



South Australian Law Reform Institute

The Provoking Operation of Provocation: Stage 1

The **South Australian Law Reform Institute** was established in December 2010 by agreement between the Attorney-General of South Australia, the University of Adelaide and the Law Society of South Australia. It is based at the Adelaide University Law School.

Postal address: SA Law Reform Institute
Adelaide Law School
University of Adelaide
North Terrace
Australia 5005

Telephone: (08) 8313 5582

Email: salri@adelaide.edu.au

Website: <http://law.adelaide.edu.au/research/law-reform-institute>

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Government of South Australia
Attorney-General's Department



THE LAW SOCIETY
OF SOUTH AUSTRALIA

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Participants

South Australian Law Reform Institute

Director

Professor John Williams

Deputy Director

Dr David Plater

Advisory Board

Professor John Williams (Chair)

The Hon David Bleby QC

Professor Melissa de Zwart (appointed 28 February 2017)

Mr Terry Evans

The Hon Tom Gray QC (until 7 March 2017)

Ms Ingrid Haythorpe (until 11 February 2017)

Emerita Professor Rosemary Owens AO (until 28 February 2017)

Mr Dini Soulio (appointed 11 February 2017)

The Hon Justice Tim Stanley (appointed 7 March 2017)

Jonathan Wells QC

Administrative Officer

Louise Scarman

Project Officer

Sarah Moulds

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This Report draws upon the significant work and initial consultation undertaken by the Institute for its Audit Report on the topic, published in September 2015.

The Institute acknowledges and relies upon the extensive previous research on this topic, and, in particular, upon the work of, and submissions to, the NSW Select Committee on the Partial Defence of Provocation of the Parliament of New South Wales and the South Australian Legislative Review Committee.

The Institute is further grateful for the many insightful submissions in relation to this reference.

Disclaimer

This Report deals with the law as it was on 31 March 2017 and may not necessarily represent the current law.

Abbreviations

<i>Audit Report</i>	South Australian Law Reform Institute, <i>Discrimination on the grounds of sexual orientation, gender, gender identity and intersex status in South Australian legislation</i> , Audit Paper (September 2015)
<i>LGBTIQ</i>	Lesbian, Gay, Bisexual, Trans, Intersex and Queer

Executive Summary

South Australia has historically been at the forefront of developing and implementing laws designed to prohibit unlawful discrimination and to promote equality. The state was the first Australian jurisdiction to introduce sex discrimination legislation and the *Sex Discrimination Act 1975* (SA) took full effect from August 1976. It was the first jurisdiction to legalise consensual homosexual acts in 1975 in the aftermath of the tragic death of Dr George Duncan in 1972.¹

This background provides the context to the South Australian Law Reform Institute's ('SALRI's') reference arising from the address of the Governor, the Honourable Hieu Van Le AO, at the Opening of the Second Session of the Fifty-Third Parliament of South Australia, on 10 February 2015. His Excellency stated that: 'My Government will invite the South Australian Law Reform Institute to review legislative or regulatory discrimination against individuals and families on the grounds of sexual orientation, gender, gender identity, or intersex status.'²

The first stage of this reference was to review legislative and regulatory discrimination against lesbian, gay, bisexual, trans and intersex South Australians.³ This culminated in the Audit Report, *Discrimination on the Grounds of Sexual Orientation, Gender, Gender Identity and Intersex Status in South Australian Legislation* ('Audit Report'), published by SALRI in September 2015.⁴ In the Audit Report process, SALRI heard from many interested parties and individuals, especially from the LGBTIQ communities, who identified various laws in South Australia as containing discriminatory and unsatisfactory features and in need of potential reform.

In its Audit Report, SALRI identified the strong criticism in the LGBTIQ community of the 'homosexual advance' or 'gay panic'⁵ aspect of provocation, that is the law which allows an accused in a criminal trial, or through a guilty plea, to reduce the crime of murder to the lesser crime of manslaughter on the basis that the deceased made an unwanted homosexual advance to the accused that causes the accused to feel so 'provoked' that they lose control of their behaviour and kill the other person in response. The Audit Report found this aspect of provocation was clearly discriminatory.

This Report contains the first stage of findings of SALRI's further consideration of the operation of the law of provocation and related issues. SALRI was clear in the Audit Report that the current law needed reform to remove its discriminatory gay panic aspect. However, this aspect of provocation is only part of a wider picture. The role, scope, and even the existence, of provocation as a partial defence to murder, is

¹ See further Clare Parker and Paul Sendziuk, 'It's Time: The Duncan Case and the Decriminalisation of Homosexual Acts in South Australia, 1972' in Yorick Smal and Graham Willett (eds), *Out Here: Gay and Lesbian Perspectives VI* (Monash University Press, 2011) 15–35.

² His Excellency the Hon Hieu Van Le AO, 'Speech to the Fifty-Third Parliament of South Australia' (Speech delivered at the Opening of the Second Session of the Fifty-Third Parliament of South Australia, 10 February 2015). See South Australia, *Parliamentary Debates*, Legislative Council, 10 February 2015, 9.

³ For the full text of the Reference, see above n 2.

⁴ South Australian Law Reform Institute (SALRI), *Discrimination on the grounds of sexual orientation, gender, gender identity and intersex status in South Australian legislation*, Audit Paper (2015) ('Audit Report'). A copy of the Audit Report is available at <https://law.adelaide.edu.au/research/law-reform-institute/documents/audit_report_lgbtiq_sept_2015.pdf>.

⁵ SALRI notes that neither the term 'gay panic' or 'homosexual advance' is an ideal description of this aspect of the partial defence of provocation as both can be seen to perpetuate the myth that there is something inherently threatening about the homosexual nature of the advance that generates 'panic' in the mind of the receiver. However, as both of these terms are now frequently associated with this aspect of provocation and are widely used to describe its application, this Report uses these two terms interchangeably where necessary to refer to this aspect of the defence.

controversial and has been the subject of extensive study and criticism. The whole issue of provocation is complex (including its interaction in South Australia with the mandatory sentence for murder). The problems of provocation extend beyond its impact on LGBTIQ communities and encompasses gender implications, especially in its application to victims of family violence.⁶

SALRI indicated in the Audit Report its intention to conduct further research into a number of complex areas, including the scope and the operation of the law of provocation, to determine what changes were necessary to ensure that the law does not discriminate against individuals and families on the grounds of sexual orientation, gender, gender identity, or intersex status.⁷ It is fundamental that the law should operate in a fair and non-discriminatory manner.

The Audit Report found that the unwanted homosexual advance aspect of provocation is objectionable and is clearly discriminatory on the grounds of sexual orientation. Its continued existence in light of the High Court's decision in *R v Lindsay*⁸ tends to indirectly legitimise and sanction lethal violence towards people demonstrating homosexual behaviour. In this regard, it is contrary to South Australia's obligations under both State and Commonwealth legislation not to discriminate on the basis of sexual orientation, gender and gender identity. With the passage of an Act by the Queensland Parliament on 21 March 2017 that provides that a non-violent sexual advance generally cannot amount to provocation,⁹ South Australia is now the only Australian jurisdiction to retain the outdated gay panic aspect of provocation. SALRI believes there is a need for legislative reform of the current South Australian law of provocation to ensure that it does not discriminate on the grounds of sexual orientation (or indeed on any other grounds). There was almost universal support amongst all those consulted by SALRI to remove the discriminatory homosexual advance of the partial defence of provocation.

However, SALRI's research and consultation demonstrates that wider and more comprehensive reform to the law of provocation is necessary beyond simply discarding the gay panic aspect.

The current application of provocation is perceived as contrary to modern societal values and norms.¹⁰ As the Hon Rev Fred Nile MLC cogently argues:

in today's modern society, we expect that citizens will maintain their self-control, even in circumstances that might be "provocative". It is unacceptable that the law offers a partial defence to people who kill in response to "provocative" circumstances which are, in fact, a normal part of human experience, such as being told a relationship is going to end, discovering infidelity, or feeling jealous or betrayed.¹¹

⁶ SALRI notes that the terms 'domestic violence', 'family violence' and 'domestic abuse' are all used. SALRI uses the term 'family violence' in this Report.

⁷ Audit Report, above n 4, 13 [2.7].

⁸ (2015) 255 CLR 272.

⁹ *Criminal Law Amendment Act 2017* (Qld) s 10. See also Queensland, *Parliamentary Debates*, Legislative Assembly, 11 May 2016, 1654 (Hon YM D'Ath, Attorney-General); Queensland, *Parliamentary Debates*, House of Assembly, 21 July 2016, 26; Joshua Robertson, "'Gay Panic' Murder Defence Thrown out in Queensland", *The Guardian* (online), 22 March 2017, <<https://www.theguardian.com/world/2017/mar/22/gay-panic-defence-thrown-out-in-queensland>>.

¹⁰ New South Wales Law Reform Commission (NSWLRC), *Partial Defences to Murder: Provocation and Infanticide*, Report No 83 (1997) 19 [2.17]; Victoria, *Parliamentary Debates*, Legislative Assembly, 6 October 2005, 1349 (Rob Hulls, Attorney-General); Farrah Tomazin, 'Provocation defence to be removed', *The Age* (online), 21 January 2005, <<http://www.theage.com.au/news/National/Government-abolishes-provocation-defence/2005/01/20/1106110863452.html>>.

¹¹ Select Committee on the Partial Defence of Provocation ('NSW Select Committee'), Parliament of New South Wales, *Partial Defence of Provocation Final Report* (2013) x.

The partial defence of provocation has been the subject of extensive criticism. Andrew Hemming describes provocation as ‘a totally flawed defence that has no place at all in any Australian jurisdiction irrespective of the particular sentencing regime.’¹²

It is widely asserted that ‘the operation of the defence is gender biased, anachronistic and archaic and promotes a culture of “victim blaming”; that the legal test is conceptually confusing, inappropriately privileges a loss of self-control and is difficult for juries to understand and apply; and that provocation can be adequately dealt with at the sentencing stage, as it is in all other criminal offences’.¹³ Indeed, the criticisms of provocation are such that all Australian jurisdictions bar South Australia have now either abolished it entirely or at least narrowed its scope.¹⁴

Given that the criticisms of the present law of provocation go beyond the homosexual advance defence, SALRI concludes that any reform should extend beyond removing this aspect of provocation. SALRI considers that wider reform of the present law is necessary. In particular, a strong criticism of the present law is that the defence of provocation is gender biased and unjust, namely that it is perceived to unfairly favour male accused (especially those who have killed a female partner) while applying unfairly to women accused of murder (especially those who have been subjected to family violence).

SALRI has considered four options to date in its consultation and research. First, retaining the partial defence of provocation but removing the homosexual advance aspect¹⁵ (or any non-violent sexual advance). Secondly, making major changes to provocation based on the New South Wales (NSW) model of ‘extreme provocation’. Thirdly, abolition of the partial defence of provocation. Fourthly, clarifying the law of self-defence in a family violence context. SALRI’s research and consultation to date has revealed that alternative models of provocation such as ensuring a non-violent sexual advance cannot amount to provocation or the NSW model of extreme provocation are problematic and may be unlikely to produce a workable and effective model in practice. SALRI especially notes that, removing a homosexual advance from the ambit of provocation, whilst serving as an important legislative declaration of non-discrimination, in practice would have very limited effect.

SALRI considers that any effort at reform should include the option of the full repeal of provocation. It is difficult to identify any viable alternative models, such as to simply discard the gay panic aspect of provocation (or extending it to any non-violent sexual advance), or even a more restrictive model such as that of ‘extreme provocation’ as exists in NSW. In fact, such options, whilst well intended, could have perverse or unintended consequences and fail to remedy the discriminatory aspects of the partial defence identified above. It may be that the preferable solution is to abolish provocation entirely with the important

¹² Andrew Hemming, ‘Provocation: A Totally Flawed Defence that has no Place in Australian Criminal Law Irrespective of Sentencing Regime’ (2010) 14 *University of Western Sydney Law Review* 1, 2.

¹³ NSW Select Committee, above n 11, 4 [1.19]. See also Graeme Cross, to Criminal Law Review, NSW Department of Attorney-General and Justice, 15 November 2013, 5; Victorian Law Reform Commission (VLRC), *Defences to Homicide; Final Report*, Report No 83 (2004), 26 [2.14] (‘VLRC (2004)’).

¹⁴ The other jurisdictions to have abolished provocation are Tasmania, Victoria and Western Australia. All other Australian jurisdictions, but for South Australia have now made reforms to restrict the application of the defence. See Kate Fitz-Gibbon, ‘Dr Kate Fitz-Gibbon responds to High Court’s judgement in *R v Lindsay*’ in *Criminology@Deakin Crime, Surveillance, Security and Justice* (7 May 2015) <<https://blogs.deakin.edu.au/criminology/dr-kate-fitz-gibbon-responds-to-high-courts-judgment-in-r-v-lindsay/>>.

¹⁵ The Hon Tammy Franks MLC introduced the *Criminal Law Consolidation (Provocation) Amendment Bill 2013* in the Legislative Council. See South Australia, *Parliamentary Debates*, Legislative Council, 1 May 2013, 3804-3808 (Hon Tammy Franks).

qualification that a court possesses sufficient flexibility to properly reflect on the offender’s culpability and any genuine mitigating factors in sentence.

SALRI considers that, in particular, the current law of provocation in South Australia needs reform to make sure that, at the least, any non-violent sexual advance (not confined to a gay sexual advance) should not be capable of amounting to provocation. However, although such a provision will serve as an important legislative statement of non-discriminatory intention, its practical value will be strictly limited, if not illusory. In light of this fact, the wider problems with the partial defence of provocation (notably its inherent gender bias) and the flaws of other potential models of provocation (such as ‘extreme provocation’ in NSW or ‘loss of control’ in England and Wales) that have emerged in its study to date, SALRI is of the view that further review should be undertaken of the general law of provocation and related issues, to identify an effective and non-discriminatory wider solution.

SALRI considers that these issues, including the law and sentencing practices for homicide offences in South Australia, require further examination to enable it to fully consider the retention, reform or repeal of the partial defence of provocation. SALRI therefore has adopted a two-stage approach to reform: to make certain recommendations now (largely relating to self-defence and family violence) as shown in orange boxes throughout this Report, with certain questions to be the subject of further review in the second stage of this project, shown in blue boxes throughout this Report. The Attorney-General has agreed with this approach.

SALRI suggests that it would be premature to make or consider any changes to the present law of provocation until its further review in the second stage has been concluded. SALRI intends to release its Stage 2 Report as soon as possible.

SALRI notes that the current law in South Australia fails to adequately reflect the situation of women who experience family violence and who may be driven to kill their abusive domestic partner, or who may be at risk of being killed by their abusive partner. Any reforms in South Australia should also address the situation of those who may kill their abusive partners in the context of family violence.

It is fundamental that any reform should also address the gender bias of the current law and ensure that victims of family violence who may kill their abusive partners are not unfairly prejudiced. This accords with SALRI’s wider remit, as it is charged with examining the law to ensure that it operates in a fair and non-discriminatory manner, regardless of gender, gender identity or sexual orientation. SALRI also notes the recent major wider developments at both a state and national level responding to family violence.

The Audit Report noted SALRI’s intention to recommend discarding the gay panic aspect of provocation but to do so in a way that most fairly removes the discriminatory nature of this law whilst also having regard to its various wider implications (including gender). This reflected the Audit Report’s focus on the discriminatory impact of the partial defence on the lives of gay, lesbian, trans and intersex South Australians, as required by SALRI’s terms of reference. However, those terms of reference also included the need to identify areas of law reform where the law discriminates against people on the basis of *gender*. This necessitates consideration of how provocation is used in cases of gender-based violence, including family violence (where most, though not all, victims are women). For this reason, this Report looks not only at the gay panic aspect of provocation, but also addresses the gender implications of the current law and its application to victims of family violence (a theme with particular significance at both a state and national level).

Therefore, SALRI recommends that South Australia should amend Division 2 of the *Criminal Law Consolidation Act 1935* (SA) and adopt an approach based on the Victorian model of self-defence (and for

consistency the Victorian approaches of duress and necessity), which explicitly takes into account both evidence of family violence and the context of family violence in clarifying the scope and operation of self-defence (and for consistency duress and necessity).

These changes would confirm that in cases of family violence, the actual or apprehended threat need not be imminent. The changes would also provide that evidence of family violence is relevant and may be taken into account to prove both the accused's belief that using force was necessary (the subjective limb of self-defence) and to prove whether the conduct said to occur in self-defence was a reasonable or proportionate response in the circumstances as the accused believed them to be (the objective limb). It should also be made clear that family violence and related evidence (including 'social framework' evidence as to the nature and effect of family violence) is relevant and admissible. These changes should not be confined to murder but rather should be of general application.

The complete defence of self-defence (in combination with the existing partial defence in South Australia of excessive self-defence) rather than provocation is the preferable vehicle to reflect the particular situation of victims of family violence. SALRI suggests these reforms to self-defence, duress and necessity could, and should, be undertaken regardless of whether provocation is ultimately retained, reformed or abolished.

