It is arguable that it paves the way for people to kill someone in revenge, or for financial motives, and then claim that it was necessary because they were in danger of inevitable harm. It may be argued that the only way to prevent such fraudulent claims is to require there to be an imminent threat of harm. In response, it could be argued that such a reform does not actually broaden the scope of the law—it simply clarifies the current law. In addition, the accused would need to believe their actions were necessary, which would not be the case if there were an alternative motive.

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QUESTION

32. Should the law specify that it is reasonable to believe that fatal force is necessary if the threat of serious injury or death is inevitable or unavoidable?

Duty to Retreat

4.119 Another barrier faced by women who kill in response to domestic violence is the availability of alternative options. This is seen to be a particular problem for women who kill in ‘non-confrontational’ circumstances, as it is usually argued that they ‘could have left’, thereby avoiding the need for fatal force to be used. There is, however, no separate legal requirement that the accused must retreat before attempting to defend him or herself.⁶¹¹ Whether or not the accused retreated will simply be a relevant factor in determining whether his or her actions were necessary in the circumstances.

4.120 We have seen above that it is argued that a number of factors should be taken into account when determining whether or not the accused should have pursued alternative options.⁶¹² One additional factor which is sometimes discussed is the location of the homicide. In particular, it is noted that such homicides usually occur in the home of the accused. It is arguable that an accused should not

609 Canadian Association of Elizabeth Fry Associations, *Response to the Department of Justice Re: Reforming Criminal Code Defences: Provocation, Self-Defence and Defence of Property*, (1998) 33–4.

610 On the issue of judge’s charges, see below paras 4.212–4.213.

611 *Zecevic v DPP (Vic)* (1987) 162 CLR 645, 663.

612 See above paras 4.45–4.52.

be required to avoid the use of force in self-defence if this would require a retreat from his or her home. A person's home is seen to be their 'castle', and it is arguable that there should be no obligation to leave that 'castle'.⁶¹³ So if, for example, intruders enter people's homes, it is argued that they should be able to defend themselves rather than being required to leave their homes.

4.121 The issue of retreating from one's home has received little attention in the context of women who kill in response to domestic violence.⁶¹⁴ It is arguable, however, that it could be of great importance. Currently, in constructing a woman's decision to kill as unnecessary, it can be argued that she could have left. Her decision not to do so may be seen as unreasonable. If it was made clear, however, that there is no obligation to leave one's home, then such arguments would be moot. Decisions to 'stay' or 'go' would not be taken into account in determining the reasonableness of an accused's actions.

4.122 It is arguable that making it clear that there is no duty to retreat from the home may lead to the risk of people unjustifiably killing in defence of their property. That is, men or women who see someone breaking into their home may come to believe that they will be excused if they kill. While this may be correct, the availability of the defence will depend on the particular circumstances. In particular, it will depend on whether the accused had a fear for their safety, based on reasonable grounds, and they believed it was necessary to kill in the circumstances.⁶¹⁵ Simply wishing to defend one's property is not sufficient grounds for killing. It would be important to ensure that the requirement for a reasonable belief that it is necessary to act in order to prevent death or serious injury, rather than to simply protect the home, is made clear in any legislative reform. This could be explicitly done either by excluding killings in defence of property from the scope of the law,⁶¹⁶ or by restricting the legislative provision to situations where people have suffered domestic violence.

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QUESTION

33. Should the law clarify that there is no duty to retreat from one's home?

DEFINE WHEN SELF-DEFENCE SHOULD NOT BE EXCLUDED

4.123 We have seen throughout this chapter that many of the barriers to the successful use of self-defence by women who kill in response to domestic violence arise because of the association of self-defence with spontaneous encounters. One of the consequences of this association is that when killings

613 This was previously the law in Australia: *Hussey* (1924) 18 Cr App R 160. This specific rule has probably now been overruled by *Zecevic v DPP (Vic)* (1987) 162 CLR 645, which focuses on the reasonableness of the act. On this issue, see Elizabeth A Sheehy, Julie Stubbs and Julia Tolmie, 'Defending Battered Women on Trial: The Battered Woman Syndrome and Its Limitations' (1992) 16 *Criminal Law Journal* 369 373–4; Nan Seuffert, 'Battered Women and Self-Defence' (1997) 17 *New Zealand Universities Law Review* 292 n 137.

614 But see, for example, Nan Seuffert, 'Battered Women and Self-Defence' (1997) 17 *New Zealand Universities Law Review* 292 316. This issue is often addressed indirectly by those who argue that rather than asking 'why didn't she leave', the relevant question should be 'why didn't he leave?', or 'why didn't he stop the abuse'. This argument attempts to make clear the fact that the woman has as much right as the man (if not more) to remain in the family home.

615 For example, if they confront the intruder who turns out to be unarmed and posing little threat to their safety, their actions may not be seen to be in self-defence.

616 See for example, Criminal Law Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code, Chapter 2, General Principles of Criminal Responsibility*, Final Report (1992) s 313.2, which excludes defence of property from the scope of self-defence which results in death.

occur in other contexts, self-defence may be thought to be irrelevant.⁶¹⁷ This may be the case even though the accused genuinely believed, upon reasonable grounds, that her or his actions were necessary in the circumstances.

4.124 One way to address this problem would be to specify that self-defence may be available in particular circumstances where it may otherwise be thought to be irrelevant. This was suggested by Bradfield, who argues that:

The aim for self-defence should be to allow the defence in situations where a person is responding to the cumulative effect of violence. Legislative prescription that the behavioural pattern of battered women acting in self-defence is not excluded from lawful self-defence would be a positive step.⁶¹⁸

4.125 Such a reform could be achieved legislatively, by drafting a provision which specifies that self-defence should not be precluded simply by virtue of a particular fact. Such a provision could form the basis of the judge's charge in relevant cases.⁶¹⁹ Some of the factors which could be specified include:⁶²⁰

- that the accused was responding to a history of personal violence against himself or herself or another rather than a single isolated attack;⁶²¹
- that the accused had not pursued options other than the use of force;⁶²²
- that the accused used a weapon against an unarmed person;⁶²³
- that the killing was planned;⁶²⁴
- that the accused killed via an agent;⁶²⁵

617 See above para 4.20.

618 Rebecca Bradfield, *The Treatment of Women Who Kill Their Violent Male Partners Within the Australian Criminal Justice System* (PhD Thesis, University of Tasmania, 2002) 245.

619 Alternatively, if legislative change is not seen as desirable, similar provisions could simply be inserted into judges' bench books: see below paras 4.212–4.213.

620 These factors are drawn from a number of sources, including Rebecca Bradfield, *The Treatment of Women Who Kill Their Violent Male Partners Within the Australian Criminal Justice System* (PhD Thesis, University of Tasmania, 2002); Canadian Association of Elizabeth Fry Associations, *Response to the Department of Justice Re: Reforming Criminal Code Defences: Provocation, Self-Defence and Defence of Property*, (1998) and Department of Justice, Canada, *Reforming Criminal Code Defences: Provocation, Self-Defence and Defence of Property*, Consultation Paper (1998).

621 This would clarify that self-defence is not to be excluded simply because there was no imminent threat of harm: see above paras 4.27–4.38.

622 This would make clear the fact that there may be a number of reasons why alternative options were not pursued: see above paras 4.45–4.52.

623 This would address problems relating to the disproportionate use of force: see above paras 4.39–4.44.

624 This would make it clear that while premeditation may raise the possibility that the use of lethal force was not reasonably believed to be necessary (because, for example, alternative options could have been pursued instead), the mere existence of planning does not mean that a killing was not in self-defence. It is argued that it 'is to ignore the nature of the danger faced by women in the home to suggest that a planned killing is never a necessary response': Rebecca Bradfield, *The Treatment of Women Who Kill Their Violent Male Partners Within the Australian Criminal Justice System* (PhD Thesis, University of Tasmania, 2002) 247.

625 In a small number of cases, women do not feel able to leave a battering relationship, nor do they feel able to end the violence. They come to form what may be a reasonable belief that the only way to avoid serious injury or death is to engage someone else to kill their abuser. This provides the court with evidence of planning and may provide a basis for rejecting self-defence. It is argued, however, that as such steps may be necessary in particular circumstances, women who kill via an agent should not be excluded from the scope of self-defence simply because they did not commit the homicide themselves. We note that such circumstances are extremely rare. For example, in Mouzos' study of female-perpetrated homicides involving an abusive intimate partner during 1989–2000 there 'were only

- that the accused was responding to a sexual assault;⁶²⁶ and
- that the accused acted in anger.⁶²⁷

4.126 The aim of specifying these factors is not to say that self-defence should always be successful in such circumstances, but rather to make clear that the accused may still have believed, on reasonable grounds, that her actions were necessary, despite the existence of such circumstances. Judges would not be able to remove self-defence from the jury's consideration simply by virtue of one of those circumstances existing, and may be required to instruct the jury that their determination should also not be solely influenced by such factors. Such an approach would be consistent with the flexibility of the current law, which no longer separately requires such factors as an imminent threat or proportionate response.⁶²⁸

4.127 It is arguable that this reform is unnecessary, for the current law does not prevent a woman who kills in any of the specified circumstances from raising self-defence at trial. In response, it is again argued that while such women may technically be able to raise self-defence in such circumstances, in practice there are barriers using it successfully. This reform may help remove them. By clarifying that self-defence is available in these non-traditional circumstances we may disrupt the identification of self-defence with the one-off confrontation, to the benefit of women who kill in response to domestic violence.

4.128 Arguably, by specifying such factors, it may become possible for men to rely on self-defence in circumstances where we may not think it is appropriate. As noted above, self-defence is a defence of general application, so any changes made are equally applicable to men and women. A reform intended to provide a defence for women who kill in response to domestic violence could equally be used by men who kill in spontaneous encounter homicides. Specifying that it may be allowable for such men to have used weapons against an unarmed person may be seen to expand the scope of self-defence too far. In response, it could be argued that listing such factors is not actually expanding the law, but simply clarifying it. An accused will still have to show that there was a belief, based on reasonable grounds, that his or her actions were necessary.

three recorded cases where the woman killed her partner with the assistance of another person (usually her son). In all these cases both the female and the co-offender had suffered abuse at the hands of the victim.' Jenny Mouzos, *When Women Kill: Scenarios of Lethal Self-Help in Australia 1989–2000* (PhD Thesis, University of Melbourne, 2003) 118.

626 Currently there is some debate about whether sexual assault is 'serious' enough to provide a possible basis for the use of fatal force. This would clarify the seriousness of a sexual assault.

627 In some cases women who kill in response to domestic violence will have felt anger towards their abuser. This may lead the prosecution to claim that the accused did not kill out of fear, but due to a desire to take revenge. It is argued that 'a valid claim to self-defence should not be denigrated solely by the existence of feelings of anger or the desire for revenge. It is to impose too high a standard on a battered woman. The important point to recall is the essential factor for reliance on self-defence is that the woman genuinely believed that the action taken was necessary for her protection, regardless of the other emotions that she may have felt.' Rebecca Bradfield, *The Treatment of Women Who Kill Their Violent Male Partners Within the Australian Criminal Justice System* (PhD Thesis, University of Tasmania, 2002) 200–1. See also Stella Tarrant, 'Something is Pushing Them to the Side of Their Own Lives: A Feminist Critique of Law and Laws' (1990) 20 *Western Australian Law Review* 573 602.

628 *Zecevic v DPP (Vic)* (1987) 162 CLR 645.

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QUESTIONS

34. Should the law clarify particular circumstances in which self-defence should not be automatically excluded?
35. If the law clarifies particular circumstances in which self-defence should not be automatically excluded, which of the following situations (or any others) should be specified?
- (a) That the accused was responding to a history of personal violence against himself or herself or another rather than a single isolated attack.
 - (b) That the accused had not pursued options other than the use of force.
 - (c) That the accused used a weapon against an unarmed person.
 - (d) That the killing was planned.
 - (e) That the accused killed via an agent.
 - (f) That the accused was responding to a sexual assault.
 - (g) That the accused acted in anger.

ENUMERATE FACTORS TO BE TAKEN INTO ACCOUNT

4.129 Instead of clarifying the scope of self-defence exclusively (by specifying circumstances in which self-defence should not be precluded), it would be possible to clarify its scope inclusively. That is, it would be possible to specify a number of factors to be taken into account in determining whether the accused believed, on reasonable grounds, that his or her actions were necessary. These factors could make it clear to the jury that self-defence is not simply about a one-off confrontation, but involves a consideration of the entire context of the killing.

4.130 This could be done through the introduction of a generic statement highlighting that contextual factors are relevant. For example, Zoe Rathus has recommended the following provision:

A person is justified in using in defence of himself or herself or of another person, such force as he or she believes, on reasonable grounds, is necessary in the circumstances. In determining the reasonableness of the beliefs of the defendant the personal history of the defendant and the history of any relationship between the defendant and the person against whom force is used and the effects of that relationship upon the defendant are relevant.⁶²⁹

629 Zoe Rathus, *Rougher Than Usual Handling, Women and the Criminal Justice System, A Gender Critique of Queensland's Criminal Code and the Review Process Initiated by the Queensland Government with Particular Reference to the Draft Criminal Code Bill, 1994* (2nd ed) (1995) Recommendation 26.

4.131 Alternatively, it may be preferable to spell out some of the factors to be taken into account in more detail. Some of the issues that have been argued to be relevant to a determination of self-defence, which could be enumerated, include:⁶³⁰

- (a) the nature, duration and history of the relationship between the accused and the abuser, including prior acts of violence or threats, whether directed at the accused or at others;
- (b) the cumulative effect of any violence;
- (c) the age, race, sex, physical and psychological characteristics and economic status of the accused and the abuser;
- (d) the nature and inevitability of the threat of violence, including whether it was part of a pattern of control, whether it was avoidable with some degree of certainty, and whether an immediate response was needed;
- (e) any efforts made by the accused to resist, expose, or minimise the violence, and the results of such efforts;
- (f) the accused's experience regarding the efforts of others to seek intervention or assistance to prevent the violence;
- (g) the means available to the accused to respond to the violence, including the accused's mental and physical abilities and the existence of options other than the use of force. Factors of relevance include:
 - the accused's economic means to support herself and her children;
 - the availability and effectiveness of refuges, taking into account factors such as the accused's race, culture, language and location;
 - the practical possibility of recourse to, and likely effectiveness of, the criminal justice system;⁶³¹ and
 - the accused's citizenship status and any threats to report the accused to immigration authorities.
- (h) the increased vulnerability of women upon separation.

4.132 Each of these factors addresses one or more of the barriers faced by women who kill in response to domestic violence. For example (e), (f) and (g) specifically target the issue of the availability of alternative options,⁶³² while (c) and (d) can also address issues relating to the imminence of harm,⁶³³ and

630 These factors are drawn from a number of sources, including Rebecca Bradfield, *The Treatment of Women Who Kill Their Violent Male Partners Within the Australian Criminal Justice System* (PhD Thesis, University of Tasmania, 2002), Canadian Association of Elizabeth Fry Associations, *Response to the Department of Justice Re: Reforming Criminal Code Defences: Provocation, Self-Defence and Defence of Property*, (1998) and Department of Justice, Canada, *Reforming Criminal Code Defences: Provocation, Self-Defence and Defence of Property*, Consultation Paper (1998).

631 While it is often said that women should seek the help of the police or the legal system, this is often not a viable alternative for a number of reasons. In their Annual Report of 2001–2002, the Women's Domestic Violence Crisis Service note that reasons given to them for not reporting domestic violence to the police include having called them in the past with no result; fear of escalating violence; fear of losing control; distrust of police and authorities; involvement in criminal activities such as drug use; fear of losing children; fear of no follow through; regarding violence as a private matter; or the fact that the perpetrator may be a member of the police force: Women's Domestic Violence Crisis Service, *What's Love Got To Do With It?: Victorian Women Speak About Domestic Violence*, Annual Report 2001–2002 (2003) 16. It is argued that these kinds of factors should be addressed in determining whether a woman had alternative options available to her.

632 See above paras 4.45–4.52.

proportionality of response.⁶³⁴ Each factor aims to make clear that self-defence is not simply limited to the bar-room brawl scenario, and that it is necessary to take into account the entire context of the relationship.

4.133 It may be argued that legislating that these factors be taken into account will make self-defence unnecessarily complex. One of the benefits of the current law is that it is simple, and capable of adapting to changing circumstances. In response to this argument, however, it can be argued that the introduction of such factors into law is necessary to ensure that the law works properly in practice. That is, enumerating such factors is necessary because we cannot presume that a judge, jury or counsel will undertake such a careful assessment of the context. If they are specified in law, it will ensure that they are considered in the course of any relevant trial. Defining such concepts will ensure a better standard of lawyering, as well as ensuring the admissibility of relevant evidence.⁶³⁵ Finally, if such factors are enumerated in law it is likely that they will also end up as part of a judge's charge to the jury at the end of the trial,⁶³⁶ leading to the explanation of concepts that may otherwise be misunderstood. The importance of enumerating such factors was argued for by the Canadian Department of Justice in proposing a similar list of factors:

The purpose of this list is to require the court to assess the context, including the history of violence and the availability of help. It may be that it is extremely difficult for a male judge to decide what is reasonable fear for a woman, but the substantive law can indicate what evidence will be relevant and require that specific issues be addressed. This is not to argue for separate legal standards, but simply for recognition that a woman may reasonably perceive herself to be in danger when a man might not.⁶³⁷

4.134 In addition, it is important to note that if such a reform were adopted, the substantive test would not change. The jury will still need to determine whether the accused believed, on reasonable grounds, that his or her actions were necessary. These are simply factors to be taken into account in relevant cases. There will not be a general need to examine these factors, unless there is an allegation of a past history of domestic violence that was relevant to the homicide.

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QUESTION

36. Should a list of factors be enumerated to be taken into account in relevant cases? If so, what factors should be listed?

633 See above paras 4.27–4.38.

634 See above paras 4.39–4.44.

635 Canadian Association of Elizabeth Fry Associations, *Response to the Department of Justice Re: Reforming Criminal Code Defences: Provocation, Self-Defence and Defence of Property*, (1998). On the admissibility of evidence, see above paras 4.88–4.107.

636 On judge's charges, see below paras 4.212–4.213.

637 Department of Justice, Canada, *Reforming Criminal Code Defences: Provocation, Self-Defence and Defence of Property*, Consultation Paper (1998) 68.

3 AMEND THE LEGAL TEST

4.135 Each of the options outlined above relies on the argument that the law itself doesn't need to be amended; it is simply a matter of clarifying its scope. There are some who argue, however, that it would be preferable to reform the legal test itself. In particular, two main options for reform have been suggested:

- make the test entirely subjective;
- make the test fully objective.

We examine each of these possibilities below.

MAKE SELF-DEFENCE ENTIRELY SUBJECTIVE

4.136 The current test relies on a mixture of subjective and objective elements. The subjective element focuses on the accused's belief that their acts were necessary, while the objective element requires that their belief be based on reasonable grounds. It has been suggested that it would instead be preferable to have an entirely subjective test.⁶³⁸ Such a test would simply require the jury to determine whether the accused honestly believed that their actions were necessary in the circumstances. The act need not actually have been necessary in the circumstances, nor need it have been based on reasonable grounds. The key issue is whether the accused *believed* it was necessary.

4.137 One of the arguments in favour of such a test is that it coincides with general principles of criminal responsibility. Ordinarily, we determine an accused's blameworthiness according to his or her mental state at the time the crime was committed. If people did not have a culpable mental state, we usually do not believe that they should be held responsible for their actions. In the case of homicide, it is argued that if people kill when they genuinely believe it was necessary to do so, they will not be 'sufficiently blameworthy to be guilty of murder',⁶³⁹ even if that belief was unreasonable.

4.138 It is also arguable that a subjective test would aid women who kill in response to domestic violence. We have seen above that one of the barriers faced by women who kill in these circumstances is showing that their belief in the necessity for action was based on reasonable grounds. Factors such as a lack of imminent harm, or the availability of alternative options, may lead a jury to conclude that the accused's belief was unreasonable. It is argued that any test of 'reasonableness' will implicitly incorporate a male standard, which takes no account of gender differences.⁶⁴⁰ This has led some to argue that

gender equity can only be achieved by applying a subjective test as to the accused's belief. If a jury is satisfied that the accused honestly believed he or she was acting in self-defence, they should be directed to acquit the accused. This formulation allows for an evaluation of the woman's defensive action without subjecting her to a male standard of reasonableness.⁶⁴¹

638 See for example, Law Reform Commission of Victoria, *Homicide*, Report No 40 (1991) Recommendation 28; Department of Justice, Canada, *Reforming Criminal Code Defences: Provocation, Self-Defence and Defence of Property*, Consultation Paper (1998).

639 Law Reform Commission of Victoria, *Homicide*, Report No 40 (1991) para 221.

640 Elizabeth Schneider, 'Equal Rights to Trial for Women: Sex Bias in the Law of Self-Defense' (1980) 15 *Harvard Civil Liberties-Civil Rights Law Review* 623 638-657.

641 Helen Brown, *Beyond Battered Woman Syndrome: Reforming Self-Defence to Seek Justice For Women Who Kill* (MA Thesis, Monash University, 1996) 77.

4.139 In response, however, it could be argued that a subjective test will not overcome the barriers faced by women who kill in response to domestic violence, because they will still have to show that they genuinely believed their acts were necessary. While factors such as the lack of imminent harm or the availability of alternative option, may be used to show that a woman's belief was unreasonable, they can also be used to undermine women's credibility. They can be used as evidence that the accused could not possibly have believed she had to kill in the circumstances and is lying. The possibility of such an argument being raised would continue to exist under a subjective test.

4.140 In fact, it is possible that the use of such factors to undermine a woman's credibility may become a bigger problem if a subjective test was introduced. This is because currently the issue of credibility can be indirectly addressed by the introduction of battered woman syndrome evidence.⁶⁴² However, such evidence is generally only relevant to the question of whether the accused's actions were based on 'reasonable grounds'. Under a subjective test, there would be no need to show reasonableness, so arguably battered woman syndrome evidence would be inadmissible. This problem could, however, be overcome by specifying that such evidence is relevant.⁶⁴³

4.141 The main criticism of a subjective test is that it will broaden the scope of self-defence too far, making it available to people who are excessively fearful. Robert Schopp et al⁶⁴⁴ provide the example of a racist man who sees a person of another race walking towards him with a baseball bat. Believing he is in danger, he kills the other person. In fact, if he had looked around he'd have seen he was near a baseball field, where a number of people were congregating for the day's game. His fear in the circumstances was unreasonable, but it was also genuinely held. Under a subjective test which simply looked at his mental state, he would be acquitted.⁶⁴⁵ This is seen to be inappropriate, as it does not require people to live up to any minimum standard of care. It is argued that, at a minimum, we should be required to take due care prior to committing homicide.⁶⁴⁶

4.142 This problem could perhaps be overcome by the introduction of a separate, partial defence for those who act upon a genuine, if unreasonable belief in the need for action. This was recommended by the former Law Reform Commission of Victoria, which in addition to arguing for a subjective test, argued for a new offence of culpable homicide.⁶⁴⁷ We discuss this possibility in detail below.⁶⁴⁸

642 See above para 4.65.

643 For a more detailed discussion about evidentiary rules, see above paras 4.89–4.95.

644 Robert F Schopp, Barbara J Sturgis and Megan Sullivan, 'Battered Woman Syndrome, Expert Testimony and the Distinction Between Justification and Excuse' (1994) *University of Illinois Law Review* 45 98–9.

645 An additional issue which arises from such a scenario is the possibility that such a defence will lead to the perpetuation of stereotypes. People who fear a particular minority group may be excused for their fear, rather than having the unreasonableness of that fear exposed in court.

646 Simon Bronitt and Bernadette McSherry argue that this setting of societal standards is an important element of any criminal defence: 'Generally, if an offence requires a particular mental state as part of its definition, then a subjective test can be applied. However, a mental state forming part of a defence requires an objective test. This distinction is based on societal values. That is, before a society decides to exercise compassion by exculpating an accused from criminal liability, it is entitled to demand that the accused lacked any blameworthiness in relation to the plea relied on. As Stanley Yeo... has pointed out "[a]n unreasonable or negligently held belief would constitute blameworthiness denying the accused the excuse".' Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (2001) 305–6, citing Stanley Yeo, *Compulsion and the Criminal Law* (1990) 200.

647 Law Reform Commission of Victoria, *Homicide*, Report No 40 (1991) paras 222–3 Recommendation 27. Helen Brown also recommends the reintroduction of excessive self-defence to deal with such issues: Helen Brown, *Beyond Battered Woman Syndrome: Reforming Self-Defence to Seek Justice For Women Who Kill* (MA Thesis, Monash University, 1996) 77.

648 See paras 4.196–4.199.

4.143 A subjective test may change the cause of women who kill in response to domestic violence. This is because their actions are no longer viewed as necessary, or even based on reasonable grounds. By simply focusing on the accused's mental state, the law may give the impression that women who kill in response to domestic violence are acting irrationally, if understandably. A test which is either fully objective, or at least contains an objective element, is seen as preferable, insofar as it highlights the reasonableness of women's reactions in the circumstances:

The argument is that the law should openly acknowledge that the behaviour of battered women who kill is an appropriate and justified response in the circumstances (justified self-defence), rather than an aberrant but excused response (excused self-defence). Self-defence as a justification recognises that others in the same situation would do the same thing, while an excuse holds that others would not do the same thing, but the circumstances explain or mitigate the accused's responsibility.⁶⁴⁹

4.144 By simply focusing on the accused's mental state, a subjective test may also add to the perception that the experience of domestic violence is an individual issue, rather than about women's collective experience of male violence. It is argued that 'the law should not contribute to the socially-held delusion that wife battering is an individualized experience'.⁶⁵⁰ It is argued that a preferable approach would be to ensure that such cases are treated as a necessary and reasonable response given the circumstances.

4.145 Finally, it is argued that in practice, given many more men than women kill, such a reformulation would in fact further entrench gender bias, as more men came to rely on the defence:

Any move towards total reliance on a subjective test for self-defence is more likely to assist in defending femicide, gay bashing and police killings...than it is to assist battered women on trial. Men who kill their female partners, who terrorize racialized people, or who kill in their roles as agents of the state are more likely to benefit from a legal test for responsibility that avoids looking at the larger context in which they are empowered to kill, and that focuses narrowly on their individual states of mind.⁶⁵¹

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QUESTION

37. Should the test for self-defence focus solely on whether the accused believed their actions were necessary?

MAKE SELF-DEFENCE ENTIRELY OBJECTIVE

4.146 We saw at the beginning of this chapter that self-defence is traditionally considered to be a defence of justification. That is, the accused's actions are seen as being necessary in the circumstances. The current test, however, requires an examination of the accused's mental state, to determine whether they believed their actions were necessary. It is arguable that this undermines the purpose of the defence, which should be focused on whether the actions were actually necessary in the circumstances.

649 Rebecca Bradfield, *The Treatment of Women Who Kill Their Violent Male Partners Within the Australian Criminal Justice System* (PhD Thesis, University of Tasmania, 2002) 73.

650 Canadian Association of Elizabeth Fry Associations, *Response to the Department of Justice Re: Reforming Criminal Code Defences: Provocation, Self-Defence and Defence of Property*, (1998) 27.

651 Ibid 27.

One way of addressing this criticism would be to make the test an objective one. That is, the test could simply be ‘was it necessary for the accused to do what they did in the circumstances?’. Whether or not the accused believed it was necessary would be irrelevant.

4.147 We saw above that, at a symbolic level, such a test may be preferable for women who kill in response to domestic violence.⁶⁵² This is because the focus will not be on their mental state, and what they believed, but rather on whether their actions were necessary. It is argued that women’s actions in such circumstances are often clearly necessary, and this is the appropriate focus for the court.

4.148 In response, however, it can be argued that making self-defence a justification may be unduly restrictive for women who kill in response to domestic violence. It is arguable that it may be too difficult to require ‘the accused to show that killing the aggressor was the right and proper thing to do, a socially desirable thing or the lesser of two evils’.⁶⁵³ This may be particularly difficult for women to show where there were alternative options available to them, or the harm was not imminent.

4.149 In addition, an objective test can be criticised on the basis that it would allow accused who do not believe their acts are necessary—who in fact kill for an alternative motive—to be excused if they can show that their actions were in fact objectively necessary. For example, a woman who kills her husband for financial motives, but can subsequently show that he was going to kill her if she didn’t act first, could be acquitted. This may be seen to be contrary to our current understanding of criminal responsibility, which generally focuses on the accused’s mental state at the time the offence was committed.

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QUESTION

38. Should the test for self-defence focus solely on the necessity of the accused’s acts?

4 INTRODUCE NEW COMPLETE DEFENCE

4.150 Each of the options outlined above propose ways of clarifying or amending the current law so that the barriers faced by women who kill in response to domestic violence can be overcome. It is arguable, however, that none of these options will ever achieve their aim. In particular, it can be argued that no matter what reforms are made, in practice self-defence is always likely to remain associated in the public consciousness with the traditional scenario of a brawl between men. As such, it is possible that women who kill in ‘non-confrontational’ circumstances will continue to be excluded from any general self-defence test, no matter what amendments are made.

4.151 One way to avert this possibility would be to introduce a new defence targeted specifically at women who kill in response to domestic violence.⁶⁵⁴ Such a defence could clearly spell out its availability in ‘non-confrontational’ circumstances, making sure that its use is not limited by the historic

652 See above para 4.143.

653 Ian Leader-Elliott, ‘Battered But Not Beaten: Women Who Kill in Self Defence’ (1993) 15 *Sydney Law Review* 403–432. See also Rebecca Bradfield, *The Treatment of Women Who Kill Their Violent Male Partners Within the Australian Criminal Justice System* (PhD Thesis, University of Tasmania, 2002) 74.

654 We note that any such test need not be limited to women, but could be extended to anyone who kills in response to domestic violence. However, we continue to focus on women throughout this Chapter, due to their prevalence as victims of domestic violence.

associations that may prevent the successful use of self-defence. Any new defence would work in conjunction with traditional self-defence—at trial, a woman could choose to rely on one or the other, or perhaps both of the defences together. It is not anticipated that any such defence would replace the current test for self-defence, which has a broader applicability.

4.152 A number of different options have been suggested. In this section we examine three of these options: a battered woman syndrome defence, the self-preservation model and the coercive control model. Before looking at these specific models we briefly consider the broader question of whether it is actually desirable to introduce a new, specific defence.⁶⁵⁵

CREATE A NEW DEFENCE OR REFORM THE OLD?

4.153 There is some debate over whether it is preferable to introduce a new defence targeted specifically at women who kill in response to domestic violence, or instead to focus on making the generic test for self-defence applicable to such women. In this section we examine some of the arguments for and against the introduction of such a defence.

4.154 The main argument in favour of the introduction of a new defence is that any attempt to incorporate the case of women who kill in response to violence within the scope of a generic defence of self-defence is destined for failure.⁶⁵⁶ It is suggested that the only way to ensure that the defence works properly for women is to craft legal responses specifically targeting the particular issue.

4.155 In support of the introduction of a new defence, it is arguable that such a defence would likely raise public awareness about the need for defensive action in some non-traditional circumstances. By specifying that a particular defence is to be available to women who kill in the context of domestic violence, it is made clear that these killings do differ in an important way from one-off, spontaneous encounters, and that those differences need to be taken into account. This is seen to be important, given that many of the barriers faced by such women are seen to arise from the association of self-defence with the bar-room brawl scenario.

4.156 It is further arguable that the introduction of a new defence will lead to more women being acquitted, due to its impact on both lawyers and juries. At present, a high proportion of women who kill in response to domestic violence end up pleading guilty to a lesser crime rather than contest the matter at trial. It is often suggested that one of the reasons for this is that defence counsel will often advise such women not to rely on self-defence, particularly if the killing arose in ‘non-confrontational’ circumstances.⁶⁵⁷ This may happen either because of a judgment by defence counsel that self-defence is unlikely to succeed, or perhaps because they do not even consider the possibility of self-defence given its

655 In considering the introduction of a new defence, we agree with the New Zealand Law Reform Commission that a number of questions must be kept in mind. These include:

- Should the defence be available only to women, or should it be gender neutral?
- Should the defence only apply to heterosexual relationships, or should it apply to any violent relationship?
- Should the defence only be available in relation to homicides, or should it be a defence to other assaults as well?
- Is the mental state of the defendant relevant, or is the preceding history of domestic violence the crucial and determinative factor?

New Zealand Law Commission, *Battered Defendants, Victims of Domestic Violence Who Offend*, Preliminary Paper 41 (2000) 25.

656 Canadian Association of Elizabeth Fry Associations, *Response to the Department of Justice Re: Reforming Criminal Code Defences: Provocation, Self-Defence and Defence of Property*, (1998) 23–4.

657 A number of other factors are also involved in the decision to plead guilty: see below para 4.202.

usual association with spontaneous encounters. If there is a specific defence to deal with such cases, however, defence counsel will be aware of it, and may be more willing to advise their clients to go to trial arguing this defence.

4.157 If a case does proceed to trial in reliance on a new defence, it is arguable that there will be an increased likelihood of acquittal by juries. This is because the terms of the defence will make it clear that the entire context of domestic violence should be taken into account in determining the outcome of the trial. The evidence will address the specific context of domestic violence, rather than focusing on generic issues of necessity and reasonableness. This may reduce the likelihood that a case is dismissed because it does not coincide with the jury's preconceived ideas about what self-defence 'really' looks like.

4.158 Finally, it can be argued that the creation of a new defence will lead to more clarity in the law. Currently, one of the problems faced by women who kill in response to domestic violence is that there are few cases of precedential value for their lawyers to rely on if they want to proceed to trial.⁶⁵⁸ This creates uncertainty about whether particular killings are likely to lead to an acquittal. If a new provision was created, and was used by women who kill in non-traditional circumstances, in future women (and their lawyers) in similar circumstances will be able to anticipate the likely outcome of their case.

4.159 Those who oppose the introduction of a new defence may argue that such a reform is unnecessary. It is arguable that the current law can be amended so that it accommodates women who kill in response to domestic violence. Such an approach may be preferable, particularly in light of the complexity a new defence would add to the law. It would potentially make trials in such cases more lengthy and complicated, particularly if the new defence is relied on in conjunction with traditional self-defence. Judges' charges, in particular, could become very confusing.

4.160 The introduction of a specific defence may be symbolically damaging to women, in that their actions may not be seen as 'reasonable' in the circumstances, but simply excusable due to the terms of the new defence. It may be preferable for such cases to instead fall within the scope of the current test, and be seen as 'genuine' cases of self-defence, where the accused had to act in the way she did to prevent serious injury or death.

4.161 There may also be problems with community acceptance of a new defence for women who kill in response to domestic violence, particularly if the defence is not framed in gender neutral terms. It could be seen as giving women a 'licence to kill', even if the test were strictly worded. There could be a fear of vigilantism, particularly in light of the common myth that women can freely leave if they are subjected to violence, rather than resort to lethal violence. This may be a particular problem given the seriousness with which homicide is viewed. Many people believe that the number of situations in which a defence to homicide is available should be as limited as possible, with self-defence being one of the few acceptable grounds for an acquittal. While there may be a willingness to accept a defence for women who kill if it can be shown to have been done in self-defence, it may not be acceptable to provide such women with their own specific defence.

658 On this point, see below para 4.215.

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QUESTION

39. Should a new defence be introduced for women who kill in response to domestic violence, or is it preferable to reform the current law?

THE BATTERED WOMAN SYNDROME MODEL

4.162 In our earlier discussion of battered woman syndrome, we noted that it is simply one factor to take into account in determining whether the accused believed, on reasonable grounds, that her acts were necessary.⁶⁵⁹ It would be possible, however, to provide for a specific battered woman syndrome defence. According to such a defence, the accused would have to provide evidence that she was suffering from battered woman syndrome, which caused her to act in the way that she did. If the prosecution could not disprove such a claim, the accused would be acquitted. Instead of examining issues such as the reasonableness or necessity of the accused's actions, the focus of the trial would be on whether she suffered from the syndrome or not, and whether the syndrome was the cause of her actions. If she did suffer from the syndrome, and that was the cause of her actions, the defence would be available, regardless of the reasonableness of her belief or the necessity of her acts.

4.163 The creation of such a defence will arguably lead to a greater recognition of the difficulties faced by women in violent relationships, and the impact such relationships can have upon them. It is also likely to be more widely utilised than the current defence, as the barriers of imminence and proportionality currently faced by women who kill in response to domestic violence will no longer be of such importance.⁶⁶⁰ In addition, it would be possible to make the defence gender neutral (battered person syndrome), so that it was available to anyone who suffered from the relevant mental condition. This could defuse any concerns about the defence being gender-biased.

4.164 However, such a defence would be subject to the same criticisms that the current use of battered woman syndrome faces.⁶⁶¹ For example, a battered woman syndrome defence medicalises women's responses, rather than focusing on the reasonableness of the actions of the accused. It may deflect attention away from the violence of the deceased towards the mental condition of the accused. The defence would require psychiatric evidence, which may not be available or affordable to all women. In addition, as noted above, the syndrome itself has been criticised for lacking scientific rigour, and failing to provide an adequate explanation of why battered women actually kill. This could be a particular problem for a battered woman syndrome defence, which would rely on a causal link between the syndrome and the killing.

4.165 Finally, it is argued that the introduction of such a defence may lead to the creation of a new, static stereotype of the 'battered woman', that will exclude particular women from the scope of the defence, despite the fact that they may be deserving of an acquittal:

It is probably preferable...to avoid reference to [battered woman syndrome] and to simply speak of the battering relationship. There is a danger that in being too closely defined, the syndrome will come to be too

659 See above para 4.62.

660 They may still be relevant, however, in determining whether the accused really did suffer from the syndrome, or whether the syndrome was the cause of her actions.

661 See above paras 4.78–4.84.

rigidly applied by the Courts. Moreover, few aspects of any discipline remain static, and further research and experience may well lead to developments and changed or new perceptions in relation to the battering relationship and its effects on the mind and will of women in such relationships.⁶⁶²

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QUESTION

40. Should a 'battered woman syndrome' defence be introduced?

THE SELF-PRESERVATION MODEL

4.166 An alternative model suggested by Suzanne Beri is the 'self-preservation' model.⁶⁶³ Rather than focusing on a psychiatric 'syndrome', this model focuses on the accused's belief in the need to protect herself. It is proposed that a defence be available to:

Any woman causing the death of a person:

- a) with whom she has, or had, a familial or intimate relationship; and
- b) who has subjected her to racial, sexual and/or physical abuse and intimidation to the extent that she:
 - i) honestly believes there is no protection nor safety from the abuse; and
 - ii) is convinced the killing is necessary for her self preservation.⁶⁶⁴

4.167 This test could have the advantage of focusing attention on the fact that women who kill in response to domestic violence face different circumstances from those who generally raise self-defence. In addition, this defence may be preferable to the current test in that the focus is not on the reasonableness or necessity of the woman's actions, but rather on her genuine belief that she needed to protect herself. It is arguable that this is an appropriate basis for an acquittal—an honest belief that killing in the circumstances was necessary for self-preservation.

4.168 By focusing simply on the woman's belief, this defence faces the criticism that the reasonableness of women's reactions in such circumstances is lost.⁶⁶⁵ In addition, it could be argued that a subjective test such as this, which focuses on the woman's mental state, is too broad. For example, by simply requiring a belief in the necessity of killing, it leaves open the possibility for excessively fearful women to be acquitted even though their belief was unreasonable. Alternatively, by not specifying the level of abuse which she must have faced, it is possible that a woman could be acquitted in circumstances where she has killed on the basis of very minimal abuse, if she could show sufficient fear.