Almost universal support was expressed to SALRI during its consultation for South Australia to adopt the Victorian model of self-defence in respect to family violence.

SALRI accepts there may be residual cases where self-defence (even the revised version of self-defence recommended in this Report) will be unavailable and it might appear harsh that such individuals face conviction for murder. Such cases reinforce the need for SALRI to consider flexibility in sentencing. SALRI notes that the partial defence of diminished responsibility as exists in NSW and the United Kingdom has been raised in consultation as a possible alternative to provocation. This suggestion is tenable but it raises its own issues and complications (including the need for expert input and the interaction with sentencing for murder) and it is beyond the remit of this Report. SALRI will separately consider the merits of the partial defence of diminished responsibility in stage 2.

The often overlooked defence of marital coercion in s 328A of the *Criminal Law Consolidation Act 1935* (which is confined to the wife in a marriage and is not open to a husband, domestic partners of either sex or same sex spouses) will be examined by SALRI in stage 2 with a view to its retention, reform or repeal.

SALRI in stage 2, will examine the role and operation of the specific Queensland defence of killing for preservation in an abusive domestic relationship in s 304B of the *Criminal Code 1899* (Qld). Introduced in February 2010, the defence has now been in operation for over five years and the extent to which it has improved legal responses to persons who kill in response to prolonged family violence merits consideration in the context of SALRI's suggested second stage.

This Report has been prepared following an extensive community consultation process. This included requests for traditional written submissions, the use of social media communications and in person consultation in the preparation of the Audit Report. There has been traditional, online and in person consultation on the law of provocation and related issues. SALRI's work also attracted local and national media interest. SALRI has engaged with a wide range of groups and individuals as part of its consultation in the preparation of both the Audit Report and this Report. Of particular relevance were a number of community roundtables hosted by SALRI and involving community members with expertise and experiences related to LGBTIQ rights, family and domestic violence specialist and related services, victims' rights services, legal and other practitioners and academics. SALRI is grateful for the thoughtful community participation in the consultation process.

These views have been carefully considered by SALRI in formulating this Report, as has the extensive comparative research undertaken to determine how other Australian and overseas jurisdictions currently tackle these complex issues.

SALRI has been assisted by the many law reform reports and other reviews and academic works that have considered provocation and related issues. SALRI was particularly assisted by the submissions and reports of the NSW Select Committee¹⁶ and the Legislative Review Committee of the South Australian Parliament.¹⁷ SALRI notes the ongoing further review of the South Australian Legislative Review Committee.

SALRI wishes to thank the South Australian community for engaging so thoughtfully and generously with this entire reference, and for sharing personal stories of how these laws impact their lives and families. The law of provocation is a contentious area but it is vital that the criminal law operates in manner that is fair and non-discriminatory to all.

¹⁶ NSW Select Committee, above n 11.

¹⁷ Parliament of South Australia, *Report of the Legislative Review Committee into the Partial Defence of Provocation* (December 2014) ('SA Legislative Review Committee').

Summary of Recommendations

Recommendation 1:

SALRI recommends that, in accordance with its reference, the current law of provocation in South Australia needs reform to remove any aspect of the current law that discriminates on the basis of sexual orientation **and/or** gender.

Recommendation 2:

SALRI recommends that the term ‘the prosecutor’ in s 18 of the *Evidence Act 1929* (SA) should be amended to include the deceased victim of homicide thereby extending the existing protection in s 18 to enable a deceased, and the families of homicide victims, to be better protected from gratuitous attacks upon the character of the deceased (a concern that especially arises in cases involving family violence or involving a gay sexual advance).

Recommendation 3:

SALRI recommends that any legislative measure to provide that a non-violent sexual advance cannot amount to provocation so as to reduce to manslaughter what would otherwise be a conviction of murder be deferred until further recommendations can be made by SALRI in Stage 2 of this Report.

Recommendation 4:

SALRI recommends that the current law of self-defence set out in Division 2 of the *Criminal Law Consolidation Act 1935* (SA) should be amended for all offences of violence (not confined to homicide) to incorporate the Victorian model of self-defence in circumstances of family violence as set out in Part IC of the *Crimes Act 1958* (Vic).

Recommendation 5:

SALRI recommends that, in particular, the current law of self-defence in Division 2 of the *Criminal Law Consolidation Act 1935* (SA) should be amended to clarify that in cases involving family violence, the actual or perceived threat need not be immediate or imminent.

Recommendation 6:

SALRI recommends that, in particular, the current law of self-defence in Division 2 of the *Criminal Law Consolidation Act 1935* (SA) should be amended to provide that evidence of family violence is relevant and may be taken into account to prove both the accused’s belief that using force was necessary (the subjective limb) and to prove whether the conduct said to occur in self-defence was a reasonable or proportionate response in the circumstances as the accused believed them to be (the objective limb).

Recommendation 7:

SALRI recommends that, in light of modern understanding, the definition of ‘family violence’ should be given a wide definition and not be confined to direct physical violence and ‘family violence’ should also be given a wide definition in relation to the relationships caught within it (especially to include Indigenous kinship) and not be confined to spouses or ‘domestic partners’. The model provided in Part IC of the

Crimes Act 1958 (Vic) is helpful but it is additionally suggested that, for consistency, the existing model of ‘family violence’ in s 8 of the *Intervention Orders (Prevention of Abuse) Act 2009* (SA) should be adopted.

Recommendation 8:

SALRI recommends that either Division 2 of the *Criminal Law Consolidation Act 1935* (SA) or the *Evidence Act 1929* (SA) should be amended in terms similar to Part IC of the *Crimes Act 1958* (Vic) to explicitly provide that evidence of family violence and related evidence (including ‘social framework’ evidence as to the nature and effect of family violence) is admissible and may be adduced in any case involving family violence (not confined to homicide) with potential defences of self-defence, duress or necessity.

Recommendation 9:

SALRI recommends that the South Australian Government consider the development and implementation of an education package on the nature and dynamics of domestic and family violence targeting the legal sector and the community more broadly.

Recommendation 10:

SALRI recommends that, for consistency with Recommendations 4, 5, 6 and 7, the common law defences of duress and necessity in South Australia should be amended in respect of all offences, to clarify that in cases involving family violence, the actual or perceived threat need not be immediate and to provide that the fact of family violence should be taken into account in considering the reasonableness or proportionality of the response employed. The model in Part IC of the *Crimes Act 1958* (Vic) provides a suitable model.

Recommendation 11:

SALRI recommends that Recommendations 3 to 10 above can, and should, be undertaken, regardless of whether provocation is ultimately retained, revised or abolished in South Australia.

PART 1 – Introduction

1.1 Background

1.1.1 The South Australian Law Reform Institute (‘SALRI’) was established in December 2010. Based at the University of Adelaide Law School, SALRI was formed by an agreement between the Attorney-General of South Australia, the University of Adelaide and the Law Society of South Australia.

1.1.2 When conducting reviews and research on proposals from the Attorney-General, SALRI focuses on the modernisation of the law; the elimination of defects in the law; the consolidation of any laws; the repeal of laws that are obsolete or unnecessary; and uniformity, where desirable, between laws of other States and the Commonwealth.

1.1.3 SALRI then provides reports to the Attorney-General or other authorities on the outcomes of reviews and/or research and makes recommendations based on those outcomes. It is ultimately up to the State Government and the South Australian Parliament to implement any recommended changes to South Australian law.

1.1.4 SALRI’s review of the law of provocation is part of SALRI’s present reference to identify and examine the laws and regulations in South Australia that discriminate against individuals and families on the basis of their sexual orientation, gender, gender identity or intersex status.¹⁸ This includes laws that discriminate against lesbians, gays, bisexuals, trans, intersex and queer (‘LGBTIQ’) people.

1.1.5 The wider context for this reference is the South Australian Government’s stated aims for a South Australia where the presence and contributions LGBTIQ people are welcomed and valued and where their ability to participate fully in all aspects of social and economic life, free from discrimination and prejudice, is maximised.¹⁹

1.1.6 On 7 September 2015, SALRI completed the first part of its work with respect to this Reference by publishing an Audit Report entitled *Discrimination on the grounds of sexual orientation, gender, gender identity and intersex status in South Australian legislation* (‘Audit Report’).²⁰ The Audit Report outlines in some detail the current legislative regime in South Australia, as well as the discriminatory impact this regime is having on the lives of LGBTIQ people in South Australia, and argued a strong case for reform.

1.2 The Audit Report

1.2.1 The Audit Report was prepared following an extensive desktop review of all South Australian laws, followed by extensive consultation by SALRI with LGBTIQ individuals and community organisations and included a public submission process facilitated by the Government’s *YourSAy* website.²¹

¹⁸ For the full text of the Reference see His Excellency, the Hon Hieu Van Le AO, above n 2. See South Australia, *Parliamentary Debates*, Legislative Council, 10 February 2015, 9.

¹⁹ Government of South Australia, *LGBTIQ State of Play: Equality for Lesbian, Gay, Transgender, Intersex and Queer (LGBTIQ) People* (2015) <<http://yoursay.sa.gov.au/documents/lgbtiq-state-of-play.pdf>> (‘LGBTIQ State of Play’).

²⁰ Audit Report, above n 4, 44 [102].

²¹ Government of South Australia, *YourSAy: LGBTIQ – Removing Discrimination from SA laws* (2015) <<http://yoursay.sa.gov.au/yoursay/lgbtiq-removing-discrimination-from-sa-laws>>.

1.2.2 The individuals and organisations consulted asked various questions of the law and the values it should enshrine. These questions served to highlight the discriminatory barriers that members of the LGBTIQ communities often encounter in their daily lives.

1.2.3 The desktop Review identified over 140 Acts and Regulations that, on their face, discriminate against individuals on the basis of sex or gender diversity. However, a smaller number of laws were identified in the Audit Report as having a more acute discriminatory impact on the lives of LGBTIQ South Australians and their families.

1.2.4 The Audit Report contained a number of recommendations for immediate reform, as well as recommendations relating to five complex areas of law that were identified as giving rise to discrimination, but which required further review and reporting.²²

1.2.5 In the Audit Report, SALRI foreshadowed its intention to conduct further research and make further detailed recommendations in these areas, including ‘the aspect of the existing common law partial defence of provocation that permits homosexual advances to constitute circumstances of provocation, having regard to any relevant recommendations of the South Australian Legislative Review Committee and relevant interstate reforms, including the *Crimes Amendment (Provocation) Act 2014* (NSW).’²³

1.2.6 This Report sets out the further research conducted by SALRI to date on the scope and operation of the law of provocation and related issues with particular regard to its LGBTIQ and gender implications and sets out a number of Recommendations having regard to its research and its consultation process (discussed below).

1.2.7 SALRI considers that the complex issues surrounding the law of provocation, including sentencing, require further examination to enable it to fully consider the retention, reform or repeal of provocation. SALRI therefore adopts a two-stage approach; this Report makes certain Recommendations (largely relating to self-defence and family violence) as shown in orange boxes within this Report with certain questions to be the subject of a Further Review, as shown in blue boxes within this Report.

1.3 Consultation Process

1.3.1 While the time frames for completing this Report did not permit SALRI to travel to regional areas or hold numerous community meetings, this Report was developed following broad community consultation, in person in Adelaide and via a range of online methods. SALRI was also assisted by the submissions to the NSW Select Committee and the Legislative Review Committee of the South Australian Parliament.

1.3.2 The preparation of this Report has involved several stages. First, following a detailed desktop review of all South Australian laws and regulations, and the provision of plain English ‘Fact Sheets’ on key issues,²⁴ SALRI undertook consultation with the South Australian LGBTIQ community to identify those laws that discriminated on the grounds of sexual orientation, gender identity and intersex status. SALRI then utilised the Government’s *YourSAy* website²⁵ and invited members of the public to provide submissions or request meetings with SALRI to discuss its work. Secondly, following the completion of

²² Audit Report, above n 4, 9–10.

²³ Ibid 13 [2.7], 144.

²⁴ See, for example, *SALRI Fact Sheet 2: Legal Protections against Discrimination* <<https://law.adelaide.edu.au/research/law-reform-institute/documents/factsheet-2-legal-protections-100615.pdf>>.

²⁵ Government of South Australia, above n 21.

the Audit Report process, SALRI conducted specific comparative research on the partial defence of provocation and hosted three community roundtables on the topic, as well as inviting further written submissions from any interested parties. The three community roundtables involved community members with expertise and experiences related to LGBTIQ rights, family and domestic violence and related services, victims' rights services, legal and other practitioners and academics. Thirdly, SALRI considered submissions made, the laws in other jurisdictions, relevant law reform and government reports and academic research and commentary. This work, reflected in the Audit Report, found that the current law of provocation in South Australia gave rise to considerable concern with respect to discrimination on the grounds of sexual orientation, gender, gender identity and intersex status.

1.3.3 The Recommendations for law reform and suggestions for further examination in stage 2 set out in this Report are made having regard to the community consultation which SALRI undertook. An initial consultation roundtable event (which included representatives of the family violence sector) was held at the Adelaide Law School on 25 February 2016. On 11 and 12 May 2016, SALRI hosted two roundtable meetings at the Adelaide Law School attended by representatives of the legal, academic, and LGBTIQ sectors, as well as by family violence agencies and other interested parties. The meetings focused on the law of provocation's implications for victims of family violence as well as the homosexual advance defence. The May 2016 roundtable meetings were conducted under Chatham House rules. SALRI will engage in further consultation as part of the second stage.

1.3.4 SALRI has considered four main options to date in its consultation and research. First, retaining the partial defence of provocation but removing its homosexual advance aspect (or any non-violent sexual advance). Secondly, making major changes to provocation based on the NSW model of 'extreme provocation'. Thirdly, abolition of the partial defence of provocation. Fourthly, clarifying the law of self-defence in a family violence context.

1.3.5 In the preparation of this Report, SALRI has had careful regard to all the various views expressed to it. SALRI has also had regard to the views expressed by interested parties and individuals to similar reviews, notably those of the NSW Select Committee and the South Australian Legislative Review Committee. SALRI also liaised with the South Australian Equal Opportunity Commission and with relevant experts from South Australia and interstate in preparing this Report.

1.4 Some Notes on Terminology

1.4.1 This Report adopts the same approach to terminology as used in the Audit Report and the Issues Paper. Underlying this approach is SALRI's strong support for the use of inclusive terminology and the right of people to identify their sexual orientation, gender identity or intersex status as they choose, and recognition of the complexity and power of language. SALRI is aware of the important distinction between the terms 'gender identity' and 'intersex status'.

1.4.2 Some of the terminology used in this Report is set out below. These uses were developed as part of the consultation process undertaken by SALRI earlier in 2015.²⁶

Battered wife syndrome ('BWS'): This term refers to a physical and psychological condition of a person who has suffered (usually persistent) emotional, physical and/or sexual abuse, typically from a spouse. It explains why an abused spouse may stay in a violent and destructive relationship.

²⁶ Audit Report, above n 4, 25–26. See also South Australia, *Parliamentary Debates*, Legislative Council, 26 July 2016, 4593–94 (RI Lucas).

Gender: The term ‘gender’ refers to the way in which a person identifies or expresses their masculine or feminine characteristics. A person’s gender identity or gender expression is not always exclusively male or female and may or may not correspond to their sex.

Gender expression: The term ‘gender expression’ refers to the way in which a person externally expresses their gender or how they are perceived by others.

Gender identity: The term ‘gender identity’ refers to a person’s deeply held internal and individual sense of gender.

Intersex: The term ‘intersex’ refers to people who are born with genetic, hormonal or physical sex characteristics that are not typically ‘male’ or ‘female’. Intersex people have a diversity of bodies and identities.

LGBTIQ: An acronym used to describe lesbian, gay, bisexual, trans, intersex and queer people collectively. Many sub-groups form part of the broader LGBTIQ movement.

Sex: The term ‘sex’ refers to a person’s biological characteristics. A person’s sex is usually described as being male or female. Some people may not be exclusively male or female (the term ‘intersex’ is explained above). Some people identify as neither male nor female.

Sexual orientation: The term ‘sexual orientation’ refers to a person’s emotional or sexual attraction to another person, including, amongst others, the following identities: heterosexual, gay, lesbian, bisexual, pansexual, asexual or same-sex attracted.

Trans: The term ‘trans’ is a general term for a person whose gender identity is different to their sex at birth. A trans person may take steps to live permanently in their nominated sex with or without medical treatment.

PART 2 – Balancing Rights and SALRI’s Terms of Reference

2.1.1 It is important to keep in mind the nature of SALRI’s Reference to which the discussion and Recommendations in this Report relate.

2.1.2 SALRI’s Reference derives from the speech made by the Governor, the Honourable Hieu Van Le AO, at the Opening of the Second Session of the Fifty-Third Parliament of South Australia, on 10 February 2015, in which His Excellency stated:

Some individuals and families are not able to participate fully in our democracy because of who they are, whether it be lesbian, gay, bisexual and transgender. The strength of our society will be shaped by the extent to which we can guarantee access to these pillars of our democracy, education, health and justice, to all South Australians.

My Government will invite the South Australian Law Reform Institute to review legislative or regulatory discrimination against individuals and families on the grounds of sexual orientation, gender, gender identity, or intersex status. Their recommendations will then be considered in the South Australian Parliament.²⁷

2.1.3 This statement provides the context for this review.²⁸

2.1.4 The need to address discrimination has been repeated in a South Australian context. The South Australian Premier, the Hon Jay Weatherill MP, for example, observed:

Governments should support the greatest possible engagement in society for all members of our community; that is, they should govern for all people. The fact remains that some individuals and families are not able to participate fully in our community because they are who they are, whether that be gay, lesbian, bisexual, transgender, intersex or queer.²⁹

2.1.5 The Opposition Leader, Steven Marshall MP, similarly commented:

Whilst South Australia has a proud history of reform, we still live in a society where people are at risk of bullying due to their sexuality and where a person’s sexuality is often the first thing used to describe them. Our state retains ‘gay panic’ as a defence to murder. Queensland is the only other state where this defence remains, but just this week the Queensland government announced that it will introduce legislation to abolish it. Other South Australia legislation also retains discriminatory aspects. Last year, the government asked the South Australian Law Reform Institute to review legislative or regulatory discrimination against individuals and families on the grounds of sexual orientation, gender, gender identity or intersex status. I look forward to further reforms being implemented in the same cooperative way as the original homosexual law reform was able to pass this Parliament... Today, I have reflected on many of South Australia’s achievements and the work that still needs to be done. Our LGBTIQ community was let down by previous Parliaments... I conclude by calling on all South Australians to do their part to help right the wrongs of the past. Promoting tolerance and respect does not stop here on North Terrace. We all have a role to play in ensuring that members of the LGBTIQ community in South Australia and beyond feel safe, valued

²⁷ His Excellency, the Hon Hieu Van Le AO, above n 2. See South Australia, Parliamentary Debates, Legislative Council, 10 February 2015, 9.

²⁸ See also *LGBTIQ State of Play*, above n 19; Government of South Australia, Department for Communities and Social Inclusion, *South Australian Strategy for the Inclusion of Lesbian, Gay, Bisexual, Transgender, Intersex and Queer People 2014-2016* (May 2014), <<http://publicsector.sa.gov.au/wp-content/uploads/20140501-DCSI-LGBTIQ-Strategy.pdf>>.

²⁹ South Australia, *Parliamentary Debates*, House of Assembly, 10 September 2015, 2503 (Jay Weatherill, Premier).

and equal in society. Whilst the world has come a long way in calling out discrimination against this community, we still live in a society where it occurs... Let us in South Australia continue to set an example of tolerance and inclusion so that we can all experience life and love to the full. Challenge hate when you hear it. Call out your friends for discrimination and promote tolerance and inclusiveness in your workplace. Discrimination has no place in our society.³⁰

2.1.6 These are important acknowledgements in considering the current law and underscore the broad support within both the South Australian community and Parliament for the removal of potentially discriminatory laws, such as the gay panic aspect of provocation.

2.1.7 However, SALRI is acutely aware that the criticisms of the law of provocation extend beyond its gay panic aspect. It is important that any examination of provocation and potential reforms have regard to its various wider implications (including gender).

2.1.8 As the current remit of SALRI includes the need to identify areas of law reform where the law discriminates against people on the basis of gender, and that most (though not all) family violence³¹ is directed against women, it is crucial that SALRI does not confine its examination to the gay panic aspect of provocation but that it also addresses the gender implications and criticisms of the current law and its application to victims of family violence. An initial consultation roundtable event (which included representatives of the family violence sector) on 25 February 2016 at the Adelaide University Law School strongly supported this broader approach. This theme was also strongly expressed at the other provocation specific roundtable consultation sessions held at the Adelaide Law School on 11 and 12 May 2016.³²

2.1.9 The acute problems raised by family or domestic violence are obvious.³³ As one recent Report notes:

Domestic violence has a significant effect on South Australia. Its terrifying impact on individuals can be psychological or physical and, too often, fatal. Domestic violence permeates every level of

³⁰ South Australia, *Parliamentary Debates*, House of Assembly, 1 December 2016, 8316–8317. See also South Australia, *Parliamentary Debates*, House of Assembly, 10 September 2015, 2462 (David Pisoni); South Australia, *Parliamentary Debates*, House of Assembly, 10 September 2015, 2460–2461 (Stephen Marshall, Opposition Leader); South Australia, *Parliamentary Debates*, House of Assembly, 10 September 2015, 2461–2462 (Katherine Hildyard).

³¹ Parliament of South Australia, *Report of the Social Development Committee into Domestic and Family Violence* (April 2016) 33 [4.2] ('SA Social Development Committee'). SALRI notes that various terms are used such as 'domestic violence' (see Government of South Australia, *Domestic Violence: Discussion Paper* (July 2016) 12) or 'family violence'. Under the *Intervention Orders (Prevention of Abuse) Act 2009* (SA), the term 'domestic abuse' is used. SALRI uses the term 'family violence' in this Report. 'Family violence is a broader term that refers to violence between family members, as well as violence between intimate partners. It involves the same sorts of behaviours as described for domestic violence. As with domestic violence, the National Plan recognises that although only some aspects of family violence are criminal offences, any behaviour that causes the victim to live in fear is unacceptable. The term, 'family violence' is the most widely used term to identify the experiences of Indigenous people, because it includes the broad range of marital and kinship relationships in which violence may occur.' See Council of Australian Governments (COAG), *National Plan to Reduce Violence against Women and their Children 2010-2022* <<https://www.dss.gov.au/women/programs-services/reducing-violence/the-national-plan-to-reduce-violence-against-women-and-their-children-2010-2022>>.

³² The Report of the 11 May 2016 roundtable is attached at Appendix 1, 100–106. The Report of the 12 May 2016 roundtable is attached at Appendix 2, 107–113.

³³ Government of South Australia, above n 31, 4–5. 'Family violence can cause terrible physical and psychological harm, particularly to women and children. It destroys families and undermines communities. Sometimes children who have directly experienced family violence or have been exposed to it go on to become victims or perpetrators of violence later in life, so that the effect of family violence is passed to the next generation.' State of Victoria, *Royal Commission into Family Violence: Summary and Recommendations*, Parl Paper No 132 (2016) 1 ('Victorian Royal Commission'). See also SA Social Development Committee, above n 31, 12.

society and endangers people of all backgrounds and experiences. It has lasting effects on our children and threatens the wellbeing of our community as a whole.³⁴

2.1.10 This consideration has been heightened by the recent national prominence of family violence.³⁵ Both the states (including South Australia)³⁶ and the Commonwealth have resolved their commitment to address family violence and over recent years there has been increased national recognition involving the states and the Commonwealth of the need to develop and implement policies to better prevent and respond to family violence.³⁷

2.1.11 Another vital factor for SALRI is the consideration that any changes should recognise the situation of women,³⁸ who may be provoked into killing their male abusers in a family violence context.³⁹

2.1.12 In this context, and in accordance with SALRI’s wider remit to address gender bias, SALRI in this Report is also considering the operation of provocation and related laws (notably self-defence) in relation to victims of family violence. It is impossible to confine any examination of the law of provocation to merely the problematic gay panic aspect. Wider issues are inevitably raised such as the gender bias of the present law and related issues such as sentencing practices for offences of homicide.

2.1.13 SALRI will adopt a two-stage approach to this review. The Attorney-General is agreeable to this approach. This Report (the first stage) covers various issues, including both the gay panic aspect of provocation and the gender bias of the current law, especially in the context of family violence. The present Report makes 11 Recommendations, largely relating to the use of provocation in the gay panic context, self-defence and family violence, as shown in orange boxes throughout this Report. Stage 2 of the review will consider further questions, notably the question of provocation in general and related matters such as sentencing practices for homicide offences, shown in blue boxes throughout this Report. Stage 2 will include a series of recommendations as to how the law of provocation should be amended, both generally

³⁴ Government of South Australia, above n 31, 4. For the some of the effects of family violence, see at 37–38; SA Social Development Committee, above n 31, 47–64; Victorian Royal Commission, above n 33, 34–41, 65–72.

³⁵ Some indicators that family violence is now on the national agenda include the appointment of Rosie Batty as Australian of the Year: Norman Hermant, ‘Raising the Bar: Being Australian of the Year’, *ABC* (online), 24 January 2016, <<http://www.abc.net.au/news/2016-01-24/rosie-batty-australian-of-the-year/7108064>>; the introduction of a national plan to reduce domestic violence: Council of Australian Governments, above n 31; and various legislative changes, see, for example, the *Residential Tenancies (Domestic Violence Protections) Amendment Act 2015* (SA).

³⁶ See, for example, Social Development Committee, above n 31, 88–134; Government of South Australia, above n 31, 8–9.

³⁷ Victorian Royal Commission, above n 33, 71–72. In January 2015, Ms Rosie Batty was appointed 2015 Australian of the Year in recognition of her efforts in campaigning against family violence following the murder of her son, Luke, at the hands of his father. National Australia Day Council, *Honour Roll: Australian of the Year 2015—Rosie Batty, Australian of the Year* <<http://www.australianoftheyear.org.au/honour-roll/?view=fullView&year=2015&recipientID=1179>>. In the same month, the former Prime Minister announced that the question of violence against women and their children would be discussed as part of the Council of Australian Governments’ agenda, and a new COAG advisory panel would be formed; the panel was to be chaired by former Victoria Police Chief Commissioner, Ken Lay APM, and Ms Batty was appointed as a founding member. See Prime Minister, the Hon Tony Abbott MP and Minister Assisting the Prime Minister for Women, Senator Michaelia Cash, ‘COAG Agenda to Address Ending Violence Against Women’ (Joint Press Release, 28 January 2015).

³⁸ Even though males can be and are victims of family violence, the role of the defence of provocation in providing a defence to female victims of family violence is notable. Where provocation is raised in the context of family violence nearly all the defendants are women. See James Moshides, *The Provisions of the ‘Loss of Self Control’ Defence in England and New South Wales: Models for Reform of New South Wales Provocation Law* (University of Gloucestershire, 2011) 3.

³⁹ NSW Select Committee, above n 11, 191 [9.5]; Women’s Electoral Lobby, Submission No 10 to *Select Committee on the Partial Defence of Provocation*, 7 August 2012, 1; Justice Action, Submission No 24 to *Select Committee on the Partial Defence of Provocation*, 10 August 2012, 2.

and with particular reference to the topics discussed in this Stage 1 Report. SALRI considers that it is premature to make or consider any changes to the present law of provocation until its further review in stage 2 has been concluded.

2.1.14 This Report does not examine family violence in general⁴⁰ and at this stage is not examining mandatory sentencing as that is beyond the remit of its current review and is presently under consideration by the South Australian Sentencing Advisory Council.⁴¹ The Sentencing Bill 2016 (SA) was introduced by the Attorney-General to the House of Assembly on 16 November 2016.⁴² The Bill will replace the current *Criminal Law (Sentencing) Act 1988* (SA). The Sentencing Bill 2016 restates the current law in South Australia relating to mandatory sentencing, notably the general minimum non-parole term of 20 years for the offence of murder.⁴³ Stage 2 of this review will consider issues of sentencing and the application of the general minimum non-parole period of 20 years for murder.

2.1.15 Though there are many criticisms of the present law of provocation,⁴⁴ two aspects attract particular criticism. These are the gay panic aspect of provocation⁴⁵ and the gender bias of the current law, especially in its application in cases involving victims of family violence.⁴⁶ SALRI accepts these criticisms of provocation are justified. It is therefore crucial that, as the problems of provocation extend beyond the gay panic aspect, any reforms must also address the gender implications of the present law and the situation of victims of family violence. SALRI notes that care must be taken to avoid establishing a new well intentioned model which may have undesirable and unintended consequential impacts in practice. The Victorian experience of its problematic and ill-fated defensive homicide law is an example of this.⁴⁷

2.1.16 The UK Supreme Court has accepted that in light of the many criticisms of the partial defence of provocation, ‘the law relating to provocation is flawed to an extent beyond reform by the courts’.⁴⁸ SALRI notes this view and agrees it is clear that any reform in this area must be an issue for Parliament.

Recommendation 1

SALRI recommends that, in accordance with its reference, the current law of provocation in South Australia needs reform to remove any aspect of the current law that discriminates on the basis of sexual orientation **and/or** gender.

2.1.17 In its Stage 2 Report, SALRI will undertake further review of the general law of provocation and related issues (notably sentencing for the offence of murder) to identify an effective and non-

⁴⁰ See generally, Social Development Committee, above n 31; Victorian Royal Commission, above n 33.

⁴¹ Miles Kemp, ‘Minimum non-parole period for murder under review’, *The Advertiser* (online), 16 February 2016, <<http://www.adelaidenow.com.au/news/south-australia/minimum-nonparole-period-for-murder-under-review/news-story/f0107087aa9cd1a4bc92e14fb39fbb54>>.

⁴² South Australia, *Parliamentary Debates*, House of Assembly, 16 November 2016, 7882–7900.

⁴³ Sentencing Bill 2016, cl 47. See further below [8.2.1]–[8.2.5].

⁴⁴ See further below [4.1.1]–[4.1.24].

⁴⁵ See further below [5.5.1]–[5.5.14].

⁴⁶ See further below [6.1.1]–[6.1.22].

⁴⁷ See, for example, Kate Fitz-Gibbon, *Homicide Law Reform, Gender and the Provocation Defence: A Comparative Analysis* (Palgrave Macmillan, 2014) 108–126; Kate Fitz-Gibbon, ‘The Offence of Defensive Homicide: Lessons learnt from failed Law Reform’ in Kate Fitz-Gibbon and Arie Frieberg, *Homicide Law Reform in Victoria: Retrospect and Prospects* (Federation Press, 2015) 128, 128–143; Kellie Toole, ‘Defensive Homicide on Trial in Victoria’ (2013) 39 *Monash University Law Review* 473. See also below n 92, n 511.

⁴⁸ *Attorney General for Jersey v Holley* [2005] 2 AC 580, 594 [27]. See also Law Commission of England and Wales, *Partial Defences to Murder*, Law Comm No 290 (2004 Cm 6301) [2.10].

discriminatory wider solution that most appropriately addresses any aspect of the current law that discriminates on the basis of sexual orientation or gender.

Stage 2 will include the following:

- 1: The option and implications of abolishing the partial defence of provocation in South Australia.
- 2: The need to ensure that the applicable law is as clear and comprehensible as possible to judges and juries.
- 3: An examination of the appropriateness, or otherwise, of the existing evidentiary provisions in the *Evidence Act 1929* (SA) as they enable or encourage evidence to be adduced which impugns the deceased victim in homicide trials, with a view to improving the protection for victims and their families, while also ensuring that legitimate social framework evidence (see Recommendation 8) is able to be admitted.
- 4: The consideration of the problematic defence of marital coercion in s 328A of the *Criminal Law Consolidation Act 1935* (SA) (which is confined to a wife in a marriage) with a view to its retention, reform or repeal.
- 5: The consideration of the operation of the Queensland defence of killing for preservation in an abusive domestic relationship and the extent to which its initial operation has achieved its aim of improving legal responses for persons who kill in response to prolonged family violence.
- 6: The further consideration of such alternative models to abolishing provocation as the NSW model of ‘extreme provocation’ as set out in s 23 of the *Crimes Act 1900* (NSW) and ‘loss of control’ in England and Wales as set out in s 54 of the *Coroners and Justice Act 2009* (UK).
- 7: In the context of abolishing the partial defence of provocation, an examination of the need to ensure that a court possesses (whether under the current law or under any revised model) sufficient flexibility in sentencing to properly reflect an offender’s culpability and any genuine mitigating factors in sentence.
- 8: The consideration of the scope of the existing common law defences of necessity and duress (beyond that contained in Recommendation 10 of this Report).
- 9: The consideration of the merits of the partial defence of diminished responsibility in South Australia, in the context of recent or ongoing changes to the linked defence of mental impairment and its intersection with sentencing for the offence of murder.