662 *Ruka v Dept of Social Welfare* [1997] 1 NZLR 154, 173 (CA) per Thomas J.

663 Suzanne Beri, 'Justice for Women Who Kill: A New Way?' (1997) 8 *Australian Feminist Law Journal* 113. For another discussion of this model, see New Zealand Law Commission, *Battered Defendants, Victims of Domestic Violence Who Offend*, Preliminary Paper 41 (2000) 22–3; New Zealand Law Commission, *Some Criminal Defences with Particular Reference to Battered Defendants*, Report No 73 (2001) 27–30.

664 Ibid 114. A similar proposal was recommended by the Taskforce on Gender Violence which was set up by the Chief Justice of the Western Australian Supreme Court: 'Conduct is carried out by a person in self-defence if the person is responding to a history of personal violence against herself or himself or another person and the person believes that the conduct was necessary to defend himself or herself or that other person against the violence.': *Report of the Chief Justice's Taskforce on Gender Bias* (1994) 214.

665 See above para 4.143.

4.169 Such a test can also be criticised for failing to cover the possible need to defend others. The test only focuses on the accused's need to defend herself, not on the possible need to protect other individuals, such as her children, from similar harm.⁶⁶⁶ Finally, although issues such as the imminence of harm or proportionality of response would no longer be barriers in terms of showing the reasonableness of the accused's response, they may still be barriers to showing that the accused was convinced that the killing was necessary in the circumstances. This test may therefore not overcome some of the problems with the current law.

? QUESTION

41. Should a defence focusing on 'self-preservation' be introduced?

THE COERCIVE CONTROL MODEL

4.170 A slightly different approach would be to introduce a defence that looks at the accused's need to free him or herself from circumstances of coercive control. The focus of such a defence will not be a psychological syndrome, nor even the need for self-preservation. Instead, such a defence targets the instrumental use of domestic violence to control women, and the possible need to escape such control through the use of lethal force.

4.171 Such a defence could be defined as follows:⁶⁶⁷

- (1) The defence of coercive control is available to a person who:
 - (a) kills in circumstances where the deceased maintains coercive control through a course of conduct which includes any of the following:
 - (i) social isolation
 - (ii) physical or sexual violence or threats thereof, to the accused or another;
 - (iii) psychological or emotional violence, including threats or attacks on pets, or threats to report the accused to immigration authorities;
 - (iv) stalking (as defined in *Crimes Act 1958* s 21A);
 - (v) public humiliation;
 - (vi) deprivation of material necessities; and
 - (b) the killing is necessary to escape the circumstances of coercive control.

⁶⁶⁶ We thank Bernadette McSherry for pointing this out to us.

⁶⁶⁷ This option was created in conjunction with Associate Professor Jenny Morgan. A similar option of introducing a defence of 'tyrannicide' was suggested by Jane Cohen who recommended two requirements for the defence: (i) proof of a regime of private tyranny; and (ii) the killing of the tyrant must be reasonably necessary for the subject to escape from the tyranny. 'Private tyranny' exists where a person maintains control of the subject through social isolation, violence and threats of violence to the subject and those important to them and uses these means to prevent the subject from freeing him or herself from the tyrant's control. In determining what is reasonably necessary for the subject to escape, it is suggested that the risks to the subject of choosing an alternative and the availability and efficacy of the community's own efforts to end such tyrannies, should be taken into account: Jane Maslow Cohen, 'Regimes of Private Tyranny: What do they Mean to Morality and for the Criminal Law?' (1996) 57 *Uni of Pitt LR* 757. This option is discussed in New Zealand Law Commission, *Battered Defendants, Victims of Domestic Violence Who Offend*, Preliminary Paper 41 (2000) 24–5; New Zealand Law Commission, *Some Criminal Defences with Particular Reference to Battered Defendants*, Report No 73 (2001) 27–30.

- (2) In assessing the necessity of the killing in s 1(b) regard must be had, where relevant, to:
 - (a) the severity of the circumstances of coercive control;
 - (b) the alternative means available to the accused to respond to the circumstances of coercive control; and
 - (c) the increased vulnerability of people upon separation from those who maintain coercive control.
- (3) In assessing the means available to the accused to respond to the circumstances of coercive control in s 2(b) a court should examine:
 - (a) the financial circumstances of the accused;
 - (b) the accused's responsibilities for children, if any;
 - (c) any previous efforts by the accused to escape the situation and the results of those efforts;
 - (d) the accused's knowledge of any resources that might be available in the community to help her or him escape the coercive control, and the effectiveness of such alternatives;
 - (e) the racial background of the accused and any effects of systemic racism in the community; and
 - (f) the physical and psychological state of the accused and the deceased.
- (4) Factors that should not preclude the use of this defence include the fact that:
 - (a) the accused had not pursued options other than the use of force;
 - (b) the accused used a weapon against an unarmed person;
 - (c) the accused killed via an agent; or
 - (d) there was no specific threat made at the time of the killing.

4.172 This is a complete, objective defence, that focuses on the necessity of the killing rather than the accused's mental state. It does so in gender neutral terms, so could be applied both to men and women who kill. It aims to address many of the problems outlined throughout this chapter. For example, section (3) specifically focuses attention on the issue of alternative options. Instead of the issue being simply seen as 'Why didn't she leave?' the inclusion of factors such as the existence of children or the race of the accused make it clear that the issue is more complicated. This draws attention to the fact that domestic violence is not an individual problem, but involves structural and cultural issues as well, which can affect a woman's options in the circumstances. These factors are further addressed in section (4), which targets those factors that may mistakenly be believed to preclude the availability of a defence.

4.173 One advantage of such a model is that it makes it clear that killing in such circumstances is necessary, rather than being due to the abnormal mental state of the accused.⁶⁶⁸ Through use of the term

668 Compare with the battered woman syndrome model: see above paras 4.162–4.165.

‘coercive control’⁶⁶⁹ this approach highlights the instrumental use of domestic violence in maintaining control over women. This concept addresses the degree of violent control the abuser has over the accused, as well as the dangers faced when trying to escape.⁶⁷⁰ In doing so, it can validate women’s anxieties about whether her actions were justified, as well as explain her angry or assertive behaviour. It also shifts the focus from questions of imminent or immediate harm, by not focusing on the question of the danger of serious injury or death, but rather on the need to escape.

4.174 It could be argued, however, that such a test is too complex to be applied in practice. It would require detailed jury instructions, which are already criticised as being too long and complicated. This will be a particular problem if traditional self-defence is run as an alternative, because instructions would need to be given on both defences. In response, however, it could be argued that this is a complicated area, and that the current test fails women due to its simplicity, as jurors rely on common myths and stereotypes. Arguably, a more complex jury charge that focuses on the relevant factors would be advantageous. For example, the recommendation above would require a judge to point to the fact that a large number of women are killed when they leave, or attempt to leave, a relationship, and that this should be taken into account in determining whether it was necessary for them to kill in the circumstances.

4.175 Another possible criticism of this defence is that it is too broad. It may be argued that the use of lethal force should be limited to cases where there is a threat of serious injury or death, rather than simply to escape a violent relationship. In response, it should be noted that the defence will only be available where the acts were ‘necessary’, and the nature and extent of the violence will be taken into account in making a determination of necessity. It is unlikely that the use of fatal force will be seen to have been necessary except in the most serious cases.

4.176 Finally, the model outlined above could be criticised for being too vague. In particular, the definition of ‘coercive control’ is alien to our current law, and contains a number of terms that may be difficult to work with in practice. For example, when will a person be held to have maintained coercive control through ‘social isolation’ or ‘public humiliation’? It can be argued that each of these terms is a general concept that is readily understandable. In addition, over time it is likely that such terms will be defined legally, so that this problem will cease to exist.

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QUESTIONS

42. Should a defence of ‘coercive control’ be introduced? If so, should the terms of the defence outlined above be amended in any way?
43. Are there any other possible defences that should be considered?

669 On this term, see further Evan Stark, ‘Battered Woman Syndrome to Coercive Control’ (1995) 58 *Albany Law Review* 973; Canadian Association of Elizabeth Fry Associations, *Response to the Department of Justice Re: Reforming Criminal Code Defences: Provocation, Self-Defence and Defence of Property*, (1998).

670 In doing so, it also allows for differentiation between individual acts of violence by women against their batterers, from the course of action engaged in by the batterers: Canadian Association of Elizabeth Fry Associations, *Response to the Department of Justice Re: Reforming Criminal Code Defences: Provocation, Self-Defence and Defence of Property*, (1998).

5 INTRODUCE NEW PARTIAL DEFENCE

4.177 Throughout this chapter we have focused on the argument that women who kill in response to domestic violence should not be excluded from the scope of self-defence if they reasonably believed their actions were necessary in the circumstances. We have looked at ways to overcome the barriers faced by such women when they raise self-defence at trial. We noted, however, that it is generally not argued that *all* women who kill in response to domestic violence should successfully be able to rely on self-defence.⁶⁷¹ There may be some circumstances where despite the existence of domestic violence, the use of lethal force was not justified. For example, the threat may not be considered sufficiently serious to require a lethal response, or practical alternative options were really available, making the accused's belief in the need to act as she did unreasonable.

4.178 Under the current law, accused persons whose actions are not held to be based on reasonable grounds, are likely to be convicted of murder.⁶⁷² It is arguable, however, that this is an inappropriate result. We saw above that one of the general principles of our criminal law is that we determine people's blameworthiness according to their mental state at the time the crime was committed.⁶⁷³ It can be argued that a person who kills when genuinely believing it is necessary to do so, is not sufficiently blameworthy to be guilty of murder, even if the belief is unreasonable,⁶⁷⁴ so that the law in this area should be reformed.

4.179 We have already seen one way this issue could be addressed—by introducing a subjective test that simply focuses on the accused's belief in the necessity of her or his acts.⁶⁷⁵ An alternative approach would be to retain the current test, but introduce a new partial excuse to cover those situations where an accused may be somewhat blameworthy due to having acted unreasonably, but not deserving of a murder conviction. In such cases the accused could instead be convicted of a lesser charge, such as manslaughter. In this section we discuss three possible partial excuses. We firstly look at those cases where there was an unreasonable mistake as to the need to use force (mistaken self-defence). We then examine those cases where there was an unreasonable mistake as to the level of force required (excessive self-defence). Finally we investigate the possibility of combining mistaken and excessive self-defence into one new offence (culpable homicide).

MISTAKEN SELF-DEFENCE

4.180 In some cases an accused may believe genuinely but mistakenly that it is necessary to act with fatal force.⁶⁷⁶ For example, someone who sees a stranger with a gun approaching may believe it is necessary to kill the stranger for self-protection. If it turns out, however, that the gun is only a replica, or that the stranger is a police officer who was coming to offer assistance, the killer's belief in the need to use defensive force will have been mistaken.

671 See above para 4.21.

672 Unless they can rely on another defence such as provocation.

673 See above para 4.137.

674 Law Reform Commission of Victoria, *Homicide*, Report No 40 (1991) para 221.

675 See above paras 4.136–4.145.

676 This is to be contrasted with cases where the accused is correct about the need to use force, but mistaken as to the level of force required: see below paras 4.189–4.195.

4.181 Under the current law, to determine the accused's criminal liability, the key question will be whether that belief was based on reasonable grounds.⁶⁷⁷ If it was based on reasonable grounds, the fact that the belief was mistaken will not matter—the accused will be acquitted on grounds of self-defence. If, the belief was based on unreasonable grounds, the accused will likely be convicted of murder.

4.182 This focus on the reasonableness of an accused's belief adds 'an objective element to the mental element for murder',⁶⁷⁸ which conflicts with general principles of liability for serious offences. It can be argued this is inappropriate, and that a person should only be guilty of murder 'if he or she intends to bring about death and has no excuse'.⁶⁷⁹ In the case of mistaken self-defence, there is seen to be a legitimate excuse (the mistake). It is argued that even if that mistake is unreasonably made, the accused should not be convicted of murder.

4.183 A possible alternative would be to introduce a partial excuse of mistaken self-defence.⁶⁸⁰ Accused who genuinely believed that their actions were necessary, but whose belief was based on unreasonable grounds, would be convicted of manslaughter. The genuine belief in the need to use force would be sufficient grounds for not convicting them of murder. However, as that belief was unreasonable, there is still some level of culpability. This reduced culpability is reflected in the manslaughter conviction.

4.184 It is arguable that such a change would benefit women who kill in response to domestic violence. We have seen above that one of the main barriers faced by such women is that a jury may not accept that their belief was based on reasonable grounds, because, for example, they could have left. Under the current law, if the jury does not believe the accused's actions were based on reasonable grounds, unless an alternative defence such as provocation can be made out, it will have little choice but to convict the accused of murder. If mistaken self-defence were available, the jury could instead convict the accused of manslaughter, with a lesser penalty.

4.185 The introduction of mistaken self-defence may also encourage more women to proceed to trial on the basis of self-defence. Currently, a high proportion of women who kill in response to domestic violence plead guilty instead of risking a trial. One of the reasons for this is that self-defence is an all-or-nothing defence—you either achieve a complete acquittal, or are likely to be convicted of murder. The consequences of a murder conviction can be quite severe, so some women prefer to plead guilty to manslaughter instead, even though the killing occurred in self-defensive circumstances.⁶⁸¹ If a partial excuse of mistaken self-defence were introduced, self-defence would no longer be an all-or-nothing defence. The jury would be given the option of convicting the accused of manslaughter, instead of simply convicting them of murder or acquitting them. This may make women more likely to risk a trial instead of pleading guilty, as they may be able to secure an acquittal.

4.186 It is arguable that such a change may in fact make things worse for women who kill in response to domestic violence. One of the main difficulties faced by women under the current law is tackling the

677 In making this determination, the relevant question is whether the accused him or herself based the belief on reasonable grounds, rather than what the hypothetical person in the position of the accused would have done. See for example, *Conlon* (1993) 69 A Crim R 92 for a very liberal approach to the issue of mistaken belief, where the accused's intoxicated state was taken into account.

678 Law Reform Commission of Victoria, *Homicide*, Report No 40 (1991) para 212.

679 *Ibid* para 112 Principle 1. On this point, see above para 4.137.

680 On this issue, see *Zecevic v DPP (Vic)* (1987) 162 CLR 645 per Deane J.

681 On the issue of pleas, see below paras 4.202–4.211.

myths about when it may be reasonable to use fatal force to protect oneself from serious injury. Many of the reforms outlined in this chapter address this issue, providing ways in which a jury could be properly informed about the dynamics of domestic violence. It is feared that if mistaken self-defence were introduced, this would offset any such reforms, by providing juries with an ‘easy’ middle option. That is, it is anticipated that rather than tackling the difficult question about whether a woman’s action was necessary and reasonable given the circumstances of domestic violence, there will be a simple assumption that believing in the need to use fatal force, particularly in ‘non-confrontational’ circumstances, is unreasonable, and so a finding of mistaken self-defence is more appropriate. This is likely to lead to a reduction in acquittals in such cases, rather than the increase sought by those who wish to reform the law in this area.

4.187 In addition, the introduction of such a defence is likely to make the law significantly more complicated. This is because it would have to be discussed in any case where self-defence is raised, and increase the length and complexity of the trial.⁶⁸²

4.188 Finally, the introduction of mistaken self-defence would not be limited to cases involving women who kill in response to domestic violence. In fact, given that the greatest proportion of homicides are committed by men, it is likely that it will be mostly relied on by men in circumstances where a defence may not be seen as desirable. In particular, it is arguable that it will provide a defence to excessively fearful individuals who kill, despite the fact that their fear was unreasonable.⁶⁸³ It is arguable that it is more appropriate to continue to treat such people as murderers, despite their mistaken belief.

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QUESTION

44. Should there be a partial excuse for acts committed in mistaken self-defence?

EXCESSIVE SELF-DEFENCE

4.189 In the previous section we looked at the situation where an accused mistakenly believes that the use of force is necessary. In some cases, the use of force may be considered necessary, but it is the need to use *fatal* force that is mistaken. That is, while some reaction was called for, killing is not seen to have been the appropriate response in the circumstances. This kind of over-reaction has traditionally been labelled ‘excessive self-defence’.

4.190 Excessive self-defence used to be a partial excuse in Victoria. A jury could return a verdict of manslaughter where the accused genuinely feared harm, but reacted excessively by killing rather than taking a less extreme action.⁶⁸⁴ This defence was abolished in 1987. The main reason for its abolition was the complexity it added to the law. The defence involved the jury being instructed about a complicated six-stage test, filled with difficult language and double negatives. Such a test was seen to be unnecessarily complex, when weighed against the advantages of the law. The High Court abolished the defence for this reason.

682 We discuss this issue in more detail in relation to excessive self-defence: see below paras 4.193–4.195.

683 On this point, see the example of the racist provided above: para 4.141.

684 See for example, *R v Howe* (1958) 100 CLR 448; *Viro v The Queen* (1978) 141 CLR 88.

4.191 This decision has been criticised by a number of commentators as lacking logic,⁶⁸⁵ and its reintroduction has been recommended by a number of committees.⁶⁸⁶ It is seen as playing an important role in providing a halfway house for those cases where self-defence is not applicable, but some excuse should be provided. Excessive self-defence has been reintroduced in both New South Wales⁶⁸⁷ and South Australia.⁶⁸⁸

4.192 As with mistaken self-defence, it is arguable that the re-introduction of excessive self-defence would benefit women who kill in response to domestic violence, due to the capacity for a jury to return a manslaughter verdict.⁶⁸⁹ However, as with mistaken self-defence this outcome is not assured. There is a concern that the re-introduction of excessive self-defence may in fact prevent women from being acquitted on the grounds of self-defence, due to the existence of an 'easy' middle option.⁶⁹⁰ This is particularly the case given that most women who kill in response to domestic violence use a weapon,⁶⁹¹ often against an unarmed man. It is easy to see the possibility that a jury, if presented with that option will simply accept that such a killing was disproportionate, instead of grappling with the difficult issue of what proportionality really means when considered in the context of domestic violence.

4.193 In addition, it is questionable whether it would be possible to frame the law in a way which is not very complicated. It was for this reason that the Model Criminal Code Officers Committee rejected the reintroduction of excessive self-defence.⁶⁹² It argued that a simple test, such as one which requires the

685 See for example, Law Reform Commission of Victoria, *Homicide*, Report No 40 (1991); Stanley Yeo, *Partial Excuses to Murder*, 161–73; Helen Brown, *Beyond Battered Woman Syndrome: Reforming Self-Defence to Seek Justice For Women Who Kill* (MA Thesis, Monash University, 1996) 78; Paul Ames Fairall, 'Excessive Self-Defence in Australia: Change for the Worse?' in *Partial Excuses to Murder*, Stanley Yeo (ed) (1991) 178–89. Louis Waller and C. R Williams, *Brett, Waller and Williams Criminal Law Text and Cases* (8th ed) (1997) 181.

686 See for example, House of Lords, *Report of the Select Committee on Murder and Life Imprisonment*, (1989); Criminal Law Revision Committee, *Offences Against the Person*, Report No 14 (1980). Compare with the Model Criminal Code Officers Committee of the Standing Committee of the Attorneys-General, *Model Criminal Code, Chapter 5, Fatal Offences Against the Person*, Discussion Paper (1998) and Gibbs Committee, *Review of the Commonwealth Criminal Law (Third) Interim Report on Principles of Criminal Responsibility and Other Matters* (1990).

687 *Crimes Act 1900* (NSW) s 421, which states that:

(1) This section applies if:

(a) the person uses force that involves the infliction of death, and

(b) the conduct is not a reasonable response in the circumstances as he or she perceives them, but the person believes the conduct is necessary:

(c) to defend himself or herself or another person, or

(d) to prevent or terminate the unlawful deprivation of his or her liberty or the liberty of another person.

(2) The person is not criminally responsible for murder but, on a trial for murder, the person is to be found guilty of manslaughter if the person is otherwise criminally responsible for manslaughter.'

688 *Criminal Law Consolidation Act 1935* (SA) s 15(2), which states that:

It is a partial defence to a charge of murder (reducing the offence to manslaughter) if:

(a) the defendant genuinely believed the conduct to which the charge relates to be necessary and reasonable for a defensive purpose; but

(b) the conduct was not, in the circumstances as the defendant genuinely believed them to be, reasonably proportionate to the threat that the defendant genuinely believed to exist.'

689 See above paras 4.183–4.185.

690 See above para 4.186. See also Canadian Association of Elizabeth Fry Associations, *Response to the Department of Justice Re: Reforming Criminal Code Defences: Provocation, Self-Defence and Defence of Property*, (1998) 31–2.

691 See above para 4.40.

692 Model Criminal Code Officers Committee of the Standing Committee of the Attorneys-General, *Model Criminal Code, Chapter 5, Fatal Offences Against the Person*, Discussion Paper (1998) 112–13.

jury to determine whether the accused ‘used greater force than was reasonably necessary for his self-protection and in doing so killed his assailant’ suffers ‘from a lack of detail in as far as it fails to provide sufficient guidance to a jury’. The Committee went on to argue that

What is required is a test which sets out with some precision how the judge is to direct the jury on excessive self-defence. When this task is embarked upon, the result tends to be an unworkably complicated test more apt to confuse than assist.⁶⁹³

4.194 This is seen as a particular problem because the burden of proof lies with the prosecution. Any defence will require a jury charge that involves the use of ‘negative’ language. That is, judges will have to instruct the jury that the prosecution has to *disprove* the accused’s claim. In the case of excessive self-defence, the jury will have to be instructed that the prosecution must disprove self-defence, then be instructed that if they have disproved the elements of self-defence, they must also disprove excessive self-defence. This makes it difficult to imagine how an instruction could be put in simple language.

4.195 Finally, as with mistaken self-defence, the use of excessive self-defence would not be limited to women who kill in response to domestic violence. This again raises the prospect of providing people with a defence in circumstances where they should arguably be convicted of murder.⁶⁹⁴

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QUESTION

45. Should excessive self-defence be reintroduced? If so, how should the defence be framed?

CULPABLE HOMICIDE

4.196 We saw earlier in this chapter that some people argue that self-defence should be a fully subjective test, which simply focuses on whether the accused believed their actions were necessary.⁶⁹⁵ If such a test were adopted, it would raise the possibility that people who have an unreasonable belief in the necessity of their actions would be acquitted. This may be seen as an unacceptable result. Community standards may require that there be some liability for killing in such circumstances.

4.197 One way to address this issue would be to introduce a new offence of culpable homicide, that specifically targets the issue of unreasonable beliefs. This was recommended by the former Law Reform Commission of Victoria in its report on homicide:

This offence could cover the person who, in a critical situation not of his or her own seeking, honestly believes that the threat is so dire as to require killing the assailant. The culpability of a person who mistakes the necessity or the proportionality of his or her response in a crisis is not in the same category as the person who, by putting others at risk of injury by gross negligence, is guilty of manslaughter. The Commission

693 Ibid 113. The Model Criminal Code Officers Committee (MCCOC) further argued that, ‘as a concept, excessive self-defence is inherently vague’. The MCCOC saw its decision not to recommend the reintroduction of excessive self-defence as compatible with its decision to abolish the one partial excuse which remains—provocation. The MCCOC favour either the use of complete defences or the use of excuses in mitigation of sentence, rather than partially exculpating defences.

694 See above para 4.188.

695 See above paras 4.136–4.145.

considers that the maximum penalty should be seven years, the same as that for culpable driving causing death.⁶⁹⁶

4.198 Such an offence was said to be able to overcome the definitional difficulties discussed in relation to mistaken and excessive self-defence, since as an offence it would not need to be framed in ‘negative’ language. It was argued that the offence would be simple to understand, and could be put to the jury as an alternative to murder, or on its own:

On the murder charge, the jury would be told that the prosecution must prove that the defendant did not honestly believe either...in the necessity for force or that the degree of force was proportionate. If the prosecution failed in that, the jury could then consider culpable homicide. To succeed on that charge, the prosecution would have to satisfy the jury that the defendant’s belief either in the necessity for force, or in the degree of force necessary, was grossly unreasonable.⁶⁹⁷

4.199 Such an offence, however, requires there to be a subjective test for self-defence. We have seen above that there are a number of criticisms of such a test.⁶⁹⁸ This offence also faces the objections faced by mistaken and excessive self-defence, such as the possibility that it will act contrary to the interests of women who kill in response to domestic violence.⁶⁹⁹ Finally, although the language of the test may be able to be kept relatively simple, it is arguable that the mere fact that the jury will be provided with a number of different alternatives will make the process unnecessarily complex.

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QUESTION

46. Should a culpable homicide offence be introduced?

6 PROCEDURAL REFORMS

4.200 We have seen above that it is often argued that it is not the law itself that poses problems for women who kill in response to domestic violence, but its application in practice. This argument has been succinctly summarised by Elizabeth Sheehy et al:

Arguably the doctrinal shape of the law is informed by the paradigm of a one-off confrontational encounter between two assailants of roughly equivalent size and strength who are relative strangers to each other. While there appears to be validity in this argument, the courts have, in recent years and in other contexts, evolved a number of principles that loosen the rigid requirements previously shaping the law of self-defence. These changes would seem, in theory to have made the defence more accessible to such offenders. That they do not appear to have been used sympathetically indicates the extent to which community norms and understanding of women in general, and battered women in particular, shape the outcome of the trial process.⁷⁰⁰

696 Para 222. The provision proposed by the Commission was that ‘A person who kills another in self-defence on the basis of a belief that was grossly unreasonable either in relation to the need for force or in relation to the degree of force that was necessary should be guilty of the offence of culpable homicide’: Law Reform Commission of Victoria, *Homicide*, Report No 40 (1991) Recommendation 27.

697 Ibid para 223.

698 See above paras 4.139–4.145.

699 See above paras 4.186, 4.192.

700 Elizabeth A Sheehy, Julie Stubbs and Julia Tolmie, ‘Defending Battered Women on Trial: The Battered Woman Syndrome and Its Limitations’ (1992) 16 *Criminal Law Journal* 369–372. Debbie Kirkwood argues a similar point, based on the inability of the law to ‘conceive of a woman’s violence as rational self-defence’, despite this possibility existing under the structure of the current law: Debbie

4.201 According to this understanding, it ‘is not the formal legal rules per se, but the informal rules of legitimate self-defence that sit uncomfortably with women’s claims to self-defence’.⁷⁰¹ We have already looked at possible evidentiary reforms that could address this problem. In this section we examine whether there are also any procedural reforms which could aid in making the law work more fairly. We start at the beginning of the process, by looking at charging procedures and prosecutorial guidelines. We then turn to the trial itself, looking at the judge’s charge to the jury. Finally, we look at some general educational steps that could be taken.

CHARGE SCREENING AND PROSECUTORIAL GUIDELINES

4.202 Throughout this chapter we have focused on the barriers faced by women who kill in response to domestic violence. It is sometimes argued that one of these barriers is the pressure that is brought to bear on such women to plead guilty to manslaughter, despite the fact that they may have a legitimate claim to have acted in self-defence. Why? Suggested reasons include the following.⁷⁰²

- If they fail at trial they may be convicted of murder and receiving a higher sentence than if they plead guilty to manslaughter. This becomes an even larger concern for women from minority backgrounds, who may also fear that racism will play a role in determining the outcome of the trial.
- Legal representatives advise them to plead guilty. Although there may be a contestable case, it is suggested that defence counsel often advise women who have killed in such circumstances to accept a plea because of the risk of being convicted of murder. While this is an issue faced by the accused in many areas of the law, it will especially be the case for women who kill in response to domestic violence because of the lack of legal precedent in the area, and the usual absence of independent witnesses to verify the accused’s claim that she was responding to abusive conduct. As a result the defence will often rest heavily on the accused’s credibility, which is often hard for defence counsel to assess accurately. It may be seen to be safer to plead guilty and receive a lesser sentence.
- They were angry at the time of the killing. This will often be interpreted by defence counsel as being inconsistent with a claim of self-defence, even though the accused may in fact have been defending herself. The mere existence of anger may lead to an assumption that provocation is the appropriate defence. As successful use of the provocation defence will lead to a manslaughter conviction, it may be thought that there is little point in going to trial if the same result can be achieved via a plea.
- They want to avoid publicly testifying about the abuse, particularly if the deceased’s friends or family are likely to be at the trial. This problem can be compounded by a fear of society’s anger and disgust at women who are perceived to be violent.
- They believe they are responsible for their ex-partner’s death and should be punished, no matter how severe or prolonged the violence was that they had faced.

Kirkwood, *Women Who Kill: A Study of Female Perpetrated Homicide in Victoria Between 1985 and 1995* (PhD Thesis, Monash University, 2000) 248.

701 Rebecca Bradfield, *The Treatment of Women Who Kill Their Violent Male Partners Within the Australian Criminal Justice System* (PhD Thesis, University of Tasmania, 2002) 193.

702 See, for example, Department of Justice, Canada, *Self Defence Review, Women in Custody*, Final Report (1997) 72–4; Elizabeth Sheehy, *Battered Women, Self-Defence and Law Reform* (1995) 26–8.

- They lack stamina or perspective to withstand a trial, especially if they have been victims of long-term abuse.
- They may not have the financial resources to hire ‘expert’ witnesses, making it less likely that they will be able to successfully raise self-defence, especially if they killed in ‘non-confrontational’ circumstances. In addition, women who kill in these circumstances often have a young family to care for and so will wish to dispense with the matter as quickly and with as low a risk as possible.

4.203 In a recent Canadian review, it was held that these forces were sometimes so powerful that women pleaded guilty despite very strong evidence of self-defence. This was seen to be of concern, because pleading guilty was influenced to a large extent by factors extraneous to the merits of the case, rather than an assessment of the strength of the defence evidence.⁷⁰³

4.204 It is arguable that this risk partly arises from the decision to charge such women with murder in the first place. Once a charge has been laid, all of the pressures outlined above may be brought to bear, leading to an unjustified guilty plea. It has been suggested that one way of tackling this issue would be to provide for some process of ‘charge screening’.⁷⁰⁴ Instead of automatically charging women with murder in such cases, a process would be undertaken to determine whether a murder charge is the most appropriate option in the case.

4.205 Currently, the police make the initial decision about what charge to lay. Generally this will be a straightforward decision, which will require little consultation. However, if the police are uncertain about the most appropriate charge, they have the capacity to consult with the OPP. Once a charge is laid, the OPP has the final discretion about whether to proceed with such a charge, or present the accused on a different charge.

4.206 Police could be required to consult with the OPP in all cases of women who kill in response to violence.⁷⁰⁵ Training could be provided to police and prosecutors to help them understand how such killings might arise and the impact of domestic violence on women. If they make an assessment that in the circumstances there is strong evidence of self-defence, they can make a decision not to charge the woman at all. Alternatively, if they are willing to accept a plea of manslaughter in the circumstances, they could perhaps charge the woman with manslaughter instead of murder, reducing the likelihood of a guilty plea as the risks of trial will not be so great.

4.207 It is also argued that there should be an ongoing process of evaluating the case, to determine whether there is sufficient evidence to justify or continue a prosecution for homicide. Prosecutorial guidelines could be developed, such that if evidence is brought to light supporting a woman’s claim of self-defence,⁷⁰⁶ a decision could be made about whether to withdraw or amend the charge.⁷⁰⁷ If

703 Department of Justice, Canada, *Self-Defence Review, Women in Custody*, Final Report (1997) 72–4.

704 See for example, *Ibid* 75–6.

705 Alternatively, a particular body could be established to deal with such cases when they arise. This could involve the Attorney-General, or people with particular experience in the field of domestic violence.

706 This could be through independent corroboration, or by the provision of statements by the accused.

707 See for example, Canadian Association of Elizabeth Fry Associations, *Response to the Department of Justice Re: Reforming Criminal Code Defences: Provocation, Self-Defence and Defence of Property*, (1998) 21 Recommendation 9.

information comes to light which suggests that there is no longer a reasonable prospect of conviction, the prosecutor should withdraw the charges.

4.208 It has been recommended that such guidelines should address the situation where the accused pleads guilty due to external pressures rather than the merits of the case.⁷⁰⁸ Guidelines could impose a duty on the prosecution to exercise extreme caution in dealing with homicide cases and to be aware of the possibility of such pleas. If the prosecution is of the view that the accused is willing to plead guilty to manslaughter solely as a means of avoiding a risk of conviction for murder, and there is evidence that may support an exculpatory defence, then the prosecutor should consider withdrawing the murder charge and proceeding with a manslaughter charge.⁷⁰⁹ It may be possible to institute a mechanism to allow review or legal challenge to a prosecutorial decision to proceed with murder charges in such cases.

4.209 In response to such suggestions it may be argued that such guidelines and procedures are unnecessary because such factors are already taken into account. Police are unlikely to charge a person with an offence they do not believe that person has committed, nor is the OPP likely to continue to present a case where there is little likelihood of success.

4.210 In addition, it could be argued that such reforms would be a violation of due process, particularly if no charge is laid at all. Determinations of guilt or innocence are often seen to be the jury's domain, and it is arguable that this role should not be usurped by the police or the OPP.

4.211 If pre-charge screening were to be recommended, it would be important to ensure that any recommendations fit within the police's operating procedures. It would be undesirable to implement an inflexible procedure that hampered their ability to investigate. In addition, care would need to be taken to ensure that any recommendations do not act against women's interests. For example, there is a risk that prosecutors could misconstrue a guideline that states that if they are willing to accept a plea to manslaughter they should only charge the accused with manslaughter. Instead of aiding women who kill in response to domestic violence by providing them with the option of a less risky trial, it could be read as a caution against accepting manslaughter pleas from battered women charged with murder.

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QUESTIONS

47. Should a pre-charge screening process be introduced in relation to women who kill in response to domestic violence? If so, how should this process work?
48. Should prosecutorial guidelines be introduced in relation to women who kill in response to domestic violence? If so, what should be included in these guidelines?

708 See for example, Department of Justice, Canada, *Self Defence Review, Women in Custody*, Final Report (1997) 77–82.

709 See for example, *Ibid* 79–81. Recommendation 3 of this Review holds that 'Prosecutorial guidelines should instruct prosecutors to exercise extreme caution when involved in plea discussions concerning homicides where there is some evidence supporting a defence such as self defense. Specifically, they should be directed to consider whether the person's apparent willingness to plead guilty to manslaughter is a true expression of their acceptance of legal responsibility for the killing or is an equivocal plea. If the latter, the prosecutor should consider proceeding on manslaughter rather than murder so that the defence evidence can be heard at trial.'

Judge's Charge

4.212 The judge's charge to the jury is an important aspect of any trial. In the charge, the judge summarises the evidence that has been presented, and explains the law to the jury. Currently, the judge is not obliged to explain how circumstances of domestic violence may have affected a woman who killed in response to such violence. The responsibility, in the main, is placed on defence counsel. It may be preferable, to require judges to provide such information to the jury.

The issues regarding the availability of self-defence have become quite complex, and the common misperceptions and stereotypes that inform our thinking about male violence against women and children can only be countered if they are addressed squarely and clearly in the judge's charge to the jury.⁷¹⁰

4.213 This could be achieved in a number of ways. For example, the judge could be required by legislation to provide information to the jury. Alternatively, a model jury instruction could be included in the judges' bench book.⁷¹¹ This was recommended by the New Zealand Law Reform Commission in its examination of battered defendants. It recommended that instructions be prepared to provide guidance for judges, providing clear directions 'linking the different aspects of the expert evidence on battering relationship to the various elements of the defences to which that evidence relates'.⁷¹²

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QUESTIONS

49. Should judges be required to provide information about domestic violence to the jury?
50. If judges be required to provide information about domestic violence to the jury, what is the most appropriate way to achieve such a reform? For example, should there be a preamble, which judges are required to read in relevant cases, or should a model jury instruction be included in their bench books?
51. If judges are required to provide information about domestic violence to the jury, what information should they be required to give?

EDUCATION

4.214 We have seen above that one of the problems women face in successfully using self-defence when they have killed in response to domestic violence is the fact that self-defence is often associated with the 'pub-brawl' scenario. This misconception of self-defence is seen to pervade all aspects of the criminal justice system, including from the attitudes of judges, lawyers and juries. It has been suggested that one way to address this problem would be to educate people about the fact that it may be necessary to kill in self-defence in non-traditional contexts.

710 Canadian Association of Elizabeth Fry Associations, *Response to the Department of Justice Re: Reforming Criminal Code Defences: Provocation, Self-Defence and Defence of Property*, (1998) 34–5 Recommendations 24–5. See also Debbie Kirkwood, *Women Who Kill: A Study of Female Perpetrated Homicide in Victoria Between 1985 and 1995* (PhD Thesis, Monash University, 2000) 265–6.

711 See above para 3.176 for a discussion of the judges' bench book.

712 New Zealand Law Commission, *Some Criminal Defences with Particular Reference to Battered Defendants*, Report No 73 (2001) 8.

4.215 It is argued that one of the reasons for the continued existence of this misconceived idea about what self-defence ‘really’ is about arises from the lack of ‘non-traditional’ cases where self-defence is used. This can lead to a number of problems:

The limited number of reported decisions (first instance and appeals) considering battered women and self-defence poses issues of access... This dissemination of information is important, as the paradigm case of self-defence does not reflect the experiences of women who kill abusive partners. And defence counsel, without information about successful cases where battered women have relied on self-defence, may be reluctant to recommend that the accused rely on self-defence (particularly in a case where the Crown is prepared to accept a plea of guilty to manslaughter). A lack of information may mean that some counsel fail to even conceive of a battered women’s actions in terms of self-defence.⁷¹³

4.216 One way of addressing this issue would be to provide increased publicity to those cases where self-defence is used outside the traditional ‘pub-brawl’ situation. Contrary to the current situation where cases which result in an acquittal may not be reported, such cases could be described in journal articles, and relevant portions of transcripts included in online services such as AustLII or Butterworths Online.⁷¹⁴ If people are increasingly exposed to such cases, they may slowly come to appreciate that self-defence is about the necessity of action, which can arise even where there is not an immediate confrontation.

4.217 Another way of addressing such misconceptions would be through the provision of training for members of the judiciary and legal profession, in an attempt to ensure they properly understand the dynamics of domestic violence.⁷¹⁵ This could be done with the assistance of the Judicial College of Victoria, or in association with bodies such as the Law Institute of Victoria or the Criminal Bar Association.

4.218 It may also be desirable to promote other forms of community education, to try to tackle public misconceptions about domestic violence. The Victorian Statewide Steering Committee to Reduce Family Violence (SSCRFV)—a committee jointly convened by Victoria Police and the Office of Women’s Policy under the Women’s Safety Strategy—is currently working in partnership with other government and non-government agencies on strategies to improve the effectiveness of responses to family violence within Victoria. The SSCRFV is undertaking a number of important activities, including the development of a best practice framework to ensure a more integrated response to family violence. A key component of this integrated approach will be a focus on community education, early intervention and prevention. The Commission would welcome any other suggestions about how this issue could be addressed.

713 Rebecca Bradfield, *The Treatment of Women Who Kill Their Violent Male Partners Within the Australian Criminal Justice System* (PhD Thesis, University of Tasmania, 2002) 196–7.

714 Ibid.

715 See for example, Nan Seuffert, ‘Battered Women and Self-Defence’ (1997) 17 *New Zealand Universities Law Review* 292–327, who argues that ‘[t]he cases suggest that Judges, juries and counsel need more training and information to facilitate a better understanding of the surrounding circumstances in which battered women kill abusers. Clear directions from the Court of Appeal on the appropriate use of expert evidence on battered women syndrome and appropriate language for summing-up would also be helpful.’ See also Debbie Kirkwood, *Women Who Kill: A Study of Female Perpetrated Homicide in Victoria Between 1985 and 1995* (PhD Thesis, Monash University, 2000) 266.

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QUESTION

52. What educative steps could be taken to provide a proper understanding of the interrelationship between self-defence and domestic violence?

HOMICIDE PREVENTION

4.219 As a final observation, we note that while the focus of the Commission's reference is on the law's response to homicide, it would obviously be preferable to avoid such homicides in the first place. While there are a number of factors that may lead a person to kill, it is argued that one significant step that could lead to the reduction of the kinds of homicide discussed in this chapter would be to increase resources to aid women who suffer from domestic violence.

Research overseas suggests that greater awareness and resources directed at the plight of women in domestic situations aids in the prevention of women killing their partners. Browne and Williams...argued that increasing resources for battered women would result in a decline in female-perpetrated intimate homicides. Evidently, their prediction was accurate if one considers the rapid proliferation of shelters across the United States, as well as in Australia, and the recent declines in homicides by women.⁷¹⁶

4.220 The Commission is aware of a number of initiatives aimed at preventing and better responding to family violence being undertaken across Victoria under the *Women's Safety Strategy*. These include a review by Victoria Police of police procedure, the implementation of recommendations to improve current police responses and the development of a police code of practice for responding to family violence. Funding is also being provided to programs aimed at supporting victims of violence, improving current responses to violence, raising community awareness about the issue, and helping men to take responsibility for their behaviour and stop their use of violence. Through these, and other programs, there may be a decrease in homicides occurring in this context in Victoria in the future.

716 Jenny Mouzos, *When Women Kill: Scenarios of Lethal Self-Help in Australia 1989–2000* (PhD Thesis, University of Melbourne, 2003) 265.

Chapter 5

People with Mentally Impaired Functioning Who Kill

BACKGROUND

5.1 Chapters 3 and 4 discussed the defences of self-defence and provocation. In this Chapter we look at the defences available to people who are mentally unwell at the time that they kill. We describe the elements of the defence of mental impairment, explain how it is used in practice and raise some problems about its current formulation. We then set out a number of options for reform of the defence of mental impairment.

5.2 The Commission has been asked to consider the introduction of the defence of diminished responsibility. We consider the option of introducing diminished responsibility as an alternative defence for people whose mental condition falls short of what is required for the defence of mental impairment. In order to explain the implications of this option, we look in some detail at the defence of diminished responsibility, and how the defence is defined in jurisdictions where it applies. We then consider the circumstances in which the defence might be raised, relying on information from our Homicide Prosecutions Study.

5.3 We also examine the current law in relation to automatism and suggest some options for change, including its possible abolition. Finally we look at a number of possible procedural reforms that could be made in addition to or instead of changing the existing defences that may apply to people who kill while they are mentally unwell.

PRELIMINARY CONSULTATIONS

5.4 For the purposes of preparing this Options Paper, the Commission has had preliminary discussions with a number of forensic psychiatrists who regularly give evidence in mental impairment hearings. We have also spoken with lawyers at Victorian Legal Aid and to some Supreme Court judges about legal issues relating to mentally impaired people who kill. We will undertake more comprehensive consultation on mental impairment issues after the release of the Paper.

WHAT DEFENCES ARE AVAILABLE FOR MENTALLY IMPAIRED PEOPLE WHO KILL?

MENTAL IMPAIRMENT

5.5 Current Victorian law allows defendants to argue mental impairment as a defence only in very limited circumstances.

5.6 The defence of mental impairment is set out in the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 (CMIA)*. The Act requires proof on the balance of probabilities that the accused was suffering from a mental impairment at the time of committing the offence; and that the mental impairment affected the accused to the extent that he or she did not know:

Balance of Probabilities

Proof on the Balance of probabilities means that the jury must decide that it is more likely than not that the accused's version of the facts is true.

- the nature and quality of the conduct (in the context of homicide this means that the person did not know that they were killing some-one) or
- that the conduct was wrong (that is, he or she could not reason with a moderate degree of sense and composure about whether the conduct, as perceived by reasonable people, was wrong).⁷¹⁷

5.7 The current law replaces the earlier common law defence of insanity. Under this system people found not guilty by reason of insanity were detained ‘at the governor’s pleasure’. No limit was placed on the period of detention. Under the *CMA* people found not guilty by reason of mental impairment can be dealt with in a number of different ways. They may be held in an institution under a custodial supervision order, or may have their behaviour supervised outside an institution, (a non-custodial supervision order).⁷¹⁸ Virtually all accused who kill while they are mentally impaired are held in custody.

INFANTICIDE AND AUTOMATISM

5.8 In Victoria, the only other ‘defences’⁷¹⁹ for people with mental conditions are infanticide and automatism. Infanticide is dealt with separately in Chapter 6 and automatism is dealt with later in this Chapter. Automatism is available where an accused person’s consciousness was so greatly impaired that the person was acting involuntarily. The accused must provide evidence of acting involuntarily (for example evidence of sleep-walking when the crime was committed). The prosecution must then prove beyond reasonable doubt that the actions of the accused were voluntary.

DIMINISHED RESPONSIBILITY

5.9 The defence of diminished responsibility is not available in Victoria. However it has been introduced in some other jurisdictions to deal with cases where an insanity defence would not be available.⁷²⁰ Diminished responsibility may be raised where it can be shown that a person was suffering from an abnormality of mind such that his or her responsibility for acts or omissions was substantially impaired. A number of the cases in the VLRC homicide study involved offenders with mental conditions which may have been sufficient to raise a defence of diminished responsibility, had that defence been available to them. These cases will be discussed in more detail below at paras 5.125-5.147.

REFORMING MENTAL STATE DEFENCES—BROAD ISSUES

5.10 Reform of the law in this area requires attention to the following broad issues.

- How should we assess the criminal responsibility of people who are mentally ill when they kill?
- To what extent should the criminal law reflect medical understanding of mental illness and impairment?
- What effect will any reform have on the disposition of mentally ill offenders?

Each of these questions requires some explanation.

717 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997*, s 20.

718 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997*, ss 26–28.

719 Strictly speaking automatism is not a defence see para 5.179.

720 *Crimes Act 1900* (ACT) s 14; *Crimes Act 1900* (NSW) s 23A; *Criminal Code* (NT) s 37; *Criminal Code* (Qld) s 304A. In England the defence is set out under s 2 of the *Homicide Act 1957*.

CRIMINAL RESPONSIBILITY AND MENTAL ILLNESS

5.11 Decisions about how broadly or narrowly to cast defences based on mental conditions must be informed by underlying principles of criminal responsibility. Criminal responsibility for serious offences requires both a criminal act, and a criminal or guilty mind accompanying that act. The principle underpinning the defence of mental impairment is that people who are ‘out of their mind’ are not capable of knowing that their conduct was wrong and so should not be held criminally responsible for their actions.⁷²¹

5.12 The boundaries of any defence relating to the mental state of the accused determine when a person who is mentally unwell will be held criminally responsible. The current law is based on a cognitive test that prevents people being held criminally liable if they can show that they were incapable of knowing that what they were doing was wrong. It has been argued that this test is too narrow and that it reflects a poor understanding of mental illness.⁷²²

5.13 Various attempts have been made in other jurisdictions to broaden the application of mental state defences and to make them more consistent with medical knowledge about mental illness. Some have recommended the expansion of the existing elements of the defence to recognise situations where offenders are unable to control their behaviour due to their mental impairment.⁷²³ Others have suggested that the issue of whether the mental condition of an offender should reduce his or her culpability for murder should be left to the jury to be decided on the evidence of psychiatric experts.

5.14 Options for reform must balance a number of competing considerations, including the need

- to deter people who are capable of controlling their behaviour from acting violently;
- to have a consistent set of rules that determine when people are and are not criminally responsible; and
- to accommodate people affected by a variety of mental conditions.

THE MEDICO-LEGAL DEBATE

5.15 Expert medical testimony forms a central component of mental condition defences. Indeed insanity, mental impairment and diminished responsibility are often described as ‘medical defences’. However, what the criminal law regards as a mental illness does not correspond with what the medical profession might include under the same heading. At the heart of this difference in definition is a philosophical difference about the origins of criminal behaviour.

5.16 Psychiatry is based on medical and physiological explanations for human behaviour. Prevention and cure of illness is seen as the appropriate response to many types of harmful behaviour. By contrast, the criminal law is based on the premise that society is made up of rational individuals who can be

721 This is not the same as saying that people who are mentally impaired did not intend their actions, although lack of intent may be raised in cases where there is evidence of mental impairment which is insufficient to support a defence of mental impairment. See *R v Hawkins* (1994) 179 CLR 500.

722 Abraham S Goldstein, *The Insanity Defense* (1967) 10.

723 This is also known as the ‘volitional element’ and is discussed in more detail below in paras 5.61–5.66.

deterred from criminal behaviour by punishing those who breach a set of pre-determined rules.⁷²⁴ In practical terms a psychiatric approach emphasises diagnosis and treatment while the criminal law approach emphasises the imposition of social controls by punishing offenders.

5.17 Victorian law defines and assesses insanity narrowly, by determining whether a person lacked the ability to reason about or understand his or her actions. By contrast the psychiatrist's approach is often far broader. For mental health professionals, insanity is a matter of physiological causation. Questions about what a person did or did not know or understand at a particular point in time cannot be determined with any certainty and are not regarded as relevant to the diagnosis of mental illness.⁷²⁵

5.18 In the majority of cases where mental impairment or insanity were raised in Victoria during the period of the VLRC study, the accused was suffering from some kind of psychotic episode. Typically the accused had a mental illness characterised by delusions or auditory hallucinations that commanded them to kill the victim.⁷²⁶ This similarity between cases is, in part, the consequence of a very restrictive legal test for mental impairment.

5.19 In theory the defence of mental impairment is not confined to those accused suffering from psychoses or schizophrenia. The current legal test might possibly also include other cognitive disorders such as dementia or delirium where an offender genuinely did not know what he or she was doing. Although the law does not specifically list mental conditions that are 'in' or 'out', the list of illnesses that are actually considered as the basis of a legal defence is quite short. Under the current law many recognised mental conditions have no bearing on whether someone is found criminally accountable for his or her actions. One of the central policy issues considered in this Chapter concerns the extent to which medical understandings of mental illness should influence the formulation of legal defences.

DISPOSITION OF MENTALLY ILL OFFENDERS

5.20 Currently, person's found not guilty of murder by reason of mental impairment are likely to receive a custodial supervision order for a nominal term of 25 years,⁷²⁷ and to be placed in a psychiatric hospital to be treated for their mental illness. If the defence is expanded, psychiatric hospitals may have to deal with much larger numbers of people, for example people with mental illnesses such as depression and post-traumatic stress disorder. Because mental health resources are limited, this may make it more difficult for the mental health system to provide treatment and care to people who kill because they are affected by severe psychotic disorders.

5.21 In considering whether the defences should be expanded it is necessary to consider how the criminal justice system deals with convicted offenders who have mental conditions. Prisoners having a diagnosed mental illness may receive medical treatment or be transferred to mental health facilities.⁷²⁸ It may be argued that this interchangeability between prison and hospital allows medicine and the

724 Alan Norrie, *Crime, Reason and History: A Critical Introduction to Criminal Law* (2nd ed) (2001) 178.

725 Ibid.

726 Although this sample is a small one, it appears reflective of the general trend.

727 See below at para 5.34–5.36 for discussion of nominal terms and more information about custodial supervision orders under the *CMIA*.

728 *Sentencing Act 1991* (Vic) Part 5. These provisions are discussed below at paras 5.34–5.36.

criminal law to achieve similar outcomes;⁷²⁹ that is the detention and treatment for significant periods of time of people who kill. If this is the case, the different approaches that psychiatry and criminal law take to mental illness may be unimportant in practical terms and there may be no need to expand mental state defences. With these questions and issues in mind, we now examine the defence of mental impairment.

MENTAL IMPAIRMENT

BACKGROUND TO THE DEFENCE

5.22 Prior to the introduction of the *Crimes (Mental Impairment and Fitness to be Tried) Act* in 1997 the common law defence of insanity applied in Victoria. The insanity defence developed in the UK over some years,⁷³⁰ but was formulated definitively by the House of Lords in the wake of the trial of Daniel M’Naghten in 1843.⁷³¹ M’Naghten was mentally ill and believed that the Tory party led by the then Prime Minister of England Sir Robert Peel, was persecuting him. He tried to kill Robert Peel, but accidentally killed his secretary Edward Drummond instead. M’Naghten was found not guilty by reason of insanity and there was a public outcry in response. The House of Lords in England was asked to clarify the law. They decided that:

- every person is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary is proved to the satisfaction of the jury;⁷³² and
- it must be clearly shown that the accused was labouring under such a defect of reason from disease of the mind at the time of committing the offence that he did not know the nature and quality of their act, or if he did know, that he did not know that it was wrong morally.⁷³³

5.23 This statement by the House of Lords formalised what had been until that time a developing cognitive test for insanity.⁷³⁴ For those found guilty by reason of insanity the result was indefinite

729 Alan Norrie, *Crime, Reason and History: A Critical Introduction to Criminal Law* (2nd ed) (2001) 194.

730 One of the earlier versions of the defence was set out in the case of Edward Arnold—as the so called ‘wild beast test’. The name of the test came from the judges’ instruction to the jury describing a mad man for the purposes of the defence as someone ‘totally deprived of his understanding and memory...[who]doth not know what he is doing, no more than an infant, than a brute or wild beast’. Lawrie Reznek, *Evil or Ill? Justifying the Insanity Defence* (1997) 17 citing Nigel Walker, *Crime and Insanity in England* (1968) 58.

731 (1843) 8 ER 718. In the period leading up to M’Naghten the law had become quite unclear in relation to the defence. The wild beast test was displaced in the later case of James Hadfield in 1800. Hadfield attempted to kill King George III, convinced that God would destroy the world unless he (Hadfield) died. Believing suicide to be a mortal sin, Hadfield planned to shoot the king knowing that the penalty would be execution. The wild beast test formulated in Arnold’s case did not apply as Hadfield very clearly knew what he was doing and that it was illegal. Nevertheless, it was argued successfully in that case that someone could be mad without that madness totally depriving him of memory and understanding. For further discussion of this history see Nigel Walker, *Crime and Insanity in England* (1968) 77 and Lawrie Reznek, *Evil or Ill? Justifying the Insanity Defence* (1997) Chapter 1.

732 It was necessary to prove this on the balance of probabilities, rather than beyond reasonable doubt.

733 In addition to these principal elements the House of Lords statement also included the following:

‘That if the accused was conscious that the act was one which he ought not to do and if the act was contrary to the law of the land, the accused should be punished. The test is of right and wrong by reference to the particular act and not to an abstract concept.

Where the act is committed under some insane delusion as to the surrounding facts, which conceals from him the true nature of the act he is doing, he will be under the same degree of responsibility as if the facts had been as he imagined them to be.’

734 The defence of M’Naghten was, arguably not based on M’Naghten’s cognitive capacity at all, but rather on his inability to control his actions. Despite the instruction given to the jury that they were not to return a verdict of not guilty unless they were satisfied that M’Naghten had not been able to distinguish right from wrong, they nevertheless found him not guilty. In other words, despite the fact that a jury had apparently found M’Naghten not guilty because of the defence argument that he had been unable to control his

detention at the monarch's pleasure.⁷³⁵ In Victoria (and other States) this became the governor's pleasure system, which meant that a person was detained until the Governor-in-Council at the recommendation of the Attorney-General as advised by the Adult Parole Board decided to release the person.⁷³⁶

THE CURRENT DEFENCE IN VICTORIA



CASE STUDY 15

John was an accountant who often went jogging near his house. Ben lived about 2 km from John with his mother. Ben was diagnosed as having schizophrenia and had been attending a mental health centre to help him to manage his illness.

One day as John was jogging, Ben who had been waiting in the bushes armed with a knife, jumped out and stabbed John in the neck. John ran away from Ben on to a busy road nearby to get help but died soon after of blood loss.

At the time of the killing Ben believed that he was an agent of God and that if he didn't kill to satisfy God he would himself be tortured horribly and killed.

Two psychiatrists testified that Ben had been psychotic at the time of the killing such that he did not know that what he was doing was wrong. He was found not guilty by reason of mental impairment.⁷³⁷

5.24 In the insanity defence and the governor's pleasure system were replaced with the introduction of the *CMIA*. The *CMIA* abolished the M'Naghten defence of insanity and replaced it with the defence of mental impairment. The defence requires the following elements to be proven on the balance of probabilities:⁷³⁸

- that the accused was suffering from a mental impairment
- that the mental impairment affected the accused so that they either did not understand the nature and quality of their conduct, or that they did not know that it was wrong.

5.25 As we discuss below⁷³⁹ these two elements are very similar to the elements of the M'Naghten defence of insanity.

actions (that is by use of a volitional test), the M'Naghten insanity doctrine was a restatement of what was already a developing cognitive test. For more detail see Lawrie Reznick, *Evil or Ill? Justifying the Insanity Defence* (1997) Chapter 1; Peter Shea, 'M'Naghten Revisited—Back to the Future? (The Mental Illness Defence—A Psychiatric Perspective)' (2001) 12 *Current Issues in Criminal Justice* 347 356.

735 The system of detention at the monarch's pleasure began with the Hadfield trial which resulted in the passing of the *Criminal Lunatics Act 1800* to deal with the disposition of Hadfield and others like him. The Criminal Lunatics Act permitted the detention of insane people charged with certain offences including murder to be detained at the king's pleasure.

736 *Mental Health Act 1986* authorised detention of a person found unfit to plead or found not guilty by reason of insanity. For further discussion of the operation of the act prior to the introduction of the *CMIA*, see Community Development Committee, Parliament of Victoria, *Report Upon the Review of Legislation Under which Persons are Detained at the Governor's Pleasure in Victoria*, Report No 57 (1995) 66.

737 The facts of this case study are based on Case No. 1998003.

738 The onus of proof depends on whether the issue is raised by the prosecution or the accused: see 5.33.

739 para 5.29–5.30.

5.26 The governor's pleasure system was replaced by court powers to make custodial or non-custodial supervision orders.⁷⁴⁰ The CMIA also introduced more humane procedures to deal with people unfit to plead.⁷⁴¹

'MENTAL IMPAIRMENT'

5.27 The new defence has replaced the requirement that the offender be suffering from a 'defect of reason from disease of the mind' at the time of committing the offence, with the more general requirement that the offender be suffering from a mental impairment. Mental impairment is not defined anywhere in the legislation, but the cases so far indicate a tendency to pursue the defence in substantially the same circumstances as the insanity defence. In seven of the nine cases where mental impairment succeeded as a defence in our study, the accused was suffering from schizophrenia. Ben was one of these accused.

THE M'NAGHTEN ELEMENTS:

5.28 Although the introduction of the CMIA meant the abolition of the M'Naghten defence of insanity, the defence still retains key elements of the M'Naghten defence. These will be referred to throughout this chapter as 'the M'Naghten elements'. In order to succeed with the defence of mental impairment, the defendant must be able to prove not only that they were suffering from a mental impairment, but also either one of the two M'Naghten elements. The M'Naghten elements are discussed below.

The First Element—'Nature and Quality of the Conduct'

5.29 The requirement that the offender not know the nature and quality of their conduct is essentially a reproduction of the M'Naghten rules. The requirement has been interpreted to mean a lack of understanding of the physical nature of the act (as distinct from its moral aspect)⁷⁴² and its consequences, for example the act of throwing a baby on a fire thinking it is a log or cutting a person's throat thinking it is a loaf of bread.⁷⁴³ In Case Study 15 Ben would find it difficult to show that he did

740 See below para 5.34–5.36.

741 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* ss 6–14 set out the provisions in relation to unfitness to stand trial. The Act provides that a person will be found unfit to stand trial if they are affected by mental impairment such that they cannot really understand the nature of the trial or what they have been charged with. The question of whether someone is fit to stand trial is a question of fact determined on the balance of probabilities by a jury empanelled for that specific purpose. Prior to the introduction of the CMIA people found unfit to plead were detained at the governor's pleasure although there had been no determination of their mental state at the time of the offence. The CMIA provides for a period of adjournment for a person found unfit to stand trial, during which that person is kept in custody and at the end of which the person's fitness to stand trial may be re-examined. After a total period of 12 months, if the person is still deemed unfit to be tried a special hearing is held. The purpose of the special hearing is to determine one of the following things:

- whether defendant is not guilty of the offence, or
- is not guilty of the offence because of mental impairment, or
- committed the offence charged.

742 *Sodeman v The King* (1936) 55 CLR at 215.

743 Alan Norrie, *Crime, Reason and History: A Critical Introduction to Criminal Law* (2nd ed) (2001) 181; See also the analogy used by Justice Dixon in *R v Porter* (1933) 55 CLR at 188 where Dixon J used the example of the killing being like the breaking of a twig and said that the mad man or woman must have no real sense of the implications of what that act amounted to.

not understand the nature and quality of what he was doing. Ben understood that he was killing John, as this is what his delusions were telling him to do.

The Second Element: 'Knowledge of Right and Wrong'

5.30 This element is also a reproduction of the M'Naghten elements, but with an additional clarifying component. The additional words providing that the offender be unable to reason 'with a moderate degree of sense and composure about whether the conduct, as perceived by reasonable people was wrong' is essentially a legislative enactment of the common law interpretation of the element as it has evolved in Australia.⁷⁴⁴ In Case Study 15, the psychiatric evidence was that Ben did not know the difference between right and wrong, because of his delusions about the need to kill to satisfy God's demands.

RAISING THE DEFENCE

5.31 Before the introduction of the CMIA, only the defence could raise the defence of insanity, although it was possible for a trial judge to put the defence to the jury if there was sufficient evidence, whether or not the defence had raised insanity or mental impairment.⁷⁴⁵ Under the CMIA it is now also possible for the prosecution, with the leave of the trial judge, to raise mental impairment if the defence does not raise it.⁷⁴⁶ In Case Study 15 this means that even if Ben instructed his lawyer not to raise mental impairment as a defence or his defence lawyer decided to argue a different defence,⁷⁴⁷ mental impairment could be raised during the course of the trial by the prosecution or the trial judge. It is too early to comment on the effect of this change. In the very small sample of cases looked at by the VLRC, there were no cases where the prosecution or the trial judge raised mental impairment.⁷⁴⁸

5.32 In most cases mental impairment is dealt with at a 'by consent' hearing. (This was the case for Ben). A hearing by consent occurs where both the prosecution and the defence agree that the accused killed the deceased person and also agree that the accused should be found not guilty by reason of mental impairment. The defence notifies the prosecution that it intends to raise mental impairment and provides a copy of a psychiatric report in support of this. The prosecution then has its own psychiatric report prepared. If it confirms that the accused is a candidate for the defence of mental impairment, a hearing by consent is held. A jury trial is empanelled and both the prosecution and the defence tell the jury of the special nature of the trial and that they both agree that the accused person was not criminally responsible for his or her actions due to mental impairment. The usual outcome of a hearing by consent is a verdict of not guilty by reason of mental impairment. We return to the issue of hearings by consent in para 5.197.

⁷⁴⁴ See *Rv Porter* (1933) 55 CLR 186, 190.

⁷⁴⁵ Desmond O'Connor and Paul Ames Fairall, *Criminal Defences* (3rd ed) (2001) 273. This principle is also reflected in the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* at s 22(2).

⁷⁴⁶ *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* s 22(1).

⁷⁴⁷ It is difficult to see what alternative defence could be raised in the context of Case Study 15, but in other cases involving provocative behaviour or threatening behaviour by the deceased, it may be seen as preferable to argue provocation or self defence than to bring about an outcome which will likely result in a lengthy custodial supervision order.

⁷⁴⁸ It is worth noting, that there were two cases in our sample in which the mental condition of the accused was commented upon by the trial judge. In one of those cases the judge expressed surprise at the fact that mental impairment had not been raised but concluded that there must be some reason for this decision and made no attempt to raise the defence.

ONUS OF PROOF

5.33 The insanity defence required the defendant to show on the balance of probabilities that he or she satisfied the requirements of the defence. Under the CMIA, the onus is upon the party who raises the defence. When Ben raised mental impairment it was up to Ben and his defence lawyer to prove the elements of the defence on the balance of probabilities by bringing expert evidence about Ben's mental illness. If the prosecution had raised mental impairment instead of Ben's lawyer, the prosecution would produce expert evidence to prove that Ben was mentally impaired on the balance of probabilities.

DISPOSITION UNDER THE CMIA

5.34 Instead of the governor's pleasure system of indefinite detention, which existed prior to the introduction of the CMIA, the court is required to make a supervision order.⁷⁴⁹ Under a custodial supervision order the person is to be held in 'an appropriate place',⁷⁵⁰ or if there is no practicable alternative, committed to custody in a prison. The person can also be released under a non-custodial order, under conditions specified by the court, for example conditions requiring the person to take medication and have other treatment for the mental illness.⁷⁵¹ While it is technically possible for a non-custodial supervision order to be made for a person who commits homicide, this is unlikely to occur in practice.⁷⁵²

5.35 Although a supervision order is for an indefinite term, there are safeguards against unjustified detention. The court is required to set a nominal term for the order, which in the case of murder or manslaughter is 25 years.⁷⁵³ The notion of the 'nominal term' was introduced to ensure that supervision orders were reviewed to avoid people being detained unnecessarily.⁷⁵⁴ The court must review the order three months before the nominal period expires, and thereafter at intervals of not more than five years, to determine whether the order should be extended or changed.⁷⁵⁵ It can also order that the matter be brought back to the court for review within the nominal term.⁷⁵⁶ In addition a person subject to an order can apply to the court for it to be varied. This can result in a custodial order being changed to a non-custodial order, under which the person receives treatment in the community.

5.36 The legislation allows the unconditional release of defendants where it is deemed appropriate.⁷⁵⁷ Before a person can be unconditionally released, reports must be obtained from at least one medical

749 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* s 26.

750 See definition of 'appropriate place' in *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* s 3.

751 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* s 26.

752 There are no cases of such orders being made in any of the case of mental impairment which have arisen since the introduction of the legislation. In early conversations with forensic psychiatrists, the view was expressed that it was unlikely that mentally ill killers would ever avoid being given a disposition for the entire nominal term.

753 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) ss 27, 28.

754 Community Development Committee, Parliament of Victoria, *Report Upon the Review of Legislation Under which Persons are Detained at the Governor's Pleasure in Victoria*, Report No 57 (1995) 127. In this report the term is 'limiting term' rather than 'normal term' as the report pre-dates the introduction of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997*.

755 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* s 35.

756 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* s 27.

757 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* s 23(b).

practitioner as well as the person supervising the offender. Consideration must be given to any victim reports as well as to the possible consequences of releasing the person.⁷⁵⁸

WHEN IS MENTAL IMPAIRMENT RAISED?

5.37 The Homicide Prosecutions Study shows that mental impairment is not raised often. When raised this tends to be with the consent of the prosecution. There were 10 cases in the VLRC sample where mental impairment was raised [st 74](#). Although the *CMIA* test of mental impairment is relatively narrow, this small number of cases probably also reflects decisions made by accused people who are mentally ill to take a chance that they will be acquitted at trial, or to plead guilty of the offence and serve a prison term, rather than to run the risk of being confined in a psychiatric hospital for a lengthy period.

5.38 In nine cases in the Homicide Prosecutions Study the defence was raised successfully [st 75](#). This success rate was due to the fact that in all cases, the verdict was reached as a result of a hearing ‘by consent.’⁷⁵⁹ The one case where mental impairment was raised unsuccessfully was a contested hearing, where the prosecution argued that the accused was not sufficiently mentally impaired to warrant a defence of mental impairment.

5.39 Of the 10 cases involving a mental impairment defence, there were four female accused and six male accused [st 76](#). Seven of the 10 cases involved the killing of a family member and of these seven, two involved a deceased and accused who were in a sexually intimate relationship at the time of the killing [st 77](#). Only one case involved the killing of a complete stranger by a mentally impaired person, the remaining two cases involved the killing of acquaintances; one was a co-worker, the other a roommate in a nursing home.

5.40 Having given an overview of the contexts in which the defence is used and the frequency with which it is raised, we now turn to consider some of the reasons to consider reforming the defence.

WHY REFORM THE DEFENCE OF MENTAL IMPAIRMENT?

5.41 A number of criticisms have been made of the *CMIA*. These can be summarised as follows.

- The current defence is too narrow—accused people who have mental conditions may have no defence available to them.
- The meaning of ‘mental impairment’ is not clear.
- The M’Naghten elements of the defence do not reflect current medical understanding of mental illness.
- The defence of mental impairment requires excessive reliance upon experts to explain and interpret the defence for the benefit of juries.
- The nominal term is a disincentive to relying on mental impairment. Some mentally ill accused may prefer to plead guilty or take the chance of an acquittal.

Each of these criticisms is considered below.

758 The requirements are set out in *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* s 40(2).

759 See above at paras 5.31–5.32 for an explanation of by consent hearings and what they involve.

THE CURRENT REGIME LEAVES SOME PEOPLE OUT

5.42 Of the 182 offenders looked at by the VLRC in its empirical study, only 10 raised either mental impairment or insanity as a defence to homicide.⁷⁶⁰ There are, however many more accused who had some kind of mental condition at the time of the homicide. The characteristics of additional offenders who might have raised the defence are analysed later in this chapter, in our discussion about possible introduction of a defence of diminished responsibility. It is clear that many people who kill as the result of a mental illness or impairment do not have a defence under the law in Victoria.

LACK OF CLARITY ABOUT THE MEANING OF MENTAL IMPAIRMENT.

5.43 There is no definition of ‘mental impairment’ either in the CMIA or in other mental health legislation. Since the introduction of the CMIA, all of the cases where mental impairment has succeeded as a defence have concerned offenders who had been psychotic at the time of the killing. As yet the boundaries of the defence have not been tested and consequently the conditions that are included and those that are excluded remain unclear. This makes it necessary for arguments to be made on a case-by-case basis about whether a particular condition is included.

THE M’NAGHTEN ELEMENTS DO NOT REFLECT CURRENT UNDERSTANDING OF MENTAL ILLNESS

5.44 The M’Naghten elements which remain part of the mental impairment defence have been criticised by psychiatrists and lawyers, because they fail to reflect medical knowledge about mental illness. The M’Naghten test is, in essence a cognitive test; it requires a lack of understanding about what was being done and about the moral, legal and human consequences of the act. The ‘right–wrong’ test in particular has caused problems for psychiatrists, who do not regard an understanding of right and wrong as determinative of sanity. There are mental states in which a person may know the distinction between right and wrong but be unable to apply that understanding to his or her own conduct. Similarly, the person may understand the nature and quality of the act and yet be unable to control that act. The Royal Commission on Capital Punishment made the point that ‘the power of distinguishing between right and wrong exists very frequently among those who are undoubtedly insane and is often associated with dangerous and uncontrollable delusions.’⁷⁶¹

5.45 The fact that the M’Naghten test excludes any other form of insanity than those resulting in a lack of ability to reason, means that in practice courts have to draw arbitrary lines between kinds of delusions.⁷⁶² Case Study 15 illustrates this problem. In the case of Ben, who believed that he was acting according to instructions from God it could be argued that he did not know that his actions were wrong. However, it could also be argued that Ben acted out of fear of torture and harm to himself rather than because of some conviction that what God commanded must be right. Whether Ben understood that what he was doing was wrong is clearly open for debate, but whether he was suffering

760 Some of the cases in the sample raised insanity as their defence before the CMIA came into operation. For these cases the transitional provisions of the CMIA in relation to disposition applied. In practice this meant that although the relevant defence was still insanity, the outcome of a finding of not guilty by reason of insanity was governed by the provisions of the CMIA.

761 Royal Commission on Capital Punishment as cited in Desmond O’Connor and Paul Ames Fairall, *Criminal Defences* (3rd ed) (2001) 259.

762 Alan Norrie, *Crime, Reason and History: A Critical Introduction to Criminal Law* (2nd ed) (2001) 180.

from delusions is not. For some this is the crucial issue because in the world of the delusional person, it makes no sense to attempt to apply the rules of the 'real' world.⁷⁶³ The current focus on cognitive capacity requires juries to make difficult and inherently nonsensical distinctions between acceptable delusions and non-acceptable delusions. In practice, their decision is usually heavily influenced by expert evidence.

EXPERT EVIDENCE AND THE 'ULTIMATE ISSUE' RULE

5.46 As a general rule an expert must not be asked to answer a question which the jury has been asked to decide – this is known as the 'ultimate issue' rule. There is a difference of opinion about the extent to which the ultimate issue still applies⁷⁶⁴ and whether it applies at all in the context of the insanity defence.⁷⁶⁵ Nevertheless, the underlying principle of the rule is that experts ought not to be allowed to usurp the role of the jury.

5.47 If the ultimate issue rule applies in the context of mental impairment cases it is very difficult to avoid breaking the ultimate issue rule. Psychiatrists are not only asked to testify about whether a particular accused was suffering from a mental illness at the time of the killing and how this mental illness affected that person (matters which lie within their specialist knowledge) but also about whether, in their opinion the accused knew what he or she was doing and understood that it was wrong. Arguably the latter question should be left to the jury.

5.48 On the other hand, some would argue that it is preferable to allow experts to play a greater role in the determination of the mental state of offenders. Queensland, for example, has set up a system in which mental condition is assessed by a specialist court assisted by psychiatric experts. We look at this model in more detail in paras 5.205–5.211.

5.49 A related concern is that expert evidence in Victoria comes from a relatively small pool of forensic psychiatrists. This may limit the application of the defence and put its interpretation in the hands of a select few. Some of the psychiatrists spoken to during the Commission's preliminary consultations agreed that the M'Naghten elements were not only confusing, but unrepresentative of what was known about psychiatric illness. However, they favoured the retention of the M'Naghten elements because forensic psychiatrists have come to understand the circumstances in which they should apply and they can interpret the elements flexibly where they consider it appropriate to do so. This 'we know it when we see it' approach to mental impairment means that there is considerable reliance upon a select group of experts to determine the circumstances in which the defence should apply. The effect of this may be that an already narrow defence is even further restricted.

DISPOSITION AND THE CMIA

5.50 Because the CMIA regime is relatively new it may be too early to ascertain its longer term effects. However one of the concerns expressed to the Commission in early conversations with forensic psychiatrists and lawyers was that mental impairment is often not used as a defence, because the

763 Ibid 178.

764 Jill Anderson, Jill Hunter and Neil Williams, *The New Evidence Law: Annotations and Commentary on the Uniform Evidence Acts* (2002) 255.

765 Desmond O'Connor and Paul Ames Fairall, *Criminal Defences* (3rd ed) (2001) 275.

outcome is still potentially more severe than a conviction for murder. The nominal term for mental impairment is 25 years. Few of those convicted of murder or manslaughter are jailed for this period.⁷⁶⁶ Of the cases studied by the VLRC there are three cases where the offender had been suffering from a psychotic episode at the time of the killing but did not raise mental impairment as a defence. It is unclear from the information available why the defence of mental impairment was not raised. Other defences may have been available in those cases and the accused may have felt that it was preferable to rely on them.

5.51 The nominal term may be a disincentive to arguing mental impairment. Although the prosecution can raise mental impairment if they choose, there are no cases in the sample where this occurred. This may undermine the aim of the CMIA, which is intended to ensure the person receives appropriate medical and psychiatric treatment.

OPTIONS FOR REFORM

5.52 In this section we outline options for reform and pose some questions for consideration. We begin by looking at arguments for retaining the current law. We then look at some ways in which the defence could be changed to take account of some of the problems already outlined. As well as options involving the alteration of the existing defence of mental impairment, we also consider the advantages and disadvantages of introducing a new defence of diminished responsibility.

LEAVE THE LAW UNCHANGED

5.53 The CMIA regime has only been in force for a short period. Hence it may be premature to consider changing it. Other arguments for the retention of the defence include the following.

- It is impossible to define mental impairment precisely.
- Leaving mental impairment undefined makes the defence flexible.
- The current defence is well understood by the psychiatric and legal professions.
- The conviction also allows treatment of mentally ill offenders, which makes reform of the defence unnecessary.
- Limiting the availability of the defence prevents the mental health system being overloaded. Mental health services can be directed to homicide accused who need them most.

DIFFICULTIES IN DEFINING THE DEFENCE MORE PRECISELY

5.54 Even if the defence of mental impairment were defined in the legislation it would be impossible to ensure that it is only used by those who are genuinely deserving of a defence. The cognitive requirement which forms the basis of the current defence is an appropriate requirement because it ensures that only those people with severe mental illness can raise the defence. The current test provides a clear connection between mental illness and principles of criminal responsibility.

766 See paras 2.77–2.82.

LACK OF DEFINITION OF MENTAL IMPAIRMENT PROVIDES APPROPRIATE FLEXIBILITY

5.55 The lack of definition of ‘mental impairment’ allows some flexibility in interpreting this term, so that people who are seriously mentally ill can be included.

THE EXISTING DEFENCE IS WELL UNDERSTOOD

5.56 The legal and medical professions understand the present system and believe it can be applied appropriately and flexibly. Despite academic critiques about the coherence of the current law, preliminary discussions with psychiatrists revealed substantial agreement that the defence works well in practice. They were also concerned that changing the law might confuse juries, lawyers and experts.

ALTERNATIVES ARE ALREADY AVAILABLE TO MENTALLY ILL OFFENDERS

5.57 Even if some people who are mentally unwell cannot use the defence it may be unnecessary to expand the current legal framework. Some of these people will not be convicted of murder because they can successfully argue lack of intention to commit the offence.⁷⁶⁷ The result will usually be a finding of manslaughter.

5.58 Where a person suffering from a mental illness insufficient to establish mental impairment is convicted of either murder or manslaughter a range of sentencing options is open to the courts, including treatment and hospital orders.⁷⁶⁸ If the policy priority in relation to mental condition defences is to ensure the appropriate disposition of people with mental impairment who kill, the appropriate use of sentencing provisions may serve this purpose just as well.

THE EXISTING DEFENCE MINIMISES THE PRESSURE ON MENTAL HEALTH SYSTEM

5.59 Another argument for retaining the present law is that it ensures that supervision orders are made only in relation to those with genuine and severe mental illnesses. This reduces unnecessary strain on limited mental health services. Psychiatrists spoken to by the Commission were concerned that broadening the defence would result in patients with less serious illnesses being admitted to mental health facilities that are already under significant pressure.

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QUESTION

53. What need, if any, is there to expand the current defence of mental impairment?

REFORMULATE THE DEFENCE OF MENTAL IMPAIRMENT

5.60 Instead of retaining the present law the defence of mental impairment could be changed. We suggest four ways of doing this below:

- excusing persons from criminal responsibility if they cannot control their behaviour;
- modifying the M’Naghten elements of the defence;

767 *R v Hawkins* (1994) 179 CLR 500.

768 *Sentencing Act 1991* (Vic) s 93.

- abolishing the M’Naghten elements and introducing a new mental condition defence; and
- including a definition of mental impairment.

EXCUSING PEOPLE FROM CRIMINAL RESPONSIBILITY IF THEY CANNOT CONTROL THEIR BEHAVIOUR

5.61 One of the simpler ways of expanding the application of the defence would be to excuse a persons from criminal responsibility because they could not control their conduct. We call this adding a ‘volitional element’ to the test.