PART 3 – The Law Relating to Provocation

3.1 Brief History and Purpose

3.1.1 The provocation defence originated in the United Kingdom in the 1600s and 1700s in circumstances where the death penalty for murder was not only available but was usually imposed (unlike in modern Australia where the death penalty has been abolished in all jurisdictions).⁴⁹ Provocation emerged as a partial defence⁵⁰ to murder — operating to reduce a murder conviction to manslaughter — in scenarios where a defendant kills while suffering from a temporary loss of self-control. The rationale for provocation was that a man was justified in killing in four situations: to free a person who was unlawfully deprived of their liberty; in response to a grossly indecent assault; in defence of another; or when killing a man who has committed adultery with one's wife.⁵¹ A product of a hetero-normative⁵² and patriarchal society, the defence operated in practice to ameliorate the criminal responsibility of men when their sense of male dignity or honour was deeply compromised. Provocation was often invoked in cases where a jealous husband killed his wife in response to actual or suspected sexual infidelity.⁵³

3.1.2 The original context of the partial defence of provocation is notable. Provocation stems from an era, as the New Zealand Law Commission (NZLC) observed in 2007, 'when it was culturally acceptable to exercise physical violence in defence of one's honour — an era of "pistols at dawn". It was also an era in which the law tended to perpetuate white, male, heterosexual, middle class, Christian values.'⁵⁴

3.1.3 By the 20th century, the rationale for the partial defence shifted from a retaliatory killing being justified in those discrete circumstances, to partially excusing an otherwise unacceptable killing in a broader set of situations.⁵⁵

3.1.4 The philosophical foundation on which the partial defence rests today is that provocative conduct can be so serious as to partially excuse an illegal killing, reducing the killer's culpability from the most serious charge of murder to a charge of less seriousness (manslaughter). In modern times, both male and female accused have sought the protection of the partial defence (though in practice it is more commonly raised by men).⁵⁶

3.1.5 There are three scenarios in which the successful use of the provocation defence has attracted significant attention and animated modern law reform debate: First, where men kill a female intimate partner in response to actual or suspected sexual infidelity and/or relationship separation; secondly, where

⁴⁹ The last person hanged in South Australia was in 1964 and the death penalty was formally abolished in South Australia in 1976. The *Crimes Legislation Amendment (Torture Prohibition and Death Penalty Abolition) Act 2010* (Cth) formally abolished the death penalty across Australia and precludes its reinstatement.

⁵⁰ In contrast, self-defence was developed under the English common law to provide defendants who used force to save themselves from an imminent attack with a full defence to murder. See Elizabeth Sheehy, *Defending Battered Women on Trial: Lessons from the Transcripts* (UBC Press, 2014) 49.

⁵¹ *R v Mangridge* (1706) Kel 119. See also Fitz-Gibbon, *Homicide Law Reform, Gender and the Provocation Defence*, above n 47, 25; VLRC (2004), above n 13, 21–23 [2.1]–[2.7].

⁵² Kent Blore, 'The Homosexual Advance Defence and the Campaign to Abolish it in Queensland: The Activist's Dilemma and the Politician's Paradox' (2012) 12 *Queensland University of Technology Law and Justice Journal* 36.

⁵³ Susan Edwards, 'Anger and Fear as Justifiable Preludes for Loss of Self-Control' (2010) 74 *Journal of Criminal Law* 223, 230.

⁵⁴ New Zealand Law Commission (NZLC), *The Partial Defence of Provocation*, Report 98 (2007) 46 [91].

⁵⁵ NSW Select Committee, above n 11, 7 [2.1]–[2.3], 10–12 [2.20]–[2.28].

⁵⁶ Fitz-Gibbon, *Homicide Law Reform, Gender and the Provocation Defence*, above n 47, 25–69.

men kill as a result of a non-violent homosexual advance; and thirdly, when women kill their abusive male spouse following a pattern of abuse.⁵⁷ In each of these scenarios the gendered operation of the partial defence has given rise to concerns that the requirements of the provocation defence are tailored to the circumstances within which men commit lethal violence as opposed to women. Australian and international research has documented the difficulties that women defendants often face in raising a partial defence of provocation, particularly where they have killed in response to cumulative family violence.⁵⁸

3.1.6 The common law rationale for the provocation defence is that where a victim's provocative conduct causes an accused to lose control and kill the victim while they have lost control (being a subjective question), and where the provocative conduct would have been capable of causing an ordinary person to lose self-control and kill (an objective question),⁵⁹ the criminal law considers the killer to be less culpable than if the circumstance of the provocation were absent. It has been stated that the moral basis of the defence lies in the defendant's justifiable sense of being seriously wronged.⁶⁰

3.1.7 The partial defence also provides a concession for the frailties of humanity — accepting as it does that people when sorely tested may lose control of their faculties, 'go berserk' and act violently, when normally they are not of violent temperament.⁶¹ The defence is less likely to be available if a person does not feel seriously wronged and commits murder at a later time; the requirement of losing control and responding to that loss of control with lethal violence is a vital and inextricable part of the defence. Therefore, the two ingredients of feeling seriously wronged and acting while 'out of control', which has traditionally been interpreted in practice as something that occurs immediately or very soon after the provocative conduct, underpins the defence.

3.1.8 The purpose of the partial defence is to make proper allowance for a person who has been placed in the invidious position of being seriously provoked and who while experiencing a sense of loss of control commits lethal violence, in circumstances where an ordinary person would likewise succumb (this is why provocation is often referred to as a 'concession to human frailty').⁶² The loss of self-control required under the test has been described in some cases as 'sudden and temporary' so that an accused 'was not, momentarily, the master of his own mind'.⁶³ Where the fatal attack is described as 'frenzied', this would also be consistent with the court's traditional understanding of a loss of control.⁶⁴ The required state of mind can be contrasted with an attack performed while the accused is 'very angry', but where he or she is otherwise in control and has made a calculated decision to end the victim's life.⁶⁵

⁵⁷ Ibid 25–84.

⁵⁸ See, for example, Kate Fitz-Gibbon and Julie Stubbs, 'Divergent Directions in Reforming Legal Responses to Lethal Violence' (2012) 45 *Australian and New Zealand Journal of Criminology* 318–336; Elizabeth Sheehy, Julie Stubbs and Julia Tolmie, 'Defences to Homicide for Battered Women: A Comparative Analysis of Laws in Australia, Canada and New Zealand' (2012) 34 *Sydney Law Review* 467. See further below [6.1.1]–[6.1.22].

⁵⁹ *Lindsay v The Queen* (2015) 255 CLR 272, 523. See also *R v McCarthy*, [2015] SASCFC 177, [92].

⁶⁰ NSW Select Committee, above n 11, 194 [9.24].

⁶¹ VLRC (2004), above n 13, 23 [2.7].

⁶² See *R v Kirkham* (1837) 8 Car & P 115, 119; 173 ER 422, 424: '[T]he law condescends to human frailty' (Coleridge J). See also *R v Hayward* (1833) 6 C & P 157, 159 (Tindal CJ), 'the law's compassion to human infirmity.'

⁶³ *R v Hajistassi* [2010] SASC 111, [79].

⁶⁴ *Lindsay v The Queen* (2015) 255 CLR 272, 292 [58]; *R v Hajistassi* [2010] SASC 111, [77].

⁶⁵ *R v Lem* [2005] SASC 405 [165].

3.1.9 The partial defence is based on the premise that people who kill as a result of provocation, who otherwise would not have killed, should not be convicted of the same charge as someone who, for example, commits premeditated murder with malice.⁶⁶ Indeed, the High Court in *Lindsay* held:

Although it is common to describe the doctrine as a ‘partial defence’, the true position is that the unlawful intentional killing of another under provocation is not murder. The malice that is implicit in the intention to kill or to do grievous bodily harm is denied in the case of a killing done under provocation.⁶⁷

3.1.10 This is why when the partial defence of provocation is successfully argued, an accused will not be convicted of murder but rather of the lesser charge of manslaughter. Although the distinction between murder and manslaughter originated as a means to afford mercy to an offender facing the death sentence, the modern distinction is:

seen to reflect degrees of seriousness of unlawful killings, based on the everyday understanding that some killings are more blameworthy than others. Liability for murder is reserved for the most serious or reprehensible killings, whereas manslaughter applies to unlawful killings which are recognised by the law as less blameworthy, whether because the offender’s mental state was affected by some mitigating influence, or because the offender did not intend to kill or otherwise lacked the requisite guilty mind for murder.⁶⁸

3.1.11 Whether this distinction remains valid is debatable.

3.2 Law in South Australia

3.2.1 The offence of murder in South Australia is contained in s 11 of the *Criminal Law Consolidation Act 1935* (SA), which states that any person who is guilty of having committed murder ‘shall be imprisoned for life’. In practice, only a handful of the most heinous murderers (such as sadistic serial killers) spend life in prison and the great majority are eventually released on parole by the Parole Board. This is supplemented by the *Criminal Law (Sentencing Act) 1988*, which requires for murder in the absence of limited ‘special reasons’, a mandatory non-parole term of at least 20 years.⁶⁹

3.2.2 In contrast, the offence of manslaughter is contained in s 13 of the *Criminal Law Consolidation Act 1935* and provides only for the possibility that a person convicted of manslaughter be imprisoned for life. There is more scope for judicial discretion in sentencing for manslaughter than murder in South Australia and, in practice, the sentences for manslaughter on the basis of provocation will be far less than those imposed for murder. Indeed, it is not unheard of for offenders convicted of manslaughter on the basis of provocation to avoid an immediate prison sentence.⁷⁰ While there are no sentencing statistics available for South Australia, the Victorian context is illustrative. In Victoria, where provocation was abolished as a partial defence to murder in November 2005, between July 1998 to June 2007 the average term imposed for provocation manslaughter was just under eight years’ imprisonment — a term higher than that imposed for other forms of manslaughter but much lower than the average term of 18 years imposed for

⁶⁶ See, for example, NSWLRC, above n 10, 27 [2.38]. This view was also relayed to SALRI in its consultation by Mr Caldicott, an experienced defence lawyer.

⁶⁷ *Lindsay v The Queen* (2015) 255 CLR 272, 284 [28]. See also *R v McCarthy* [2015] SASCFC 177, [92].

⁶⁸ NSWLRC, *Partial Defences to Murder: Diminished Responsibility*, Report 82 (1997) 6 [2.1].

⁶⁹ *Criminal Law (Sentencing) Act 1988*, s 32A. This is restated in clause 47 of the Sentencing Bill 2016 now before the South Australian Parliament.

⁷⁰ See, for example, *R v Narayan* [2011] SASCFC 61.

murder.⁷¹ The relevant law and sentencing practices for murder and manslaughter will be considered in further detail in Stage 2.⁷²

3.2.3 To raise provocation and have it considered by the jury as a partial defence, a defendant has only an evidentiary onus and not a persuasive onus.⁷³ That is a relatively undemanding test.⁷⁴ It can be raised if there is evidence to ground a factual foundation for the defence.⁷⁵ It is enough that there is a reasonable possibility on the facts most favourable to the accused that provocation may arise.⁷⁶ Once the issue of provocation is raised (whether by the accused or otherwise),⁷⁷ it is incumbent upon the prosecution to rebut the defence beyond reasonable doubt for an accused to be found guilty of murder. To do this, the prosecution must demonstrate that there is no reasonable possibility that the accused was acting under provocation when he or she killed the victim. The prosecution may argue that either (or both) of the two limbs are not satisfied; that is, first that the accused was not, in fact, sufficiently provoked so as to lose self-control when he or she killed the victim (this forms the subjective limb and is a question of fact), and secondly, that the provocative conduct would not cause an ordinary person to lose control and kill (the objective limb and a question of opinion).⁷⁸

3.2.4 The question under the second limb is whether the provocative conduct could have caused an ordinary person to act as the accused did. But it is only with reference to the personal attributes or characteristics of the accused that a jury can determine if the nature, extent and gravity of the deceased's provocative conduct could have caused an ordinary person to lose control in the manner of the defendant. 'That is to say, the question is whether the provocation, measured in gravity by reference to the personal situation of the accused, could have caused an ordinary person to form an intention to kill or do grievous bodily harm and to act upon that intention, as the accused did, so as to give effect to it.'⁷⁹

3.2.5 The High Court has explained that, in assessing the gravity or seriousness of the provocation, it: 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

⁷¹ Arie Freiberg, Karen Gelb and Felicity Stewart, 'Homicide Law Reform, Provocation and Sentencing' in Kate Fitz-Gibbon and Arie Freiberg (eds), *Homicide Law Reform in Victoria: Retrospect and Prospects* (Federation Press, 2015), 57–75.

⁷² Mr Caldicott, noting the tight constraints of the present law (see s 32A of the *Criminal Law (Sentencing) Act 1988*), argued that the present law does not provide adequate flexibility to recognise genuine provocative conduct by the deceased as a mitigating factor in sentence. See also Law Society Submission dated 28 October 2014, Inquiry into the Partial Defence of Provocation, 3–4, <https://www.lawsocietysa.asn.au/pdf/Submissions/L281014_Inquiry_into_the_Partial_Defence_of_Provocation.pdf>. Mr Caldicott also noted that even if s 32A applies, the likely sentence for murder is still likely to exceed what would now be imposed for manslaughter on the basis of provocation. See also NSW Select Committee, above n 11, 87 [5.98].

⁷³ *R v Hajistassi* [2010] SASC 111, [93].

⁷⁴ Hemming, above n 12, 33–34.

⁷⁵ *R v Stingel* (1990) 171 CLR 312, 334.

⁷⁶ See, for example, *Van Den Hoek v The Queen* (1986) 161 CLR 158, 162; *R v Rogers* [2016] SASFC 38 [6] (Gray J).

⁷⁷ Provocation should be left to the jury if there is a reasonable possibility it may arise, even if the defence does not ask for it to be left. See, for example, *R v McCarthy* [2015] SASFC 177.

⁷⁸ *Lindsay v The Queen* (2015) 255 CLR 272, 278–279 [15].

⁷⁹ See, for example, *Masciantonio v The Queen* (1995) 183 CLR 58; *R v Moffa* (1997) 138 CLR 601, 606. The complexity of this test is notable. See further below [4.1.4]–[4.1.3].

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.⁸⁰

3.2.6 Even if provocation is not raised by an accused, if there is material upon which a reasonable jury could enter a verdict of manslaughter on the basis of provocation, a trial judge must put this to the jury⁸¹ (indeed, this is what occurred in the first trial in *Lindsay*).

3.2.7 South Australian courts have dealt with provocation in a range of situations other than that of a non-violent homosexual advance, including where one man has unlawfully killed another man.⁸² There are no publicly available statistics in South Australia regarding the varying incidences of provocation. However, in NSW, cases involving when one man had unlawfully killed another man accounted for 10 of the 20 convictions for manslaughter by reason of provocation finalised in the 10 years prior to the 2014 NSW legislative reforms (January 2005 to December 2014).⁸³

3.2.8 The case law also demonstrates that provocation has been raised in other circumstances partially excusing the murder of a woman by a male (as in the controversial NSW case of *R v Singh*⁸⁴ and the equally controversial Victorian case of *R v Ramage*⁸⁵). In Victoria, in the five years prior to the abolition of provocation as a partial defence to murder, such cases comprised six of the 14 cases where an offender was sentenced for manslaughter on the basis of provocation.⁸⁶ While this period includes the infamous *Ramage* case, research has documented that the *Ramage* case was not unique to the Victorian operation of provocation or the operation of the partial defence in other Australian jurisdictions. Research reveals that provocation cases of male perpetrated intimate homicide permeate Australian and comparable international jurisdictions.⁸⁷ In such cases men are most likely to kill a current or former female intimate partner in response to an actual or threatened separation or an allegation of sexual infidelity.⁸⁸

⁸⁰ *Masciantonio v The Queen* (1995) 183 CLR 58, 66–67; see also *R v Lem* [2005] SASC 405 [157].

⁸¹ *Van Den Hoek v The Queen* (1986) 161 CLR 158, 161; *R v Clothier* (2001) 107 SASC 9; *R v McCarthy* [2015] SASCFC 177.

⁸² Indeed, this is the most common use of provocation, typically after violent physical confrontations. See Sam Indyk, Hugh Donnelly and Jason Keane, *Partial Defences to Murder in New South Wales 1990-2004* (Judicial Commission of New South Wales, 2006) 39–40.

⁸³ Kate Fitz-Gibbon, 'Homicide Law Reform in New South Wales: Examining the Merits of the Partial Defence of Extreme Provocation' (2017, forthcoming) 40 *Melbourne University Law Review*.

⁸⁴ [2012] NSWSC 637.

⁸⁵ [2004] VSC 508.

⁸⁶ Kate Fitz-Gibbon and Sharon Pickering, 'Homicide Law Reform in Victoria, Australia: From Provocation to Defensive Homicide and Beyond' (2011) 52(1) *British Journal of Criminology*, 159.

⁸⁷ Fitz-Gibbon, *Homicide Law Reform, Gender and the Provocation Defence*, above n 47, 43–56.

⁸⁸ This has been consistently documented in research. See, for example, Rebecca Bradfield, 'Domestic Homicide and the Defence of Provocation: A Tasmanian Perspective on the Jealous Husband and the Battered Wife' (2000) 19 *University of Tasmania Law Review* 5; Jeremy Horder and Kate Fitz-Gibbon, 'When Sexual Infidelity Triggers Murder: Examining the Impact of Homicide Law Reform on Judicial Attitudes in Sentencing' (2015) 74 *Cambridge Law Journal* 307; Adrian Howe, "'Red Mist' Homicide – Sexual Infidelity and the English Law of Murder (Glossing Titus Andronicus)" (2013) 3 *Legal Studies* 407. The study of the 75 cases in which provocation was successfully raised as a defence in NSW between 1990 and 2004 (58 by men, 17 by women) found that 11 cases involved a male defendant who killed a female intimate partner. 'In all 11 cases the use of lethal violence occurred in response to the alleged infidelity or the breakdown of an intimate relationship': Fitz-Gibbon, *Homicide Law Reform, Gender and the Provocation Defence*, above n 47, 154. See also Indyk, Donnelly and Keane, above n 82, 42. It is also significant to note that of the 15 men in Victoria between 1980 and 2000 who successfully raised provocation, eight were able to do so on the basis of their partner's infidelity or separation. See Fitz-Gibbon, *Homicide Law Reform, Gender and the Provocation Defence*, above n 47, 109–112.