5.62 A number of Australian jurisdictions have included a volitional element in their formulation of the defence.⁷⁶⁹ Both the American Model Penal Code and the Australian Model Criminal Code also include a volitional element to the defence.

5.63 In Australia, the jurisdictions which include a volition element generally add the element to the M’Naghten elements. For example the Western Australian legislation is framed as follows:

‘a person is not criminally responsible for an act or omission on account of unsoundness of mind if at the time of doing the act or making the omission he is in such a state of mental impairment as to deprive him of capacity to understand what he is doing, or of capacity to control his actions, or of capacity to know that he ought not to do the act or make the omission’⁷⁷⁰

5.64 The addition of a volitional element to the defence of mental impairment broadens the defence, but retains the basic principles of criminal responsibility and the cognitive requirement which has formed the basis of the defence for so long. Historically volition has been central to important case law on insanity. In practice some cases involving lack of control due to mental illness are interpreted as mental impairment cases although they do not comply with the M’Naghten elements. Arguably, it is preferable for the defence to reflect the reality of this practice.

5.65 One of the principal problems with the addition of a volitional element is the risk it introduces that people will abuse it. It is, after all very difficult to determine the difference between the person who could not control his or her actions and the person who could but did not.⁷⁷¹

5.66 It may also be argued that this approach is inconsistent with current psychiatric thinking. The notion that the mind can be divided in to separate and independent compartments (faculty psychology)⁷⁷² has been abandoned in favour of the view that all faculties are inter related. The notion that a person might understand what was done and that it was wrong, but nevertheless be unable to control his or her actions is a simplistic understanding of mental functioning and should not be enshrined in law.

769 *Criminal Code Act 1924* (Tas) s 16(2); *Criminal Code Compilation Act 1913* (WA) s 27; *Criminal Code Act 1899* (Qld) s 27; *Criminal Law Consolidation Act 1935* (SA) s 269C(c); *Criminal Code Act 1983* (NT) s 43C(1).

770 *Criminal Code Compilation Act 1913* (WA) s 27.

771 Bernadette McSherry, 'Mental Impairment and Criminal Responsibility: Recent Legislation' (1998) 6 *Journal of Law and Medicine* 10 13; Samuel Jan Brakel and James L. Cavanaugh, 'Crime, Psychiatry and the Insanity Defence: A Report on Some Recent Reforms in the United States' (1996) 30 *Australian and New Zealand Journal of Psychiatry* 134. See also Law Reform Commission of Victoria, *Mental Malfunction and Criminal Responsibility*, Discussion Paper No 14 (1988) 19.

772 Bernadette McSherry, 'Mental Impairment and Criminal Responsibility: Recent Australian Legislative Reforms' (1999) 23 *Criminal Law Journal* 135 .

REFORMULATE THE M'NAGHTEN ELEMENTS OF THE DEFENCE

5.67 Another possible approach would be to retain the M'Naghten elements but develop them so that they can be interpreted more broadly. A variety of attempts have been made to alter M'Naghten in this way. For example, the American Law Institute in 1955⁷⁷³ suggested the following version:

A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality (wrongfulness) of his conduct or to conform his conduct to the requirements of the law.⁷⁷⁴

5.68 It is unclear exactly what this change from 'knowledge' to 'appreciation' actually means or whether it makes any real difference to the application of the defence. It has been interpreted as suggesting a broader kind of understanding including the capacity to understand emotions.⁷⁷⁵ Such an interpretation could mean that the defence would extend to people with personality disorders and, more specifically to particularly cruel offenders who act with premeditation and cruelty but without remorse for their victims.⁷⁷⁶

ABOLISH THE M'NAGHTEN ELEMENTS AND INTRODUCE A NEW MENTAL CONDITION DEFENCE

5.69 There are a number of suggested replacements for the M'Naghten elements which have been put forward.

UK Royal Commission on Capital Punishment

5.70 A very broad approach to the defence was recommended by the 1953 Royal Commission on Capital Punishment. The Royal Commission proposed that the jury should determine:

whether at the time of the act the accused was suffering from disease of the mind (or mental deficiency) to such a degree that he ought not to be held responsible. The court should offer no test or formulation other than this.⁷⁷⁷

The 'Product' Test Used in Maine

5.71 Maine in the United States applied the so-called 'product test'.⁷⁷⁸ A person could rely on the defence of insanity if it could be shown that the criminal act or omission was a product of a mental disease or defect.⁷⁷⁹

5.72 The rationale for this broad test was to avoid the exclusion of potentially deserving cases. It was felt that juries should and could be trusted to make correct decisions based on the particular

773 A similar formulation exists under the *Canadian Criminal Code* RS 1985, s 16.

774 American Law Institute, *Model Penal Code and Commentaries (Official Draft and Revised Comments) With text of Model Penal code as adopted at the 1962 Annual Meeting of the American Law Institute at Washington, D.C. May 24, 1962, Part 1, General Provisions 3.01 to 5.07* (1985) s 4.01 163.

775 Robert F Schopp, *Automatism, Insanity and the Psychology of Criminal Responsibility* (1991) 33.

776 This concern was expressed by Schopp—Ibid 33.

777 *Report of the Royal Commission on Capital Punishment 1949–1953*, Cmd 8932 (1953).

778 The product test was formulated in the case of *Durham v US* 214 F 2d 862, (DC Cir 1954).

779 For further discussion of the case and the test see Ronald D Mackay, *Mental Condition Defences in the Criminal Law* (1995) 110.

circumstances of the case. The test allowed expert witnesses to provide their opinion about whether the accused was suffering from a disease of the mind or mental deficiency and the jury was then left to decide whether this disease or deficiency was such that the accused should not be held responsible.⁷⁸⁰

5.73 This approach can be criticised because it may lead to arbitrary and inconsistent decisions being made by juries, who receive no guidance as to what kind of features of mental illness should reduce culpability. People might be found not guilty merely because they have a mental illness, and not because the mental illness actually made them less culpable.

5.74 In Maine this approach was abandoned because it did not remove the issue of criminal responsibility from mental health experts. Psychiatrists continued to testify about whether the behaviour was the product of the mental disease, rather than simply providing information about the person's disease and leaving the jury to make a determination about the applicability of the defence.⁷⁸¹

The 'Modified Product' Rule—Australia

5.75 In Australia a narrower approach has been suggested by Peter Shea, Director of the Medium Security Unit at Morisset Hospital in New South Wales. Shea suggests a new defence of mental illness (called the 'modified product' rule) which is as follows:

A person has a mental illness defence if he or she was suffering from any one of four symptoms—delusions, hallucinations, severe disturbance of mood or severe intellectual impairment—at the time of the offence and the symptom or symptoms were directly causally related to the criminal act and were the only causal factors related to the act.⁷⁸²

5.76 This definition attempts to reflect psychiatric understanding of mental illness and its impact on behaviour and to provide a clear nexus between the illness and the behaviour. There are no M'Naghten elements in the defence. Instead it requires that the person was suffering from one of the listed illnesses at the time of the offence and that the illness was causally related and indeed the only causal factor which influenced the person's behaviour.

5.77 Shea's list of mental conditions is very limited. Apart from delusional behaviour, which would include the kind of psychotic episodes to which the current defence applies, only serious kinds of depression and similar mood disorders and extreme intellectual disability are included. Personality disorders would almost certainly be excluded. The benefit of this approach is that by requiring a causal link rather than cognitive incapacity, the definition moves away from the much criticised M'Naghten requirement that an offender be unable to understand his or her actions.

5.78 A potential problem with this approach is that there may be disagreement on the list of conditions which should be included as the basis of the defence.

780 Law Reform Commission of Victoria, *Mental Malfunction and Criminal Responsibility*, Discussion Paper No 14 (1988) 21.

781 Ronald D Mackay, *Mental Condition Defences in the Criminal Law* (1995) 111.

782 Peter Shea, 'M'Naghten Revisited—Back to the Future? (The Mental Illness Defence—A Psychiatric Perspective)' (2001) 12 *Current Issues in Criminal Justice* 347 360.

Expanded Mental Impairment Defence—McSherry Approach

5.79 Bernadette McSherry has suggested the following expanded definition of mental impairment in the context of reforming the law in relation to automatism.⁷⁸³ This approach has also been suggested by the Canadian Psychiatric Association

A person is not criminally responsible for an offence if he or she was suffering from mental impairment at the time of the commission of the offence such that his or her ability to reason was substantially impaired.⁷⁸⁴

5.80 This approach moves away completely from the M’Naghten requirements and would potentially cover cases of diminished responsibility⁷⁸⁵ and states of automatism. However it has been criticised for its focus on ‘reason’ as a core element. From a psychiatric perspective, mental illness is not necessarily related to the ability to reason.

The Butler Committee—United Kingdom

5.81 In England the Butler Committee also recommended changing the insanity defence and removing the M’Naghten elements. The Committee’s view was that psychiatrists should not be asked to give evidence on the extent of an accused’s responsibility for an offence because degrees of responsibility are legal rather than medical concepts.

5.82 The Committee recommended that the defence of insanity or mental disorder should be divided into two possible scenarios in which a special verdict could be returned:

- (i) Situations where the prosecution is unable to establish the mental element of the offence due to a mental disorder; and
- (ii) Situations where every element is established but due to the accused’s ‘severe mental illness’ or ‘severe subnormality’ (defined above) they should be acquitted.

5.83 In these situations the Committee recommended that there be an alternative verdict of ‘not guilty on evidence of mental disorder’.

5.84 This is another attempt to remove requirements of cognition and to provide a defence which would, in effect leave determination to the jury in each case. The problem with the formulation is that it requires no causal connection between the mental illness and the criminal behaviour and therefore could be used in situations where it was not intended to apply. It is also possible that the imprecision of the test would make juries more and not less reliant upon experts.

783 Automatism is discussed in more detail below at paras 5.178–5.195.

784 Bernadette McSherry, ‘Getting Away with Murder? Dissociative States and Criminal Responsibility’ (1998) 21 *International Journal of Law and Psychiatry* 163 175.

785 Discussed in detail at paras 5.98–5.124.

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QUESTION

54. Is the current cognitive test an appropriate one?
55. If the defence is changed, how should it be changed:
- (a) by introducing a volitional element?
 - (b) by reformulating the M’Naghten elements?
 - (c) by replacing the M’Naghten elements with a new mental condition defence?

DEFINE ‘MENTAL IMPAIRMENT’

5.85 Under the current law it is arguably unnecessary to define ‘mental impairment,’ because the M’Naghten elements limit the availability of the defence. If these elements were removed or modified it might be desirable to define ‘mental impairment’ more precisely, in order to prevent the defence being available in a very broad range of situations.

EXISTING AND PROPOSED DEFINITIONS

5.86 In Australia, there are a number of jurisdictions which have statutory definitions of insanity,⁷⁸⁶ mental impairment or mental illness. There have also been a number of attempts to formulate new definitions by law reform bodies here and in overseas jurisdictions. The following table provides a representative sample of these. Some merely restate the common law, while others attempt to provide more precise clinical criteria.

786 Queensland, New South Wales, Tasmania and Victoria do not have legislative definitions, Western Australia, South Australia, the Northern Territory, Queensland and the ACT do provide a definition.

TABLE 17: STATUTORY DEFINITIONS COVERING IMPAIRED MENTAL FUNCTIONING

Jurisdiction/Reform Body	Definition
Western Australia	<p><i>Mental Impairment</i> ‘Mental illness, intellectual disability, senility.’</p> <p><i>Mental illness</i> ‘[A]n underlying pathological infirmity of the mind, whether of short or long duration and whether permanent or temporary, but does not include a condition that results from the reaction of a healthy mind to extraordinary stimuli.’⁷⁸⁷</p>
Model Criminal Code	<p><i>Mental Impairment</i> ‘[S]enility intellectual disability, mental illness, brain damage and severe personality disorder.’⁷⁸⁸</p> <p><i>Mental Illness</i> ‘[A]n underlying pathological infirmity of the mind, whether of long or short duration and whether permanent or temporary. A condition that results from the reaction of a healthy mind to extraordinary external stimuli is not a mental illness. However, such a condition may be evidence of a mental illness if it involves some abnormality and is prone to recur.’⁷⁸⁹</p>
Community Development Committee—Victorian Parliament	<p><i>Mental impairment</i> ‘Mental illness, intellectual disability, acquired brain injury (including senility) and severe personality disorder.’⁷⁹⁰</p>
ACT pre-2003	<p><i>Mental Dysfunction</i> ‘[A] disturbance or defect to a substantially disabling degree, of perceptual interpretation, comprehension, reasoning, learning, judgment, memory, motivation or emotion.’⁷⁹¹</p>
England—Butler Committee proposed definition	<p><i>Severe Mental Illness</i> (a) Lasting impairment of intellectual functions shown by failure of memory, orientation, comprehension and learning capacity. (b) Lasting alternation of mood of such degree as to give rise to delusional appraisal of the patient’s situation, his past or his future, or that of others, or to lack of any appraisal. (c) Delusional beliefs, persecutory, jealous or grandiose. (d) Abnormal perceptions associated with delusional misinterpretations of events. (e) Thinking so disordered as to prevent reasonable appraisal of the patient’s situation or reasonable communication with others.’⁷⁹²</p>

787 The defence in Western Australia is actually insanity, but the defence, defined under section 27 of the Western Australian Criminal Code requires evidence of a state of mental impairment. Mental impairment and its component mental illness are defined under section 1 of the Code.

788 Criminal Law Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code, Chapter 2, General Principles of Criminal Responsibility*, Final Report (1992) 302.1.

789 Ibid para 302.1.

790 Community Development Committee, Parliament of Victoria, *Report Upon the Review of Legislation Under which Persons are Detained at the Governor’s Pleasure in Victoria*, Report No 57 (1995) 172.

791 *The Crimes (Amendment) Act 1994* (ACT) s 428B. This is no longer in operation and has been superseded by the *Criminal Code 2002* (ACT) 528, which includes a definition of mental impairment and mental illness based closely on the Model Criminal Code.

5.87 The Western Australian definition is quite broad. Although the definition is limited by the requirement that mental illness should not include reactions of ordinary people to extreme circumstances, it appears that potentially any diagnosable mental illness could be included.⁷⁹³ The Model Criminal Code Officer's Committee defines 'mental impairment' with a list of conditions and provides a definition of mental illness substantially similar to the West Australian version with the added element that while the reaction of a healthy mind to extraordinary external stimuli is not of itself evidence of mental illness, it may be evidence of such illness if it is prone to recur. The Model Criminal Code Officer's Committee also includes severe personality disorder on the list of conditions.

5.88 The definition proposed by the Victorian Parliamentary Community Development Committee is very similar to that recommended by the Model Criminal Code Officer's Committee. It was recommended in the Community Development Committee's Report on the governor's pleasure system which, also recommended that the defence of insanity be replaced with a defence of mental impairment. Although the defence of mental impairment was introduced, the suggested definition was not taken up.

5.89 Both the definition used in the ACT prior to 2003 and that proposed by the Butler Committee in 1975 in England⁷⁹⁴ approach the problem from a clinical or diagnostic perspective. Some would argue this provides greater clarity and predictability to the defence.⁷⁹⁵

THE PROBLEM OF PERSONALITY DISORDERS

5.90 The definition of mental impairment is likely to raise difficulties in two main situations. The first relates to the distinction between different kinds of automatism, the second relates to determining whether a definition should include personality disorders. We discuss some problems relating to automatism in paras 5.188–5.195. In this section we consider whether people with antisocial personality disorders should come within the definition of mental impairment.

5.91 At present the M'Naghten elements make it difficult, if not impossible, for people with personality disorders to rely on the defence of mental impairment. If a decision were made to define 'mental impairment' it would be necessary to consider whether or not personality disorders should be excluded from the definition.

5.92 Personality disorder can be defined as:

...an enduring pattern of inner experience and behaviour that deviates markedly from the expectations of the individual's culture, is pervasive and inflexible, has an onset in adolescence or early adulthood, is stable over time, and leads to distress or impairment.⁷⁹⁶

792 Committee on Mentally Abnormal Offenders, *Report of the Committee on Mentally Abnormal Offenders* (1975) 188.

793 *R v Radford* (1985) 42 SASR 266 where it was found per King CJ that 'disease of the mind' was synonymous with 'mental illness' and further held that the 'defect of reason' required for insanity must result from 'an underlying pathological infirmity of the mind, be it of long or short duration and be it permanent or temporary, which can be properly termed mental illness, as distinct from the reaction of a healthy mind to extraordinary stimuli.' This view was approved by the High Court in *R v Falconer* (1990) 171 CLR 30. The definition in South Australia is also very similar to this.

794 The Butler Committee made a range of recommendations in relation to mentally abnormal offenders. The recommendations in relation to the defence were never taken up and the UK still relies on the common law defence of insanity, although the defence is now rarely used, due to the availability of the defence of diminished responsibility. See generally, Committee on Mentally Abnormal Offenders, *Report of the Committee on Mentally Abnormal Offenders* (1975) 188.

795 Bernadette McSherry, 'Mental Impairment and Criminal Responsibility: Recent Legislation' (1998) 6 *Journal of Law and Medicine* 10 13.

5.93 A person with an anti-social personality disorder is likely to exhibit ‘a pattern of disregard for, and violation of, the rights of others.’⁷⁹⁷

5.94 There has been a great deal of disagreement about whether or not personality disorders should be regarded as mental illnesses. The current definition of mental illness in the Victorian *Mental Health Act 1986* excludes people whose sole diagnosis is personality disorder, so that they cannot be subjected to involuntary treatment.⁷⁹⁸ Bodies that have reviewed the law in the past have usually opposed the treatment of personality disorder as a mental illness.⁷⁹⁹

5.95 Two main arguments are made against including personality disorders within the definition of mental illness. Some argue that hospital disposition of people with anti-social personality disorders is inappropriate, partly because they tend to be very disruptive patients and partly because they are very difficult to treat with any success.⁸⁰⁰ For this reason it is argued that this kind of mental condition should be excluded from the definition of mental illness or abnormality of mind, so that these people are put in prison rather than hospital. The second reason given for excluding personality disorders and in particular anti-social personality disorders is that they are qualitatively different to other illnesses and are treated as such by psychiatry.⁸⁰¹ Indeed some would argue that people with personality disorders cannot be regarded as being mentally ill within the discipline of psychiatry.⁸⁰²

5.96 Those who favour inclusion of personality disorders within the definition of mental impairment argue that it is unfair to prevent people with personality disorders from relying on a mental impairment defence, simply because we do not yet know how to treat them. People should not be treated as guilty of an offence because it is believed that it is preferable to detain them in a prison rather than a hospital.⁸⁰³ It can also be argued that juries should be left to decide whether a person with a personality disorder should be treated as having a mental impairment, in the circumstances of the particular case.⁸⁰⁴ Under this approach the definition of mental impairment should not exclude personality disorder.

796 American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (4th ed) (2000) 685.

797 Ibid 701.

798 *Mental Health Act 1986* (Vic) s 8 (2).

‘A person is not to be considered to be mentally ill by reason only of anyone or more of the following:...

‘(l) that the person has an antisocial personality;...’

799 See David Neal, ‘Personality Disorder, The Criminal Justice System and the Mental Health System’ in *Serious Violent Offenders: Sentencing, Psychiatry and Law Reform: Proceedings of a Conference held 29–31 October 1991, Melbourne*, Sally-Anne Gerull and William Lucas (eds) (1993) for a summarised account of this debate and in particular for an account of the different positions of the Victorian Law Reform Commission and the Social Development Committee of the Victorian Parliament. See also Law Reform Commission of Victoria, *The Concept of Mental Illness in the Mental Health Act 1986*, 31 (1990) and Social Development Committee, Parliament of Victoria, *Interim Report upon Inquiry into Mental Disturbance and Community Safety: Strategies to Deal with Persons with Severe Personality Disorder who present a Threat to Public Safety*, Parliamentary Paper No 131 (1990).

800 See Law Reform Commission of Victoria, *Mental Malfunction and Criminal Responsibility*, Report No 34 (1990) 16; see also discussion of this issue in Community Development Committee, Parliament of Victoria, *Report Upon the Review of Legislation Under which Persons are Detained at the Governor’s Pleasure in Victoria*, Report No 57 (1995) 153 and Criminal Law Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code, Chapter 2, General Principles of Criminal Responsibility*, Final Report (1992) 39. See also David Neal, ‘Personality Disorder, The Criminal Justice System and the Mental Health System’ in *Serious Violent Offenders: Sentencing, Psychiatry and Law Reform: Proceedings of a Conference held 29–31 October 1991, Melbourne*, Sally-Anne Gerull and William Lucas (eds) (1993).

801 Bernadette McSherry, ‘Mental Impairment and Criminal Responsibility: Recent Legislation’ (1998) 6 *Journal of Law and Medicine* 10 12.

802 C R Williams, ‘Psychopathy, Mental Illness and Preventive Detention: Issues Arising from the David Case’ (1990) 16 *Monash University Law Review* 161 165.

803 Law Reform Commission of Victoria, *Mental Malfunction and Criminal Responsibility*, Report No 34 (1990) 16.

804 Ibid

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QUESTIONS

56. Does the current lack of definition of mental impairment cause uncertainty?
57. Should the defence of mental impairment include a definition of 'mental impairment'?
58. If a definition of 'mental impairment' is introduced should it be broad and general like the Western Australian definition or based on diagnostic criteria like those that used to exist in the ACT and those suggested by the Butler Committee?
59. Are there any alternative definitions of mental impairment that would be preferable?
60. Should personality disorders be included within the definition of mental impairment?

5.97 We have looked at the arguments for retaining the existing defence of mental impairment, and the implications of reforming the defence. We now turn to the possibility of introducing a partial defence of diminished responsibility

INTRODUCE THE PARTIAL DEFENCE OF DIMINISHED RESPONSIBILITY

5.98 We have seen that there are a number of ways in which the existing defence of mental impairment might be amended so that people with a wider range of mental conditions can use the defence. As an alternative the law could be amended to introduce the partial defence of diminished responsibility. The terms of reference asked the Commission to consider this possibility.

5.99 In the section below we explain this defence, referring to the law in other jurisdictions and to other law reform proposals. The Homicide Prosecutions study provides some indication of how the defence might operate if it were to be introduced in Victoria. We discuss the possible impact of the defence based on the findings of this Study. We will then examine the reasons for and against the introduction of the defence of diminished responsibility and look at some possible ways of introducing the defence.

WHAT IS DIMINISHED RESPONSIBILITY ?

5.100 Diminished responsibility is a partial defence to homicide, which originated in the UK and is now available in a number of Australian jurisdictions. The defence of diminished responsibility was first developed in Scotland in 1866 as a response to the purely cognitive elements of the M'Naghten insanity defence which were criticised because they did not take into account situations where offenders had their power of self-control diminished due to insanity.⁸⁰⁵ It was also felt that it was too harsh to confine mentally ill homicide offenders indefinitely and that there was a need for a defence which resulted in less severe outcomes for people who killed while they were mentally unwell.

805 Lawrie Reznick, *Evil or Ill? Justifying the Insanity Defence* (1997) 22.

5.101 Diminished responsibility was introduced into English law in 1957, despite the recommendations of the British Medical Association that an irresistible impulse test be added to the M’Naghten rules instead.⁸⁰⁶ The English formulation is as follows:

Where a person kills or is party to the killing of another, he shall not be convicted of murder if he was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility for his acts or omissions in doing or being party to the killing.⁸⁰⁷

5.102 This formulation forms the basis of diminished responsibility as it has developed in the Australian Capital Territory, New South Wales, the Northern Territory and Queensland.⁸⁰⁸

5.103 Each state that has a defence of diminished responsibility expresses the test in slightly different terms. There are, however, three common elements:⁸⁰⁹

- the accused must have been suffering from an abnormality of mind;
- the abnormality of mind must have arisen from a specified cause; and
- the abnormality of mind must have substantially affected the accused in a specified way.

Each of these elements requires closer examination.

Abnormality of Mind

5.104 ‘Abnormality of the mind’ is not defined clearly in the legislation, but a common law definition has developed and expanded over time. While early Scottish law suggested that ‘abnormality of mind’ meant actual mental illness or disease, the law in Australia has developed a much broader interpretation.⁸¹⁰ The term now appears to cover all the mind’s aspects, not only the perception of physical acts as required for a mental impairment defence, but also the ability to form a rational judgment about whether an act is right or wrong, and the ability to exercise will power to control physical acts in accordance with that rational judgment.⁸¹¹ A range of conditions have been found to amount to abnormality of mind including psychosis, organic brain disorder, schizophrenia, psychopathy, epilepsy, hypoglycaemia, depression both (reactive and endogenous), post-traumatic stress disorder, anxiety, personality disorder and pre-menstrual tension.⁸¹²

Hypoglycaemia or low blood glucose is a condition in which the level of glucose in the blood drops below a certain level. It is often suffered by diabetics as a result of an overdose of insulin. Hypoglycaemia can cause a variety of symptoms including irritability, agitation and convulsions in some people.

Reactive depression is depression which occurs in response to circumstances, such as external stress, the loss of a loved one or the end of a relationship. Endogenous depression is depression resulting from an inherent predisposition to depression.

806 Ibid 24.

807 *Homicide Act 1957* (England) s 2.

808 *Crimes Act 1900* (ACT) s 14; *Crimes Act 1900* (NSW) s 23A; *Criminal Code* (NT) s 37; *Criminal Code* (Qld) s 304A. There is also a defence of diminished responsibility under s 13 of the *Defence Force Discipline Act 1982* (Cth).

809 The accused need not prove these beyond reasonable doubt—they must simply prove them on the balance of probabilities: *R v Purdy* [1982] 2 NSWLR 964; *Tumanako* (1992) 64 A Crim R 149 at 158–160.

810 Desmond O’Connor and Paul Ames Fairall, *Criminal Defences* (3rd ed) (2001) 298.

811 *R v Byrne* [1960] QB 396 per Lord Parker.

812 New South Wales Law Reform Commission, *Provocation, Diminished Responsibility and Infanticide*, Discussion Paper 31 (1993) para 4.11.

5.105 Though the exact parameters of the term are unclear, it is nonetheless clear that it covers a broader range of mental conditions than mental impairment.

A Specified Cause

5.106 The requirement that the abnormality of mind be due to a 'specified cause' is imposed to ensure that ordinary emotions such as anger or jealousy are not relied upon as a basis for the defence.⁸¹³ In most Australian jurisdictions, the abnormality must have arisen due to:

- a condition of arrested or retarded development of mind;
- an inherent cause; or
- disease or injury.⁸¹⁴

5.107 Appropriate linkages must be established between the underlying elements and the abnormality. It appears from the case law that the temporary effects of intoxication,⁸¹⁵ emotions which are capable of modification by the accused such as prejudice, anger, temper or jealousy and particular attitudes or prejudices of a political or religious nature cannot be the cause of an abnormal state of mind.⁸¹⁶ In order to demonstrate diminished responsibility an accused must be able to separate causes that are excluded from the defence and successfully establish a link between one of the included causes and the abnormality.

5.108 If the abnormality of mind arises from an 'inherent cause', it must have some quality or attribute of permanence, even if it is not always apparent.⁸¹⁷ This means that if it stems from an underlying pathology which does have some degree of permanence to it, it may form a valid basis for the defence.⁸¹⁸

5.109 'Arrested or retarded development' includes mental infirmity, but appears not to extend to psychopathy or anti-social personality disorder.⁸¹⁹ 'Disease' has been found to include disorders such as epilepsy, delirium from fever, functional and organic psychiatric conditions.⁸²⁰ Injury has also been interpreted very broadly to include both physical and psychological injuries. Brain injury resulting from long term alcohol use, and stress sufficient to cause post-traumatic stress disorder are both examples of the interpretation of the word.⁸²¹

5.110 The New South Wales Law Reform Commission has attempted to remedy the problems surrounding the identification of causes by introducing a reformulated defence called 'substantial impairment by abnormality of mind' which replaces the reference to specified causes with the

813 Ronald D Mackay, *Mental Condition Defences in the Criminal Law* (1995) 187.

814 *Crimes Act 1900* (ACT) s 14(1); *Criminal Code* (NT) s 1; *Criminal Code* (Qld) s 304A.

815 Desmond O'Connor and Paul Ames Fairall, *Criminal Defences* (3rd ed) (2001), 300 citing *Jones* (1986) 22 A Crim R 42 at 44 per Street CJ.

816 *Ibid* 300, citing *Whitworth v The Queen*, [1989] 1 Qd R 437.

817 This is not required if it stems from a condition of arrested or retarded development of the mind or a disease of injury.

818 *McGarvie v The Queen*, (1986) 5 NSWLR 270.

819 Desmond O'Connor and Paul Ames Fairall, *Criminal Defences* (3rd ed) (2001) 302.

820 *Ibid* 303.

821 *Ibid* 303.

requirement that the abnormality must arise from an ‘underlying condition’. An ‘underlying condition’ is now defined in the *Crimes Act 1900*, s 23A to include ‘a pre-existing mental or psychological condition other than a condition of a transitory kind’.⁸²²

Substantially Impaired Capacity

5.111 It is also necessary to show that the abnormality of mind substantially impaired the defendant’s capacity. In most Australian jurisdictions where the defence is available,⁸²³ this means the defendant must have an impaired capacity to:

- understand what they were doing;
- know or judge that they ought not to do the act; or
- control their actions.

5.112 ‘Substantial impairment’ has been defined as falling somewhere between total and merely trivial or minimal impairment.⁸²⁴ The decision as to whether the accused’s capacity was substantially impaired in some way is a decision for the jury rather than the judge.

DISPOSITION

5.113 In all Australian jurisdictions where the defence of diminished responsibility exists, a defence results in a verdict of manslaughter. In New South Wales the judge cannot order that an offender be committed to a mental hospital when sentencing someone in a diminished responsibility case. The most that can be recommended is that the offender be put in a prison with psychiatric facilities.⁸²⁵ There is no discretion to continue to detain people at the end of their sentence if they are still regarded as dangerous.

5.114 In England, the *Mental Health Act 1983* empowers the courts to make hospital orders. Those who succeed in raising the defence of diminished responsibility may be, and in practice are likely to be committed to hospitals for the mentally ill.⁸²⁶ The offence must be punishable by imprisonment but does not include murder.⁸²⁷ Under section 37 of the Act a hospital order can be made on the evidence of

822 New South Wales Law Reform Commission, *Partial Defences to Murder: Diminished Responsibility*, Report No 82 (1997) Recommendation 4 para 3.43.

823 In the Australian Capital Territory, the test is that the accused’s ‘mental responsibility’ was substantially impaired.

824 New South Wales Law Reform Commission, *Provocation, Diminished Responsibility and Infanticide*, Discussion Paper 31 (1993) para 4.20.

825 New South Wales Law Reform Commission, *Partial Defences to Murder: Provocation and Infanticide*, Report No 83 (1997) para 4.47.

826 Studies conducted after the introduction of the defence of diminished responsibility indicated that over time it had become far more common for diminished responsibility cases to be dealt with through lengthy hospital dispositions than through prison sentences. It is important to note that England has a very different approach to dealing with mentally ill offenders. There are special hospitals run by the Department of Health and Social Security (as distinct from hospitals run by the National Health Service) purpose-built to deal with mentally ill offenders regarded as requiring detention in conditions of ‘special security’. See Susanne Dell, ‘The Detention of Diminished Responsibility Homicide Offenders’ (1983) 23 *British Journal of Criminology* 50 52.

827 There is currently a draft bill before the English Parliament which sets out considerable powers to detain mentally ill people who are considered to be dangerous whether or not they have committed a crime. The bill has been a very controversial one and the subject of much criticism from mental health services in England.

two medical practitioners who testify that detention or treatment is appropriate. In addition to this, restriction orders may be made which prevent discharge without the consent of the Home Secretary.⁸²⁸

POSSIBLE MODELS FOR DIMINISHED RESPONSIBILITY

5.115 As mentioned earlier, diminished responsibility is available as a defence in a number of different jurisdictions, but the defence takes a variety of different forms. A number of different law reform bodies have suggested alternative formulations. Some jurisdictions allow a broad range of mental conditions to form the basis of the partial excuse, in others an attempt is made to restrict the circumstances in which offenders can rely on diminished responsibility. We outline some examples of each below.

Broad Formulations

The English Homicide Act

5.116 The existing formulation of the defence in England is set out above at para 5.101. This formulation forms the basis of the law as it exists in Australia.

New South Wales

5.117 The New South Wales Law Reform Commission reviewed the defence of diminished responsibility in 1993 and recommended that it be retained but reformulated. The result of the recommended changes was the following version of the defence:

(1) a person, who would otherwise be guilty of murder, is not guilty of murder if, at the time of the act or omission causing death, that person's capacity to:

- (a) understand events; or
- (b) judge whether that person's actions were right or wrong; or
- (c) control himself or herself

was so substantially impaired by an abnormality of mental functioning arising from an underlying condition as to warrant reducing murder to manslaughter.

...23A(3) If a person was intoxicated at the time of the acts or omissions causing the death concerned, and the intoxication was self-induced intoxication (within the meaning of section 428A), the effects of that self-induced intoxication are to be disregarded for the purpose of determining whether the person is not liable to be convicted of murder by virtue of this section.⁸²⁹

5.118 'Underlying condition' in the subsection means a pre-existing mental or physiological condition other than one of a transitory kind.⁸³⁰

5.119 The replacement of 'abnormality of mind' with 'abnormality of mental functioning' introduces a definition in keeping with the New South Wales *Mental Health Act 1990*. In theory, this makes it easier for mental health professionals to apply the definition.

828 New South Wales Law Reform Commission, *Partial Defences to Murder: Provocation and Infanticide*, Report No 83 (1997) para 4.60.

829 *Crimes Act 1900* (NSW) s 23A.

830 *Crimes Act 1900* (NSW) s 23A(8).

5.120 The inclusion of the requirement that the abnormality arise from an underlying condition is an attempt to prevent the defence being used in circumstances which merely involve heightened emotions. According to the Commission, this formulation would in practice exclude cases involving extreme anger such as ‘road rage’ but could include violence resulting from a severe depressive illness, despite the fact that that illness was not permanent.

Narrower Formulations

5.121 There have been a number of attempts by law reform bodies to formulate the defence of diminished responsibility more narrowly so that it may only be used in limited circumstances. The following is an example of this approach.

Butler Committee Recommendation

5.122 In its 1975 Report on mentally abnormal offenders, the Butler Committee recommended a reformulation of the defence of diminished responsibility as follows:⁸³¹

Where a person kills or is party to the killing of another, he shall not be convicted of murder if there is medical or other evidence that he was suffering from a form of mental disorder (arrested or incomplete development of mind, psychopathic disorder and any other disorder or disability of mind, except intoxication) as defined in section 4 of the *Mental Health Act 1959* and if, in the opinion of the jury, the mental disorder was such as to be an extenuating circumstance which ought to reduce the offence to manslaughter.

5.123 This replaces reference to specified causes of mental unwellness (for example inherent cause, disease or injury and retarded development) with a more carefully and legislatively defined list of causes. It also replaces the notion of ‘substantially impaired capacity’ with ‘extenuating circumstances’. The test is less complicated than the existing defence as it simply asks the jury to consider the mental disorder from which the defendant was suffering and decide whether it was sufficient to reduce the offence to manslaughter. This avoids confusion about the issue of abnormality of mind and inherent causes and also requires the mental condition to be one which contained in mental health legislation. This may reduce the situations in which the defence might be applicable.

5.124 With these various models in mind, we now turn to the Homicide Prosecutions Data to determine the possible circumstances in which diminished responsibility might be used.

THE HOMICIDE PROSECUTION STUDY

5.125 As part of our study, information from the psychiatrists’ and psychologists’ reports included with the case files was examined and analysed in order to see whether anything could be concluded about the implications of introducing the defence of diminished responsibility in Victoria. We look below at cases where people with diagnosed mental conditions did not raise mental impairment as a defence. We then attempt to assess whether diminished responsibility could have been raised in those cases, had it been available.

831 Committee on Mentally Abnormal Offenders, *Report of the Committee on Mentally Abnormal Offenders* (1975).

5.126 Our assessment was based on psychiatrist and psychologist reports. These were prepared for the prosecution or the defence under a system which does not recognise a diminished responsibility defence and may well have been written very differently had the defence been available. Thus our conclusions on the effect of introducing diminished responsibility are speculative, as it is impossible to say with certainty which of the potential cases we look at might actually have succeeded in raising the defence, had it been available to them.

5.127 Psychiatrist or psychologist reports were prepared in 126 cases **st 78**. Of those 126, 69 reported a pre-existing mental illness or impairment of some kind **st 79**. An additional three cases clearly involved a mental illness but did not have a record of a report from a psychiatrist or psychologist. Cases involving diagnoses of mental disturbance or illness that developed as a consequence of the homicide were not included in our study and psychiatric reports that merely made general observations about violent upbringings or stressful family environments were also excluded.

5.128 The disorders set out in the American Diagnostic and Statistical Manual of Mental Disorders⁸³² were used as a guide to determine which diagnoses to include as was case law on the meaning of diminished responsibility. For example one case of an offender suffering from post-traumatic stress disorder (PTSD) was included as case law supports a verdict of diminished responsibility in cases of PTSD. The 69 cases involving mental illness diagnoses were then sorted under the general diagnostic headings reflected in Table 18 below.

5.129 In addition to mental illnesses the Table includes a further set of cases where substantial drug or alcohol abuse by the offender was reported, as distinct from evidence only that drugs or alcohol had been consumed. The reason for including these cases is that where drug or alcohol abuse has caused cognitive impairment or deficit it could form the basis of a defence of diminished responsibility. In this next section we have set out some sample case studies as illustrations of the kinds of cases in each of the broad categories. This information will be used later in the chapter as the basis for a discussion about the advantages and disadvantages of introducing the defence.

TABLE 18: MAJOR CATEGORIES OF MENTAL ILLNESS/IMPAIRMENT⁸³³ **ST 80 & 81**

Mental illness/impairment categories	Number
Depression or depression related	33
IQ related	23
General indicators of mental instability	13
Personality disorders	11
Psychotic illness	11
Conditions other than mental illness	2
Other mental illnesses	5
Alcohol/drug abuse	29

832 American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (4th ed) (2000).

833 Note that the sum of these illnesses will not equal 69 because in 29 of the cases there were multiple conditions diagnosed.

Depressive Illness

5.130 This category included cases where some kind of clinical depression had been diagnosed. In order to base a defence of diminished responsibility on depression an offender would need to be able to show a pre-existing history of depressive illness, rather than depression which was merely transitory and affected the offender only at the time of the killing. The following case study illustrates the kind of situation in which an abnormality of mind on the basis of depression might have been arguable.



CASE STUDY 16

Mark and Louise were married in 1985. Louise had a 9-year-old daughter Penny from a previous marriage. Mark was made redundant from his job shortly after the wedding and did odd jobs to supplement his unemployment benefits and support his family. Mark and Penny had had a very bad relationship from the time that Penny was in her early teens. Mark was very violent towards Penny and had sexually assaulted her on several occasions. Mark had also threatened to shoot Penny and had even put a loaded gun to Penny's head on a number of occasions. When Penny was 18 she moved out of home and began a youth training program. She began socialising and making friends. When Mark heard of this, he was not happy and asked Penny to move back home. Penny refused and would not visit her mother for fear of running into Mark.

Finally Penny agreed to visit her parents for dinner and to stay the night. During dinner it came out that Penny had a boyfriend, that she had stayed overnight at his house and that Louise was aware of this and had not told Mark. Mark was very angry and upset about this and argued with both Penny and Louise before going to bed. Penny and her mother continued talking for some time in the kitchen and were sitting at the kitchen table when Mark came in with a gun and shot both Penny and Louise. Penny died instantly while Louise survived with brain damage.

Mark was diagnosed by two different psychiatrists as having, in the period preceding the murder, a severe depressive illness, which had probably begun years earlier and was precipitated by him being made redundant from work.

Mark raised provocation at his committal hearing, but ultimately pleaded guilty to murder and was sentenced to 23 years in prison.⁸³⁴

5.131 Depressive illness was by far the most common diagnosis within cases where diminished responsibility could have been argued, if this partial excuse had been available. Men and women accused in our study suffered from depressive illnesses equally frequently. Because men kill much more frequently than women, introducing diminished responsibility would make this partial excuse available to larger numbers of depressed men than women [st 82](#).

5.132 Eighteen killings involving a depressed accused occurred in the context of sexual intimacy [st 83](#). Half of the male accused suffering from depression killed in the context of sexual intimacy. It is difficult to conclude very much from such small numbers, other than that there is some overlap between accused affected by depression and killing in the context of sexual intimacy. Empirical research in New South Wales where diminished responsibility is available shows that the defence tends to be relied upon

834 Based on Case Study 1999042.

frequently in cases where male offenders kill their female partners in situations of sexual intimacy, and more specifically as a result of jealousy or the need to control the relationship.⁸³⁵ This is a relevant factor in deciding whether the defence should be introduced.

5.133 Not all depression-related cases of homicide involve men killing their partners. Case Study 9, for example, which is outlined in Chapter 3, referred to a man who killed his father after years of horrific and brutal physical and sexual abuse by his father.⁸³⁶ The killing occurred after an argument between father and son and provocation was raised successfully as a defence. The son's childhood and the history of abuse was included as part of the defence's argument.

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QUESTION

61. Should depression ever form the basis of a partial defence to murder?
62. If depression can provide the basis for a partial excuse of diminished responsibility, how should the law distinguish between killings where depression should be a relevant consideration and circumstances where it should not?

IQ Related Conditions

5.134 This category included those with below average intelligence (with an IQ range of 70 to 89) and those with an actual intellectual disability (an IQ of less than 70). In most of the jurisdictions where diminished responsibility is available one of the specified causes of an abnormality of mind is a 'condition of arrested or retarded development of mind', so intellectual disability can be used as the basis of diminished responsibility. The following case study provides an illustration of an offender with an intellectual disability.

5.135 Low IQ could clearly provide the basis for a diminished responsibility defence, but it is less clear which people should be included. According to the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders⁸³⁷ a person with an IQ of 70 and below is regarded as intellectually disabled. There were only four offenders in this category (of whom two were co-offenders) with the remaining 19 offenders having IQs ranging from 70 to 89 **st 80**.

835 Rebecca Bradfield, *The Treatment of Women Who Kill Their Violent Male Partners Within the Australian Criminal Justice System* (PhD Thesis, University of Tasmania, 2002) 107.

836 See Chapter 3 para 3.102.

837 American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (4th ed) (2000) 740.



CASE STUDY 17

Frank and Harry were working as itinerant fruit pickers who had been travelling together for some time from farm to farm. Harry had an intellectual disability and Frank had been in and out of prison. Frank had tried to join the army but had been unable to because of his prison record and was very angry and bitter about this.

Harry and Frank met Lou on one of the farms where they were all working. One night while talking over dinner Lou bragged to Frank and Harry about his days in the army. Frank became very jealous and later told Harry to kill Lou. He arranged for a friend to supply Harry with a knife, which Harry used to kill Lou while he was sleeping.

Harry pleaded guilty to murder and was sentenced to 17 years in prison.⁸³⁸

5.136 In our early consultations with psychiatrists, the view was expressed that those with low intelligence were often susceptible to the influence of those around them. Case Study 17 is an example of a situation where the accused committed a homicide because of the influence of another party. However in our Homicide Prosecutions Study more accused who had low IQs acted alone than as a co-accused. Nine were co-offenders, 14 were single offenders [st 84](#).



QUESTION

63. If diminished responsibility is introduced, should it be restricted to people with an intellectual disability, or be more broadly defined?

General Indicators of Mental Instability

5.137 This category includes cases where the psychiatric reports recorded a variety of symptoms without a firm or specific diagnosis of mental illness.⁸³⁹ Most of the people in relation to whom general indicators of mental instability were recorded also had other illnesses such as depression as a diagnosis. The following case study is an example of a case in this category.

⁸³⁸ This Case Study is based on Case No 1999277.

⁸³⁹ See Case Study 19 as another example of this category. As well as having a personality disorder, Amanda was diagnosed as suffering from a 'gross disturbance of mental functioning' which, while it is not of itself a mental illness, is nevertheless was considered significant enough to record.



CASE STUDY 18

Tom separated from his wife Mary after four years of marriage. It was Tom's idea to end the marriage, however when Mary began a relationship with another man Tom began harassing Mary. Mary took out an intervention order against Tom which angered him. One day, Tom took his axe and hid it near Mary's flat. He then returned to her house early the next morning, broke into her flat and killed her with the axe.

Tom then removed his blood stained clothing and buried it in a nearby vacant lot before going to the nearest police station and making a full confession. Tom said that he believed that Mary had been unfaithful throughout their marriage and that this had been upsetting him ever since they separated.

Tom was diagnosed as suffering from cerebral dysfunction as well as having 'paranoid trends', anxiety, hypomanic features and a 'schizoid trend'. No actual mental illness was diagnosed, Tom pleaded guilty to murder and was sentenced to 19 years in prison.⁸⁴⁰

5.138 Non-specific diagnoses short of actual mental illness would not necessarily preclude diminished responsibility from being raised. Diminished responsibility requires evidence of a 'specified cause', however in cases of multiple diagnoses it will be necessary to identify the relevant 'cause' of the abnormality of mind. In practice, this may simply involve choosing the cause most likely to be accepted by a jury so the defence may ultimately be quite artificially constructed and very complicated for a jury to comprehend.⁸⁴¹ In addition to the 13 cases where there were 'general indicators of mental instability' there were a total of 29 cases involving multiple diagnoses [st 85](#).



QUESTION

64. Should general indicators of mental instability short of precise diagnoses be included in a definition of diminished responsibility? If not, how might they be excluded from a definition of the defence?

Personality Disorders

5.139 This category contains people with personality disorders [st 80](#). In many of the cases the type of personality disorder was not specified. There are many different kinds of personality disorder and each type relates to particular behavioural features of the disorder. The American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders attributes personality disorder to a person whose behaviour deviates considerably from that which is expected by that person's culture and which is pervasive and inflexible.⁸⁴² There are a variety of different kinds of personality disorder, each

840 This Case Study is based on Case No 2000239.

841 Gleeson CJ in *R v Chayna* (1993) 63 A Crim R 178; Law Reform Commission of Victoria, *Mental Malfunction and Criminal Responsibility*, Report 34 (1990) 52.

842 American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (4th ed) (2000) 710.

characterised by its own particular deviant behaviour. A borderline personality disorder, for example is characterised by instability in personal relationships. Diagnostic criteria for borderline personality disorders include ‘frantic efforts to avoid real or imagined abandonment [by others]’ and ‘a pattern of unstable and intense interpersonal relationships characterised by alternating between extremes of idealisation and devaluation’.⁸⁴³ The following case study involves an accused person with a borderline personality disorder.



CASE STUDY 19

Amanda was a school acquaintance of Sarah’s. Sarah was successful at school and was also a very talented actress with plans to study acting at the end of high school. Amanda was overweight and unpopular with very low self-esteem. Amanda became obsessed with Sarah and was very jealous of her talents and physical appearance. Amanda became convinced that she could assume Sarah’s persona. She found out Sarah’s birth date and applied for a copy of her birth certificate. She kidnapped Sarah and killed her, concealing her body for some weeks before the police finally found the body and arrested Amanda.

Amanda was diagnosed as having a borderline personality disorder as well as suffering from a ‘gross disturbance of normal mental functioning’. Amanda pleaded guilty to murder and was sentenced to 20 years in prison.⁸⁴⁴

5.140 Most existing definitions of diminished responsibility, including the more narrow definitions could be used as the basis of a defence for people with personality disorders. It would then depend on the circumstances of the case and the decision of the jury as to whether a particular personality disorder was seen as reducing a person’s capacity to control his or her behaviour.



QUESTION

65. If diminished responsibility is introduced in Victoria should it apply to people with personality disorders?

Conditions Other than Mental Illness

5.141 This category contains only two cases: one involving an offender with epilepsy and one involving an offender with hypoglycaemia⁸⁴⁵ **st 80**. There is little recorded information about the conditions on the files as they are not psychiatric conditions and thus not likely to be reported or commented upon by a psychiatric report. They have, nonetheless been included in the sample as it would be possible to mount an argument of diminished responsibility if it could be shown that the condition substantially impaired the offender’s responsibility for his or her actions. Certainly it would be open to argue that either epilepsy or hypoglycaemia should be classified as abnormalities of mind.

Other Diagnoses

843 Ibid 710.

844 This Case Study is based on Case No 1999275.

845 For definition refer above para 5.104.

5.142 This category contains five cases of distinct diagnoses of mental conditions which do not fit into any of the other categories. The diagnoses included a conduct disorder; a dissociative disorder; a post-traumatic stress disorder; a hyperactivity disorder and an impulse control disorder **st 80**.

Alcohol or Drug Abuse

5.143 The 29 cases involving alcohol and drug use were coded separately from those involving mental disorders **st 81**. Cases were coded to reflect different levels of alcohol or drug related impairments. In order to be included there had to be a record of an extensive history of severe drug or alcohol abuse. Within that group there were cases where alcohol abuse had led to memory loss or to mental impairment and where drug abuse had led to mental impairment, brain injury or psychosis. The following is a case study involving an accused who was suffering from a drug induced psychosis at the time of the killing.



CASE STUDY 20

Victor and Cherie had grown up together and were married when they were in their early 20s. Soon after their marriage, Vick discovered that Cherie had been unfaithful to him and from that point onwards he became very violent towards her. Both Victor and Cherie were regular users of amphetamines. Victor used these drugs very heavily for some years. He regularly hit Cherie for reasons including not ironing his shirt properly or forgetting to buy him cigarettes at the supermarket.

Eventually Cherie left Victor and obtained an intervention order against him, but after a period of time they reconciled and began living together in a share house with other people. Victor continued his violent behaviour, beating Cherie severely when she was pregnant with their child and causing Cherie to have a miscarriage. Finally after one particularly bad beating Cherie collapsed unconscious and was rushed to hospital where she died of a cerebral haemorrhage as a result of Victor beating her around the head.

Victor was assessed by a psychiatrist after Cherie's death and was diagnosed as suffering from a drug induced psychosis at the time of the killing resulting in paranoid ideas and auditory hallucinations about his wife's unfaithful behaviour.

Victor pleaded guilty to manslaughter on the basis that he had not intended to kill Cherie and was sentenced to five years in prison.⁸⁴⁶

5.144 Extensive and long-term abuse of alcohol or drugs can precipitate particular mental illness or cause actual brain injury and thus can arguably form the basis of a defence of diminished responsibility. Case law clearly excludes using intoxication at the time of the killing as a basis for the defence and the New South Wales diminished responsibility provisions specifically exclude the use of intoxication as the basis of the defence.



QUESTION

846 Based on Case Study 1999263.

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QUESTION

66. Should psychosis induced by long term excessive drug or alcohol abuse be accepted as a basis for a mental condition defence?

OVERLAP BETWEEN PROVOCATION AND DIMINISHED RESPONSIBILITY

5.145 There is likely to be an overlap between cases where provocation is relied on as a partial excuse and cases where diminished responsibility could be argued. Within the diminished responsibility group provocation was raised by men in 12 cases and by women in three cases [st 86](#). All but one of the men also raised provocation at trial [st 87](#). If diminished responsibility were introduced provocation and diminished responsibility might be run concurrently. If provocation were abolished and diminished responsibility were introduced some accused might rely on diminished responsibility instead.

5.146 This overlap is likely to occur in homicides occurring in the context of sexual intimacy. In our study men who might have relied on diminished responsibility raised provocation in the context of sexual intimacy more often than in any other context. There were only three women who raised provocation in the study. All of these were women who might have raised diminished responsibility and two of the three killed in the context of sexual intimacy.

5.147 Having examined the characteristics of people who might raised the defence, we now turn to consider reasons for and against the introduction of diminished responsibility.

WHY INTRODUCE DIMINISHED RESPONSIBILITY?

5.148 There are a number of reasons to consider the introduction of the defence of diminished responsibility.

- Diminished responsibility provides an intermediate defence for those with mental conditions falling short of mental impairment.
- If provocation is retained, then diminished responsibility should be introduced for the sake of fairness and consistency.
- Diminished responsibility provides an alternative defence for women.
- More accused may be prepared to plead guilty if diminished responsibility is available, making a trial unnecessary.
- Diminished responsibility could replace infanticide and possibly also automatism.
- Diminished responsibility is preferable to taking the mental condition of the accused into account at sentencing.

Each of these reasons needs some further explanation.

'Half-Way' Mental Condition Defence

5.149 Diminished responsibility provides an intermediate option for offenders who are suffering from mental illness and yet are not ill enough to raise mental impairment. The M'Naghten rules require a very high degree of mental impairment, which is too difficult for many to establish. Diminished responsibility presents a possible alternative to expanding the mental impairment defence. Its

introduction would reflect the reality that mental illness ranges along a continuum and so should levels of criminal responsibility.

Diminished Responsibility Should be Introduced if Provocation is Retained

5.150 If provocation is retained in Victoria, there is a strong argument that diminished responsibility should be introduced to ensure the law operates consistently and fairly. Provocation reflects a belief that the law should make concessions to human frailty in the form of uncontrolled anger. It is unfair that such a concession is not made to offenders with diagnosed mental illnesses. As we saw in Chapter 3, the proposition that extreme emotions such as anger can deprive people of their ability to control themselves is controversial. It seems more justifiable for the law to recognise that certain mental illnesses reduce a people's responsibility for their behaviour.

Diminished Responsibility Provides an Alternative Defence for Women

5.151 Diminished responsibility may be of use to women in situations of domestic violence where no other defence is available to them. As we have seen in Chapters 2 and 3 women may have difficulty in raising provocation or self-defence in such situations. Diminished responsibility could enable women to argue that they were suffering from an abnormality of mind due to abuse over a prolonged period of time. In England, for example where diminished responsibility is available, a diagnosis of Battered Women Syndrome has been seen as sufficient to establish 'abnormality of mind' for the purposes of diminished responsibility.⁸⁴⁷

Encouraging Pleas

5.152 In England it has become common practice to accept a manslaughter plea where the medical evidence of mental abnormality is not in dispute. This has become by far the most common way of dealing with diminished responsibility cases.⁸⁴⁸ It has been suggested by some that the existence of the defence saves time and money by making a trial unnecessary.⁸⁴⁹

A 'Catch-All Defence'

5.153 Diminished responsibility may also operate in place of the defences of infanticide and automatism, which have been widely criticised for their failure to reflect psychiatric knowledge and understanding of mental illness. Infanticide is discussed in Chapter 6 of this paper. We deal with automatism in paras 5.178–5.195.

Preferable to Dealing with Mental Condition at Sentencing

5.154 One of the arguments for retaining the current law is that there is a range of sentencing options already available, including hospital dispositions, which can take account of the mental condition of offenders. For a number of reasons this may be viewed as an undesirable option. First, the judge is

847 Susanne Dell, 'The Detention of Diminished Responsibility Homicide Offenders' (1983) 23 *British Journal of Criminology* 50 52.

848 Ronald D Mackay, *Mental Condition Defences in the Criminal Law* (1995) 181; Susan Dell, 'Diminished Responsibility Reconsidered' (1982) *Criminal Law Review* 809.

849 New Zealand Law Commission, *Battered Defendants, Victims of Domestic Violence Who Offend*, Preliminary Paper 41 (2000) 39 para 130.

reliant upon the defence to present information regarding the offender's mental condition and this may not be prioritised in the absence of a specific defence. Secondly it has been argued that matters of criminal responsibility are best determined by the jury, rather than left to the judge's sentencing discretion. This was one of the most important reasons for the New South Wales Law Reform Commission's recommendation to retain diminished responsibility.⁸⁵⁰

REASONS NOT TO INTRODUCE DIMINISHED RESPONSIBILITY

5.155 The arguments against introducing diminished responsibility can be summarised as follows.

- The defence is not necessary—there are other ways in which the mental condition of accused can be taken into account.
- If provocation were abolished its defects would be retained by the introduction of diminished responsibility.
- The defence is too broad and consequently it may be abused.
- Expanding the defence of mental impairment is preferable to introducing diminished responsibility.
- People with personality disorders will be able to raise diminished responsibility.
- Diminished responsibility pathologises women.
- The onus and standard of proof for diminished responsibility may be confusing in practice, particularly if the defence can be run concurrently with provocation.
- In many cases manslaughter will be an inappropriate outcome for people who succeed in raising diminished responsibility.

A Diminished Responsibility Defence is Unnecessary

5.156 In 1975 in its report on mentally abnormal offenders, the Butler Committee recommended that the defence of diminished responsibility be removed and that a discretionary sentencing regime for murder should be introduced. These recommendations recognise that the practical reason for having a defence of diminished responsibility is to secure a shorter sentence for offenders. If the particular context of the offender can be taken into account during sentencing, there is no reason to retain diminished responsibility as a separate defence.

5.157 In Victoria, which has a discretionary sentence for murder, as well as reasonably flexible sentencing options including the potential for hospital dispositions for mentally ill offenders,⁸⁵¹ this argument is persuasive. In addition to existing sentencing options it is arguable that the defence of lack of intent on the basis of mental disorder is now available as a result of the recent decision in *R v Hawkins*.⁸⁵² A lack of intent defence might be used in circumstances where defendants were able to argue that their mental condition rendered them unable to form the requisite intent for murder. The effect of such an argument would, in most cases, be a verdict of manslaughter. Such a defence might be seen as

850 New South Wales Law Reform Commission, *Partial Defences to Murder: Diminished Responsibility*, Report No 82 (1997).

851 *Sentencing Act 1991* (Vic) ss 90, 91, 93.

852 (1994) 179 CLR 500.

sufficiently similar to the defence of diminished responsibility as to make the introduction of that defence unnecessary.

Diminished Responsibility Could be Used to Replace Provocation

5.158 One of the options considered in this Options Paper is the abolition of provocation. If provocation is abolished and diminished responsibility is introduced it is likely to operate in many cases as a replacement defence. Rather than raising the provocative conduct of their partners, men may instead rely on the fact that they were suffering from depression at the time of the killing and that this impaired their capacity to control their behaviour.

The Defence is Too Broad and Consequently Liable to Abuse

5.159 The defence of diminished responsibility can be used in a wide range of circumstances, which may be broader even than those who support its introduction might have intended. For example, while we may sympathise with the son who suffers from severe depression mentioned in paragraph 5.133 killing his father after years of abuse, it is perhaps less likely that we would want a defence of diminished responsibility to be available to Mark in Case Study 16, who killed his stepdaughter. Nevertheless, the defence would be arguable in both cases and provides no basis for distinguishing between the two.

5.160 We also saw that the defence can be raised on the basis of vague and general diagnoses. 'Abnormality of mind' is not a medical term and there is no clear definition of the term in any of the jurisdictions where the defence is available.⁸⁵³ The defence also calls for a number of subjective assessments, such as whether or not the abnormality 'substantially impaired' the defendant's capacity. For example, while most formulations of the defence make allowances for abnormality of mind based on 'arrested or retarded development of mind', what this translates into in practice is less clear.

5.161 As a consequence of the imprecise nature of the defence, trials where diminished responsibility is raised appear more likely than mental impairment trials to involve disagreements between experts and also a tendency to involve more experts. This creates a perception that it is open to the prosecution and defence to 'shop around' for experts sympathetic to their case. A recent example of this is the case of *Chayna*⁸⁵⁴ where seven different psychiatrists gave evidence and each had a different diagnosis. Cases such as *Chayna* raise the concern that an 'abnormality of mind' is easier to fake than mental impairment and therefore more open to abuse.

5.162 As in the case of mental impairment, the use of expert evidence in diminished responsibility cases may result in a breach of the ultimate issue rule.⁸⁵⁵ Experts will be asked to comment not only on the mental state of the accused, but also upon the extent to which this mental state affected his or her capacity to obey the law. There is a fine but important distinction between giving an expert opinion about how a particular mental state might affect a person in the circumstances of the accused and giving

853 See Gleeson CJ in the case of *R v Chayna* (1993) 63A Crim R 178. Gleeson CJ commented that the operation of s 23A of the *Crimes Act 1900* (NSW) depended on concepts that were 'ambiguous' and 'unscientific': see *Chayna* Commentary (1993) 17 CLJ 273 at 276. Law Reform Commission of Victoria, *Mental Malfunction and Criminal Responsibility*, Report No 34 (1990); Model Criminal Code Officers Committee of the Standing Committee of the Attorneys-General, *Model Criminal Code, Chapter 5, Fatal Offences Against the Person*, Discussion Paper (1998).

854 *R v Chayna* (1993) 63A Crim R 178 referred to in Victorian Law Reform Commission, *Defences to Homicide*, Issues Paper (2002) 74.

855 Criminal Law Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code, Chapter 5: Fatal Offences Against the Person*, Discussion Paper, (1998) 125.

an opinion about whether or not the particular mental condition did in fact affect the accused. The latter is a question of fact for the jury to decide based on the views of expert evidence. In practice however, the distinction can seem an academic one. Given that diminished responsibility cases can be very confusing, juries may tend to defer to expert opinion about ultimate issues rather than arriving at their own determination based on the evidence.

Expanding the Defence of Mental Impairment is Preferable to Introducing Diminished Responsibility

5.163 Some may argue that although the defence of mental impairment is perhaps too narrow, that diminished responsibility is overly broad. Included in the study were several cases involving accused who were suffering from psychotic episodes at or around the time of the killing. These people were not sufficiently affected by their psychoses to raise a defence of mental impairment, but they should, arguably, have some kind of defence available to them. The addition of a volitional element to the defence of mental impairment may be a more appropriate, controlled expansion of the current defence of mental impairment. The other reason to amend the existing defence rather than introducing diminished responsibility is that the outcome will be a hospital disposition rather than a manslaughter verdict and a prison sentence. The dispositional issues associated with the defence of diminished responsibility are further discussed below at paras 5.167–5.168.

Personality Disorders and Diminished Responsibility

5.164 The debate about the inclusion of personality disorders within the parameters of mental condition defences has been outlined above in relation to mental impairment, essentially many are concerned by any proposal which might involve having to deal with people affected by personality disorders within the current hospital system.⁸⁵⁶ In England, this issue has been dealt with by means of special hospitals for mentally ill offenders. Currently the issue of people with dangerous and severe personality disorders is being addressed through introduction of new mental health legislation that would allow very broad discretion in relation to the ongoing detention of people with personality disorders who are regarded as dangerous. This kind of pre-emptive detention is not something which has ever been favoured in Australia and careful consideration would therefore need to be given to sentencing options for those with personality disorders who raised the defence of diminished responsibility successfully.

Diminished Responsibility Pathologises Women

5.165 One of the arguments for the introduction of diminished responsibility is that it provides an alternative defence for women in situations where they find it difficult to raise either provocation or self-defence. The difficulty with this approach is that it treats women who kill in response to violence as mentally ill, rather than focusing on the violent behaviour of the abusive partner. It may be preferable to reform the defence of self-defence.

Onus and Standard of Proof for Diminished Responsibility and Provocation

5.166 The onus for proving diminished responsibility is on the defence. While this is consistent with the defence of mental impairment, in practice in jurisdictions where the defence operates it has been

856 See above para 5.95.

raised concurrently with the defence of provocation. This can lead to confusion and some have argued, to unjust outcomes. Raising the defence of provocation requires the prosecution to prove that there was no provocation beyond reasonable doubt. By contrast, the defence has the responsibility of proving diminished responsibility on the balance of probabilities. Ensuring that juries understand the different burdens is difficult. It also seems unfair that people who lose their temper and kill should have the benefit of the burden being upon the prosecution, where people who are mentally unwell do not.⁸⁵⁷ Of the 69 potential diminished responsibility cases, 14 offenders (11 male, three female) raised provocation at some stage of their trial. While it is, impossible to know whether these cases would have run diminished responsibility and provocation concurrently if diminished responsibility were available, it is nevertheless an indication of the proportion of cases where both defences would be available and therefore where problems of conflicting standards and onus of proof issues might arise.

Disposition of People Who Successfully Raise Diminished Responsibility

5.167 Diminished responsibility cases can result in sentencing anomalies and difficulties. The practical effect of introducing diminished responsibility is that an accused is found guilty of manslaughter and not murder. Nevertheless the practical reality is that reduced sentences may not be the appropriate way of dealing with people who have killed because of an abnormality of the mind.⁸⁵⁸

5.168 Sentencing legislation in jurisdictions which have a diminished responsibility defence allows judges to take into account the dangerousness of the offender in imposing a sentence. This does not sit comfortably with the fact that the diminished responsibility is supposed to be a defence to murder, so that the outcome should be a less severe sentence than that resulting from a guilty verdict.⁸⁵⁹

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QUESTION

67. What should the outcome be for offenders who succeed in raising diminished responsibility?

TEST FOR DIMINISHED RESPONSIBILITY

5.169 If diminished responsibility is to be introduced, it will be necessary to determine how the Victorian version of the defence should be drafted. To what extent could the definition of the defence address the concerns raised above?

5.170 Briefly, the options include:

- following the English model;
- including a more precise definition of ‘abnormality of mind’;
- excluding particular conditions from the definition of ‘abnormality of mind’; and

857 This argument was raised in one of the submissions to the New South Wales Law Reform Commission see New South Wales Law Reform Commission, *Provocation, Diminished Responsibility and Infanticide*, Discussion Paper 31 (1993) para 4.22.

858 See in particular, in relation to this issue the case of *R v Veen (No1) (1979) 143 CLR 458*; and *Veen (No2) (1988) 164 CLR 465* a case in New South Wales where a defendant was given a reduced sentence because he successfully raised diminished responsibility despite the fact that there was also an argument raised that he was a likely repeat offender. Veen was released and did in fact kill again.

859 This difficulty was recognised by the New South Wales Law Reform Commission which, however, ultimately recommended against introducing any new sentencing options see New South Wales Law Reform Commission, *Partial Defences to Murder: Diminished Responsibility*, Report No 82 (1997) para 3.116.

- developing better options for dealing with people who succeed in raising diminished responsibility.

Following The English Model—the Most Common Formulation

5.171 As mentioned above, the English *Homicide Act 1957*, provides the basis of the defence in most Australian jurisdictions:

Where a person kills or is party to the killing of another, he shall not be convicted of murder if he was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility for his acts or omissions in doing or being party to the killing.⁸⁶⁰

This is a very broad defence, which would not address some of the concerns outlined above.

Including a Definition of ‘Abnormality of Mind’

5.172 The application of the defence could be limited by providing specific definitions of abnormality of mind. This has been done in a very general way in New South Wales where ‘abnormality of mind’ has become ‘abnormality of mental functioning’ to bring the definition into line with existing mental health legislation. The Butler Committee formulation also attempts to provide a more precise definition by referring to the Mental Health legislation.

5.173 It would also be possible to use one of the existing definitions of mental impairment as the basis of diminished responsibility, such as that used by the Model Criminal Code or suggested by the Butler Committee.⁸⁶¹

5.174 A definition such as that suggested by the Model Criminal Code⁸⁶² might assist experts to determine with greater certainty which illnesses should be excluded from the defence. This definition would also ensure that conditions such as reactive depression (that is depression arising as a result of circumstances as distinct from depression as a pre-existing mental illness) were excluded from the definition.

5.175 Having a definition of abnormality of mind that was similar to that used for mental impairment would make it clearer that the difference between the two defences was one of degree. Whereas in the case of mental impairment the accused has no capacity to know what they were doing was wrong, in the case of diminished responsibility, this capacity is ‘substantially impaired’.

Excluding Specified Mental Conditions from a Definition of ‘Abnormality of Mind’

5.176 Rather than attempting to come up with an acceptable and exhaustive definition of mental illness, it may be clearer to explicitly exclude conditions from the defence. Personality disorder, for example, might be explicitly excluded as might cases involving diagnoses of reactive depression. If a consensus cannot be reached about the kinds of circumstances which diminished responsibility might cover, excluding certain conditions would provide greater certainty.

860 *Homicide Act 1957* (England) s 2.

861 See above at paras 5.86–5.87.

862 See above para 5.87 and Table 17.

Developing Better Dispositional Options

5.177 In addition to the above changes, the introduction of diminished responsibility would also require consideration of how those who rely on this defence should be dealt with. Flexible disposition options could allow some people who are successful in arguing diminished responsibility to be given prison sentences and others to receive hospital dispositions. This would discourage people relying on the defence when they did not require treatment.

AUTOMATISM

5.178 We have discussed a number of options for expanding the mental condition defences to provide a defence for people with a wider range of mental conditions. These include reform of the defence of mental impairment and the introduction of a new defence of diminished responsibility. In this section of the chapter we look briefly at automatism. Although automatism is rarely raised any change to the current regime in relation to mental condition defences is likely to have an impact on it. We discuss options for change below.

WHAT IS AUTOMATISM?



CASE STUDY 23

Michael and Sandra were engaged to be married. Their relationship had been quite volatile. They had broken up on several occasions, but had later resumed their relationship. Michael lived with his parents. One night Sandra came to stay at Michael's house. She went to bed early. Michael followed about 30 minutes later. About five minutes after Michael went to bed, his family heard Sandra scream. They ran to the bedroom, where they found Sandra with a knife sticking out of her body. She had been stabbed 25 times. Michael was covered in Sandra's blood. Sandra died later that night.

Initially Michael said that he could remember nothing from the moment he entered the room and hugged Sandra to the moment his mother entered the room after Sandra had been stabbed. He later testified that Sandra had told him that she didn't love him anymore and that she had found someone else. Sandra told Michael that her new lover was better in bed than he was. Michael's testimony was that he remembered nothing from that point on except hearing voices and everything appearing 'dreamlike'.

Michael raised evidence of automatism at trial but was unsuccessful.⁸⁶³

5.179 Although automatism is often referred to as a defence, strictly speaking it is not one. It is different to other defences discussed in this options paper. For other defences, the prosecution will prove all the elements of the crime and the accused will then allege that, for some reason they should not be held responsible. In the case of automatism, one of the elements of the crime itself has not been proven. In practice, however, automatism operates in a similar way to defences: the prosecution will

863 There were no cases of automatism in the Commission's study. The facts of this case are based on the case of *R v Leonboyer* [2001] VSCA 149. The case of *Leonboyer* falls outside the time frame of the Commission's study, but only by a matter of months, the homicide having occurred in that case in May 1997.

claim the accused committed the crime, the accused's lawyer may claim that the accused was acting involuntarily and it will then be up to the prosecution to prove, beyond reasonable doubt, that the accused was acting voluntarily.

5.180 Automatism is rarely used successfully in Victoria in relation to homicide, although it has been argued in a small number of cases. For example, men such as Michael have sometimes argued that the stress of a relationship breakdown caused them to 'snap' and act involuntarily. Although Michael was unsuccessful, there have been cases where this argument has been put by men and succeeded.⁸⁶⁴ Alternatively, women who kill after a long history of being subjected to violence may also argue that their action was unwilling. The advantage of using automatism in such cases, rather than the more often used defence of provocation, is that in contrast to provocation, which merely reduces murder to manslaughter, automatism can lead to a complete acquittal in certain circumstances.⁸⁶⁵

ELEMENTS OF AUTOMATISM

5.181 The underlying principle of automatism is that a person who acts without being conscious of his or her actions cannot be held criminally responsible for their actions. Where a mental malfunction or impaired consciousness causes a person to act involuntarily, automatism is open to them.⁸⁶⁶ 'Unconsciousness' in the context of automatism has been given a fairly broad interpretation by the courts. Conditions which have been found by the courts to cause automatism include blows to the head,⁸⁶⁷ sleep disorders (sleepwalking),⁸⁶⁸ hypoglycaemia,⁸⁶⁹ epilepsy⁸⁷⁰ and dissociation arising from extraordinary external stress.⁸⁷¹ Complete loss of control need not be established for automatism to be proven, but it must be shown that the actions carried out by the accused were involuntary. In Case Study 23 Michael argued that he was in a dissociative state but failed to convince either a jury or an appeal court of this.

SANE AND INSANE AUTOMATISM

5.182 There are two kinds of automatism, sane automatism and insane automatism. Much of the confusion surrounding automatism stems from the fact that the distinction between these two types is unclear. Sane automatism arises where the condition which causes the automatism is not considered to be a disease of the mind. In the case of insane automatism the underlying cause of the automatism is a disease of the mind of some kind. Importantly, the effect of a finding of sane automatism is a complete acquittal. By contrast a finding of insane automatism results in a disposition under the *CMIA*. Generally the defence will argue for sane automatism, but where they do this, they risk the prosecution countering this argument with their own experts and making an opposing argument of insane automatism to ensure that the outcome is a supervision order under the *CMIA*, rather than acquittal.

864 See, for example, the case of *R v Mansfield* (unreported, Supreme Court of Victoria, Hampel J, acquittal 5 May 1994); Bernadette McSherry, 'Getting Away with Murder? Dissociative States and Criminal Responsibility' (1998) 21 *International Journal of Law and Psychiatry* 163.

865 An acquittal will depend upon whether the automatism is found to be sane or insane and this is discussed further below at para 5.182.

866 Law Reform Commission of Victoria, *Mental Malfunction and Criminal Responsibility*, Report No 34 (1990) 63.

867 *R v Scott* [1967] VR 276 (SC Vic).

868 *R v Burgess* [1991] 2 QB 92 (CA).

869 *August v Fingleton* [1964] SASR 22.

870 *Bratty v Attorney-General (Northern Ireland)* [1962] AC 78.

871 *R v Falconer* (1990) 171 CLR 30.

5.183 Insane automatism is based on the common law definition of ‘disease of the mind’.⁸⁷² Because this is quite a broad definition,⁸⁷³ in effect the law has developed to restrict the circumstances in which sane automatism can be raised.

THE RECURRENCE TEST

5.184 If a mental state is likely to recur it should be considered a disease of the mind.⁸⁷⁴ Where it is temporary or transitory in nature it will result in a finding of sane automatism.

THE INTERNAL/EXTERNAL TEST

5.185 If the mental state is ‘internal’ to the accused it should be considered a disease of the mind and lead to a determination of insane automatism.⁸⁷⁵ This test is intended to ensure that automatism resulting from drugs or physical blows come within the definition of sane automatism. The rationale is that automatism caused by some condition internal to the offender is more likely to recur and more likely to warrant a disposition that will ensure the person receives medical treatment.

THE SOUND/UNSOUND MIND TEST

5.186 This test has developed⁸⁷⁶ in an attempt to deal with contexts where dissociative states (a particular kind of mental state) cause automatic behaviour. In practice, evidence of dissociative states arising from a ‘psychological blow’ or extreme emotional shock has been used in some cases as evidence of sane automatism—the argument is put in such cases that the accused were affected so severely by a particular kind of emotional trauma, that they experienced a dissociative state and behaved as an automaton. The test attempts to distinguish between sane and insane automatism by assessing whether or not a person was responding to his or her own delusions (insane automatism) or from extreme external stimuli (sane automatism).⁸⁷⁷ A dissociative state is:

a disruption in the usually integrated functions of consciousness, memory, identity, or perception of the environment. The disturbance may be sudden or gradual transient or chronic⁸⁷⁸

5.187 The test for establishing the difference between sane and insane dissociation is to take the ordinary person and assess the strength of the mind of the accused against the mind of the ordinary person. If the mind of the accused was weaker than that of the ordinary person, that is if the accused reacted to a level of psychological trauma which the ordinary person’s mind would have withstood, then the mind is seen as infirm and the outcome will be insane automatism. If the reaction of the person to

872 ‘Disease of the mind’ was defined in *R v Radford* (1985) 42 SASR 266, by King CJ who said that ‘disease of the mind’ was synonymous with ‘mental illness and that mental illness was ‘an underlying pathological infirmity of the mind, be it of long or short duration and be it permanent or temporary, which can be properly termed mental illness, as distinct from the reaction of a healthy mind to extraordinary external stimuli’.

873 Note here that it is the M’Naghten elements which restrict the definition of insanity; disease of the mind is a very broad concept.

874 *Bratty v Attorney General (Northern Ireland)* [1962] AC 78.

875 *R v Falconer* (1990) 171 CLR 30; *R v Rabey* (1977) 37 CCC (2d).

876 The sound/unsound mind test was developed in the case of *R v Falconer* (1990) 171 CLR 30.

877 *R v Radford* (1985) 42 SASR 266.

878 American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (4th ed) (2000).

the particular psychological trauma is seen as being that of the ordinary person or at a level higher than that of the ordinary person, then the result will be a finding of sane automatism.⁸⁷⁹

REASONS TO REFORM AUTOMATISM

SANE/INSANE DISTINCTION REMAINS UNCLEAR

5.188 Each of the tests described above for establishing the existence of a disease of the mind has been criticized. All are seen as unclear and liable to cause arbitrary results. The recurrence test, for example, could be used to argue that conditions such as epilepsy and hypoglycaemia due to diabetes were diseases of the mind and therefore appropriate foundations for an argument for insane automatism, which is not an appropriate outcome. Similarly, the internal/external test has been criticised for the sometimes nonsensical results of its application. The test has, for example, resulted in a finding that hypoglycaemia, which is an insufficient supply of blood sugar, due to the excessive use of insulin by a diabetic, was not a disease of mind because it was due to 'external' factors, namely, the administration of insulin;⁸⁸⁰ whereas hyperglycaemia, which is an excess of blood sugar, caused by the failure of the diabetic to produce insulin, was an internal factor and so could be regarded as a disease of the mind.⁸⁸¹

5.189 In relation to the sound/unsound mind test, it is not at all clear how the difference should be established. The use of the ordinary person test is as problematic here as it has proven in relation to the test for provocation. It has also proven difficult to know what kind of external stimuli should be regarded as sufficient to cause a dissociative response. The case law suggests that the ordinary stresses and disappointments of life are not sufficient and that therefore where someone reacts by behaving as an automaton in response to 'ordinary stresses', insane automatism is likely to be the finding.⁸⁸² The result may be that the distinction is merely about individual susceptibility to stress or psychological stress rather than being properly representative of the presence or absence of a mental disease.⁸⁸³

A SUSCEPTIBILITY TO ABUSE

5.190 One of the principal concerns in relation to automatism is establishing whether or not the accused was actually acting in a state of impaired consciousness. The more famous cases of automatism involve what appear to be fantastic and implausible stories⁸⁸⁴ and there is some scepticism among psychiatrists about whether dissociative states necessarily cause involuntary action. People who experience dissociative states as the result of extreme emotional stress often forget what they have done,

879 *R v Radford* (1985) 42 SASR 266; see Bernadette McSherry, 'Getting Away with Murder? Dissociative States and Criminal Responsibility' (1998) 21 *International Journal of Law and Psychiatry* 163-172, for a more detailed explanation of the sound/unsound mind test and its development in *Radford*.

880 *R v Quick* [1989] 1 WLR 287.

881 *R v Hennessy* [1973] 1 QB 910.

882 *Rabey v The Queen* (1977) 37 CCC (2d) 461.