3.2.9 The successful use of provocation in reducing what would otherwise be murder to manslaughter in such cases has attracted extensive criticism as legitimating the killing of women who are exercising their right to leave a relationship and/or begin a new relationship while simultaneously providing an avenue for blaming of the female victim.⁸⁹ Dr Rebecca Bradfield has argued that the successful use of provocation in this context:

endorses outdated attitudes that women are the property of their husbands, attitudes that continue to permit men who kill their partners following sexual provocation such as rejection, a partner's unfaithfulness or jealousy to be accommodated within the defence of provocation. The defence of provocation operates as a "licence" for men to kill their female partners who dare to assert their own autonomy by leaving or choosing a new partner.⁹⁰

3.3 Other Jurisdictions

3.3.1 The common law model of provocation as still exists in South Australia is now the exception rather than the rule. The criticisms of provocation are such that all Australian jurisdictions over recent years except South Australia have either abolished the partial defence entirely or at least narrowed its scope.⁹¹

3.3.2 Tasmania was the first Australian jurisdiction to abolish provocation (with the *Criminal Code Amendment (Abolition of Defence of Provocation) Act 2003* (Tas)) followed by Victoria in 2005 (*Crimes (Homicide) Act 2005* (Vic))⁹² and Western Australia in 2008 (*Criminal Law Amendment (Homicide) Act 2008* (WA)). Turning abroad, New Zealand abolished provocation in 2009 via the *Crimes (Provocation Repeal) Amendment Act 2009* (NZ).⁹³ The common law defence of provocation was also abolished in England and Wales in 2009 by the *Coroners and Justice Act 2009* (UK) and in New South Wales in 2014 by the *Crimes Amendment (Provocation) Act 2014* (NSW). However, the common law model of provocation has been replaced to a great extent by the similar legislative defences of 'extreme provocation' in NSW and 'loss of

⁸⁹ See for example, Fitz-Gibbon, *Homicide Law Reform, Gender and the Provocation Defence*, above n 47, 65–69; Adrian Howe, 'Provoking Comment: The Question of Gender Bias in the Provocation Defence – A Victorian Case Study' in Norma Grieve and Alisa Burns (eds), *Australian Women: New Feminist Perspectives* (Oxford University Press, 1986) 225–235; Danielle Tyson, *Sex, Culpability and the Defence of Provocation* (Routledge, 2013); Jenny Morgan, 'Provocation Law and Facts: Dead Women Tell No Tales, Tales Are Told about Them' (1997) 21 *Melbourne University Law Review* 237.

⁹⁰ Bradfield, above n 88, 35.

⁹¹ See Fitz-Gibbon, above n 14.

⁹² Provocation was initially abolished in Victoria (see *Crimes Act 1958* (Vic) s 3B) and replaced with a new model of 'defensive homicide' but that model proved problematic. See above n 47. After wide criticism, in 2014 the offence of defensive homicide was abolished by the *Crimes Amendment (Abolition of Defensive Homicide) Act* in Victoria. In announcing the repeal of defensive homicide, the Government conceded that the law 'had failed to work as intended' (Matt Johnson, 'Killer Blow: Defensive Homicide Laws Hijacked by Thugs will be Scrapped', *Herald Sun* (Melbourne) 21 June 2014, 1) instead allowing full responsibility to be avoided in situations where a conviction for murder would have been deserved. Indeed, it was noted that defensive homicide had proved to be 'provocation by new name': Fitz-Gibbon and Pickering, above n 86, 169. See also below n 527. It has been argued that the Victorian defensive homicide model does not wholly deserve its bad press, especially in relation to accused with a cognitive or mental impairment. See Madeleine Ulbrick, Asher Flynn and Danielle Tyson, 'The Abolition of Defensive Homicide: A Step towards Populist Punitivism at the Expense of Mentally Impaired Offenders' (2016) 40 *Melbourne University Law Review* 324.

⁹³ The New Zealand Law Commission after much consideration recently concluded not to recommend reviving the partial defence of provocation. See NZLC, *Understanding Family Violence: Reforming the Criminal Law Relating to Homicide*, Report 139 (2016) 11 Rec 9.

control’ in England and Wales (which is also a partial defence that may reduce liability for murder to manslaughter). The merits of the English and NSW models will be considered further below.⁹⁴

3.3.3 The gay panic aspect of provocation has been abolished in the ACT. The *Sexual Discrimination Amendment Act 2003* (ACT) amended s 13 of the *Crimes Act 1900* (ACT) to exclude any non-violent sexual advance, by itself, from amounting to provocation. The position in the Northern Territory is similar.⁹⁵

3.3.4 Most recently, a Bill was introduced to the Queensland Parliament on 30 November 2016 to provide that an ‘unwanted sexual advance’ cannot amount to provocation other than in ‘exceptional circumstances’.⁹⁶ This Bill passed the Queensland Parliament on 21 March 2017, and once this Act comes into force, South Australia will be left as the only Australian jurisdiction to permit a provocation defence on the basis of gay panic.

3.4 Queensland

3.4.1 The Queensland position and the rationale for their recent changes regarding provocation is highly significant for this Report and is considered below. The Queensland developments concerning the law of provocation in relation to the gay panic defence are significant in that they demonstrate that well intended reforms may not always achieve their desired ends.

3.4.2 Section 304 (Killing on provocation) of the *Criminal Code* (Qld) provides the partial defence of provocation which, if successfully raised, reduces the criminal responsibility of the accused from murder to manslaughter. The offence of murder in Queensland carries mandatory life imprisonment, whereas the offence of manslaughter carries a maximum discretionary penalty of life imprisonment.

3.4.3 In April 2011, s 304 was amended to address perceived bias and flaws in the law following the recommendations of the Queensland Law Reform Commission (QLRC) contained in its 2008 report.⁹⁷ The revised section provided that provocation was not available ‘if the sudden provocation is based on words alone, other than in circumstances of a most extreme and exceptional character’.⁹⁸ Further, the 2011 amendments reversed the onus of proof to a defendant. While not specifically dealing with the issue of an unwanted sexual advance, the 2011 amendment to exclude ‘words alone’ applied to a sexual proposition, unaccompanied by physical contact.

3.4.4 However, the partial defence of provocation in Queensland has proved controversial and continued to be criticised on the basis that it could be relied upon by a man who had killed in response to

⁹⁴ See below [7.1.1]–[7.1.8] (England) and [7.2.1]–[7.2.15] (NSW).

⁹⁵ *Criminal Code* s 158. The NT provision also allows conduct to be considered, regardless of whether it occurs immediately before any loss of self-control.

⁹⁶ This Bill was prompted by the contentious use of the gay panic case at the trial in Queensland in 2010 of two men, Jason Pearce and Richard Meerdink. See further below [3.4.6]–[3.4.9] for a discussion of the new Queensland Act.

⁹⁷ Queensland Law Reform Commission (QLRC), *A Review of the Excuse of Accident and the Defence of Provocation*, Report No 64 (2008).

⁹⁸ The section further provides that provocation is unavailable ‘other than in circumstances of a most extreme and exceptional character, if a domestic relationship exists between two persons; and one person unlawfully kills the other person (the deceased); and the sudden provocation is based on anything done by the deceased or anything the person believes the deceased has done to end the relationship; or to change the nature of the relationship; or to indicate in any way that the relationship may, should or will end, or that there may, should or will be a change to the nature of the relationship.’

an unwanted homosexual advance from the deceased.⁹⁹ There was considerable public pressure in Queensland to revise the law of provocation in the aftermath of a contentious case of gay panic¹⁰⁰ from Maryborough arising from the violent death of Wayne Ruks (the two offenders, Richard Meerdink and Jason Pearce, in 2009 were convicted of manslaughter by apparent reason of provocation).¹⁰¹

3.4.5 In November 2011, an expert committee (the Committee) was tasked by the Queensland Government with reviewing s 304 regarding its application to an unwanted homosexual advance. The Committee was chaired by the Honourable John Jerrard, a retired judge. The Committee was equally divided about an amendment to s 304 on this issue; however, ultimately, the Chairman recommended an amendment to exclude an unwanted sexual advance from the ambit of the partial defence, other than in circumstances of an exceptional character.¹⁰² The report notes the Chairman’s reasoning of ‘the goal of having a *Criminal Code* which does not condone or encourage violence against the Lesbian, Gay, Bisexual, Trans, Intersex (LGBTI) community’ as being persuasive in supporting the amendment.

3.4.6 The Queensland Government committed during the 2015 State general election to amend the *Criminal Code* (Qld) to exclude an unwanted sexual advance from being able to establish a partial defence of provocation in the case of murder. The Queensland Attorney-General subsequently announced on 11 May 2016 that the gay panic aspect of provocation would be abolished in Queensland.¹⁰³ The Attorney-General explained:

Today I commenced targeted consultation with key legal stakeholders by circulating a draft amendment to s 304 of the *Criminal Code* for comment on whether the amendments achieve the policy intention. I want to thank in advance those stakeholders for their consideration of these amendments. I consider it absolutely essential to obtain their feedback in this matter. Their comments will be considered in developing the final amendments. I would welcome comments from the Opposition as I know it had previously indicated support for such a proposal. Amendments that touch on criminal defences are always highly complex and technical and must strike the right balance between protecting the community while also protecting the rights of the individual accused. The Palaszczuk government considers it imperative to ensure that the amendments responsibly and meaningfully deliver on this important shift in the criminal law, reflecting the changes in community

⁹⁹ See, for example, Blore, above n 52; Patrick Caruana, ‘Qld scraps “Gay Panic” Defence Changes’, *The Australian* (online), 2 August 2012, <<http://www.theaustralian.com.au/news/latest-news/ql-d-scrap-gay-panic-defence-changes/story-fn3dxiwe-1226427364778>>; Robert Sims, ‘Licence to kill? Time to abolish the “gay panic” defence’, *ABC News* (online), 22 August 2012, <<http://www.abc.net.au/news/2012-08-22/simms-licence-to-kill/4204460>>.

¹⁰⁰ To add to the controversy of the case, Mr Ruks was not even gay. As his mother commented in her understandable criticism of the law: ‘My son was not gay, and that was the hardest part. It shows the defence can be used against ... Even the CCTV footage showed no sign of a homosexual advance. It was just used as an excuse.’ See Clementine Norton, ‘“Gay Panic” Killer walks Free’, *Fraser Coast Chronicle* (online), 20 July 2012, <<http://www.frasercoastchronicle.com.au/news/killer-walks-free-after-just-4-years/1460306/>>.

¹⁰¹ See, for example, Blore, above n 52. Father Paul Kelly, a Catholic priest, was especially active in campaigning for law reform as a result of Mr Ruks’s death. Mr Ruks was killed in the churchyard of the church of which Father Kelly was the priest. See Annie Guest, ‘Priest Fights for End to Gay Panic Defence’, *ABC News* (online), 11 January 2012, <<http://www.abc.net.au/news/2012-01-11/petition-calls-for-end-to-gay-panic-defence/3767446>>; Karen Skinner, ‘The Catholic priest fighting to repeal the homophobic law that shames Australia’, *Sydney Morning Herald* (online) 17 May 2016, <<http://www.smh.com.au/comment/the-catholic-bishop-fighting-to-repeal-the-homophobic-law-that-shames-australia-20160516-gowhg5.html>>; Joshua Robertson, ‘How “gay panic” defence reform was brought about by a straight man’s death’, *The Guardian* (online), 1 December 2016, <<https://www.theguardian.com/australia-news/2016/dec/01/how-gay-panic-defence-reform-was-brought-about-by-a-straight-mans-death>>; Queensland, *Parliamentary Debates*, Legislative Assembly, 30 November 2016, 4699 (Hon YM D’Ath, Attorney-General).

¹⁰² John Jerrard, ‘Special Committee Report on Non-Violent Sexual Advances’ (Special Committee Report to the Queensland Attorney-General, Parliament of Queensland, 2012).

¹⁰³ Queensland, *Parliamentary Debates*, Legislative Assembly, 11 May 2016, 1654 (Hon YM Y’Ath, Attorney-General).

expectations demanded by a modern, progressive society. Queensland's *Criminal Code* must not be seen to condone violence against the gay community or indeed any community. I anticipate introducing the proposed amendments to s 304 of the *Criminal Code* in the House later this year.¹⁰⁴

3.4.7 The subsequent Bill, introduced to the Queensland Parliament on 30 November 2016, amends s 304 of the *Criminal Code* (Qld) to exclude an 'unwanted sexual advance',¹⁰⁵ other than in circumstances of an 'exceptional character', from the ambit of the partial defence. The Attorney-General highlighted 'the importance attached to this reform recognising as it does the modern and progressive society Queensland is in 2016.'¹⁰⁶ The Attorney-General acknowledged the amendment's importance to the LGBTIQ community. She explained the proposed amendment reflects changes in community expectations that such conduct should not be able to establish a partial defence of provocation to murder, namely where the defendant has killed with murderous intent. However, the proposed amendment also includes the proviso 'other than in circumstances of an exceptional character' to guard against unjust outcomes as it is impossible to predict the factually dynamic circumstances that may arise in homicide cases.¹⁰⁷

3.4.8 The Attorney-General shed some light on what is an 'exceptional circumstance':

Let me be perfectly clear and remove any doubt: an unwanted homosexual advance is not of itself to be considered an exceptional circumstance. Consistent with the other subsections of section 304, which limit the operation of the defence, a proviso is included to allow for circumstances of an exceptional character. Such a proviso is included to act as a safeguard in case of any unjust outcomes as it is impossible to foresee the myriad circumstances that may arise in homicide matters. As to what circumstances fall within the exception, no examples are provided. This will be a matter for the trial judge to assess on a case-by-case basis. ... This in no way is intended to limit the circumstances of an exceptional character to which consideration may be had.¹⁰⁸

3.4.9 The Queensland developments have one major implication for South Australia. The Queensland Bill passed Parliament with broad all party support on 21 March 2017.¹⁰⁹ Once the Queensland Act comes into effect, South Australia will be left as the only Australian jurisdiction to still permit a provocation defence on the basis of an unwanted homosexual advance.

¹⁰⁴ Ibid.

¹⁰⁵ As to the term 'unwanted sexual advance', this is defined in new subsection (9) as meaning a sexual advance that 'is unwanted by the person' and 'if the sexual advance involves touching the person—involves only minor touching'. The term sexual advance is not defined and carries its everyday meaning and the conduct can transpire in infinite ways. It refers to conduct of a sexual nature towards the person, including conduct made up of no words or touching, such as a gesture: Queensland, *Parliamentary Debates*, Legislative Assembly, 30 November 2016, 4698.

¹⁰⁶ Queensland, *Parliamentary Debates*, Legislative Assembly, 30 November 2016, 4697.

¹⁰⁷ Ibid 4698.

¹⁰⁸ Ibid. See also See further Queensland, *Parliamentary Debates*, Legislative Assembly, 21 March 2017, 602–603.

¹⁰⁹ Gail Burke, 'Gay panic defence scrapped by Queensland Parliament after lobbying by Catholic priest', *ABC News* (online), 22 March 2017, <<http://www.abc.net.au/news/2017-03-22/gay-panic-defence-scrapped-by-queensland-parliament/8374758>>. See further Queensland, *Parliamentary Debates*, Legislative Assembly, 21 March 2017, 601–631.

PART 4 – Criticisms of the Provocation Defence Generally

4.1 An Overview of the Criticisms of Provocation

4.1.1 There are many criticisms of the common law model of provocation. These criticisms extend beyond the gay panic aspect of provocation and the perceived gender bias of the present law (which will be separately discussed further below).¹¹⁰

4.1.2 The underlying rationale of the ordinary person test is viewed as flawed. It is said to be at odds with reality as ordinary people, no matter the provocation (especially in a modern climate) do not kill. As one party submitted to the NSW Select Committee, ‘ordinary people, when affronted, do not resort to lethal violence ... it is clear the ordinary person does not kill. Only the most extraordinary person does.’¹¹¹ Andrew Hemming raises how society in the 21st century responds to lethal violence and argues ‘there is no justification or excuse for an intentional killing being downgraded to manslaughter, as the ordinary person, whatever the gravity of the alleged provocation, does not kill in response to provocative conduct. Such a statement is grounded both in moral principle and public policy.’¹¹² The whole notion that a person can lose self-control and kill someone is itself medically and scientifically dubious. The NSW Select Committee ‘noted the comments of various participants and academics that there is little or no medical or scientific basis for the “condition” of having lost one’s self-control’.¹¹³ Crucially, the Committee said that ‘the phrase “loss of self-control” fails to acknowledge the reality of domestic and family violence.’¹¹⁴

4.1.3 SALRI finds these views persuasive. It finds the view of the Victorian Law Reform Commission (VLRC) in 2004 compelling: ‘Historically, an angry response to a provocation might have been excusable, but in the 21st century, the Victorian community has a right to expect people will control their behaviour, even when angry or emotionally upset.’¹¹⁵ As a basic principle of policy, society in the 21st century should not countenance the idea that even an angry person might be partly excused in killing someone. SALRI considers that the criticisms of the present law are such that any review of the current law must consider the option and implications of abolishing the partial defence of provocation in South Australia.