883 See Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (2001) for more detailed discussion of this.

884 For example the Canadian case of Kenneth Parks who drove 23 kilometres in the middle of the night and killed his parents-in-law and was acquitted after successfully raising automatism on the grounds that he had been sleep-walking at the time of the killing. See Bernadette McSherry, 'Defining What is a "Disease of the Mind": The Untenability of Current Legal Interpretations' (1993) 1 *Journal of Law and Medicine* 76.

but this does not mean that their actions while experiencing the dissociative state were involuntary.⁸⁸⁵ There is an obvious concern in relation to the recent introduction of so-called ‘psychological blow’ cases that a person will say that they ‘blacked-out’ and remember nothing about the crime and no-one will be able to prove otherwise. From that point it will be merely a matter of establishing whether or not the circumstances were sufficiently extraordinary to have caused an ordinary mind to have acted in a similar way. Obviously arguing sane automatism in such a circumstances would appear to be a fairly risky business. Nevertheless when the outcome could be complete acquittal it seems that defence counsel occasionally take that risk.

UTILITY OF AUTOMATISM

5.191 One of the arguments for the reform and in particular for the abolition of sane automatism based on dissociative states is that there is no real need for it because of the availability of the defence of mental impairment and the possibility of arguing lack of intent. In cases of so-called ‘insane automatism’ where a person has acted unconsciously due to some kind of mental impairment, the defence of mental impairment is also open. Alternatively, an accused person suffering from some condition short of mental impairment may be able to introduce evidence of this as evidence of a lack of intention.⁸⁸⁶ This being the case, the utility of automatism is open to question.

REFORM AUTOMATISM

5.192 There are a two principle options for reform in relation to automatism.

- Define automatic behaviour more precisely.
- Remove sane automatism as a ‘defence’.

DEFINE AUTOMATIC BEHAVIOUR MORE PRECISELY

5.193 One way to reform the defence of automatism would be to specify more precisely what kind of actions could be included under the heading of ‘unconscious’. For example, there might be a legislated requirement that in order to raise automatism an accused must have evidence that:

- the accused acted without direction and purpose; and
- the accused’s actions were a result of a particular disorder.

5.194 Such a formulation would only allow actions which lacked direction and purpose to be used as the basis of an argument for automatism. The definition would exclude many of the cases that are now accepted as the basis of the defence, such as cases involving psychological blows where an offender acts under extreme emotional stress. The only cases where an offender might be able to raise the defence under such a restricted definition would be where he or she had acted because of a physical reflex such as someone having an epileptic fit.

885 See for example, the comments of Professor Mullen in *R v Leonboyer* [2001] VSCA 149 at para 49. Professor Mullen stated in his evidence in that case that ‘studies suggest that between one third and one half of people who kill in a domestic situation have no memory whatsoever of the actual killing. The memory is so awful that people protect themselves against it by having amnesia. This does not indicate whether the person has acted wilfully at the time of the event.’

886 *R v Hawkins* (1994) 179 CLR 500.

REMOVE SANE AUTOMATISM

5.195 The more radical alternative would be to remove sane automatism entirely. This would mean that cases involving automatism would be argued either as mental impairment cases, as diminished responsibility cases, if that defence were introduced or as part of a lack of intention argument. The principal problem with using mental impairment, lack of intent or diminished responsibility as alternative options is that they may not offer acquittal as an outcome. Where the offender can successfully argue lack of intention, the outcome will usually be manslaughter. Similarly, the outcome for diminished responsibility is manslaughter and in the case of mental impairment the outcome is the possibility of a 25 year nominal disposition.

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QUESTION

68. Should automatism be available as a 'defence'?

69. If automatism is retained should there be legislated restrictions as to when it can be argued?

CHANGES TO THE PROCEDURE

5.196 So far in this chapter we have looked at possible ways in which the law might be reformed in relation to mental condition defences. In this next and final section we want to look briefly at some options for procedural reform. These are:

- introducing a new plea of 'guilty by mentally impaired';
- introducing special hearings for 'by consent' cases; and
- establishing a separate specialist body to determine the mental condition and disposition.

INTRODUCE A NEW PLEA OF 'GUILTY BUT MENTALLY IMPAIRED'

5.197 Currently, where the prosecution and the defence agree that a particular defendant should be found not guilty by reason of mental impairment, there must still be a jury trial. The trial will be an unusual one in that the prosecution will tell the jury that the accused committed the homicide and that he or she did so because of a mental impairment, and this will not be contested by the defence. At that trial, evidence of the facts of the case will be presented as well as expert evidence about the nature of the mental impairment. The prosecution will generally present all of the evidence and will make clear to the jury that neither the facts nor the issue of mental impairment are in dispute. Often the defence counsel will say very little if anything other than to support the evidence being presented by the prosecution. The process is a formality and while the jury is not told that they must return a verdict of not guilty by reason of mental impairment, the implication is that there is no other verdict open to them. The trial is more ceremonial than actual and has therefore been criticised as unnecessary.⁸⁸⁷ The process was criticised during the Commission's early conversations with Supreme Court Judges. There was a reference to a consent hearing where the jury returned a verdict of guilty of murder, despite all of the evidence and the directions of the judge. Such situations expose the fact that these hearings are not

887 Law Reform Commission of Victoria, *Mental Malfunction and Criminal Responsibility*, Discussion Paper No 14 (1988) para 72, citing 37 of the Draft Criminal Code (UK). The option was discussed and rejected by the Law Reform Commission.

actually intended to determine whether an accused was not guilty by reason of mental impairment, but to initiate a process for the appropriate disposition of a mentally impaired accused.

5.198 An alternative approach might be to introduce a new plea of ‘guilty but mentally impaired,’ which would obviate the need for a trial of the facts and allow proceedings to progress immediately to the question of what the appropriate disposition for the defendant should be. Such an approach would save time and court resources. It would also reduce some of the suffering for the defendant, who is often very distressed by what he or she has done and in need of medical treatment.

PROBLEMS WITH THE INTRODUCTION OF A NEW PLEA

5.199 It could be argued that removing the determination of mental impairment from the trial process is unsatisfactory because it lacks transparency and openness. Hearings by consent, while they may seem largely procedural, ensure that the process of determining guilt or innocence occurs in open court and that the decision is made by a jury. The perception that decisions about the guilt or otherwise of mentally ill offenders was being made behind closed doors by doctors and lawyers would be a detrimental one and could be a highly unsatisfactory one from the perspective of the families of victims as well as the general public.

5.200 Another argument against the introduction of a plea of ‘guilty but mentally impaired’ is that while it may reflect the view of the victim’s family that the accused is guilty because he or she in fact did the killing, it does not fit with principles of criminal responsibility. The criminal law makes determinations about culpability based on the actions of the accused and their state of mind. The mentally impaired have traditionally been seen to be ‘not guilty’ because they did not have the capacity to control or reason about their actions. A plea of ‘guilty’ would undermine these important criminal law principles.

INTRODUCE A SPECIAL HEARING FOR MENTAL IMPAIRMENT ‘BY CONSENT’ CASES

5.201 Another option could be to introduce a special kind of hearing for ‘by consent’ cases. This would mean that the accused could still plead not guilty by reason of mental impairment, but that his or her case would be heard by a single judge rather than by jury trial.

5.202 Such a hearing might also consider submissions from victims’ families and other interested parties as part of a process of considering the appropriate disposition for the offender. The hearings could be by consent as they are now, but would occur without a jury. The process would be far more straightforward and transparent in that all of the evidence would still be heard but there would be no room for confusion and no need to ask a jury to determine if something has, in effect, already been accepted.

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QUESTION

70. Should a new plea of ‘guilty but mentally impaired’ be introduced?

71. If ‘by consent’ hearings are not replaced with a plea of ‘not guilty by reason of mental impairment, should by consent hearings be heard by a single judge rather than by a jury?

ESTABLISH A SPECIALIST BODY TO DECIDE CASES INVOLVING MENTAL IMPAIRMENT

5.203 Another option would be to place more emphasis on the medical understanding of mental illness and to allow medical experts to have a far greater say in whom the law should excuse.

5.204 This option has been taken up in Queensland where a specialist mental health court has been established to determine the mental state of offenders. We examine this model below and consider whether such a model could be adopted in Victoria.

THE QUEENSLAND MENTAL HEALTH COURT

5.205 The Mental Health Court (previously the Mental Health Tribunal) was developed partially in response to the United Nations principles on the protection of people with mental illness.⁸⁸⁸ The underlying rationale of the Court is to remove mentally ill people who have been charged with a criminal offence from the criminal justice system so that an appropriate course of action can be taken in relation to them.

5.206 The Mental Health Court is constituted by a Supreme Court judge assisted by two psychiatrists.⁸⁸⁹ The psychiatrists appointed to assist the court are present to examine the material received and make recommendations, but they do not have any decision making power. The ultimate decision about whether a particular defence applies will be made by the judge. The Court operates on an inquisitorial model, which is different from the normal adversarial model adopted in Australian criminal trials. This means that the judge has far more control over the proceedings and can discover and examine the evidence by questioning both prosecution and defence counsel. The normal rules of evidence do not apply so that evidence which might be excluded at a criminal trial would be admissible before the mental health court.

5.207 The court makes determinations in relation to both indictable and summary offences and determines:

- whether the person was of unsound mind;
- whether the person was of diminished responsibility; and
- whether the person is unfit for trial⁸⁹⁰

5.208 In cases where the facts are in dispute the matter must be returned to a criminal court.⁸⁹¹ If the court determines that there was no mental condition, the accused can still return to the normal criminal process and raise either insanity or diminished responsibility and evidence of the court's determination is inadmissible.⁸⁹²

888 Brian Boettcher, 'Evaluation of forensic psychiatry with reference to the Queensland Mental Health Act' www.lap.org.au March 2001.

889 *Mental Health Act 2000* (Qld) s 382.

890 *Mental Health Act 2000* (Qld) s 267.

891 *Mental Health Act 2000* (Qld) s 269.

892 *Mental Health Act 2000* (Qld) s 317.

5.209 The relevant standard of proof in matters before the Mental Health Court is reasonable cause to believe that the person alleged to have committed the offence is mentally ill or was mentally ill at the time of the alleged offence.

5.210 The effect of a decision by the Mental Health Court may be any of the following.

- If the person is not of unsound mind and is fit for trial the matter is returned to criminal court.
- If the person is of unsound mind or is unfit for trial the court can make a forensic order under which a person can be detained in an authorised mental health service or a high security unit for treatment or care. The court also has the power to order limited community treatment,⁸⁹³ which involves the person residing in the community with active monitoring by a mental health service.⁸⁹⁴

5.211 Provisions assisting victims of crime have been added to the *Mental Health Act 2000*. The new legislation ensures that victims of crime can have their views in relation to the accused person heard by the Mental Health Court including information about the risk the victim believes that the alleged offender represents to the victim or the victim's family.⁸⁹⁵

Advantages of the Mental Health Court Model

5.212 There are a number of reasons why this process might be desirable. Having a separate court process for mentally ill offenders explicitly recognises that this is an area of law that involves and has direct implications for the mental health system as much as for the legal system. The court process strikes a balance between the medical and the legal professional that is more reflective of this fact.

5.213 The Mental Health Court is undoubtedly a more humane way of dealing with the mentally ill offender. The inquisitorial model it adopts is less antagonistic and therefore far less stressful. In many instances mentally ill offenders will have acted while in a delusional state and are likely to be deeply distressed about what they have done if they are no longer delusional at the time of the trial.

5.214 It is also arguable that the problems existing with expert evidence, which have been outlined in other sections would not be such a problem in the context of a specialist court. Experts who are members of an expert panel in a specialist court do not provide evidence for either prosecution or defence. Presumably, this means they can concentrate on providing diagnostic information about an accused's mental state. In addition to this, providing expert evidence in such a context is less likely to lead to confusion than it might in the context of a jury trial.

Disadvantages of the Mental Health Court Model

5.215 The Mental Health Court removes the question of guilt or innocence from the jury and it could be argued that this undermines the purpose of the criminal law to make such determinations. In addition, it could be argued that the model gives too much power to psychiatrists in the process of determining what should happen to mentally ill offenders. Given the disagreements that exist in the

893 *Mental Health Act 2000* (Qld) ss 289, 290.

894 *Mental Health Act 2000* (Qld) s 288.

895 *Mental Health Act 2000* (Qld) ss 284, 285.

medical profession about what mental illness is and what it should include, there may be an argument for limiting rather than increasing the role that psychiatric experts play in the context of determining who should have a mental condition defence available to them.

5.216 Although recent amendments to the legislation in Queensland make provisions for victims' families, there is still real potential for dissatisfaction among the families and friends of victims. Removing the criminal trial process may leave some people with the impression that justice is not being done. A criminal trial in an open court may be perceived as a more transparent process by many and may also be perceived as recognising more explicitly the wrong that was done by the offender whether or not he or she are ultimately held to have been criminally responsible.

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QUESTION

72. Should a Mental Health Court similar to that available in Queensland be introduced in Victoria?

Chapter 6

Infanticide

INTRODUCTION

6.1 In this Chapter we discuss the defence (and offence) of infanticide. In Victoria, the defence of infanticide is only available to a natural mother who kills a child under 12 months old when she is suffering from a mental disturbance as a result of giving birth or lactation. Our study of homicide defences shows that this defence is very rarely used. It was not raised in the sample of homicide cases examined by the Commission between 1997 and 2001.

6.2 In the next section of this Chapter we explain the defence and discuss some criticisms of its current formulation. We then discuss the problem of child killing and the social contexts in which it occurs. This discussion of social context is intended to highlight a possible mismatch between the defence and social reality and to reveal issues that are relevant in deciding whether the defence should be changed.

6.3 The defence of infanticide has attracted criticism from medical professionals, academics and feminists. The medical foundations for the defence are now debatable. Research on child killing has identified a range of factors that can coincide to increase the risk of a child being killed by its mother or father. These factors very often relate more to social and economic factors than to mental health.

6.4 We then consider whether and how these factors might be taken into account in changing the law of infanticide. In the final sections of the Chapter we explain how infanticide is dealt with in other jurisdictions and go on to set out a number of options for reform.

THE DEFENCE OF INFANTICIDE

6.5 In Victoria, infanticide is a specific defence to a particular type of child killing.⁸⁹⁶ Unlike the other defences to homicide discussed in this Options Paper, infanticide is an offence as well as a partial

896 *Crimes Act 1958* s 6:

Offence of infanticide

(1) Where a woman by a wilful act or omission causes the death of her child being a child under the age of twelve months, but at the time of the act or omission the balance of her mind was disturbed by reason of her not having fully recovered from the effect of giving birth to the child, or by reason of the effect of lactation consequent upon the birth of the child, then, notwithstanding that the circumstances were such that but for this section the offence would have amounted to murder, she shall be guilty of the indictable offence of infanticide and be liable to level 6 imprisonment (5 years maximum).

(2) Where upon the trial of a woman for the murder of her children, being a child under the age of twelve months, the jury are satisfied that she by any wilful act or omission caused its death, but that at the time of the act or omission the balance of her mind was disturbed by reason of her not having fully recovered from the effect of giving birth to the child or by reason of the effect of lactation consequent upon the birth of the child, then the jury may, notwithstanding that the circumstances were such that but for the provisions of this section they might have returned a verdict of murder, return in lieu thereof a verdict of infanticide.

defence. That is to say, a woman who kills her child can be charged with infanticide by the prosecution instead of murder or manslaughter or, if the prosecution charges her with murder or manslaughter, she may raise infanticide as a partial defence.

6.6 Infanticide is available where it can be shown that a child under 12 months was killed by its natural mother at a time when the balance of her mind was disturbed owing either to the effects of childbirth or of lactation.

6.7 The defence (and offence) of infanticide was originally based on United Kingdom law. Historically, it was presumed that if a child's death had been concealed, it was because the mother had murdered the child.⁸⁹⁷ A woman convicted of murdering her young child was subject to the death penalty. The *Infanticide Act 1922* (UK) created the offence of infanticide to overcome this harsh result. The Act created the offence of infanticide where a mother killed her newborn baby while the balance of her mind was disturbed.⁸⁹⁸ The effect of this was a much lower penalty.

6.8 Prior to the introduction of infanticide in 1922,⁸⁹⁹ reformers had argued for conditions such as poverty, abandonment by the father and social disgrace to be taken into account when assessing the mother's state of mind.⁹⁰⁰ None of these considerations were finally included. As Robin Lansdowne puts it 'stress on the woman's state of mind appears to have become a convenient catch-all for all the other concerns.'⁹⁰¹ The Act was amended in 1938 to extend the age limit from a 'newly born' child to a child under one year old and provided the basis for the law as it currently operates in Victoria.

CRITICISMS OF THE DEFENCE

6.9 Commentators have identified two main problems with the defence. These relate to:

- the medical basis for the defence, which is now widely questioned; and
- the fact that the defence is only available to women.

These concerns are briefly discussed below. We then go on to consider the situations in which child-killing occurs and the relevance of infanticide to these situations.

THE MEDICAL MODEL

6.10 The defence of infanticide reflects the view that childbirth and lactation can cause mental disturbance that results in some women killing their children. The current law provides that women who have been affected in this way ought not to be held responsible for murder, in the same way as others who deliberately kill another person. However there is little evidence to suggest that the emotional disturbances that may result in a mother killing a young child are principally due to chemical

897 Lord Ellensborough's Act 42 Geo 3 c 58 (1803). For more information about the history of infanticide see Victorian Law Reform Commission, *Defences to Homicide*, Issues Paper (2002). See also Robyn Lansdowne, 'Infanticide: Psychiatrists in the Plea Bargaining Process' (1990) 16 *Monash University Law Review* 41.

898 Robyn Lansdowne, 'Infanticide: Psychiatrists in the Plea Bargaining Process' (1990) 16 *Monash University Law Review* 41 45.

899 *Infanticide Act 1922* (UK) s 1.

900 Robyn Lansdowne, 'Infanticide: Psychiatrists in the Plea Bargaining Process' (1990) 16 *Monash University Law Review* 41 45.

901 *Ibid* 45.

or hormonal imbalances resulting from the birth itself.⁹⁰² While many medical texts continue to refer to ‘postpartum psychiatric disorders’,⁹⁰³ some psychiatrists are of the view that childbirth can cause emotional instability and that a range of psychiatric syndromes may manifest themselves during this period. To join these together in the category ‘postpartum depression’ is, according to some, misleading.⁹⁰⁴ The American Psychiatric Association’s Diagnostic and Statistical Manual of Mental Disorders was updated in 1980 to remove ‘psychosis with childbirth’ as a distinct diagnostic category from other forms of psychosis. This reflected the range of expert views about the extent to which childbirth was the precipitating factor for psychosis, which was manifested after a child was born.⁹⁰⁵

6.11 Research into women’s health and psychology reveals lack of clarity and agreement about what is meant by postnatal depression and also about whether it can be distinguished at all from other kinds of depression.⁹⁰⁶ Motherhood can cause enormous distress and depression for many women, but these emotional responses, it has been argued, should be understood within the context of the transition to motherhood. New mothers can experience such feelings as loss of identity, freedom and independence, as well as the realisation that the mythology around motherhood bears little resemblance to the reality of mothering.

6.12 In addition to possible emotional upheaval women are also faced with social pressures and expectations about their role as mothers, which can prove quite overwhelming, particularly if they are finding caring for their children difficult.⁹⁰⁷ Whilst society commonly focuses on the satisfaction that childbearing can bring, there is little mention of the stress and worry involved. Such stress may come as a shock to many women, particularly as it involves a role that they cannot relinquish and that will continue indefinitely.⁹⁰⁸

6.13 In this respect women may be no different from men in their responses to the responsibility of caring for children. Research conducted into the responses of men who are the sole parents of children or the sole carers of elderly parents or other family members reveals that they too may suffer from similar depression.⁹⁰⁹ This makes it problematical for the law to treat infanticide as due to postnatal depression caused by the act of childbirth or lactation, when in fact the depression may have far more to do with the pressures of child rearing and be part of the process of adapting to parenthood.⁹¹⁰

902 Bernadette McSherry, ‘The Return of the Raging Hormones Theory: Premenstrual Syndrome, Postpartum Disorders and Criminal Responsibility’ (1993) 15 *Sydney Law Review* 292–305.

903 John J Harding, ‘Postpartum Psychiatric Disorders: A Review’ (1989) 30 *Comprehensive Psychiatry* 109.

904 Daniel Maier-Katkin, ‘Postpartum Psychosis, Infanticide and the Law’ (1991) 15 *Crime Law and Social Change* 109–122.

905 Ibid 122. See also Bernadette McSherry, ‘The Return of the Raging Hormones Theory: Premenstrual Syndrome, Postpartum Disorders and Criminal Responsibility’ (1993) 15 *Sydney Law Review* 292–294–295.

906 Jane Ussher, ‘Reproductive Rhetoric and the Blaming of the Body’, Paula Nicolson and Jane Ussher (eds) *A Psychology of Women’s Health and Health Care* (1992) 50.

907 Ibid.

908 Toni C Antonucci and Karen Mikus, ‘The Power of Parenthood: Personality and Attitudinal Changes During the Transition to Parenthood’ in *The Transition to Parenthood: Current Theory and Research*, G Michaels and W Goldberg (eds) (1988) 62.

909 Jane Ussher, ‘Reproductive Rhetoric and the Blaming of the Body’ in *The Psychology of Women’s Health and Health Care*, Paula Nicolson and Jane Ussher (eds) (1992) Ibid citing research of Jenkins, ‘Sex Differences in minor psychiatric morbidity’ *Psychological Medicine* Mono. Suppl. 7 Cambridge University Press.

910 Jane Ussher refers to early motherhood as an ‘adaptive process’ during which a woman may grieve for the loss of her former ‘self’: Jane Ussher, ‘Reproductive Rhetoric and the Blaming of the Body’, Paula Nicolson and Jane Ussher (eds) *A Psychology of Women’s Health and Health Care* (1992) 50.

6.14 The mothers with severe psychiatric disturbances at the time of the killing generally had a history of psychiatric illness.⁹¹¹ This would seem to support the view that for the most part it is far too simplistic to offer an explanation of mothers killing their children as the result of ‘raging hormones’.

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QUESTIONS

73. Should the defence of infanticide be removed because medical knowledge has changed since its introduction?
74. If the defence of infanticide is retained, should it be modified to reflect current medical understanding about the potential effects of child-bearing on mothers?

GENDER BIAS

6.15 The defence of infanticide is only available to the natural mother of the child. Fathers, defacto, adoptive or foster parents or other types of carers cannot rely on the defence. Some feminists view the defence as an example of a tendency in the criminal law to treat women who commit violent crimes as so atypical that they must necessarily be mentally unstable.⁹¹² The notion that women’s medical makeup, their hormones and their menstrual cycles affect their behaviour to the extent that they become incapable of resisting violent impulses is criticised by some feminists. There is also, as we have already mentioned, considerable medical opposition to the argument and very limited medical evidence in support of it.⁹¹³

6.16 Recognition of the gender-biased nature of the defence might suggest that the defence should also be extended to fathers or other carers, in some circumstances. On the other hand it could be argued that it should be confined to women because they are usually the primary carers of children. For this reason, women may be more likely than men to be affected by stress, anxiety and depression which can be associated with the responsibility of childcare. Perhaps the responsibility felt by a child’s natural mother is stronger than that felt by other carers. Arguably a natural mother is more susceptible to becoming depressed or otherwise emotionally overwhelmed by parenthood than other parents or carers.

6.17 On the other hand it could be suggested that it is unfair that the defence is not available to fathers who are sole parents. It might also be argued that it should be extended to adoptive and foster parents who may have sole responsibility for a young child.

911 Christine Alder and Kenneth Polk, *Child Victims of Homicide* (2001) 62. See also Debbie Kirkwood, *Women Who Kill: A Study of Female Perpetrated Homicide in Victoria Between 1985 and 1995* (PhD Thesis, Monash University, 2000) 169. Kirkwood reports that all the women in her sample who had killed while experiencing a psychotic episode had a history of mental illness.

912 Ania Wilczynski, 'Mad or Bad? Child-Killers, Gender and the Courts' (1997) 37 *British Journal of Criminology* 419.

913 Robyn Lansdowne, 'Infanticide: Psychiatrists in the Plea Bargaining Process' (1990) 16 *Monash University Law Review* 41 51. See also Debbie Kirkwood, *Women Who Kill: A Study of Female Perpetrated Homicide in Victoria Between 1985 and 1995* (PhD Thesis, Monash University, 2000) 156–9. Kirkwood discusses the tendency for ‘retrospective pathologising’ of women who kill their children.

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QUESTION

75. Should the defence of infanticide be extended to apply to fathers, defacto parents, adoptive parents or foster parents? How should we distinguish between the application of the defence to some carers but not to others?

6.18 Modification of the defence of infanticide must include consideration of both the medical foundation and the gender bias upon which this medical model is, in part, based. However, these are not the only problems with the current formulation of the defence. In order to highlight the remaining difficulties with the defence, and to ensure that our discussion of the law is grounded in what we know of what occurs in reality, it is necessary to examine the situations in which child killings typically occur.

BACKGROUND AND SOCIAL CONTEXT

6.19 In considering possible changes to the defence of infanticide, it is important to take account of the situations in which child homicides typically occur. Child killing has existed across historical periods and cultures as a means of disposing of unwanted children.⁹¹⁴ In ancient civilisations, infanticide was condoned, and in some cases, mandated as a form of euthanasia for disabled or ill children.⁹¹⁵ Historically, the use of infanticide as a form of birth control was a virtually universal phenomenon.⁹¹⁶ Over time, however, the contexts and precipitating factors for child killing have changed, as has our understanding of the phenomenon. Although there were no cases of infanticide raised as a defence in the Commission's study, there were six cases of child killing. While we intend to refer to these few cases to provide a context for the discussion, it is not possible to draw any general conclusions from such a small number of cases. Instead we draw upon data about child killing which has been collected from other studies.⁹¹⁷

6.20 There are two main Victorian studies on child homicides: Ken Polk and Christine Alder's study of child homicides in Victoria between 1985 and 1995 and Debbie Kirkwood's research which focused on female-perpetrated homicide in Victoria between 1985 and 1995.⁹¹⁸ Of the 90 children killed during the ten year sample period for the study conducted by Polk and Alder, 58 children were killed by a parent. Of the offenders, 22 were female and 24 were male.⁹¹⁹ Polk and Alder showed that parents typically killed children in the following situations:⁹²⁰

- neonaticide—where the child was killed within the first 24 hours of birth;

914 Laila Williamson, 'Infanticide: An Anthropological Analysis', Marvin Kohl (ed) *Infanticide and the Value of Life* (1978) 61.

915 In Sparta, for example, exposing deformed infants (that is, leaving them in an exposed place to die) was required by law: Michael Tooley, *Abortion and Infanticide* (1983) 316.

916 Laila Williamson, 'Infanticide: An Anthropological Analysis', Marvin Kohl (ed) *Infanticide and the Value of Life* (1978) 61 63.

917 There is a considerable literature on this issue. See for example, P T d'Orban, 'Women Who Kill Their Children' (1979) 134 *British Journal of Psychiatry* 560; Ralph A Weisheit, 'When Mothers Kill Their Children' (1986) 23 *Social Science Journal* 439 and Mark Jackson (ed) *Infanticide: Historical Perspectives on Child Murder and Concealment 1550–2000* (2002).

918 Debbie Kirkwood, *Women Who Kill: A Study of Female Perpetrated Homicide in Victoria Between 1985 and 1995* (PhD Thesis, Monash University, 2000).

919 Christine Alder and Kenneth Polk, *Child Victims of Homicide* (2001) 124.

920 There were also 'special cases' that did not fit into any of the main categories.

- homicide-suicide situations—where a parent killed his or her child and then either committed or attempted to commit suicide;
- fatal assault—where a child was either shaken or beaten to death, including situations where there had been ongoing abuse for months or years and the cumulative effect was the death of the child; and
- extreme psychiatric disturbance—where a parent was suffering from a mental disturbance at the time of the killing.

6.21 Of the six cases of child killings in the sample examined by the Commission, all cases involved male perpetrators, all children were five years or under and in all but one case, the context was one of fatal assault which was the culmination of earlier abuse. The remaining case involved a homicide-suicide. Probably because of the size of our sample was small, our results differed from the Polk and Alder study, which found that in the context of child killing, women killed almost as often as men.⁹²¹ The various types of child killings are discussed in more detail below.

NEONATICIDE

6.22 Neonaticide is the killing of a child by its biological mother within the first 24 hours after birth. It is difficult to collect detailed information about neonaticide because the circumstances surrounding these killings are often unknown.⁹²² It appears that some of these cases are not prosecuted.

6.23 Of the 11 neonaticides in the study conducted by Christine Alder and Kenneth Polk, only one resulted in a charge of infanticide. The known offenders were women and the study characterises neonaticide as an offence perpetrated by women, although there have been reported cases of assistance being provided by male relatives. The known offenders who killed their children within the first hours after birth were very often completely unprepared for motherhood; indeed, in some of the recorded cases, the mother was unaware that she was pregnant or was in denial of the fact. In many cases, the mother was ‘deeply fearful of the repercussions of a pregnancy’⁹²³ due to her young age, family background or both. Often the child was killed through neglect, by being left somewhere such as a wardrobe or cupboard, but there were also cases where the baby was suffocated.⁹²⁴ The study revealed that neonaticide rarely involves planning. Generally, the mother disposed of the child in a nearby location, continued with her daily routine and was later confused about what happened and unable to remember the details of what she did with the child. The majority of neonaticides are committed by young single women or single women from religious or migrant communities, where there is strong disapproval of unmarried women who bear children.⁹²⁵

6.24 Neonaticide is the situation which invokes the most sympathy for retention of the defence of infanticide. The scenario seems similar to that contemplated when infanticide was introduced in the

921 Christine Alder and Kenneth Polk, *Child Victims of Homicide* (2001) 124. See also Debbie Kirkwood, *Women Who Kill: A Study of Female Perpetrated Homicide in Victoria Between 1985 and 1995* (PhD Thesis, Monash University, 2000).

922 There were no neonaticides in the study conducted by the Commission.

923 Christine Alder and Kenneth Polk, *Child Victims of Homicide* (2001) 45; Debbie Kirkwood, *Women Who Kill: A Study of Female Perpetrated Homicide in Victoria Between 1985 and 1995* (PhD Thesis, Monash University, 2000) 167–9.

924 Christine Alder and Kenneth Polk, *Child Victims of Homicide* (2001).

925 Ibid 39.

United Kingdom at the beginning of last century. Women who kill their babies within hours of birth are typically not fully aware of what they are doing and are often in shock. They are often fearful of the sometimes dire social, personal and economic consequences of having given birth.

6.25 At present use of the defence in this situation may be based on the fiction that the child was killed because the mother was unhinged by the birth process, rather than because of the social context in which the child was born. If disturbance of mind owing to childbirth or lactation is not the real basis for the defence, it may be preferable for the law to recognise this explicitly.

6.26 One possibility would be to reform the underpinnings of the medical defence and allow a mother's disturbance to arise from the consequences of having a child rather than because of the birthing process itself. The defence would, in other words continue to be a medical defence requiring expert evidence, but the causes of mental disturbance could extend to include the responsibilities and stress of parenthood. Another approach would be to allow the social circumstances of the mother to be taken into account. This may mean that a mother's fear of reprisals from her family, her age and understanding about childbirth, as well as her economic circumstances and capacity to care for a new born infant, could be considered.

6.27 The second option is inconsistent with the general approach of the criminal law, which does not usually take account of the personal circumstances of an offender. Put simply, the criminal law is concerned with establishing whether or not a person performed a criminal act or omission and whether that person was criminally responsible for that act or omission. The environment, upbringing or background of the accused person is irrelevant until after criminal responsibility has been established and the person is being sentenced. The law assumes that everyone has the capacity to act rationally and to choose freely and appropriately between courses of action.⁹²⁶ If personal circumstances are to be taken into account, careful consideration would need to be given as to how these circumstances would be articulated and what circumstances should and should not be considered sufficient to warrant a reduction in criminal responsibility.

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QUESTIONS

76. Should the personal circumstances of a mother be taken into account when considering cases of infanticide?
77. How should the law distinguish between circumstances that are relevant and those that are not?

HOMICIDE-SUICIDE

6.28 Homicide-suicide describes situations where a parent kills his or her child and then either commits or attempts to commit suicide. Only one of the six child killing cases examined by the Commission involved a homicide-suicide and in this case, as in all others in the study, the offender was a man. The study conducted by Alder and Polk differentiates between the types of precipitating factors

926 F A Whitlock, *Criminal Responsibility and Mental Illness* (1963) 55.

which influence fathers who kill their children in context of homicide-suicide and those which influence mothers.

6.29 Of the sample investigated in the Alder and Polk study, 18 cases involved homicide-suicide scenarios. Homicides-suicides involving women commonly involved situations of economic or emotional hardship where the pressure and stress drove them to believe that suicide was the only option. In such circumstances, the mother may herself have been the subject of ongoing abuse and may suspect or know that the child is also subject to abuse. Homicide-suicide killings were often very carefully planned and there was generally no evidence of prior abuse leading up to the killing. Indeed, mothers who killed their children in this context often expressed great love for their children and described their actions in altruistic terms; that is, they saw themselves as saving their children either from a life of child abuse or from a motherless existence.

6.30 The defence of infanticide has limited application in cases involving child killing combined with attempted suicide. Where a mother kills all her children and attempts suicide unsuccessfully, she can only rely on infanticide as a defence in relation to a child under 12 months. She may be able to raise mental impairment in relation to the other children, but only if she is able to satisfy the very strict requirements of that defence.⁹²⁷

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QUESTIONS

78. Should the age limit for infanticide be extended beyond one year? If so, what should the age limit be?
79. Should there be another defence in addition to infanticide and mental impairment, such as diminished responsibility,⁹²⁸ to cover situations where parents kill their whole family as a result of depressive illness?

6.31 The Polk and Alder study reported that homicide-suicide scenarios involving men were more likely to be a reaction to separation and an unsatisfactory custody/access outcome. Men are more likely to describe their motives for killing their children, as well as themselves, as punishment of the mother and ex-partner. The following case study is a modified account of the one homicide-suicide case in the Commission sample:

927 See Chapter 5 for a discussion of the defence of mental impairment.

928 Diminished responsibility is discussed in more detail in Chapter 5 paras 5.98–5.124.

*** CASE STUDY NO 24**

When Lisa and Steve met, she was 18 and he was 20. They had a stormy four-year relationship during which Lisa gave birth to a son, Simon. Steve was very jealous and possessive of Lisa while they were together. Lisa left Steve on a number of occasions before leaving him permanently when Simon was eight months old. Steve was very upset by the final separation and angry about his financial obligations to Simon and Lisa as a result of the separation. The Family Court gave Steve weekend contact with Simon. Steve was very possessive of Simon and would manipulate him to spite Lisa.

When Simon was five years old, Steve began talking to friends and family about killing himself and Simon, saying that this would be the best way to ruin Lisa's life. One weekend, when Steve had Simon on an access visit, he booked himself into a motel where he suffocated Simon with a pillow while the child was sleeping. He then wrote a suicide note to Lisa telling her she would never get Simon back, that she would not get any more money and that he hoped that she 'rotted in hell for the rest of her miserable lonely life'. Steve attempted suicide by slashing his wrists and then called an ambulance. The ambulance arrived before Steve had died. He was charged with murder and sentenced to life imprisonment.

6.32 The data on homicides associated with attempted suicides shows that men and women are motivated by different factors. While women usually kill their children due to despair about social or economic circumstances, sometimes in the context of ongoing domestic violence, men are more commonly motivated by feelings of jealousy or control—as Case Study 24 illustrates. If the defence of infanticide were extended to cover men and if it was based on the mental state of the parent at the time of the child killing, rather than on childbirth or lactation, it could apply to men like Steve in Case Study 24. It would be necessary to decide whether the law should distinguish between different motivations for child killings combined with attempted suicide.

FATAL PHYSICAL ASSAULT

6.33 Fatal physical assault describes situations where a child is either shaken or beaten to death. This includes situations where there has been ongoing abuse for months or years and the cumulative effect results in the death of the child. Death resulting from fatal physical assault was the most common context in which infanticide occurred in the Alder and Polk study.⁹²⁹ Of the six child killing cases examined by the Commission, five were deaths resulting from physical assault by the father or defacto father of the child. Child killing as a result of assault was a more common context for male offenders than female offenders. Particularly where the offender was the defacto partner of the child's mother, it appeared that the killing was motivated by jealousy of the attention the child was receiving from its mother.

6.34 While situations involving homicide-suicide were planned carefully, fatal assaults were generally spontaneous outbursts of anger and were often justified as discipline. Fatal assaults were often preceded

929 In this study, 19 out of 58 killings by parents were the result of fatal physical assault: Christine Alder and Kenneth Polk, *Child Victims of Homicide* (2001) 29.

by a history of violence. Women who assault their children in these contexts described rising frustration at being unable to stop their children from crying, culminating in a loss of control. They also described their concern about what the neighbours or their defacto partner would think about the continuous crying of the child. In all of these contexts, it was not unusual for there to be a range of underlying socio-economic factors contributing to the pressure and stress felt by the women. These factors included stress about financial worries, trauma and distress relating to a relationship ending or breaking down, as well as situations of long-term ongoing domestic violence.

6.35 Fatal assault is probably the context of infanticide that generates the least sympathy. Public outrage usually follows media reports of the deaths of children as the result of parental abuse. In reforming the defence it is necessary to consider whether it should ever be available to parents who lose control due to anger and frustration, to such an extent that they violently and fatally assault their young children. If it were to be a defence we would need to consider whether the social circumstances and background of the offender should be taken into account in considering whether the defence is available. Should parents be able to argue that the extreme physical and emotional strain of child rearing was more than they could tolerate? Could lack of education and training in the care of children be seen as a factor in parents' frustrated attempts to discipline small children? If such considerations can be taken into account for women, should they also be available for men? This last question is particularly relevant where men have taken primary responsibility for childcare, as illustrated in the following case study.



CASE STUDY NO 25

Brian began a defacto relationship with Andrea shortly before Andrea was jailed for drug related offences, leaving Brian to care for Andrea's three children Tom (aged eight) , Martin (four), and Dylan (two) as well as his own child Ben, who was 12 years old. Brian had a very painful neck injury which required him to take morphine.

One morning, Brian woke in great pain but had run out of morphine. He phoned the doctor to make an appointment to get more morphine and then went to have a shower. While Brian was in the shower, Dylan, who had been unwell, dirtied his nappy and also vomited. When Brian found Dylan, he was very angry. Brian had been trying to toilet train Dylan and believed that he was being deliberately disobedient. Brian grabbed Dylan and shook him, hitting his head on the floor in the process, knocking him unconscious. Brian then took Dylan to the hospital where he told the medical staff a variety of different stories about how Dylan had been injured. Dylan died the following day from head injuries, but examination following the death revealed that Dylan had been injured in the days leading up to his death including bruising to the penis and scrotum indicative of violent toilet training.

Brian was found guilty of manslaughter and sentenced to 10 years in prison.

6.36 As Dylan's defacto father, Brian would not have been able to use infanticide as a defence. Even if the defence was made available to fathers Dylan was more than 12 months old and therefore fell outside the current age limit for infanticide. Nevertheless, the case illustrates circumstances which might be used to argue for diminished culpability. Brian was left as the sole carer for four children—three of them under the age of 10. He had very little experience in childcare and had no knowledge of how to toilet train a young child. He was also suffering from chronic pain and on the day of the killing

had had no medication.⁹³⁰ Does this scenario differ from that of a mother who is overwhelmed by the responsibilities of parenthood, who kills her child? Would our response be different if there was evidence of some emotional or mental disturbance affecting Brian at the time of the killing?

EXTREME PSYCHIATRIC DISTURBANCE

6.37 This category of child killing describes situations where a parent kills as the result of a mental illness or disturbance. Only a small proportion of parents who kill children do so as the result of an extreme psychiatric disturbance. Of the 58 cases where a child was killed by its parent in the Polk and Alder study, only six were the result of extreme psychiatric disturbance. Other studies have revealed similar figures.⁹³¹ Psychotic episodes featured prominently amongst the cases of extreme psychiatric disturbance. There were three instances of women who killed as a result of extreme psychiatric disturbance. In each of these cases, the women reported that they felt compelled by external forces, such as voices and visions, to kill their children.⁹³² In most of these cases, the women involved had prior histories of psychiatric illness.

6.38 Child killing as the result of extreme psychiatric disturbance was less common for men than for women. In the Polk and Alder study only one man killed his children as a result of extreme psychiatric disturbance. In that tragic case, a father and husband with a prior history of depression and paranoid delusional thoughts killed his entire family.⁹³³

6.39 The defence of mental impairment would serve the same purpose as infanticide and be open to both mothers and fathers, who killed as a result of extreme disturbance. Unlike infanticide the defence of mental impairment has no age restrictions attached to its application. Infanticide would nevertheless remain a very attractive option for female offenders because the penalty for infanticide is five years imprisonment and may in practice be a non-custodial sentence. By contrast a person found not guilty by reason of mental impairment may incur a custodial supervision order for a period of at least 25 years.

6.40 On the other hand, women who kill their children as a result of extreme mental illness are usually not suffering from a transitory illness. Empirical research indicates that women who kill in these circumstances are likely to have a history of mental illness. If we are to take into account what is known about mental disturbance and child killing, it may be more appropriate for the women to receive a custodial supervision order and appropriate medical treatment than a jail sentence or non-custodial disposition for infanticide.

OTHER PROBLEMS WITH THE CURRENT FORMULATION OF INFANTICIDE

6.41 In addition to the issues discussed above, there are other legal and procedural problems with the defence of infanticide.

930 For a discussion of the influence of poverty, disadvantage and ignorance as precipitating factors in violence towards children. see Ann Goetting, 'When Parents Kill Their Young Children: Detroit 1982–1986' (1988) 3 *Journal of Family Violence* 339–345.

931 P T d'Orban, 'Women Who Kill Their Children' (1979) 134 *British Journal of Psychiatry* 560; Debbie Kirkwood, *Women Who Kill: A Study of Female Perpetrated Homicide in Victoria Between 1985 and 1995* (PhD Thesis, Monash University, 2000) 169.

932 Christine Alder and Kenneth Polk, *Child Victims of Homicide* (2001) 58.

933 Ibid 85.

ONUS OF PROOF

6.42 Where a mother is charged with infanticide, the onus of proof is on the prosecution to prove the elements of the offence. However where infanticide is raised as a defence, the law may require the mother to satisfy the jury that her mind was disturbed due to the effects of childbirth or lactation.⁹³⁴ This is because there is a legal assumption that people are sane. The *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* states explicitly that the onus of proof in relation to mental impairment is on the party who raises it (generally the defence).⁹³⁵

6.43 If the defence of infanticide is retained there is a need to clarify who has the onus of proving that the mother's mind was disturbed. As the New South Wales Law Reform Commission pointed out in its review of infanticide, most defences require the prosecution to negate a defence once evidence in favour of the defence has been produced.⁹³⁶ However this would be inconsistent with the approach taken under the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997*, in relation to people with mental impairment.

Fault Element

6.44 There is no requirement that the mental disturbance affecting the mother should be connected to the killing. The defence need only show that the mother was suffering from some kind of mental disturbance owing to childbirth or lactation at the time of the act or omission causing death. This differs from other mental condition defences, which require some nexus between the mental condition and the behaviour of the offender. The possible consequence of this is that a mother could kill her child and raise the defence despite the fact that her particular mental disturbance had nothing to do with her decision to kill.

INFANTICIDE IN OTHER JURISDICTIONS

AUSTRALIA

6.45 Although the offence of infanticide exists in four Australian jurisdictions: New South Wales,⁹³⁷ Tasmania,⁹³⁸ Western Australia⁹³⁹ and Victoria,⁹⁴⁰ it only exists as a defence in Victoria and New South Wales. In Tasmania, where infanticide is an offence, the provision makes no reference to lactation. Western Australia's infanticide provisions are relatively recent, having only been introduced in 1986.⁹⁴¹ Western Australia is also the only jurisdiction to provide explicitly that the fault element for infanticide

934 Law Reform Commission of Victoria, *Mental Malfunction and Criminal Responsibility*, Discussion Paper No 14 (1988)

935 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997*.

936 New South Wales Law Reform Commission, *Partial Defences to Murder: Provocation and Infanticide*, Report No 83 (1997).

937 *Crimes Act 1900* (NSW) s 22A.

938 *Criminal Code* (Tas) s 165A.

939 *Criminal Code* (WA) s 281A.

940 *Crimes Act* s 6.

941 *Criminal Code* (WA) s 281A

is the same as that for murder.⁹⁴² The New South Wales provision is substantially the same as the law in Victoria.

6.46 The New South Wales Law Reform Commission has recently recommended the abolition of infanticide, on condition that the defence of diminished responsibility is retained.⁹⁴³ In 1990, the Victorian Law Reform Commission recommended that the defence be retained.⁹⁴⁴ The drafters of the Model Criminal Code have recommended against its inclusion regarding it as an unnecessary as well as a conceptually problematic defence.⁹⁴⁵

ENGLAND

6.47 In the United Kingdom, infanticide is governed by the *Infanticide Act 1938* and is substantially the same as Victorian law. In 1975, a report on mentally abnormal offenders recommended that the defence be abolished.⁹⁴⁶ In spite of this recommendation, it has been retained.

NEW ZEALAND

6.48 The law in New Zealand differs from the law in Australia or the United Kingdom in a number of respects. The maximum age of the child is 10 years. The mother's mind may be disturbed by having given birth to the child who was killed, or any other child, and the provision also states that the mental element for the act causing death must be that required for murder or manslaughter.⁹⁴⁷ In addition, the use of the words 'child of hers' has been interpreted in case law to extend to children under a woman's legal guardianship.⁹⁴⁸ The provision also refers to reasons of 'any disorder consequent on childbirth or lactation' and as such broadens the defence so that it may apply to disturbances even though not directly related to childbirth or lactation.⁹⁴⁹

CANADA

6.49 The Canadian Criminal Code provides a defence where a mother kills her 'newly born child'.⁹⁵⁰ However, the Code also provides that if the evidence establishes that the mother caused the death, but

942 *Criminal Code* (WA) s 281A: 'Infanticide definition of

(1) When a woman or girl who unlawfully kills her child under circumstances which, but for this section, would constitute wilful murder or murder, does the act which causes death when the balance of her mind is disturbed because she is not fully recovered from the effect of giving birth to the child or because of the effect of lactation consequent upon the birth of the child, she is guilty of infanticide only'.

943 New South Wales Law Reform Commission, *Partial Defences to Murder: Provocation and Infanticide*, Report No 83 (1997).

944 Law Reform Commission of Victoria, *Mental Malfunction and Criminal Responsibility*, Report No 34 (1990).

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

946 Committee on Mentally Abnormal Offenders, *Report of the Committee on Mentally Abnormal Offenders* (1975) 188.

947 *Crimes Act 1961* (NZ) s 178(1).

948 New South Wales Law Reform Commission, *Provocation, Diminished Responsibility and Infanticide*, Discussion Paper 31 (1993); New South Wales Law Reform Commission, *Partial Defences to Murder: Provocation and Infanticide*, Report No 83 (1997) citing the New Zealand case of *R v P* [1991] 2 NZLR 116.

949 *Crimes Act 1961* (NZ) s 178(1). New South Wales Law Reform Commission, *Provocation, Diminished Responsibility and Infanticide*, Discussion Paper 31 (1993) para 5.37.

950 *Canadian Criminal Code RS 1985*, s 233:

does not establish that her mind was disturbed or that she was not fully recovered from childbirth, it is still possible to convict her of infanticide.⁹⁵¹ The effect of this to broaden the definition of infanticide considerably so that even if mental disturbance due to childbirth is not established, infanticide can still succeed as a defence.⁹⁵²

6.50 The Canadian Law Reform Commission has recommended abolition of the defence in favour of a more general defence of mental disorder which would apply in situations of both diminished responsibility and infanticide.⁹⁵³

OPTIONS FOR REFORM

6.51 In considering possible changes to the defence of infanticide, it is important to take account of current medical and empirical knowledge about the circumstances in which women kill their children. In the section which follows we consider three broad options for reform. These are:

- retaining the defence of infanticide as it currently exists;
- reformulating the defence of infanticide; and
- abolishing the defence of infanticide and introducing the defence of diminished responsibility.

RETAIN INFANTICIDE

6.52 There are a number of jurisdictions where law reform bodies have recommended the abolition of infanticide, including Canada, the United Kingdom and New South Wales, and yet none of these jurisdictions have acted on the recommendations. In 1990, the previous Law Reform Commission of Victoria recommended the retention of infanticide.⁹⁵⁴ In part, this was influenced by the absence of a defence of diminished responsibility. The Commission also expressed the view that the defence of infanticide recognised that the killing of a young child by the child's mother was 'a distinctive kind of human tragedy'⁹⁵⁵ which required a distinctive response.

6.53 Any review of the current defence is likely to lead to the conclusion that it is not coherent in its current form; however, many people are reluctant to remove it. Infanticide cases are quite rare. As we

A female person commits infanticide when by a wilful act or omission she causes the death of her newly-born child, if at the time of the act or omission she is not fully recovered from the effects of giving birth to the child and by reason thereof or of the effect of lactation consequent on the birth of the child her mind is then disturbed.

951 *Canadian Criminal Code* RS 1985, s 633:

Where a female person is charged with infanticide and the evidence establishes that she caused the death of her child but does not establish that, at the time of the act or omission by which she caused the death of the child,

(a) she was not fully recovered from the effects of giving birth to the child or from the effect of lactation consequent on the birth of the child, and

(b) the balance of her mind was, at that time, disturbed by reason of the effect of giving birth to the child or of the effect of lactation consequent on the birth of the child,

she may be convicted unless the evidence establishes that the act or omission was not wilful.

952 This option was also discussed in the New South Wales Law Reform Commission's review of infanticide: New South Wales Law Reform Commission, *Provocation, Diminished Responsibility and Infanticide*, Discussion Paper 31 (1993) para 5.40.

953 Law Reform Commission of Canada, *Homicide*, Working Paper 33 (1984) 77.

954 Law Reform Commission of Victoria, *Mental Malfunction and Criminal Responsibility*, Report No 34 (1990) 58.

955 Law Reform Commission of Victoria, *Mental Malfunction and Criminal Responsibility*, Discussion Paper No 14 (1988) 69.

have seen, there have been none in Victoria over the past four years. When these cases do arise, it may be felt that infanticide is an important defence to have available. In the absence of this defence it would be difficult within the current principles of criminal responsibility to take account of the complex coincidence of factors that can contribute to such killings. If the defence were abolished, such factors could be considered at sentencing, but the person guilty of killing the child would be convicted of murder (or perhaps manslaughter).

REFORMULATE THE DEFENCE

6.54 Another alternative would be to reformulate the defence. A number of modifications and amendments might be made to the defence in order to remedy some of the problems already outlined. To focus the discussion we outline three models ranging from a minimalist approach, with only minor changes to a comprehensive reformulation of the defence.

MINIMALIST APPROACH

6.55 Research conducted by the Commission indicates that a core problem with the current defence of infanticide is the medical model upon which it is based. Changes could be made to the defence to remove references to childbirth and lactation as precipitating factors for the disturbance of the mother's mind and to allow the disturbance that led to the killing to stem from the circumstances of having giving birth. This would be consistent with the New Zealand approach. It would leave open the possibility of arguing that a mother was affected by postnatal depression, but would also allow for evidence of depression brought on by the responsibilities of parenthood generally.

6.56 Under this approach the legislation could refer to 'circumstances following the birth of the child' instead of referring to childbirth and lactation as factors leading to a mental disturbance. The provisions might also be reworded in plain language for greater accessibility.

- (1) Where a woman causes the death of her child by a wilful act or omission that would ordinarily amount to murder, she may be guilty of the offence of infanticide.
- (2) For the offence of infanticide to apply the woman must show that at the time of the act or omission her mind was disturbed, because she had not fully recovered from the effect of giving birth or because of a disorder that developed following the birth of her child.
- (3) Where a woman is tried for the murder of her child and the jury are satisfied that she caused the death of her child by a wilful act or omission, such that they might ordinarily return a verdict of murder, they may instead return a verdict of infanticide if they are satisfied that at the time of that act or omission her mind was disturbed because she had not fully recovered from the effects of childbirth or from the circumstances following the birth of her child.
- (4) in these sections 'child' means a child less than 12 months old.

MODERATE APPROACH

6.57 More comprehensive reform would include the above changes and build upon them to resolve other problems with the defence. This reform would retain the basic structure of the defence but clarify who bears the onus of proof, specify a mental element and make the defence available to mothers who kill children older than 12 months, as the result of depression brought on by having given birth to another child. The new provision might be worded as follows.

- (1)(a) Where a woman causes the death of her child by a wilful act or omission that would ordinarily amount to murder, she may be guilty of the offence of infanticide.

- (b) For the offence of infanticide to apply the woman must show that at the time of the act or omission her mind was disturbed, because she had not fully recovered from the effect of giving birth or because of a disorder that developed following the birth of her child.
- (c) In this section 'child' means a child under 10 years.
- (d) When there is evidence that would support a verdict of infanticide in a trial of a woman for murder or manslaughter, the jury may return a verdict of infanticide.
- (e) A woman is presumed not to have been suffering from a disturbance of mind referred to in section (1) until the contrary is proved.
- (f) The question of whether a woman was suffering from a disturbance of mind having the effect referred to in subsection (b) is a question of fact to be determined by the jury on the balance of probabilities.

COMPREHENSIVE REFORM

6.58 The third possibility is to completely rethink the defence rather than simply changing words and adding elements. Comprehensive reform would result in a defence that attempts to reflect what we know about the reality and the complexity of child killing and provides the jury with a set of guidelines within which to make a final judgment about the extent of criminal responsibility on a case by case basis. The defence might be worded as follows.

- (1) Where the primary carer of a child kills that child in such circumstances that the jury are of the opinion that he or she should not be held fully responsible, the primary carer may be guilty of infanticide and not murder or manslaughter.
- (2) In determining whether the primary carer should be held responsible, the jury should have regard to the following factors:
 - (a) the age of the primary carer;
 - (b) the social and economic circumstances of the primary carer including whether he or she is sole carer, and whether the primary carer had access to support from family, friends or social services at the time of the killing;
 - (c) the mental health of the primary carer at the time of the killing;
 - (d) the education of the primary carer including whether the primary carer is aware of how to look after a small child; and
 - (e) the social and familial implications of the birth of the child.
- (3) 'Primary carer' means the person with primary responsibility for a child's day-to-day needs including clothing, feeding, bathing and supervising.⁹⁵⁶

ABOLISH INFANTICIDE AND INTRODUCE DIMINISHED RESPONSIBILITY

6.59 Another option would be to deal with cases of infanticide by introducing the defence of diminished responsibility. We have already explored other reasons for introducing diminished responsibility in Chapter 5. If diminished responsibility were introduced, parents affected by an

⁹⁵⁶ The *Intellectually Disabled Persons' Services Act 1986* and the *Guardian and Administration Act 1986* define primary carer as 'any person who is primarily responsible for providing support or care to a person'. For our purposes, we thought it was preferable to be more specific about the nature of the role in the context of caring for small children.

'abnormality of mind' falling short of mental impairment, would be able to rely on this defence. The definition of 'abnormality of mind' could cover situations of severe depression as well as other disturbances short of psychosis. Diminished responsibility would overcome the limitations of the infanticide defence as it would be open to male and female carers to raise it whether or not they were the natural parents of the child and regardless of the age of the child.

ABOLISH INFANTICIDE

6.60 From both a legal and a medical perspective, the legitimacy of the defence of infanticide is open to criticism. Legally, the formulation of the defence is incoherent. Additionally, the belief that childbirth or lactation actually causes some women to become mentally disturbed is widely contested. Retaining this as the core foundation of the defence may seem irrational. Abolishing the defence entirely would mean leaving defendants to raise either mental impairment or argue lack of intention depending upon the circumstances of the case.

6.61 Mental impairment would only be available to those who could make out the elements of this defence; that is, that they did not understand the nature and quality of what they were doing or that it was wrong. Given the narrow formulation of the mental impairment defence, it is likely only to be available in cases of psychosis where a carer felt compelled by imagined external forces to kill the child. Parents who kill due to severe depression or anxiety or other kinds of mental illness short of that required for a mental impairment defence would not be covered. Parents who kill their children accidentally, due to excessive violence in an attempt to discipline them might be able to raise evidence of lack of intention. In such cases, they will fall within the parameters of unlawful and dangerous act manslaughter.

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QUESTION

80. Should the defence of infanticide be abolished?

81. Alternatively should it be modified in one of the ways specified above?

Chapter 7

A New Approach?

BACKGROUND

7.1 The purpose of this Options Paper is to promote discussion about a range of possible reforms to homicide defences. We look at the various defences to homicide, and the legal principles that govern how the law is used in practice. We have discussed both the conceptual and the practical problems with the defences as they are currently formulated and suggested some options for reform in relation to each defence. In this final Chapter, we summarise the issues and problems raised through the Paper and consider a proposal for a new approach. The existing defences to homicide operate to distinguish between different kinds of murder and to categorise and grade levels of culpability. We suggest an alternative way of distinguishing between levels of culpability.

SUMMARY OF ISSUES AND PROBLEMS

7.2 Throughout this Options Paper and the Issues Paper, we have proposed options reflecting the view that, in order for the law reform process to work most effectively, it is necessary to have a clear understanding of the social problem that it is seeking to address. It is only by understanding the context in which homicide takes place and the ways in which defences are currently dealt with by the legal system that we will be able to make appropriate recommendations for legal reform. For this reason, the Paper began by reporting on the result of the VLRC's four-year study into homicides and defences to homicides in Victoria.

7.3 In Chapter 2 we found that on the whole, our empirical research confirmed the results of a number of other studies on the contexts in which homicide occurs. The more significant findings were:

- that more men kill and are killed than women;
- that the most common context for homicide is sexually intimate relationships (and generally involves men killing women);
- that the second most common context for homicide is spontaneous encounters (and generally involves men killing men); and
- that there is a significant number of people who kill while affected by some kind of mental illness.

THE PROBLEMS IN REVIEW

7.4 When we take the contexts in which homicides tend to occur and look at how the law currently operates, a number of problems become apparent. These problems have been discussed at length through each of the chapters of the Paper but these are the central concerns.

- The defences of self-defence and provocation are gender biased in their application.⁹⁵⁷
- The prospective defence of diminished responsibility offers women a possible solution to the gender bias of other defences, but does so by medicalising their response to violence.⁹⁵⁸
- The defence of provocation recognises anger as an excuse for violence. In practice it is men who are more likely to kill because they have been provoked. Consequently the current law sends a message that male violence in response to anger is understandable and excusable.⁹⁵⁹
- The defence of infanticide misrepresents the complexity of the circumstances surrounding child killing.⁹⁶⁰
- The prospective defence of diminished responsibility and the existing defence of mental impairment highlight the difficulty in determining when mental conditions should form the basis of a legal defence to homicide.⁹⁶¹

7.5 Our purpose in this Chapter is to discuss alternative approaches that might address some of the concerns listed above, but first we provide a more detailed summary of the legal and policy challenges that flow from these concerns.

HOW CAN WE MAKE DEFENCES MORE REFLECTIVE OF SITUATIONS IN WHICH WOMEN KILL?

7.6 The concern expressed in a number of the chapters in this Paper has been that defences such as provocation are more easily available in situations where men kill other men or kill women than in situations where women kill men. The existing defences are often inapplicable to the circumstances in which women tend to kill. The sudden ‘hot blooded’ violent response typical in cases where the defence of provocation⁹⁶² is raised and the physical strength required to defend oneself against a threat of lethal force are more descriptive of men’s than women’s behaviour and physiques. When women kill they are more likely to wait until their partner is asleep or vulnerable in some other way or to enlist the help of a third party. Although self-defence may motivate many killings in this kind of context, it will be difficult to prove. Provocation may be slightly easier to raise successfully, but it does not properly reflect the woman’s reasons for killing and it still results in a verdict of manslaughter.

7.7 Reconsidering the current framework requires some consideration of how to reflect the situations in which women kill. The introduction of diminished responsibility may provide a practical solution in some cases, but diagnoses of abnormality of mind or ‘battered woman syndrome’ can completely overlook the circumstances of domestic violence and deny women the truth of what happened to them. This truth can be crucial for women, for their sense of self-respect and for their ability to deal with what has happened to them and their own violent response.

957 See Chapter 3 paras 3.38–3.52 and Chapter 4 paras 4.17–4.38.

958 See Chapter 5 para 5.165.

959 See Chapter 3 para 3.93.

960 See Chapter 6.

961 See Chapter 5.

962 Although the defence has evolved to include loss of control based on fear or panic and provocation as the result of a history of abusive treatment, the practical reality is that it is not used often or particularly successfully in those contexts. See Chapter 3 for further discussion of this point.

TO WHAT EXTENT SHOULD WE EXPECT AND EXCUSE MALE VIOLENCE?

7.8 Another concern expressed in relation to provocation is that the availability of the defence reflects the view that extreme emotions such as anger or jealousy can overwhelm people to such an extent that they are not responsible for their behaviour. If it is easier for men than for women who kill to rely on provocation the practical result is that it is male violence which is judged as less culpable. While we may understand people losing their temper in certain contexts, it has become less understandable and less acceptable for people to kill as a result of such a loss of temper, particularly in contexts of sexual jealousy or injured pride. Despite recent judicial rulings that the ordinary person is not ‘racist homophobic or sexist’,⁹⁶³ the effect of the ordinary person test for provocation continues in some cases to provide a partial excuse in circumstances involving racism, homophobia and misogyny. The success rate for provocation may be in decline and juries may be less inclined to excuse people for so-called ‘hot-blooded’ killing. However, the defence of provocation sends the symbolic message that killings provoked by anger are less morally reprehensible than other killings. Whether and to what extent emotions such as anger should be considered as the basis of a defence is considered in more detail below in paragraph 7.11.

HOW SHOULD WE DEAL WITH PARENTS WHO KILL THEIR CHILDREN?

7.9 In Chapter 6 we saw that one of the problems with infanticide is the medical foundation of that defence. The notion that some women can become mentally ill as the result of childbirth or lactation is contested by some psychiatrists and commentators. While in some cases women do kill their children because they are suffering from some kind of mental illness, in many cases the defence does not reflect what has happened at all. There is very often a complex range of factors contributing to a woman’s state of mind in the days and months following childbirth, including the difficulty of transition to parenthood, socio-economic stresses and lack of support from family or other networks. These factors can also affect fathers where they are the sole carers or the primary carers of children, a fact which is not reflected in the current law.

HOW DO WE LIMIT DEFENCES BASED ON MENTAL CONDITIONS?

7.10 In Chapter 4 we saw that a legal defence to homicide on the basis of mental illness or impairment is currently available only in very limited circumstances, despite the fact that there are many more homicide offenders who were suffering from some kind of mental illness or impairment at the time of the killing. In considering whether to broaden the current mental condition defence or introduce a new mental condition defence the central challenge is how to properly determine who should be covered by such a defence and who should not.

WHEN SHOULD EXTREME EMOTION BE AN EXCUSE FOR KILLING?

7.11 The operation of existing defences highlights the practical importance of the emotion that motivates killing in some cases. We know for example that extreme anger can form the basis of an excuse for murder. However, there is no clear articulation of which emotions are acceptable as the basis for a defence and which are not. Should extreme emotions ever form the basis of a defence or partial

963 *R v Kumar* [2002] VSCA 139. See above paras 3.13–3.15, 3.53, 3.83–3.88 for further discussion of the application of the ordinary person test

defence to homicide and if so, when? If emotions such as anger and jealousy, for example, are as we have suggested, not acceptable are they unacceptable in every case? Consideration of emotions may help us to understand why a killing occurred and on that basis decide whether a killing should be excused, but how do we decide which emotions should provide an excuse and which should not?

7.12 Acceptable emotions might, for example, include the extreme fear felt by a woman who has been regularly beaten by her husband for years and kills him while he sleeps. However, consider a situation where a man kills a black man in the street who asks him for money because he fears he will be attacked. The emotion is the same and may be felt very strongly, but we find it harder to accept because it is not based on any real threat of injury. How can the law, if it decides to focus on emotion, reflect the difference between such cases?

7.13 Unacceptable emotions might include extreme anger such as that which is typical of the bar room brawl where a man is killed because he insults or provokes the accused. We may want to say that this anger is not an acceptable emotion and should not form the basis of a defence. However, what about the situation where a woman discovers that her husband has been sexually abusing their children and kills him? The motivating emotion is clearly extreme anger, and we may want to say that this anger is more acceptable than that felt by the man in a bar in response to insulting or aggressive behaviour.

7.14 Our new approach focuses upon emotion in a way that the current system does not. Before we look at this new approach, we outline briefly the existing framework for determining and categorising levels of culpability and discuss some of the criticisms of this approach.

THE EXISTING FRAMEWORK—JUSTIFICATION AND EXCUSE

7.15 Throughout this Options Paper we have explained culpability by talking about justifications and excuses.⁹⁶⁴ Justifications identify actions that are not regarded as wrongful because they were morally appropriate actions. For example, if Joe runs at Bob with a knife with the clear intention of killing Bob and Bob is unable to stop Joe or get out of his way, then Bob is justified in killing Joe. This is an example of killing in the context of self-defence. Self-defence is one of the clearer examples of a justification. Bob is justified in killing Joe because it is preferable that he defend himself than that he be killed by Joe's wrongful and violent act. Bob's actions are warranted in the circumstances.⁹⁶⁵ It has been said that justifications are act-specific and general because the act would be justified in that situation regardless of who did the act.⁹⁶⁶

7.16 By contrast, excuses apply to actions that are wrongful (or unwarranted) but the actor is either blameless or less culpable. This can be either because of the circumstances of the act or because of some condition affecting the actor. Mental impairment is one example of an excuse. For example, Peter kills Sally because he suffers from schizophrenia and hears voices in his head telling him that Sally is evil and that unless she dies the world will come to an end. Peter's killing of Sally is wrongful; however, his mental illness means that he cannot be blamed. While justifications focus upon the act and the context in which it took place, excuses focus upon the circumstances of the actor and the extent to which they

964 Victorian Law Reform Commission, *Defences to Homicide*, Issues Paper (2002) 40–46.

965 Kent Greenawalt, 'Distinguishing Justifications from Excuses' (1986) 49 *Law and Contemporary Problems* 89–91.

966 *Ibid* 91.

affected his or her ability to obey the law.⁹⁶⁷ The approach has also been referred to as the ‘capacity’ view of defences, as it is founded on assessments of the capacity of the offender to avoid criminal behaviour.⁹⁶⁸

7.17 This distinction between justification and excuse is a contested one. Some people argue either that the distinction is flawed or that the distinction is unhelpful in assessing culpability fairly and consistently. In the section below we outline some of the problems that have been identified with the distinction and consider whether by abandoning the distinction, we might develop a better way of assessing levels of culpability.

CRITICISMS OF THE ‘JUSTIFICATION OR EXCUSE’ APPROACH

7.18 Although justifications purport to be entirely about the circumstances of the act and partial excuses about the circumstances or conditions affecting the actor, the distinction is an artificial one. Conduct is a focus of the criminal law, but it cannot be understood independently of the attitude of the actor. Even in the context of justifications, the state of mind of the actor is important.⁹⁶⁹ People who kill in self-defence will need to show that they believed on reasonable grounds that it was necessary to kill in the circumstances.⁹⁷⁰

7.19 It is very difficult to assess people’s capacity to control their behaviour and yet this is a requirement of excuses as part of determining the extent to which a person’s culpability should be reduced.

7.20 How can we ever know what someone was actually capable or incapable of with any certainty? Very often expert evidence will be raised in relation to capacity and this may serve only to further complicate matters. In cases of diminished responsibility for example, there may be multiple and conflicting expert opinions about what the defendant could have controlled about his or her behaviour in the context of a particular crime.

7.21 Self-defence is now the only defence described as a justification.⁹⁷¹ Some commentators question whether this is how the defence is actually applied. In theory, a justification requires a killing to bring about a morally preferable set of circumstances. In reality very few scenarios of self-defence meet these criteria. Self-defence is most frequently used in the context of spontaneous encounters such as bar room brawls, because the test is not whether the killing was morally preferable, but whether the accused believed on reasonable grounds that the killing was necessary. Nevertheless, the continuing perception and categorisation of self-defence as a justification may work to prevent the defence from being used in some scenarios particularly those where women kill violent partners.

967 Dan M Kahan and Martha C Nussbaum, 'Two Conceptions of Emotion in Criminal Law' (1996) 96 *Columbia Law Review* 269 para 319.

968 Andrew Ashworth and Barry Mitchell (eds) *Rethinking English Homicide Law* (2000) 114. The idea that justification/excuse is based on capacity is disputed by John Gardner in "The Gist of Excuses" (1998) 1 *Buff Crim L Rev* 575.

969 Kent Greenawalt, 'Distinguishing Justifications from Excuses' (1986) 49 *Law and Contemporary Problems* 89 90.

970 Andrew Ashworth and Barry Mitchell (eds) *Rethinking English Homicide Law* (2000) 116.

971 Provocation has evolved over time. Anger was at one time regarded as a reasonable and rational response to certain behaviour. It is now most commonly described as an excuse, see paras 3.5–3.8.

7.22 Indeed, it seems that neither justification nor excuse work as appropriate categories for situations in which women kill their violent partners. Consider a wife who kills her partner while he sleeps, after years of being beaten severely by him. She does not fit within the category of justification because her act of killing was not obviously warranted, as he was asleep and not actually attacking her. In order for her killing to fit within the category of excuses she has to show that she was deprived her of the capacity to obey the law. This will be difficult to do as she has deliberately waited until he was asleep to kill, which shows some capacity to reason and think through what she is doing and what the consequences of her actions will be. Her failure to establish that she lost the capacity to obey the law could be cited as an example of the failure of provocation as a defence for women.

7.23 An alternative approach might be to say that the key question being asked in this situation is the wrong one. Instead of asking whether the woman in this situation could control her behaviour, we should be asking whether the reasons that led her to kill should result in her being acquitted or convicted of manslaughter. It is this focus on reasons that forms the basis of the new approach that is outlined below. In considering this new approach we do not deal with mental condition defences at all, but we return to the issue of mental illness and culpability at para 7.49.

LOOKING BEYOND THE CATEGORIES — A NEW APPROACH ?

7.24 The ‘capacity’ based approach described above is based on an understanding of emotions as things we cannot control, but which control us. For example, the excuse of provocation is based on the notion that an emotion such as anger or jealousy can so overwhelm people that they are unable to control their behaviour.⁹⁷² This approach assesses people’s reasons for acting and the emotions behind those reasons as evidence only of those people’s ability to control their behaviour. Some have argued in opposition to this, that emotion is not an uncontrollable irrational force. Instead our emotions embody judgments and ways of seeing the world for which we can and should be held to account.⁹⁷³ If we accept that emotions can be objectively assessed and judged, then arguably it is also possible to assess culpability based on people’s reasons for behaving (and the emotions underlying those reasons). This idea forms the basis of what we and others call a ‘reasons-based approach’ to defences.⁹⁷⁴

7.25 The reasons-based approach allows us to look beyond the act and the circumstances of the act to why people killed and to make judgments about the values and views that drove the accused’s decision to act. If criminal offences provide minimum standards of socially acceptable behaviour, then this reasons approach to defences assesses the extent to which accused persons’ behaviour departed from that standard of behaviour.

7.26 A reasons-based approach would rank different kinds of excuses, with ‘complete’ and ‘partial excuses’ marking the distinction between levels of culpability. This reflects the view that killing is never

972 This understanding of emotion is called the ‘mechanistic conception of emotion’ and is discussed at length in Dan M Kahan and Martha C Nussbaum, ‘Two Conceptions of Emotion in Criminal Law’ (1996) 96 *Columbia Law Review* 269 paras 278–290.

973 Ibid 269.

974 The approach described here is an adapted version of the reasons approach described by Nicola Lacey in her article ‘Partial Defences to Homicide: Questions of Power and Principle in Imperfect and Less Imperfect Worlds’ in Andrew Ashworth and Barry Mitchell (eds) *Rethinking English Homicide Law* (2000) 107–131 and on the emotion centred approach to culpability which is outlined in Dan M Kahan and Martha C Nussbaum, ‘Two Conceptions of Emotion in Criminal Law’ (1996) 96 *Columbia Law Review* 269.

a desirable or a justifiable act, but that in certain cases, because of the context or the particular characteristics of the offender, the law will find the offender less culpable or not culpable.⁹⁷⁵

7.27 This approach might be achieved by the introduction of a new standard—that of the ‘normal, socially responsible person’⁹⁷⁶ Applying this standard to the reasons-based approach we might say that complete excuses would describe situations where a person has acted on the basis of reasons which do not depart from what we can expect of the normal socially responsible person, whereas partial excuses respond to situations where a person has acted for reasons which depart from what would be expected of a normal socially responsible person, but only to a limited degree. Of course, quantifying what a ‘limited degree’ might include is problematic. We discuss this further below at paragraph 7.40.

WHY CONSIDER EMOTIONS–REASONS APPROACH AS AN ALTERNATIVE?

7.28 This alternative approach of looking at the emotions which inform reasons for killing allows for greater fairness and consistency of approach between cases. Take for example the difference between the case discussed earlier of a wife who kills her violent husband while he sleeps after years of violent abuse and the case of a husband who kills his wife because she tells him she is leaving him for another man. On first reading, this may seem an inappropriate comparison since one scenario is about self-defence and the other about provocation. The reality is, however that many women will not risk raising self-defence and will instead opt for provocation. Neither defence is properly reflective of what has occurred. The comparison between the two cases is included here to expose the problems inherent in the current categories and the unfair results that are produced. The justification/excuse dichotomy means that the abused wife must show either that she has been angered and wronged to such a degree that she does not have the capacity to control herself or prevent herself from killing or she must show that her killing was warranted because of the lethal threat her husband posed. That she has waited until her husband is in a vulnerable position before attacking him makes it difficult either to justify her behaviour by arguing self-defence or to excuse her behaviour by arguing provocation. The context of the killing makes both defences hard to argue. On the other hand, the insulted husband has much more of a chance on the justification/excuse model as he can argue that he was swept away by his anger at the insult from his wife and his jealousy about her leaving him for someone. The current framework for defences cannot deal appropriately with the difference between these two scenarios and as a result the battered wife is less likely to have a defence.

7.29 If instead we look at and assess the reasons for the killings in each instance we are likely to arrive at quite different conclusions. The woman has killed her husband because she fears that he will eventually kill her and she can see no other means of escaping the situation. If we assess this reason by reference to what we can expect of the normal socially responsible person, it is far more possible for us to arrive either at the conclusion that she was not departing from that standard at all or that she was doing so only to a limited degree. The husband, on the other hand has killed because he does not think his wife should be permitted to leave and he believes also that she does not have the right to insult him. These are reasons indicative of an inappropriate set of beliefs about his rights as a husband and her rights as a woman. On this basis we could very easily conclude that the husband has behaved for reasons that completely depart from what we regard as the standards of a normal socially responsible person.

975 This differs from the Nicola Lacey model which refers to exemptions and exculpatory reasons. See Lacey in Andrew Ashworth and Barry Mitchell (eds) *Rethinking English Homicide Law* (2000).

976 Ibid 118.

7.30 Similarly, the women who kills out of extreme anger upon finding that her husband has been sexually abusing their children⁹⁷⁷ could be dealt with using this approach. The woman's anger in this circumstance is based on feelings of betrayal and outrage. She feels strongly that her husband has violated her trust and harmed their children, perhaps irreparably and those feelings are based on a belief that it is unforgivable for anyone particularly a father to sexually abuse young children. While we may still say that the minimum standards set by the law dictate that killing is not a socially acceptable act, we may also say that the reasons for killing depart from what we would expect of a normal socially responsible person to a limited degree only.

7.31 The reasons approach is a more transparent approach and it has the capacity for achieving greater consistency between cases. Evaluations of motives and reasons already form part of the process of assessing culpability, but this fact is obscured by the formulation of the defences themselves and confused by the requirement of volition or capacity. Both juries and judges are already influenced to some degree by their own notions of acceptable and unacceptable reasons when assessing provocative conduct, for example—so why not make these evaluations an explicit and defined element of that process? This would at least ensure that there is a consistent set of acceptable reasons and unacceptable reasons to apply from case to case.

POSSIBLE PRACTICAL IMPLEMENTATION OF THE EMOTION–REASONS APPROACH

7.32 There are a number of issues that would need to be addressed if a reasons approach were adopted and they are briefly outlined below.

DEFINING THE 'NORMAL SOCIALLY RESPONSIBLE PERSON'

7.33 Whatever systemic or legislative changes are made to facilitate an emotion–reasons approach, consideration will have to be given to who the 'normal socially responsible person' is. To avoid confusion with other legal standards such as the 'ordinary person' test, it may be worth considering enumerating the particular qualities of the normal socially responsible person, for example the fact that the normal socially responsible person is not racist, homophobic or sexist.

7.34 To those who ask how a new objective test will reduce the problems associated with assessing levels of culpability, we argue that a new test would expose and make explicit the values upon which decisions about culpability are made. This, we believe might be an improvement on the current system.

DEFINING WHAT CONSTITUTES A PARTIAL EXCUSE AND WHETHER THIS SHOULD BE LEFT TO THE JURY

7.35 As mentioned at 7.27, trying to assess when someone has departed 'to a limited degree' from what we would expect of the normal, socially responsible person, is likely to be a very difficult task and a decision will need to be made as to who will be responsible for making that assessment. If it is the jury, what guidance will they be given. Will there be a list of reasons that are seen as fitting the category of 'partial excuses'? If the decision is regarded as too difficult for a jury to make, it may be a decision reserved for the judge at sentencing stage. This might in effect mean removing the distinction between murder and manslaughter.

977 See above para 7.13.

7.36 One way of incorporating the new approach to defences would be to remove the distinction between murder and manslaughter in the formulation of individual defences and to allow mitigation and the distinction between levels of culpability to occur at the sentencing stage.⁹⁷⁸

7.37 Victoria has a flexible sentencing regime and so it has been argued that many of the distinctions between types of killing and levels of criminal responsibility would be dealt with more effectively through sentencing rather than attempting to change or develop the formulation of the individual defences. This option would readily allow reasons to be taken into account along with the specific contexts and individual circumstances. Abolishing the distinction would allow for greater scope and flexibility in sentencing than is currently possible. Rather than the sentencing commencing with a conviction for either murder or manslaughter after the success or failure of a particular defence, sentencing could begin after an assessment of guilt or innocence by a jury. Reasons-based sentencing could then evaluate a defendant's reasons for killing along with their life circumstances to arrive at an appropriate sentencing outcome.