1. For Further Review

The option and implications of abolishing the partial defence of provocation in South Australia.

4.1.4 A further criticism of provocation is the complexity of the current law. As described by the VLRC, ‘[t]he current test for provocation is criticised as being conceptually confused, complex and difficult for juries to understand and apply.’¹¹⁶ The twofold objective and subjective limbs of provocation occasion particular difficulty as ‘highly complex and artificial to apply’.¹¹⁷ The provocation defence is complex and

¹¹⁰ See further below [5.5.1]–[5.5.14] (gay panic) and [6.1.1]–[6.1.22] (gender bias).

¹¹¹ NSW Select Committee, above n 11, 59 [4.133].

¹¹² Hemming above n 12, 18. The result in *R v Doughty* (1986) 83 Cr App R 319 that the crying of an infant was held to be legally sufficient to amount to provocation is frankly absurd.

¹¹³ Select Committee, above n 11, 63, [4.153].

¹¹⁴ Ibid 64 [4.164]. See also at 54 [4.110] quoting Women’s Legal Services NSW, Submission 37, 14–15.

¹¹⁵ VLRC (2004), above n 13, xxi.

¹¹⁶ Ibid 34 [2.34]. See also Fitz-Gibbon, *Homicide Law Reform, Gender and the Provocation Defence*, above n 47, 214–221.

¹¹⁷ Julia Tolmie, ‘Is the Partial Defence an Endangered Defence? Recent Proposals to Abolish Provocation’ [2005] *New Zealand Law Review* 25, 50. See further NSW Select Committee, above n 11, 57–59 [4.125]–[4.131], 60–61 [4.135]–[4.142].

may well be misapplied by judges and juries, a real concern in the context of murder, the most serious crime in the criminal calendar. One academic told the NSW Select Committee of the current law, '[i]t is a nightmare. It is an absolute illogical, nonsensical nightmare, and judges have actually admitted it is a nightmare.'¹¹⁸

4.1.5 Understanding and correctly applying the subjective test is difficult. Accurately determining whether an accused had 'lost control' when doing the killing or was in control is vexed, especially if no one was present at the killing except for the accused and the victim. It is also dubious whether there is, in reality, very much difference in the psychological state of someone who has 'lost control' and an extremely angry person, for example.¹¹⁹

4.1.6 Turning to the application of the objective test, this too is difficult and potentially confusing for juries. The High Court decision in *Lindsay* requires that the nature of the 'sting' of the provocation must be assessed from the position of the accused. The accused's personal circumstances need to be taken into account. Proving the degree to which the seriousness of the sting could have hurt someone in the position of the accused entails much speculation. In performing this exercise, it may be difficult for the jury to adequately place themselves in the shoes of someone of a different race, gender, and/or background and appreciate how provocative words or conduct could have been to the accused. It is a further abstract step to then import that degree of provocation and the seriousness of the sting into an objective consideration of whether a reasonable person would have killed in response to that level of provocation.

4.1.7 The test is confusing in practice. It has been acknowledged by the judiciary that juries may struggle with the differences between the first two steps of the ordinary person test, which enables personal characteristics to be taken into account when assessing the perception of gravity of the provocation but not when assessing the person's power to exercise self-control in relation to that provocation. For example, in *R v Mankotia*,¹²⁰ Smart AJ in the NSW Court of Criminal Appeal observed:

In practice the gravity of provocation/self-control distinction has proved hard to explain to a jury in terms which are intelligible to them... I would go a little further. Many trial judges in this state give juries both verbal and written directions on provocation. Juries struggle with the distinction and find it hard to grasp. Many do not do so. The directions on provocation and the distinction frequently lead to a series of questions indicating that these issues are causing difficulty, prolonged deliberations by juries and not infrequently juries being unable to agree whether the accused is guilty of murder or manslaughter. This leads to a retrial. I have been left with the firm impression that, despite extensive endeavours to explain the directions, the jury has had trouble appreciating their import. Other trial judges have had similar experiences.¹²¹

4.1.8 One submission to the NSW Select Committee relayed the comments of Thomas J of the New Zealand Court of Appeal regarding:

¹¹⁸ Graeme Coss, Evidence, 28 August 2012, 71, quoted by NSW Select Committee, above n 11, 60 [4.138]. See also Hemming, above n 12, 34–35.

¹¹⁹ Indeed, the scientific substance of the notion of a killing under a total 'loss of control' is widely doubted. See NSW Select Committee, above n 11, 53–54 [4.101]–[4.106], 63 [4.153], 193 [9.16]. 'Many commentators, noting the psychological literature, have poured scorn on this concept of loss of control, concluding either that there is insufficient evidence for its existence, or else that the evidence in fact supports the notion that there is always choice, an election to act in a certain way. The law has continued to ignore the science, preferring instead to rely on "common sense": at 53 [4.106] quoting Graeme Coss.

¹²⁰ (2001) 120 A Crim R 492.

¹²¹ Ibid 495 [18]–[19].

the glazed look in the jurors' eyes as, immediately after instructing them that it is open to them to have regard to the accused's alleged characteristic in assessing the gravity of the provocation, they are then advised that they must revert to the test of the ordinary person and disregard that characteristic when determining the sufficiency of the accused's loss of self-control.¹²²

4.1.9 This view is not universally shared. Mr Caldicott, a highly experienced criminal lawyer, for example, told SALRI that a properly presented and instructed jury can understand and apply the current South Australian law as to provocation and complex criminal trials are far from unknown.¹²³ This reflects the view presented to the NSW Select Committee by Dina Yehia SC, representing the NSW Public Defender's Office, who also disputed the suggestion that juries do not understand the test for provocation and referred to other areas of law in which juries are subjected to complicated directions or complex matters of fact. She argued that 'it is for judges and for practitioners like me to make sure that directions and evidence is presented in a way that is clear and that is simple ... juries do represent community values.'¹²⁴

4.1.10 Ms Yehia SC did not accept that the fault lay with juries or the law but rather with judges and lawyers:

I do not accept that the provocation test or the directions are so complex that juries cannot understand it ... If it is complex then it is a matter for the judges and for advocates to try to present it as simply and as clearly as they can. ... by and large, I think juries are well equipped to deal with the issues and if there is a failing then there is a failing on the part of judges and advocates.¹²⁵

4.1.11 The Model Criminal Code Officers' Committee, a group comprised of senior officers from each Australian jurisdiction with expertise in criminal law, commented in 1998 on the difficulties of striking an appropriate balance in devising a model of provocation: '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'.¹²⁶

4.1.12 The NSW Select Committee agreed with many of the concerns raised about the nature and complexity of the legal test for provocation,¹²⁷ though it ultimately did not accept the view of the Model Criminal Code Officers' Committee that the current dual test was 'fundamentally flawed'.¹²⁸

4.1.13 The reference by Thomas J to the glazed eyes of jurors is telling. SALRI notes that the current law of provocation in South Australia and the application of its objective and subjective limbs appears neither simple nor straightforward. The fact that *Lindsay* to date has given rise to three trials, two appeals to the Court of Criminal Appeal and one successful appeal to the High Court illustrates the fraught nature

¹²² *R v Rongonui* [2000] 2 NZLR 385, 446, quoted by NSW Select Committee, above n 11, 59 [4.131]. See also *R v Mankotia* (2001) A Crim R 482, 495 [19].

¹²³ See also Law Society Submission dated 28 October 2014, *Inquiry into the Partial Defence of Provocation*, 2, <https://www.lawsocietysa.asn.au/pdf/Submissions/L281014_Inquiry_into_the_Partial_Defence_of_Provocation.pdf>.

¹²⁴ Dina Yehia SC, Evidence, 28 August 2012 74, quoted by NSW Select Committee, above n 11, 62 [4.146].

¹²⁵ *Ibid* 62, [4.146]. The Privy Council in *Attorney General for Jersey v Holley* [2005] 2 AC 580, 594 [26] similarly viewed the difficulty faced by juries in relation to provocation as overstated and more an issue of 'presentation' rather than substance.

¹²⁶ Model Criminal Code Officers' Committee of the Standing Committee of the Attorneys-General ('Model Criminal Code Officers' Committee'), *Model Criminal Code, Chapter 5: Fatal Offences against the Person Discussion Paper* (1998) 103.

¹²⁷ NSW Select Committee, above n 11, 63, [4.152].

¹²⁸ *Ibid* 64 [4.154].

of the current law. SALRI considers that it is undesirable that a law such as provocation, especially in a climate where there is already extensive concern over the length and complexity (if not incoherence) of jury directions,¹²⁹ should be so convoluted. It is important that the applicable law should be as clear and comprehensible as possible to both judges and juries. This theme should be integral to the further review to be undertaken by SALRI in stage 2 and to any reform of the present law.

2. For Further Review

The need to ensure that the applicable law is as clear and comprehensible as possible to judges and juries.

4.1.14 If provocation were to be abolished, those offenders who may have otherwise been partially excused by provocation would likely be convicted and sentenced for the offence of murder instead (although it is acknowledged that they may also have received a conviction for manslaughter on another basis). It has been argued that in some contexts of lethal violence it would be unfair for such offenders to be ‘labelled’ as murderers, having killed in provocation, as particular stigma attaches to the offence of murder.¹³⁰

4.1.15 In opposition to the fair labelling argument, other commentators have noted the presence of an intent to kill in cases where provocation is successfully raised and argued that a conviction for murder more accurately reflects the severity of the lethal violence perpetrated.¹³¹ A provoked murder remains murder. Jennifer Yule, for example, argues: ‘Murder should be labelled murder. If there is an intention to kill someone then it should be named murder. Why should the loss of self-control be the basis of a defence? ... Violence should not be condoned. Self-control should be encouraged.’¹³²

4.1.16 The importance of recognising the intent present in a provocation killing has also been acknowledged by numerous law reform bodies and cited in support for abolition of the partial defence of provocation.¹³³

4.1.17 It is sometimes said that to abolish provocation would be to usurp the role of the jury. Supporters of the partial defence of provocation oppose its abolition by arguing that the abolition of the partial defence amounts to a lack of trust in the jury system.¹³⁴ The NSW Law Reform Commission (NSWLRC), for example, argued:

While the defence of provocation is no longer necessary for the purpose of providing judges with a discretion in sentencing for unlawful homicide, the defence remains vitally important in terms of

¹²⁹ See, for example, Fitz-Gibbon, *Homicide Law Reform, Gender and the Provocation Defence*, above n 47, 232–234; VLRC, *Jury Directions: Final Report* (2009); Lord Justice Moses, ‘Summing Down the Summing-Up’ (Speech delivered at the Annual Law Reform Lecture, 23 November 2010); Justice Mark Weinberg, ‘The Criminal Law – A “Mildly Vituperative” Critique’ (2011) 35 *Melbourne University Law Review* 1177; NSWLRC, *Jury Directions* (Report 136) (November 2012); Criminal Law Review, *Jury Directions: A Jury-Centric Approach* (Department of Justice and Regulation, March 2015).

¹³⁰ See, for example, Thomas Crofts and Arlie Loughnan, ‘Provocation; The Good, The Bad and the Ugly’ (2013) 37 *Criminal Law Journal* 23, 27–30, 41; SA Legislative Review Committee, above n 17, 7, 35–36 [6.2.4]; NSWLRC, above n 10, 27 [2.38]; NSW Select Committee, above n 11, 69 [5.10]–[5.11], 73 [5.30], 87 [5.97].

¹³¹ See, inter alia, Jennifer Yule, ‘Current Issues with Regards to the Defences of Provocation and Self-Defence in the Criminal Law Context’, *Proceedings: Australasian Law Teachers Association* (September 2007, Perth); Fitz-Gibbon, *Homicide Law Reform, Gender and the Provocation Defence*, above n 47, 250–252.

¹³² Yule, above n 131, 17–18.

¹³³ See, for example, VLRC, *Defences to Homicide: Issues Paper* (2002); QLRC, above n 97, 469–470 [21.26]–[21.31].

¹³⁴ Hemming, above n 12, 39.

gaining community acceptance of reduced sentences for manslaughter rather than murder. The defence of provocation remains necessary as a means of involving the community, as represented by the jury, in the process of determining the degree of an accused's culpability according to his or her loss of self-control in response to provocation.¹³⁵

4.1.18 To this end, it is argued that the partial defence and its application by the jury plays an important role in dealing with ordinary people who find themselves in extreme circumstances.¹³⁶

4.1.19 The VLRC was unswayed by this argument. It accepted that the abolition of the partial defence of provocation will require judges to make factual findings about whether the offender was provoked when they are determining the sentence which should be imposed. However, sentencing already requires judges to consider many factual issues other than provocation.¹³⁷ As the NZLC commented, 'the task of crafting penalty to blameworthiness has long been the daily diet of judges'.¹³⁸ Dealing with provocation as an issue to be taken into account in sentencing would ensure the fact that the killing occurred as the result of the offender's loss of self-control could be weighed against other matters which also affected the offender's culpability.¹³⁹

4.1.20 'Provocation is an anomaly in the law.'¹⁴⁰ It does not operate as a defence or partial defence to any other crime in South Australia. For all offences other than murder, provocation is dealt with as an issue in sentence.

4.1.21 The Law Reform Commission of Western Australia (LRCWA) argued that: 'In any event, there is no reason why provocation as a mitigating factor for murder should be singled out as one issue requiring community input via the jury.'¹⁴¹ The jury must still determine the guilt or innocence of the accused and it is said to be artificial and unnecessary to require the community's input as to the presence of provocation only for the crime of murder through a jury's verdict.

4.1.22 It is also said that the provocation allows, even encourages, a culture of unfair 'victim blaming', especially in cases involving family violence or assertions of gay panic.¹⁴²

4.1.23 SALRI notes these various criticisms of the present law of provocation. Such criticisms should be carefully taken into account in any examination of the law in this area and in identifying any alternative models. SALRI considers that any reform in this area should be an issue for Parliament.¹⁴³

4.1.24 SALRI proposes in stage 2 to consider carefully the various criticisms of the current law in identifying any preferred model.

¹³⁵ NSWLRC, above n 10, 25 [2.33]. See also Crofts and Loughnan, above n 130, 29.

¹³⁶ NSWLRC, above n 10 27 [2.38]. NSW Select Committee, above n 11, 4 [1.21], quoting Submission 14, James Trevallion, 2. See also at 4 [1.22], quoting Submission 33, Winston Terracini QC, 3.

¹³⁷ VLRC (2004), above n 13, 11 [1.27].

¹³⁸ NZLC, *Some Criminal Defences with Particular Reference to Battered Defendants*, Report No 73 (2001) 41.

¹³⁹ VLRC (2004) above n 13, 11 [1.27].

¹⁴⁰ *Ibid* 33 [2.31].

¹⁴¹ Law Reform Commission of Western Australia (LRCWA), *Review of the Law of Homicide*, Final Report No 97 (2007), 217.

¹⁴² This view was relayed to SALRI by the SA Commissioner for Victims Rights. See further below [4.2.1]–[4.2.18].

¹⁴³ See *Attorney General for Jersey v Holley* [2005] 2 AC 580, 594 [27]; Law Commission of England and Wales, above n 48 [2.10].

4.2 Victim Blaming

4.2.1 The partial defence of provocation, by its nature, requires an investigation of the evidence relating to the conduct of the deceased victim, including the version of events presented by the defendant. Through that process, the trial may necessarily focus on the victim and his or her conduct, as opposed to the conduct of the defendant who is on trial. By its focus at the trial on the conduct of the deceased, provocation allows the focus and ‘blame’ for the offence to be placed on the deceased victim. ‘The continued existence of provocation can be seen as promoting a culture of blaming the victim and sending a message that some victims’ lives are less valuable than others.’¹⁴⁴ This can especially arise in the gay panic scenario,¹⁴⁵ and where the defence is raised in the context of family or domestic violence.¹⁴⁶

4.2.2 Victim blaming is a main criticism of the law of provocation.¹⁴⁷ In provocation trials, as Dr Fitz-Gibbon explains, as the actions of the victim become the focus at both trial and sentencing, ‘they are simultaneously used to partially legitimise, excuse or justify the perpetration of lethal violence, leaving the perception that it is ultimately the victim, not the defendant, on trial.’¹⁴⁸

4.2.3 The VLRC in 2004 recognised the problem of victim blaming in the operation of the law of provocation:

The continued existence of provocation can be seen as promoting a culture of blaming the victim and sending a message that some victims’ lives are less valuable than others. An argument that the victim provoked his or her own death can understandably be the cause of significant distress to the friends and families of victims.¹⁴⁹

4.2.4 Both Dr Fitz-Gibbon and the South Australian Commissioner for Victims’ Rights, Mr O’Connell, reiterated this criticism to SALRI. This criticism is widespread. The NSW DPP informed the NSW Select Committee that ‘the defence, in my view ... creates a culture of blaming the victim and I think there is a real perception that sometimes the blame is manufactured because there is no-one there to refute it.’¹⁵⁰

4.2.5 Similar views were also expressed to the South Australian Legislative Review Committee by Dr Fitz-Gibbon who noted that a victim blaming theme had ‘plagued’ the operation of provocation.¹⁵¹ She argued that ‘victim blaming is unavoidable in provocation cases and provides a central reason for why provocation must be abolished as a partial defence to murder in South Australia.’¹⁵² The South Australian Commissioner for Victims Rights, Mr O’Connell, also expressed this concern to the South Australian Legislative Review Committee. He noted that victim blaming was an ‘inherent part’ of the defence and his

¹⁴⁴ VLRC (2004), above n 13, 32 [2.29]–[2.30].

¹⁴⁵ See also David Mack, “‘But Words Can Never Hurt Me’”: Untangling and Reforming Queensland’s Homosexual Advance Defence’ (2013) 35 *Sydney Law Review* 167, 181.

¹⁴⁶ See, for example, Victoria, *Parliamentary Debates*, Legislative Assembly, 26 October 2005, 1831 (Mr McIntosh); Fitz-Gibbon, *Homicide Law Reform, Gender and the Provocation Defence*, above n 47, 56–64; Morgan, above n 89, 237–276.

¹⁴⁷ See VLRC (2004), above n 13, 32 [2.29]; NSW Select Committee, above n 11, 49–51 [4.75]–[4.87], 186–188 [8.139]–[8.148]; Fitz-Gibbon, *Homicide Law Reform, Gender and the Provocation Defence*, above n 47, 56–65.

¹⁴⁸ Fitz-Gibbon, *Homicide Law Reform, Gender and the Provocation Defence*, above n 47, 56.

¹⁴⁹ VLRC (2004), above n 13, 32 [2.29].

¹⁵⁰ Lloyd Babb SC, Director of Public Prosecutions, Office of the Director of Public Prosecutions, Evidence, 29 August 2012, 46, quoted by NSW Select Committee, above n 11, 49 [4.77].

¹⁵¹ SA Legislative Review Committee, above n 17, 30 [6.14].

¹⁵² *Ibid* 31 [6.14].

office had received complaints from friends and relatives of deceased victims about defence imputations which ‘too often remain untested and unsubstantiated’.¹⁵³

4.2.6 The NSW Select Committee acknowledged and shared the concerns that the operation of provocation can result in a perception that the deceased victim is at least partly to blame for the conduct of the defendant that resulted in the victim’s death.¹⁵⁴ The Committee noted the key concern raised is that, although there will be a need to focus on the conduct of the victim, ‘there are times where the evidence raised by the defence at trial arguably goes beyond what is necessary to draw out the facts as to the provocative conduct’.¹⁵⁵ It was argued that in these situations a strategic opportunity arises for the defence to inappropriately portray the victim in a particular way so as to create antipathy toward them and sympathy for the defendant.¹⁵⁶ However, the Select Committee stated that provocation is not unique in this regard and noted the testimony of Dina Yehia SC, that any evidence given by a defendant is tested in court.¹⁵⁷ However, the Committee agreed that the use of evidence that defames or denigrates a deceased victim in provocation cases is ‘an issue of significant concern’ and agreed that ‘there may be merit’ in proposals to prohibit or control the use of such evidence.¹⁵⁸ The Committee recommended that the NSW Attorney General examine this issue further, with a view to determining whether any such evidentiary provisions are warranted.¹⁵⁹

4.2.7 The South Australian Legislative Review Committee accepted that victim blaming was a ‘vexed issue’ with provocation and was sympathetic to victims and their families but stated an accused should be entitled to present any relevant evidence at either trial or sentence and did not support any limitation be placed on the material that can be adduced on a defendant’s behalf.¹⁶⁰

4.2.8 SALRI accepts the force of the criticism of provocation as leading to victim blaming. The prosecution is rarely in a position to contest or contradict the defendant’s version of events, as often the only other witness has been killed by the defendant.¹⁶¹ SALRI notes that the operation of the gay panic aspect of provocation especially lends itself to victim blaming.¹⁶² This theme was highlighted to SALRI in its consultation by LGBTIQ groups. In brief, the problem of victim blaming, especially in a gay panic situation, provides powerful support for at least some reform in this area.

4.2.9 The law is traditionally wary of allowing the previous convictions or past misconduct of an accused to be adduced in a criminal trial.¹⁶³ ‘The long experience of the common law is that such evidence in a jury trial is liable to besmirch justice with the ugly stain of prejudice or prejudgment.’¹⁶⁴ It is considered that such evidence may distract the jury from considering the central facts in the case and prove unfairly

¹⁵³ Ibid 30 [6.14].

¹⁵⁴ NSW Select Committee, above n 11, 52 [4.94]–[4.95], see also at 188 [8.147]–[8.148].

¹⁵⁵ Ibid 52 [4.94].

¹⁵⁶ Ibid, see also at 188 [8.147].

¹⁵⁷ Ibid 52 [4.95], see also at 51–52 [4.88]–[4.93].

¹⁵⁸ Ibid 188 [8.148].

¹⁵⁹ Ibid 189.

¹⁶⁰ SA Legislative Review Committee, above n 17, 42.

¹⁶¹ Hemming, above n 12, 5.

¹⁶² Jeff Sewell, “I just bashed somebody up. Don’t worry about it Mum, he’s only a poof”: The “Homosexual Advance Defence” and Discursive Constructions of the “Gay” Victim’ (2001) 5 *Southern Cross University Law Review* 47, 58–71; Mack, above n 145, 180–181.

¹⁶³ *Phillips v R* (1985) 159 CLR 45, 59–60 (Deane J).

¹⁶⁴ Ibid 60.

prejudicial. Section 18 of the *Evidence Act 1929* (SA) provides that a person charged and called as a witness ‘shall not be asked, and if asked, shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged, or is of bad character.’¹⁶⁵

4.2.10 However, the prohibition of such questions (and the adducing of evidence to show past misconduct) is not an absolute rule and an accused may forfeit the protection of this provision (or ‘lose the shield’). In particular, s 18 allows questioning of an accused in two situations.¹⁶⁶ First, if the accused ‘has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establish his own good character or has given evidence of his good character’.¹⁶⁷ Secondly, an accused may ‘lose the shield’ of s 18 ‘if the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or a witness for the prosecution and the imputations are not such as would necessarily arise from a proper presentation of the defence.’¹⁶⁸

4.2.11 It is important to note that, even if an accused has lost his or her ‘shield’ under s 18 of the *Evidence Act 1929*, cross-examination by the prosecution of an accused as to past convictions or misconduct is strictly discretionary.¹⁶⁹ The majority of the High Court in *Phillips v R*¹⁷⁰ observed that ‘it is undoubtedly right that the discretion of a trial judge to permit such an attack be sparingly and cautiously exercised.’¹⁷¹ A similar cautious approach is evident in South Australian authority.¹⁷²

4.2.12 SALRI does not question this cautious approach but it is significant that s 18 does not include the victim of a homicide¹⁷³ and thus s 18 does not allow the cross-examination of an accused of his or her bad character who might cast unnecessary imputations upon the character of a deceased. This appears anomalous. It means an accused facing trial for homicide is at liberty to cast the most unnecessary, even gratuitous, imputations upon the character of the deceased with impunity whilst in the trial for any other offence, such imputations might expose the accused to cross-examination about his or her bad character. It is significant that other jurisdictions extend the ‘tit for tat’ protection of provisions such as s 18 to the victim of a homicide.¹⁷⁴ The Commissioner for Victim’s Rights supported this approach in the interests of both consistency with other offences and protecting a deceased and the families of homicide victims from

¹⁶⁵ *Evidence Act 1929* (SA) s 18(1)(d).

¹⁶⁶ There are other circumstances but it is unnecessary to discuss these.

¹⁶⁷ *Evidence Act 1929* (SA) s 18(1)(d)(ii).

¹⁶⁸ *Ibid* s 18(2). The rationale of allowing such cross-examination in this situation is that the jury ‘is entitled to know the credit of the man on whose word the witness’s character is being impugned’ (*R v Cook* [1959] 2 QB 340, 348).

¹⁶⁹ See, for example, *Phillips v R* (1985) 159 CLR 45; *R v P* (1992) 61 SASR 75; *R v Brownlow* [2003] SASC 262. Cross-examination under a provision such as s 18 is only relevant to the credit of the accused as a witness and cannot be used to directly support an inference of guilt: *Maxwell v DPP* [1935] AC 309, 321; *Phillips v R* (1985) 159 CLR 45. The mental gymnastics that may be involved in this reasoning for a jury is apparent. See, for example, *Phillips v R* (1985) 159 CLR 45, 63, 66–67.

¹⁷⁰ (1985) 159 CLR 45.

¹⁷¹ *Ibid* 57.

¹⁷² See, for example, *R v P* (1993) 61 SASR 75; *R v Brownlow* [2003] SASC 262 [42].

¹⁷³ The ‘prosecutor’ referred to in s 18 does not extend to the victim of a homicide. See *R v Biggin* (1920) 1 KB 213; *R v Gillis* (1957) VR 91.

¹⁷⁴ See, for example, England, where the *Criminal Evidence Act 1898* was amended for this reason to read ‘the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution or the deceased victim of the alleged crime.’ This position is retained in the *Criminal Justice Act 2003* (UK). See also *Evidence Act 1906* (WA) s 8(1)(e)(ii).

gratuitous attacks upon the character of the deceased (a concern that especially arises in cases alleging a gay sexual advance).

Recommendation 2:

SALRI recommends that the term ‘the prosecutor’ in s 18 of the *Evidence Act 1929* (SA) should be amended to include the deceased victim of homicide thereby extending the existing protection in s 18 to enable a deceased, and the families of homicide victims, to be better protected from gratuitous attacks upon the character of the deceased (a concern that especially arises in cases involving family violence or involving a gay sexual advance).

4.2.13 SALRI also notes with interest the 2014 legislative reforms introduced in Victoria to address victim blaming in homicide trials that allow a court to exclude evidence that ‘unnecessarily’ demean the deceased in a homicide trial. The Victorian reform, introduced as part of the *Crimes Amendment (Abolition of Defensive Homicide) Act 2014* (Vic):

gives the court the discretion under the *Evidence Act* to exclude evidence if its probative value is substantially outweighed by the danger that the evidence might “unnecessarily demean the deceased in a criminal proceeding for a homicide offence”, while including a note that this “does not limit evidence of family violence that may be adduced” under the new self-defence, duress and sudden emergency provisions.¹⁷⁵

4.2.14 The role and operation of such evidence was explained by the relevant Minister as follows:

Clause 9 of the Bill will amend s 135 of the *Evidence Act* to empower a court, in criminal proceedings for a homicide offence, to refuse to admit evidence if its probative value is substantially outweighed by the danger that it may unnecessarily demean the deceased. The purpose of clause 9 is to reduce unjustifiable attacks on the character and reputation of the deceased during homicide proceedings. Evidence that demeans a deceased person is not automatically excluded. Rather, clause 9 requires the court to determine whether the desirability of admitting the evidence outweighs the undesirability of admitting evidence that unnecessarily demeans the deceased. Evidence will not be excluded if there are legitimate forensic reasons for admitting that evidence. The judicial discretion to refuse to admit evidence under s 135 operates as a safeguard that protects and balances the rights of accused, the deceased and the witnesses in the proceeding, and the importance of the court hearing all relevant evidence. In my opinion, this is consistent with the right to a fair hearing and rights in criminal proceedings.¹⁷⁶

4.2.15 These limitations have been compared with the rape shield laws that now exist (and are widely accepted) to prevent the unnecessary and often demeaning questioning or adducing evidence about the sexual history of a rape victim.¹⁷⁷

4.2.16 The benefit or otherwise of such evidence was considered by the NSW Select Committee.¹⁷⁸ The Committee was referred to a number of cases by Inquiry participants who suggested that the character and reputation of the deceased victim was ‘blackened’, and that this was ‘a deliberate strategy designed to

¹⁷⁵ Parliament of Victoria, *Crimes Amendment (Abolition of Defensive Homicide) Bill 2014*, Research Brief (Department of Parliamentary Services, 2014) 7, as cited in Fitz-Gibbon, (2017, forthcoming) above n 83.

¹⁷⁶ Victoria, *Parliamentary Debates*, Legislative Council, 25 June 2014, 2128 (Edward O’Donohue, MP, Minister for Liquor and Gaming Regulation).

¹⁷⁷ NSW Select Committee, above n 11, 187–188 [8.144].

¹⁷⁸ *Ibid* 186–188 [8.139]–[8.148].

portray the victim to the jury in a particular way in order to garner sympathy for the defendant.¹⁷⁹ The Committee noted these concerns.¹⁸⁰ It concluded:

It has been suggested that evidentiary provisions that would operate to prohibit the adducing of evidence that defames or denigrates the deceased victim in provocation cases are warranted. The Committee is of the view that this is an issue of significant concern and agrees that there may be merit in such proposals. The Committee therefore recommends that the Attorney General examine this issue further, with a view to determining whether such provisions are warranted.¹⁸¹

4.2.17 Victoria remains the only Australian jurisdiction to date to introduce such reforms with the aim of addressing victim blaming in homicide cases. As these changes have only been in operation for two years, their impact in practice is yet to emerge in case law.

4.2.18 SALRI suggests that the impact of this reform should be closely monitored and, noting the recommendation of the NSW Select Committee,¹⁸² that proper consideration in due course should be given to the introduction of similar provisions in South Australia.

3. For Further Review

An examination of the appropriateness, or otherwise, of the existing evidentiary provisions in the *Evidence Act 1929* (SA) as they enable or encourage evidence to be adduced which impugns the deceased victim in homicide trials, with a view to improving the protection for victims and their families, while also ensuring that legitimate social framework evidence (see Recommendation 8) is able to be admitted.¹⁸³

¹⁷⁹ Ibid 186 [8.140].

¹⁸⁰ Ibid 188 [8.147].

¹⁸¹ Ibid 188 [8.148].

¹⁸² Ibid 189 Rec 3.

¹⁸³ See further below [9.6.1]–[9.6.14].

PART 5 – The ‘Gay Panic’ Defence

5.1 A Brief History of the Homosexual Advance Defence

5.1.1 As outlined in the Audit Report and noted above, the so-called gay panic or homosexual advance defence is not a specific and discrete defence but rather a subset or type of the wider partial defence of provocation. However, while falling under the umbrella of the provocation defence, the gay panic defence has been raised in quite different circumstances to those where people kill their spouse or domestic partner in the context of family violence and raise a partial defence of provocation. In family violence scenarios, the crux of the accused’s defence is that they killed the victim but their culpability should be expressed in the criminal law to a lesser degree because the family violence that they and/or other family members experienced at the hands of the deceased provoked them to commit the offence. In contrast, in circumstances where the homosexual advance defence has been argued, again the accused does not dispute that they were the killer, but argue that their culpability should be expressed in the criminal law to a lesser degree because the deceased made an unwanted homosexual approach to the accused, causing the accused to feel so affronted and provoked that they lost their self-control and killed the other person in response.

5.1.2 The existence, rationale and operation of the homosexual advance aspect of provocation is highly controversial.¹⁸⁴ The gay panic defence and its retention in the criminal law was strongly criticised to SALRI by almost all interested parties and individuals during its consultation process (reflecting the wider research) as outdated, unjustifiable and discriminatory. In particular, the idea that a person’s sexual orientation could constitute a prima facie basis for another person to be provoked to such a degree that they should no longer be legally culpable for murder, was strongly contested by many in the consultation process as contrary to modern standards of morality and human rights.

5.1.3 Kent Blore explains the difference in the rationale for the gay panic defence in the United Kingdom, the United States and Australia.¹⁸⁵ Blore discusses how the rationale of the defence rests upon highly contested and varied cultural assumptions, rather than any universally accepted ethical or philosophical truth. Blore highlights the underlying flaw of the ‘defence’ (wherever it exists):

In England and Wales the legal tactic is called the “Portsmouth defence” or “Guardsman’s defence”. In the United States a similar tactic exists called “gay panic defence”, though it relies upon the dubious psychological condition of “acute homosexual panic” to explain the accused’s violence, thereby implying a “real irrationality or a pathological defect on the part of the accused”. In contrast, the Australian variety draws on a culture of homophobic masculinity in order to place the blame squarely upon the victim. The narrative fed to the jury is that the lethal violence arose naturally enough from a loss of control the killer experienced when his heterosexual male honour was at stake.¹⁸⁶

5.1.4 By demonstrating that the homosexual advance defence is a product of certain past cultural values and attitudes, the corollary is that if those values and attitudes have changed, the criminal law too should evolve to reflect modern (and very different) values and attitudes, especially to acceptance of LGBTIQ issues.

¹⁸⁴ See, for example, NSW Select Committee, above n 11, 97–99, [6.47]–[6.58].