SHOULD PARTICULAR CIRCUMSTANCES BE EXCLUDED IN ASSESSING CULPABILITY?

7.38 Regardless of who is responsible for assessing reasons, there will need to be guidance as to which reasons are acceptable and which are not. One possibility would be to legislate to exclude particular circumstances or reasons, such as marital infidelity, from being considered as the basis for a defence to murder.

SHOULD THERE BE COMPULSORY JURY DIRECTIONS?

7.39 If the decision is left to juries to make, legislation might also extend to legislated compulsory jury directions for judges so that they are obliged to inform juries of which reasons they should consider and which they should disregard in determining culpability.

PROBLEMS WITH THE REASONS APPROACH

7.40 There are some significant problems with the reasons approach. We have set out the principal problems below.

GOOD AND BAD REASONS—HOW TO DECIDE

7.41 Perhaps the strongest argument against the reasons approach is that it requires the formulation of a clear, acceptable and widely understood framework for determining which reasons are socially acceptable and which are not. How to formulate such a framework in a modern democratic pluralistic society may ultimately be an insurmountable problem. The current legal framework sets down rules, which are applied independently of the moral outlook of the actor. The reasons approach attempts to provide a set of moral standards for the community to aspire to.

978 This approach would apply only to manslaughter in the context of reduced culpability for murder, it is not suggested that removal of the distinction between murder and manslaughter would affect the existing offences of unlawful and dangerous act manslaughter and gross negligence manslaughter.

7.42 This becomes problematic when trying to formulate a system of rules that are reasonably clear, accessible and intelligible. Reasons are rarely entirely good or bad. There will always be subtle distinctions and gradations between ‘partially good’ or acceptable reasons and ‘partially bad’ reasons. We mentioned earlier the problem of how to assess the same emotional response in different contexts. While reasons may be a clearer way of approaching the problem, the subtleties lose none of their complexity. It might be relatively straightforward on first examination to argue that the woman who kills her violent husband has more acceptable reasons than the man who because he holds a racist belief that black men are dangerous kills a black man who asks for money in the street. However, if we also know that the man in question has been beaten up and robbed by black men on several occasions, to what extent should this change our assessment of his reasons?

7.43 Determining what is a ‘socially acceptable’ motivation may not be sufficiently definable or even generally agreed upon in our modern society. Although the ideas that under-pin the reasons approach may be attractive and while intuitively it may make sense to place motive at the centre of our assessment of people’s criminal behaviour, it may be that this is ultimately too utopian an approach. In an ideal world we would, of course, want people not to kill because they understood that killing was an inappropriate way of resolving conflict or dealing with emotion and not merely because they understood that it was against the law. Perhaps the most we can hope for is a system of law that regulates behaviour under which ‘the person who effectively suppresses hatred is on a par with the person who ceases to hate.’⁹⁷⁹

WILL A NEW APPROACH EXPAND PARTIAL DEFENCES?

7.44 One of the risks inherent in adopting an approach based on reasons is that this will necessarily increase the number of circumstances in which a defence to homicide may be raised. Without the delineated categories of provocation, self-defence and the others, there is potentially a far broader set of circumstances and reasons that may be able to be considered as a basis for a defence to homicide. If the approach is to be adopted, ways of limiting the availability of defences would need to be considered.

WHO SHOULD MAKE DECISIONS ABOUT REASONS AND HOW SHOULD THEY BE GUIDED?

7.45 We have set out briefly above the ways in which the reasons approach might be accommodated. What remains unclear, however is how the load should be shared between legislature judge and jury. Juries may be well placed to reflect where there have been deviations from the socially responsible person. However, they may not be capable of making the kinds of graded distinctions between behaviour that the reasons approach can demand and given the secrecy of the jury room there simply is no way of assessing the factors taken into account in reaching decisions.⁹⁸⁰

7.46 If the primary role is to be taken up by the court then the process of decision-making about sentences will become more important and more scrutinised and may need far more detailed articulation.⁹⁸¹ An expansion of judicial discretion in implementing a reasons approach may also attract

979 Dan M Kahan and Martha C Nussbaum, 'Two Conceptions of Emotion in Criminal Law' (1996) 96 *Columbia Law Review* 269 para 300.

980 Nicola Lacey, in Andrew Ashworth and Barry Mitchell (eds) *Rethinking English Homicide Law* (2000) 128.

981 *Ibid* 129.

the criticism that too much power in the hands of judges is undesirable and may lead to injustice and inconsistencies.

7.47 In part the difficulty is in deciding who should be responsible for determining culpability, or how that responsibility should be shared. It is also about how best to guide decision-makers in the subtleties that will inevitably arise in assessing culpability from an assessment of emotions and reasons.

TAKING ACCOUNT OF INDIVIDUAL CIRCUMSTANCES

7.48 If it is argued that emotions are the result of cognitive appraisals based on value judgments then it also must be recognised that a person's value judgments are, to some degree, the result of that person's moral education and upbringing. Once this has been admitted, then it is difficult to assess the degree to which someone should be held personally responsible for a system of values that they were taught from a very young age. The boy who is taught to fear and or ridicule gay men, to see them as sexual predators, to view their sexual practices as disgusting and immoral and to avoid being perceived to be gay may well grow into a man who responds violently to a sexual proposition from a gay man. The argument in response to this is that sentencing systems have the flexibility of a two stage approach to assessing culpability and appropriate punishment.⁹⁸² The first stage involves an assessment of guilt or innocence including an evaluation of the offenders' actions and their reasons for acting. The second stage involves consideration of the offenders' background and factors which may give rise to a more sympathetic assessment of culpability and a more merciful disposition. This allows us to hold people responsible for their inappropriate reasons, while also taking into account to some degree the source of those reasons.

MENTAL CONDITION DEFENCES AND REASONS

7.49 Reasons for acting that are the result of mental conditions are qualitatively different to other kinds of reasons. Cases of mental impairment are excused because someone was acting entirely under the influence of their mental illness, so that their reasons cannot be assessed according to the standard of the normal socially responsible person. Those with mental illnesses that fall short of what is required for a mental impairment defence are as difficult to deal with using the emotions–reasons approach as they are under the current framework. The current system, in jurisdictions where diminished responsibility is available, requires evidence that accused persons' mental abnormality has reduced their capacity to control their behaviour. As we have seen in Chapter 5 it is very difficult to draw an accurate line between those who could not and those who simply did not control their behaviour. Using the emotions–reasons approach the question is whether and to what extent to assess a person's reasons according to the standard of the normal, socially responsible person. In the case of mental illness, changing the approach does not change the problem of where to draw the line in relation to mental condition defences. For example, it might be argued that a husband suffering from depression, who kills his wife because she leaves him, is acting out of emotion based on an inability to accept her right to leave. Alternatively it could be argued that the husband's depression caused him to have these particular beliefs. There is no clarity about how to draw the line between situations in which people should be held responsible for their reasons and situations in which they should not.

982 Dan M Kahan and Martha C Nussbaum, 'Two Conceptions of Emotion in Criminal Law' (1996) 96 *Columbia Law Review* 269.

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QUESTION

82. Instead of retaining the existing defences to homicide, would it be preferable to enumerate reasons that would allow a person who kills to be excused from criminal liability?
83. If a reasons centred approach is adopted, how should it work?
- (a) By defining clearly what constitutes a partial excuse?
 - (b) By enumerating or excluding reasons that can be considered the basis for a defence?
 - (c) By defining clearly who the normal socially responsible person is?
 - (d) Some combination of these?
84. If we determine culpability using the reasons approach, who should be responsible for that determination—judge or jury?
85. If we do not use the reasons approach, is there an alternative approach to defences that would address some of the problems outlined in this Options Paper?

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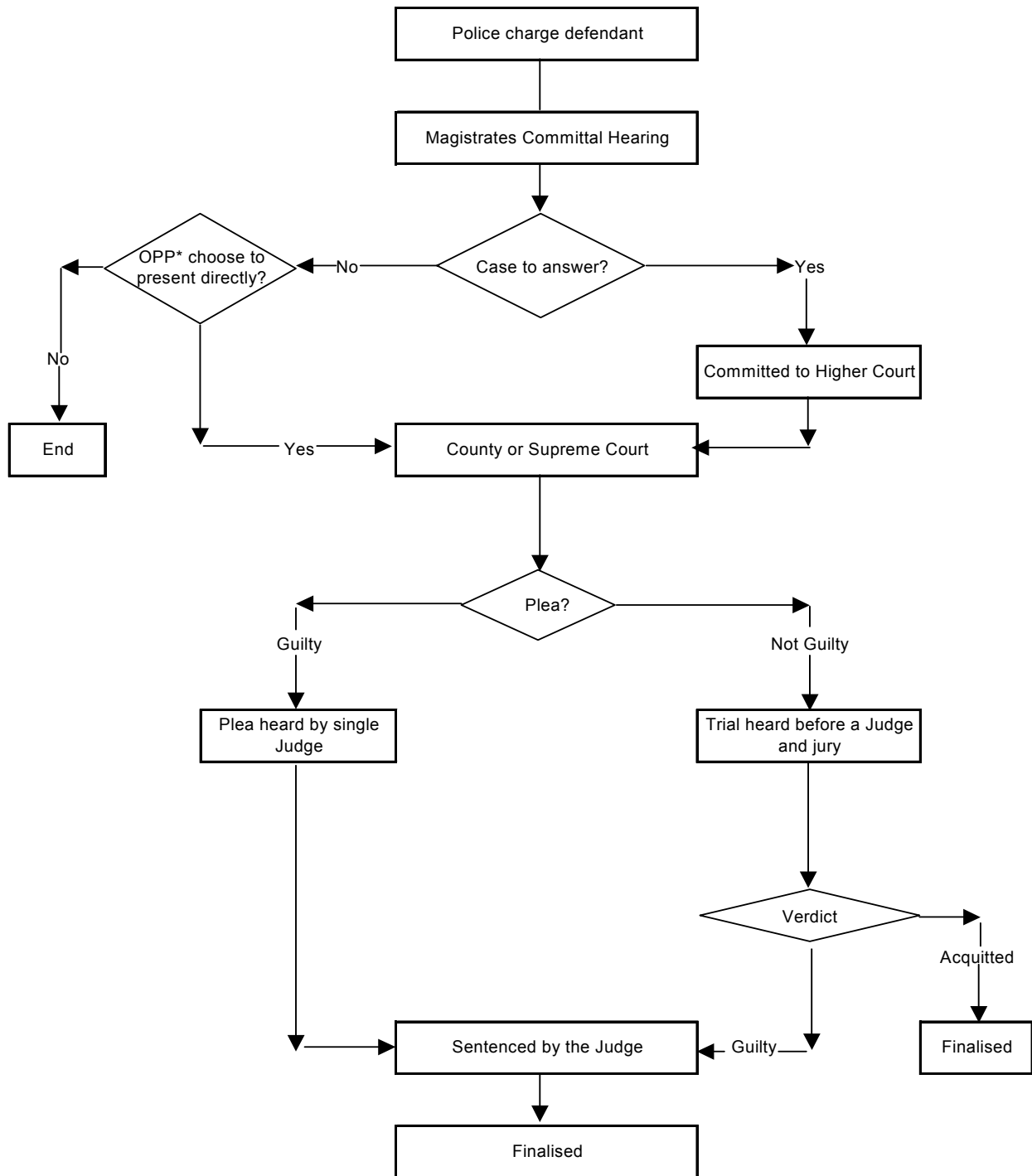
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Appendix 1: How Homicide Cases are Processed



*OPP = Office of Public Prosecutions

Appendix 2: Additional Tables

A NOTE ON STATISTICAL SIGNIFICANCE TESTING USED IN THIS PAPER

Tests of statistical significance are generally used to determine whether results in a sample can be generalised to the population. As this study utilises a population of homicide accused this problem is not as apparent. However, as a tool to assist the reader to determine the degree of meaning in the variations of results, statistical significance tests have been run and can be used to draw conclusions about Victorian homicide prosecution cases that occurred between 1 July 1997 and 30 June 2001 as compared with other States or other time periods.

Pearson's Chi-square was used for statistical significance testing, with the level of significance set at a minimum of 0.05. Significance always relates to the independent variable, or those that are placed in the columns of the tables.

Due to the small sample size, statistical tests were undertaken and are presented conservatively. That is, significant results are only presented on tables meeting maximum requirements:

- both the row and column variables were categorical;
- not more than 20% of the table cells have an expected count of less than five cases; and
- none of the cells have a minimum expected cell count of less than one case.

Results of Pearson's Chi-square is only reported where the level reached statistical significance.

EXPLANATORY NOTES

The data reported on in Appendix 2 is based on all cases which proceeded beyond the committal stage on a charge of murder, manslaughter or infanticide from the period 1 July 1997 to 30 June 2001. Any matters which had not yet proceeded to a sentencing hearing by 15 January 2003 were excluded from the sample. Matters which had proceeded beyond the sentencing stage, but were awaiting appeal, were included in the data.

There were no persons charged with the offence of infanticide over the period considered. Cases involving culpable driving charges and cases involving manslaughter by suicide pact or assisted suicide were excluded, as were cases prosecuted on the basis of manslaughter by gross negligence. Two cases where the accused pleaded guilty to manslaughter by gross negligence have been included as they were initially prosecuted for either murder or manslaughter.

There were 143 incidents of homicide in the relevant period—two of which involved two victims. There are therefore 143 incidents of homicide reported on, involving 145 victims.

While 198 people were charged in relation to these incidents, only 182 of these had murder or manslaughter charges beyond the committal stage. The remaining 16 people were either charged with lesser offences, such as assisting the offender, or had their homicide charges dropped to a lesser offence at the committal stage.

TABLE 1: NUMBER OF ACCUSED INVOLVED IN HOMICIDE INCIDENTS, GENDER OF DECEASED BY GENDER OF ACCUSED

		Male accused		Female accused		Total accused	
No of accused	Gender of deceased	n	% of accused	n	% of accused	N	% of accused
1	Male	51	54.3%	6	50.0%	57	53.8%
	Female	43	45.7%	6	50.0%	49	46.2%
	Subtotal	94	100.0%	12	100.0%	106	100.0%
2	Male	24	72.7%	3	37.5%	27	65.9%
	Female	9	27.3%	5	62.5%	14	34.1%
	Subtotal	33	100.0%	8	100.0%	41	100.0%
3	Male	15	88.2%	2	33.3%	17	73.9%
	Female	2	11.8%	4	66.7%	6	26.1%
	Subtotal	17	100.0%	6	100.0%	23	100.0%
4	Male	5	100.0%	2	100.0%	7	100.0%
	Subtotal	5	100.0%	2	100.0%	7	100.0%
5	Male	4	100.0%	1	100.0%	5	100.0%
	Subtotal	4	100.0%	1	100.0%	5	100.0%
Total	Male	99	64.7%	14	48.3%	113	62.1%
	Female	54	35.3%	15	51.7%	69	37.9%
	Subtotal	153	100.0%	29	100.0%	182	100.0%

Base: All Homicide accused (N=182)

TABLE 2: AGE GROUP OF ACCUSED BY GENDER OF ACCUSED

Age group of accused	Male accused		Female accused		Total accused	
	n	% of accused	n	% of accused	n	% of accused
10-14	0	.0%	1	3.4%	1	.5%
15-17	7	4.6%	2	6.9%	9	4.9%
18-24	42	27.5%	10	34.5%	52	28.6%
25-34	50	32.7%	3	10.3%	53	29.1%
35-49	41	26.8%	5	17.2%	46	25.3%
50-64	11	7.2%	6	20.7%	17	9.3%
65+	2	1.3%	2	6.9%	4	2.2%
Total	153	100.0%	29	100.0%	182	100.0%

Base: All Homicide accused (N=182)

TABLE 3 AGE GROUP OF DECEASED BY GENDER OF DECEASED

Age group of deceased	Male deceased		Female deceased		Total deceased	
	n	% of deceased	n	% of deceased	n	% of deceased
<1	2	2.4%	0	.0%	2	1.4%
1-9	4	4.7%	0	.0%	4	2.8%
10-14	0	.0%	1	1.7%	1	.7%
15-17	2	2.4%	3	5.0%	5	3.4%
18-24	6	7.1%	8	13.3%	14	9.7%
25-34	27	31.8%	20	33.3%	47	32.4%
35-49	26	30.6%	15	25.0%	41	28.3%
50-64	14	16.5%	4	6.7%	18	12.4%
65+	3	3.5%	9	15.0%	12	8.3%
Unknown	1	1.2%	0	.0%	1	.7%
Total	85	100.0%	60	100.0%	145	100.0%

Base: All Deceased (N=145)

TABLE 4: ACCUSED'S RELATIONSHIP TO DECEASED BY NUMBER OF ACCUSED

Accused's relationship to deceased	Single accused		Multiple accused		Total	
	n	% of accused	n	% of accused	n	% of accused
Current partner	20	18.9%	3	3.9%	23	12.6%
Ex-partner	12	11.3%	2	2.6%	14	7.7%
Family	19	17.9%	3	3.9%	22	12.1%
Friend	10	9.4%	11	14.5%	21	11.5%
Acquaintance	26	24.5%	43	56.6%*	69	37.9%
Stranger	14	13.2%	12	15.8%	26	14.3%
Other	5	4.7%	2	2.6%	7	3.8%
Total	106	100.0%	76	100.0%	182	100.0%

Base: All Homicide accused (N=182)

* Chi-square is significant at < 0.001.

TABLE 5: CONTEXT OF HOMICIDE IN CASES INVOLVING ALLEGATIONS OF PRIOR DOMESTIC VIOLENCE AGAINST THE ACCUSED.

Broad context category	Male accused		Female accused		Total accused	
	n	% of accused	n	% of accused	n	% of accused
Sexual intimacy	22	78.6%	1	33.3%	23	74.2%
Child killings	5	17.9%	0	.0%	5	16.1%
Other family member	1	3.6%	0	.0%	1	3.2%
Mental impairment / Gross mental disturbance	0	.0%	2	66.7%	2	6.5%
Total	28	100.0%	3	100.0%	31	100.0%

Base: Homicide Accused where there were allegations of domestic violence against the accused (N=31)

TABLE 6: TYPE OF WEAPON USED BY MALE AND FEMALE DECEASED

Type of weapon used	Male deceased		Female deceased		Total deceased	
	n	% of deceased	n	% of deceased	n	% of deceased
Knife and other sharp instrument combined	34	40.0%	25	41.7%	59	40.7%
Hands, feet	16	18.8%	12	20.0%	28	19.3%
Firearm	18	21.2%	7	11.7%	25	17.2%
Blunt instrument	11	12.9%	9	15.0%	20	13.8%
Other	4	4.7%	5	8.3%	9	6.2%
Fire	2	2.4%	2	3.3%	4	2.8%
Total	85	100.0%	60	100.0%	145	100.0%

Base: All Deceased (N=145)

TABLE 7: CONTEXT OF THE HOMICIDE BY MALE AND FEMALE DECEASED

Broad context category	Male deceased		Female deceased		Total deceased	
	n	%	n	%	n	%
Sexual intimacy	12	14.1%	33	55.0%	45	31.0%
Conflict resolution	21	24.7%	4	6.7%	25	17.2%
Spontaneous encounters	17	20.0%	0	.0%	17	11.7%
Originating in other crime	11	12.9%	3	5.0%	14	9.7%
Miscellaneous	4	4.7%	6	10.0%	10	6.9%
Mental impairment / Gross mental disturbance	5	5.9%	5	8.3%	10	6.9%
Other family member	5	5.9%	3	5.0%	8	5.5%
Child killings	6	7.1%	0	.0%	6	4.1%
Sexual predation / exploitation	0	.0%	5	8.3%	5	3.4%
Other killing	3	3.5%	1	1.7%	4	2.8%
Homophobic killing	1	1.2%	0	.0%	1	.7%
Total	85	100.0%	60	100.0%	145	100.0%

Base: All Deceased (N=145)

TABLE 8: GENDER OF DECEASED AND PRINCIPAL OUTCOME (MURDER OR MANSLAUGHTER ONLY) BY MEDIAN SENTENCE IMPOSED FOR PRINCIPAL OFFENCE WITH GENDER OF ACCUSED

	Principal outcome	Male accused		Female accused		Total	
		Total months of maximum sentence imposed for principal offence		Total months of maximum sentence imposed for principal offence		Total months of maximum sentence imposed for principal offence	
		n	Median	n	Median	n	Median
Male deceased	Guilty murder	32	204.00	5	180.00	37	204.00
	Guilty manslaughter	40	72.00	5	48.00	45	72.00
	Total	72	108.00	10	132.00	82	114.00
Female deceased	Guilty murder	33	216.00	5	216.00	38	216.00
	Guilty manslaughter	14	72.00	5	66.00	19	72.00
	Total	47	204.00	10	102.00	57	204.00
Total deceased	Guilty murder	65	216.00	10	204.00	75	216.00
	Guilty manslaughter	54	72.00	10	54.00	64	72.00
	Total	119	174.00	20	120.00	139	168.00

Base: All Homicide Accused with a principal outcome of either murder or manslaughter and who received a custodial sentence (N=139, excludes one accused who was found guilty 'other'). Total includes both Pleas and Trials. For additional explanation of the accused who are excluded from this table see n 171.

TABLE 9: GENDER OF THE DECEASED AND THE CONTEXT OF THE HOMICIDE BY GENDER OF ACCUSED

Gender of deceased	Broad context category	Male accused		Female accused		Total accused	
		n	% of accused	n	% of accused	n	% of accused
Male deceased	Spontaneous encounters	17	17.2%	0	.0%	17	15.0%
	Conflict resolution	32	32.3%	1	7.1%	33	29.2%
	Originating in other crime	19	19.2%	2	14.3%	21	18.6%
	Homophobic killing	1	1.0%	0	.0%	1	.9%
	Other killing	3	3.0%	0	.0%	3	2.7%
	Sexual intimacy	9	9.1%	8	57.1%	17	15.0%
	Child killings	6	6.1%	0	.0%	6	5.3%
	Other family member	4	4.0%	2	14.3%	6	5.3%
	Mental impairment / gross mental disturbance	4	4.0%	1	7.1%	5	4.4%
	Miscellaneous	4	4.0%	0	.0%	4	3.5%
	Subtotal	99	100.0%	14	100.0%	113	100.0%
Female deceased	Conflict resolution	1	1.9%	7	46.7%	8	11.6%
	Originating in other crime	3	5.6%	1	6.7%	4	5.8%
	Sexual predation / exploitation	5	9.3%	1	6.7%	6	8.7%
	Other killing	1	1.9%	0	.0%	1	1.4%
	Sexual intimacy	33	61.1%	2	13.3%	35	50.7%
	Other family member	3	5.6%	0	.0%	3	4.3%
	Mental impairment / gross mental disturbance	2	3.7%	3	20.0%	5	7.2%
	Miscellaneous	6	11.1%	1	6.7%	7	10.1%
	Subtotal	54	100.0%	15	100.0%	69	100.0%
Total deceased	Spontaneous encounters	17	11.1%	0	.0%	17	9.3%
	Conflict resolution	33	21.6%	8	27.6%	41	22.5%
	Originating in other crime	22	14.4%	3	10.3%	25	13.7%
	Sexual predation / exploitation	5	3.3%	1	3.4%	6	3.3%
	Homophobic killing	1	.7%	0	.0%	1	.5%
	Other killing	4	2.6%	0	.0%	4	2.2%
	Sexual intimacy	42	27.5%	10	34.5%	52	28.6%
	Child killings	6	3.9%	0	.0%	6	3.3%
	Other family member	7	4.6%	2	6.9%	9	4.9%
	Mental impairment / gross mental disturbance	6	3.9%	4	13.8%	10	5.5%
	Miscellaneous	10	6.5%	1	3.4%	11	6.0%
	Total	153	100.0%	29	100.0%	182	100.0%

Base: All Homicide accused (N=182)

TABLE 10: CONTEXT OF THE HOMICIDE INCIDENT AND DEFENCES RAISED (AT ANY STAGE OF THE PROSECUTION) BY GENDER OF THE ACCUSED

Broad context category	Defences raised at any stage	Male accused		Female accused		Total accused	
		n	%	n	%	n	%
Sexual intimacy	Denial of participation raised as a defence at any Stage?	4	12.1%	5	62.5%	9	22.0%
	Lack of intention to kill / no recklessness raised as a defence at any stage?	15	45.5%	3	37.5%	18	43.9%
	Intoxication of accused raised as a defence at any stage?	3	9.1%	0	.0%	3	7.3%
	Other defences raised at any stage?	3	9.1%	0	.0%	3	7.3%
	Provocation raised as a defence at any stage?	15	45.5%	2	25.0%	17	41.5%
	Self-defence raised as a defence at any stage?	4	12.1%	2	25.0%	6	14.6%
	Number of accused	33	100.0%	8	100.0%	41	100.0%
Conflict resolution	Denial of participation raised as a defence at any Stage?	8	47.1%	0	.0%	8	47.1%
	Lack of intention to kill / no recklessness raised as a defence at any stage?	6	35.3%	0	.0%	6	35.3%
	Provocation raised as a defence at any stage?	3	17.6%	0	.0%	3	17.6%
	Self-defence raised as a defence at any stage?	4	23.5%	0	.0%	4	23.5%
	Number of accused	17	100.0%	0	.0%	17	100.0%
Originating in other crime	Denial of participation raised as a defence at any Stage?	3	30.0%	0	.0%	3	30.0%
	Lack of intention to kill / no recklessness raised as a defence at any stage?	5	50.0%	0	.0%	5	50.0%
	Other defences raised at any stage?	2	20.0%	0	.0%	2	20.0%
	Provocation raised as a defence at any stage	1	10.0%	0	.0%	1	10.0%
	Self-defence raised as a defence at any stage?	2	20.0%	0	.0%	2	20.0%
	Number of accused	10	100.0%	0	.0%	10	100.0%

TABLE 10 (CONTINUED):

Broad context category	Defences raised at any stage	Male accused		Female accused		Total accused	
		n	%	n	%	n	%
Spontaneous encounters	Lack of intention to kill / no recklessness raised as a defence at any stage?	9	75.0%	0	.0%	9	75.0%
	Intoxication of accused raised as a defence at any stage?	3	25.0%	0	.0%	3	25.0%
	Other defences raised at any stage?	3	25.0%	0	.0%	3	25.0%
	Provocation raised as a defence at any stage?	5	41.7%	0	.0%	5	41.7%
	Self-defence raised as a defence at any stage?	6	50.0%	0	.0%	6	50.0%
	Number of accused	12	100.0%	0	.0%	12	100.0%
Miscellaneous	Denial of participation raised as a defence at any stage?	3	42.9%	0	.0%	3	42.9%
	Lack of intention to kill / no recklessness raised as a defence at any stage?	5	71.4%	0	.0%	5	71.4%
	Intoxication of accused raised as a defence at any stage?	3	42.9%	0	.0%	3	42.9%
	Other defences raised at any stage?	1	14.3%	0	.0%	1	14.3%
	Provocation raised as a defence at any stage?	1	14.3%	0	.0%	1	14.3%
	Self-defence raised as a defence at any stage?	2	28.6%	0	.0%	2	28.6%
	Number of accused	7	100.0%	0	.0%	7	100.0%
Mental impairment / gross mental disturbance	Insanity / mental impairment raised as a defence at any stage?	6	100.0%	4	100.0%	10	100.0%
	Lack of intention to kill / no recklessness raised as a defence at any stage?	0	.0%	1	25.0%	1	10.0%
	Provocation raised as a defence at any stage?	0	.0%	1	25.0%	1	10.0%
	Number of accused	6	100.0%	4	100.0%	10	100.0%
Other family member	Lack of intention to kill / no recklessness raised as a defence at any stage?	2	50.0%	0	.0%	2	50.0%
	Intoxication of accused raised as a defence at any stage?	1	25.0%	0	.0%	1	25.0%
	Provocation raised as a defence at any stage?	4	100.0%	0	.0%	4	100.0%
	Self-defence raised as a defence at any stage?	1	25.0%	0	.0%	1	25.0%
	Number of accused	4	100.0%	0	.0%	4	100.0%

TABLE 10 (CONTINUED):

Broad context category	Defences raised at any stage	Male accused		Female accused		Total accused	
		n	%	n	%	n	%
Child killings	Denial of participation raised as a defence at any stage?	1	33.3%	0	.0%	1	33.3%
	Lack of intention to kill / no recklessness raised as a defence at any stage?	2	66.7%	0	.0%	2	66.7%
	Number of accused	3	100.0%	0	.0%	3	100.0%
Sexual predation / exploitation	Denial of participation raised as a defence at any stage?	1	100.0%	0	.0%	1	100.0%
	Number of accused	1	100.0%	0	.0%	1	100.0%
Other killing	Lack of intention to kill / no recklessness raised as a defence at any stage?	1	100.0%	0	.0%	1	100.0%
	Number of accused	1	100.0%	0	.0%	1	100.0%
Total	Denial of participation raised as a defence at any stage?	20	21.3%	5	41.7%	25	23.6%
	Insanity / mental impairment raised as a defence at any stage?	6	6.4%	4	33.3%	10	9.4%
	Lack of intention to kill / no recklessness raised as a defence at any stage?	45	47.9%	4	33.3%	49	46.2%
	Intoxication of accused raised as a defence at any stage?	10	10.6%	0	.0%	10	9.4%
	Other defences raised at any stage?	9	9.6%	0	.0%	9	8.5%
	Provocation raised as a defence at any stage?	29	30.9%	3	25.0%	32	30.2%
	Self-defence raised as a defence at any stage?	19	20.2%	2	16.7%	21	19.8%
	Total of accused	94	100.0%	12	100.0%	106	100.0%

Base: All Homicide Accused where a defence could be identified as being raised at any stage of the prosecution (N=106).

Note: There are more than 106 defences as some accused raised more than one defence during the prosecution. Percentages are based on accused. Thus 20.2% of male accused raised self-defence at some stage of the prosecution. However, due to the multiple possible defences for each accused, percentages add up to more than 100%.

TABLE 11: CONTEXT OF THE HOMICIDE INCIDENT AND DEFENCES RAISED (AT TRIAL) BY GENDER OF THE ACCUSED

Broad context category	Defences raised at trial	Male accused		Female accused		Total accused	
		n	%	n	%	n	%
Sexual intimacy	Denial of participation raised as a defence at trial?	4	14.8%	4	57.1%	8	23.5%
	Lack of intention to kill / no recklessness raised as a defence at trial?	12	44.4%	2	28.6%	14	41.2%
	Intoxication of accused raised as a defence at trial?	1	3.7%	0	.0%	1	2.9%
	Other defences raised at trial?	2	7.4%	0	.0%	2	5.9%
	Provocation raised as a defence at trial?	12	44.4%	2	28.6%	14	41.2%
	Self-defence raised as a defence at trial?	3	11.1%	2	28.6%	5	14.7%
	Number of accused	27	100.0%	7	100.0%	34	100.0%
Conflict resolution	Denial of participation raised as a defence at trial?	8	47.1%	0	.0%	8	47.1%
	Lack of intention to kill / no recklessness raised as a defence at trial?	6	35.3%	0	.0%	6	35.3%
	Provocation raised as a defence at trial?	2	11.8%	0	.0%	2	11.8%
	Self-defence raised as a defence at trial?	4	23.5%	0	.0%	4	23.5%
	Number of accused	17	100.0%	0	.0%	17	100.0%
Originating in other crime	Denial of participation raised as a defence at trial?	3	30.0%	0	.0%	3	30.0%
	Lack of intention to kill / no recklessness raised as a defence at trial?	5	50.0%	0	.0%	5	50.0%
	Other defences raised at trial?	2	20.0%	0	.0%	2	20.0%
	Provocation raised as a defence at trial?	1	10.0%	0	.0%	1	10.0%
	Self-defence raised as a defence at trial?	2	20.0%	0	.0%	2	20.0%
	Number of accused	10	100.0%	0	.0%	10	100.0%
Spontaneous encounters	Lack of intention to kill / no recklessness raised as a defence at trial?	8	88.9%	0	.0%	8	88.9%
	Intoxication of accused raised as a defence at trial?	3	33.3%	0	.0%	3	33.3%
	Other defences raised at trial?	2	22.2%	0	.0%	2	22.2%
	Provocation raised as a defence at trial?	4	44.4%	0	.0%	4	44.4%

TABLE 11: (CONTINUED):

Broad context category	Defences raised at trial	Male accused		Female accused		Total accused	
		n	%	n	%	n	%
	Self-defence raised as a defence at trial?	5	55.6%	0	.0%	5	55.6%
	Number of accused	9	100.0%	0	.0%	9	100.0%
Miscellaneous	Denial of participation raised as a defence at trial?	3	42.9%	0	.0%	3	42.9%
	Lack of intention to kill / no recklessness raised as a defence at trial?	5	71.4%	0	.0%	5	71.4%
	Intoxication of accused raised as a defence at trial?	3	42.9%	0	.0%	3	42.9%
	Other defences raised at trial?	1	14.3%	0	.0%	1	14.3%
	Provocation raised as a defence at trial?	1	14.3%	0	.0%	1	14.3%
	Self-defence raised as a defence at trial?	2	28.6%	0	.0%	2	28.6%
	Number of accused	7	100.0%	0	.0%	7	100.0%
Mental impairment / gross mental disturbance	Lack of intention to kill / no recklessness raised as a defence at trial?	0	.0%	1	25.0%	1	10.0%
	Insanity / mental impairment raised as a defence at trial?	6	100.0%	4	100.0%	10	100.0%
	Provocation raised as a defence at trial?	0	.0%	1	25.0%	1	10.0%
	Number of accused	6	100.0%	4	100.0%	10	100.0%
Other family member	Lack of intention to kill / no recklessness raised as a defence at trial?	2	50.0%	0	.0%	2	50.0%
	Provocation raised as a defence at trial?	4	100.0%	0	.0%	4	100.0%
	Self-defence raised as a defence at trial?	1	25.0%	0	.0%	1	25.0%
	Number of accused	4	100.0%	0	.0%	4	100.0%
Child killings	Lack of intention to kill / no recklessness raised as a defence at trial?	2	100.0%	0	.0%	2	100.0%
	Number of accused	2	100.0%	0	.0%	2	100.0%
Sexual predation / exploitation	Denial of participation raised as a defence at trial?	1	100.0%	0	.0%	1	100.0%
	Number of accused	1	100.0%	0	.0%	1	100.0%

TABLE 11: (CONTINUED):

Broad context category	Defences raised at trial	Male accused		Female accused		Total accused	
		n	%	n	%	n	%
Total	Denial of participation raised as a defence at trial?	19	22.9%	4	36.4%	23	24.5%
	Lack of intention to kill / no recklessness raised as a defence at trial?	40	48.2%	3	27.3%	43	45.7%
	Intoxication of accused raised as a defence at trial?	7	8.4%	0	.0%	7	7.4%
	Insanity / mental impairment raised as a defence at trial?	6	7.2%	4	36.4%	10	10.6%
	Other defences raised at trial?	7	8.4%	0	.0%	7	7.4%
	Provocation raised as a defence at trial?	24	28.9%	3	27.3%	27	28.7%
	Self-defence raised as a defence at trial?	17	20.5%	2	18.2%	19	20.2%
	Total of accused	83	100.0%	11	100.0%	94	100.0%

Base: All Homicide Accused where a defence could be identified as being raised at any stage of the prosecution (N=94).

Note: There are more than 94 defences as some accused raised more than one defence at trial. Percentages are based on accused. Thus 20.5% of male accused raised self-defence at trial. However, due to the multiple possible defences for each accused, percentages add up to more than 100%.

TABLE 12: CONTEXT OF THE HOMICIDE INCIDENT AND HISTORY OF DOMESTIC VIOLENCE ALLEGATIONS AGAINST THE ACCUSED

Broad context category	History of domestic violence (accused)					
	No		Yes		Total	
	Count	Column %	Count	Column %	Count	Column %
Spontaneous encounters	17	11.3%	0	.0%	17	9.3%
Conflict resolution	41	27.2%	0	.0%	41	22.5%
Originating in other crime	25	16.6%	0	.0%	25	13.7%
Sexual predation / exploitation	6	4.0%	0	.0%	6	3.3%
Homophobic killing	1	.7%	0	.0%	1	.5%
Other killing	4	2.6%	0	.0%	4	2.2%
Sexual intimacy	29	19.2%	23	74.2%	52	28.6%
Child killings	1	.7%	5	16.1%	6	3.3%
Other family member	8	5.3%	1	3.2%	9	4.9%
Mental impairment / gross mental disturbance	8	5.3%	2	6.5%	10	5.5%
Miscellaneous	11	7.3%	0	.0%	11	6.0%
Total	151	100.0%	31	100.0%	182	100.0%

Base: All Homicide accused (N=182).

TABLE 13: CONTEXT OF THE HOMICIDE INCIDENT AND PRINCIPAL OUTCOME (MURDER AND MANSLAUGHTER ONLY) BY MEDIAN SENTENCE IMPOSED FOR PRINCIPLE OFFENCE WITH GENDER OF ACCUSED

Broad Context category	Principle Outcome	Gender of the Accused					
		Male		Female		Total	
		Total months of maximum sentence imposed for principle offence		Total months of maximum sentence imposed for principle offence		Total months of maximum sentence imposed for principle offence	
		n	Median	n	Median	n	Median
Spontaneous encounters	Guilty murder	6	204.00	0	.	6	204.00
	Guilty manslaughter	6	72.00	0	.	6	72.00
	Total	12	144.00	0	.	12	144.00
Conflict resolution	Guilty murder	14	204.00	2	210.00	16	204.00
	Guilty manslaughter	9	72.00	3	48.00	12	72.00
	Total	23	180.00	5	120.00	28	177.00
Originating in other crime	Guilty murder	7	204.00	0	.	7	204.00
	Guilty manslaughter	11	84.00	3	36.00	14	72.00
	Total	18	102.00	3	36.00	21	96.00
Sexual predation / exploitation	Guilty murder	2	234.00	0	.	2	234.00
	Guilty manslaughter	0	.	1	72.00	1	72.00
	Total	2	234.00	1	72.00	3	216.00
Homophobic killing	Guilty manslaughter	1	60.00	0	.	1	60.00
	Total	1	60.00	0	.	1	60.00
Other killing	Guilty manslaughter	3	60.00	0	.	3	60.00
	Total	3	60.00	0	.	3	60.00
Sexual intimacy	Guilty murder	27	228.00	6	192.00	33	228.00
	Guilty manslaughter	13	72.00	3	60.00	16	72.00
	Total	40	216.00	9	168.00	49	204.00
Child killings & Other family member	Guilty murder	4	156.00	0	.	4	156.00
	Guilty manslaughter	8	90.00	0	.	8	90.00
	Total	12	108.00	0	.	12	108.00
Mental impairment / gross mental disturbance	Guilty murder	0	.	1	120.00	1	120.00
	Total	0	.	1	120.00	1	120.00
Miscellaneous	Guilty murder	5	216.00	1	240.00	6	216.00
	Guilty manslaughter	3	96.00	0	.	3	96.00
	Total	8	204.00	1	240.00	9	204.00
Total	Guilty murder	65	216.00	10	204.00	75	216.00
	Guilty manslaughter	54	72.00	10	54.00	64	72.00
	Total	119	174.00	20	120.00	139	168.00

Base: All Homicide Accused with a principal outcome of either murder or manslaughter and who received a custodial sentence (N=139, excludes 1 accused who was found guilty 'other'). Total includes both Pleas and Trials. For additional explanation of the accused who are excluded from this table see n 171.