¹⁸⁵ Blore, above n 52.

¹⁸⁶ Ibid 37. See also Mack, above n 145, 170–171.

5.2 *Green v The Queen*

5.2.1 The homosexual advance aspect of provocation has only been employed in Australia in comparatively recent times.¹⁸⁷ It was considered by the High Court in 1997 in the controversial case of *Green v The Queen*.¹⁸⁸ Green was convicted of murder and the majority of the High Court on appeal held that the issue of provocation and certain evidence in that context should have been left with the jury.

5.2.2 The facts of *Green* are significant. The deceased was 36 years of age and had been Green's confidant. Green was 22 years of age. He had known the deceased about six years and described him as one of his 'best friends'.¹⁸⁹ In evidence at trial, Green said that he trusted the deceased, looked up to him, and valued his advice. On the night of the killing, the deceased had invited Green to dinner. Each consumed a considerable amount of alcohol during the evening. The deceased asked Green if he would like to stay overnight. After initially refusing the offer, Green decided to stay. The deceased said that he would sleep in his mother's bedroom and that Green could sleep in the deceased's bedroom. In a record of interview with police a few hours after the killing, Green described waking up and receiving persistent unwanted non-violent sexual advances from the deceased in his bed. Green violently responded by punching and stabbing the victim repeatedly.¹⁹⁰ According to Green's account, he punched the deceased about 35 times and then stabbed him as he rolled off the bed. He admitted to stabbing the deceased up to half a dozen times.¹⁹¹ 'However, the post mortem examination revealed the ferocity and brutality of [the] attack upon the deceased. Ten stab wounds were found.'¹⁹² Green told the police: 'Yeah, I killed him, but he did worse to me.' When asked why he had done it, Green said: 'Because he tried to root me.'¹⁹³ Green's mother and sisters had been physically or sexually abused by the father and it was stated that as a result Green possessed unusual sensitivity.

5.2.3 The majority of the High Court in *Green* accepted that a homosexual advance could be one of the circumstances relevant to whether provocation is established.¹⁹⁴ *Green* has been the subject of extensive academic criticism;¹⁹⁵ one commentator noting it as 'representing as it does, a new low point in the

¹⁸⁷ Blore, above n 52, 38, points out that the first recorded case in Australia where the homosexual advance defence was employed was in 1992 in *R v Murley* (Unreported, Supreme Court of Victoria, Teague J, 28 May 1992).

¹⁸⁸ (1997) 191 CLR 334.

¹⁸⁹ Ibid 359 (McHugh J).

¹⁹⁰ Ibid 389.

¹⁹¹ Ibid 390.

¹⁹² Ibid.

¹⁹³ Ibid 391 (Kirby J).

¹⁹⁴ Green was convicted of manslaughter on the basis of provocation at the retrial and sentenced to a maximum of 10½ years in prison. See Fitz-Gibbon, *Homicide Law Reform, Gender and the Provocation Defence*, above n 47, 33.

¹⁹⁵ See, for example, Blore above n 52; Rebecca Bradfield, 'Criminal Cases in the High Court of Australia: *Green v The Queen*' (1998) 22 *Criminal Law Journal* 296; Graeme Coss, 'Editorial: Revisiting Lethal Violence by Men' (1998) 22 *Criminal Law Journal* 5; Ben Golder, 'The Homosexual Advance Defence and the Law/Body Nexus: Towards a Poetics of Law Reform' (2004) 11(1) *Murdoch University Electronic Journal of Law* [31]–[39]; Barbara Ann Hocking, 'Limited (and Gendered?) Concessions to Human Frailty: Frightened Women, Angry Men and the Law of Provocation' (1999) 6 *Psychiatry, Psychology and Law* 57; Adrian Howe, '*Green v The Queen*: The Provocation Defence: Finally Provoking Its Own Demise?' (1998) 22 *Melbourne University Law Review* 466; Dirk Meure, 'Homo Panic in the High Court: The High Court in *Green v R*' (2001) 10(2) *Griffith Law Review* 240; Sewell, above n 162, 48–50; Bronwyn Statham, 'The Homosexual Advance Defence: "Yeah, I Killed Him, but He Did Worse to Me"' (1999) 20 *University of Queensland Law Journal* 301.

lamentable history of the provocation defence in Anglo-Australian law¹⁹⁶ (though there is a contrary view that *Green* is explicable by its wider and particular facts and actually has little to do with homophobia).¹⁹⁷

5.3 *R v Lindsay*

5.3.1 The High Court in the South Australian case of *R v Lindsay*¹⁹⁸ has confirmed that, despite some previous views to the contrary,¹⁹⁹ the gay panic aspect of provocation remains part of the common law. *Lindsay* provides strong context to SALRI’s current report.

5.3.2 The facts of *Lindsay* are significant. Michael Lindsay was accused of the murder of a man, Andrew Negre, whom he had met while out drinking and had invited back to his home. Lindsay, his partner and his sister were entertaining the deceased at the home, when the deceased straddled Lindsay, moving his hips suggestively in a sexual manner. Lindsay warned the deceased not to do that, that he was not gay and that he would hit him if he did things like that. Lindsay’s partner became upset at the deceased’s sexually suggestive conduct. The drinking continued. Eventually, Lindsay invited the deceased to sleep in his guest room. The deceased then sexually propositioned Lindsay again, by saying he did not want to sleep alone and offering to pay Lindsay for sexual favours. When challenged, the deceased repeated the offer, allegedly offering a sum of money for sex. Lindsay then attacked Mr Negre, first kicking and punching him and then stabbing him.

5.3.3 The trial judge, Sulan J, left provocation to the jury as a possible partial defence to murder (though the case was not run by the defence at this trial on this basis).²⁰⁰ Lindsay was convicted of murder at first instance and was given a life sentence with a non-parole period of 23 years. The conviction and sentence were appealed. The three judges of the South Australian Court of Criminal Appeal dismissed the appeal.²⁰¹

5.3.4 The majority of the Court, Peek J (Kourakis CJ agreeing), found that the trial judge’s directions to the jury were flawed in relation to provocation. However, Peek J concluded that the inadequate directions did not result in a substantial miscarriage of justice and did not deprive Lindsay of the chance of a verdict of manslaughter that was fairly open to him. The majority held that no reasonable jury could find that an ordinary person could have lost control and attacked the deceased in the way that Lindsay did due to the

¹⁹⁶ Howe, above n 195, 466.

¹⁹⁷ Tom Molomby, ‘Revisiting Lethal Violence by Men – A Reply’ (1998) 22 *Criminal Law Journal* 116. *Green* is noteworthy because of the breach of trust from the deceased at *Green* and *Green*’s heightened sensitivity owing to his father’s sexual abuse of his sisters. ‘The real sting of provocation could have been found not in the force used by the deceased, but in his attempt to violate the sexual integrity of a man who had trusted him as a friend and father figure ... and in the evoking of the [Green’s] recollection of the abuse of trust on the part of his father’: *Green* (1997) 191 CLR 334, 345 (Brennan J)). See also at 370 (McHugh J). *Green*’s solicitor noted the importance attached by the majority of the High Court to *Green*’s family’s history and ‘the man whom [Green] had come to regard as a substitute father unexpectedly behaved in a way which triggered all the pent up rage against his sisters’: Molomby, above n 196, 116.

¹⁹⁸ (2015) 255 CLR 272.

¹⁹⁹ Prior to the High Court’s decision many, including the South Australian Attorney General, the Hon John Rau, were of the view that the ‘gay panic defence was a common law notion that no longer formed part of the law in South Australia’. Submission from Hon John Rau, Attorney-General, to the South Australian Legislative Review Committee’s Inquiry into the Partial Defence of Provocation, 23 July 2014, 3. See also SA Legislative Review Committee, above n 17, 32.

²⁰⁰ If there is evidence of provocation the judge has a duty ‘to leave the question of provocation to the jury notwithstanding that it has not been raised by the defence and is inconsistent with the defence which is raised’: *Stingel v R* (1990) 171 CLR 312, 333, 334.

²⁰¹ *R v Lindsay* (2014) 119 SASR 320.

deceased's conduct. In other words, the trial judge should not have concluded that provocation was available as a defence and should not have left the verdict of manslaughter open to the jury.

5.3.5 Peek J explained that the objective limb 'is an instrument of policy employed to keep the partial defence of provocation within bounds acceptable to *contemporary* society.'²⁰² Peek J accepted there 'is no doubt that in former times, when acts of homosexuality constituted serious crime and men were accustomed to resort to weapons and violence to defend their honour'²⁰³ a killing under the provocation present in *Lindsay* would have been viewed as giving rise to a verdict of manslaughter rather than murder. 'However, times have very much changed.'²⁰⁴ Peek J noted that the question has to be decided in the light of contemporary conditions and attitudes, for what might be provocative in one age might be regarded with comparative tolerance in another, and a greater measure of self-control is expected as society develops.²⁰⁵

5.3.6 Peek J concluded:

After careful consideration of the authorities, and of some of the extensive academic literature, I have come to the firm view that in twenty-first century Australia, the evidence taken at its highest in favour of the appellant in the present case was such that no reasonable jury could fail to find that an ordinary man could not have so far lost his self-control as to attack the deceased in the manner that the appellant did. Accordingly, the Judge was incorrect in his decision to leave the partial defence of provocation to the jury in this case.²⁰⁶

5.3.7 Gray J also dismissed the appeal, but for somewhat different reasons. His Honour held that the trial judge's directions accorded with settled authority and the summing up on both the objective and subjective limbs was adequate and appropriate. Gray J noted that the evidence to support the defence of provocation was 'weak' and highlighted the 'overwhelming evidence ... weigh heavily against any suggestion of a sudden and temporary loss of self-control'.²⁰⁷ Gray J observed that it would have been open to the trial judge not to have left provocation to the jury.²⁰⁸

5.3.8 The Court of Criminal Appeal thus unanimously dismissed Lindsay's appeal.

5.3.9 Lindsay then appealed to the High Court, arguing that the trial judge had been correct to leave provocation to the jury but those directions were flawed. All five judges of the High Court allowed the appeal.²⁰⁹ The High Court held that the trial judge did not err by leaving the verdict of manslaughter based on provocation to the jury. The High Court quashed the conviction and ordered a retrial and found that there had been a substantial miscarriage of justice due to the inadequate directions given by the trial judge regarding provocation.

5.3.10 The High Court took into account that Lindsay is an Aboriginal man, and given the context where the conduct occurred in Lindsay's own home (including the deceased's request for sexual favours in the

²⁰² Ibid [234].

²⁰³ Ibid [235].

²⁰⁴ Ibid.

²⁰⁵ *Moffa v The Queen* (1976-1977) 138 CLR 601.

²⁰⁶ *R v Lindsay* (2014) 119 SASR 320, [236].

²⁰⁷ Ibid [60]. As to the circumstances of Lindsay wearing gloves, searching through the deceased's pockets at the time the attack was taking place, co-opting Hutchings to assist in this process and telling those present to stay out of the way.

²⁰⁸ Ibid [62].

²⁰⁹ (2015) 255 CLR 272. French CJ, Kiefel, Bell, and Keane JJ delivered a joint judgment allowing the appeal. Nettle J delivered a separate judgment, agreeing that the appeal should be allowed.

presence of his spouse and offering money) where the deceased had been invited as a guest, the deceased’s conduct may have been construed as particularly insulting.²¹⁰

5.3.11 The High Court emphasised the need to exercise caution before declining to leave provocation to the jury.²¹¹ The majority of the Court observed:

There is an evident need for caution before a court determines as a matter of law that contemporary attitudes to sexual relations are such that conduct is incapable of constituting provocation. The partial defence recognises human frailty and requires that the gravity of the provocation be assessed from the standpoint of the accused, taking into account his or her history and attributes.²¹²

5.3.12 After an unsuccessful effort,²¹³ Lindsay’s retrial was heard in March 2016. Provocation was raised as a partial defence. Lindsay was again convicted of murder. This conviction was also appealed and leave to appeal was granted.²¹⁴ On 2 September 2016, Lindsay was resentenced for murder. In line with the second jury’s verdict, the sentencing judge, Bampton J, described the killing as an ‘unprovoked killing of a man in your home’ and noted that the victim’s actions ‘did not make you [Lindsay, the defendant] lose control’.²¹⁵ Lindsay was sentenced to life imprisonment with a non-parole period of 23 years. Bampton J offered no comments in her sentencing remarks in *Lindsay* relating to the law of provocation in South Australia though she did not accept that the conduct of the deceased amounted to a mitigating factor or a ‘special reason’ to depart from the usual 20-year mandatory minimum sentence for murder.²¹⁶

5.3.13 Lindsay’s second appeal against conviction based on inadequate directions to the jury regarding the issue of provocation and other grounds was heard by the Court of Criminal Appeal.²¹⁷ The Court on 8 December 2016, dismissed the appeal and found that the trial judge’s directions regarding provocation were satisfactory.²¹⁸ Vanstone J, delivered the Court’s judgment. She quoted the trial judge’s detailed

²¹⁰ Ibid 287 [37] (French CJ, Kiefel, Bell and Keane JJ), 300 [81] (Nettle J).

²¹¹ Ibid 284 [27]–[28] (French CJ, Kiefel, Bell and Keane JJ). See also *Stingel v The Queen* (1990) 171 CLR 312, 334.

²¹² (2015) 255 CLR 272, 284, [28] (French CJ, Kiefel, Bell, and Keane JJ).

²¹³ A second trial before Nicholson J resulted in a mistrial. See *R v Lindsay* [2016] SASCF 129, [9].

²¹⁴ Andrew Hough, ‘Man Found Guilty of “Gay Panic” Murder Wins Right to Appeal Fresh Conviction’, *The Advertiser* (online), <<http://www.adelaidenow.com.au/news/south-australia/man-found-guilty-twice-of-gay-panic-murder-wins-right-to-appeal-fresh-conviction/news-story/c5cad77b71b1a06eba6bbbf2bbb4b66>>. The grounds of appeal include concerns about Bampton J’s direction of the jury including whether the prosecution had ‘excluded the possibility that Mr Lindsay had killed Mr Neagre as a consequence of a sudden and temporary loss of self-control brought about by Mr Neagre’s conduct’.

²¹⁵ *R v Lindsay*, 2 September 2016 (Bampton J) No. SCCRM-12-16, Supreme Court Criminal Jurisdiction: Adelaide.

²¹⁶ *Criminal Law (Sentencing) Act 1988* (SA) s 32A. See further below [8.2.1]–[8.2.5].

²¹⁷ SALRI, at the request of the lawyers involved in the case, undertook not to publicly publish any finding or report into the issue of gay panic and provocation until the appeal process arising from the retrial is completed.

²¹⁸ *R v Lindsay* [2016] SASCF 129.

observations regarding the issue of provocation,²¹⁹ remarking: ‘It is hard to see what more could have been done.’²²⁰

5.3.14 *Lindsay* remains a significant decision. The High Court was clear that, noting the importance of culture and the need for caution in not allowing a claim of provocation to go the jury, a non-violent sexual advance could still amount to provocation. The majority observed that Peek J did not purport to decide that a non-violent sexual advance might never amount to provocation in law and ‘such a conclusion would be inconsistent with the holding in *Green*.’²²¹ Nettle J cautioned that whatever may ‘have very much changed’²²² since *Green* was decided in 1997, ‘the law remains now as it was then, that the application of the objective test depends on the jury’s evaluation of the degree of outrage which the accused might have experienced. ... “it [is] not for the Court to determine questions of that kind, especially when reaction to sexual advances are critical to the evaluation”.’²²³

5.3.15 The High Court’s decision is widely perceived²²⁴ to have confirmed that the gay panic aspect of provocation remains part of the present law (though there is a view that *Lindsay*, as with *Green*, is explicable by its wider and particular facts and actually has little to do with homophobia and/or gay panic).²²⁵ SALRI has proceeded on the premise that, as have most parties in its consultation, *Lindsay* provides that a homosexual advance (even though in practice it is likely to be part of a wider factual matrix)²²⁶ can still amount to provocation under the present South Australian law.

5.4 First Legislative Committee Review

5.4.1 On 2 December 2014, the Legislative Review Committee of the South Australian Parliament presented its report into the partial defence of provocation.

²¹⁹ See *ibid* [46]: ‘Just turning now to provocation. I will remind you that you must take into account all of the evidence that you have heard from each of the witnesses in evaluating the gravity of the conduct that was perceived by Mr Lindsay, including the matters that I have referred to earlier when I spoke about provocation. You need also to take into account those matters that you heard Brigitte Mildwaters give evidence about where she said that Andrew Negre was talking down to Michael Lindsay and that he was a bragger. She also referred to him persisting in asking Mr Lindsay to sleep with him and when his persistence was rejected Mr Negre then said “I’ll pay you for it then” and he also made reference to having \$600 in his wallet. So, you must also take that into account in determining the gravity of the provocation that you may find. You also take into account the responses of Mr Lindsay’s partner Mel and Mr Lindsay’s responses that you heard evidence about.’

²²⁰ *Ibid* [46].

²²¹ (2015) 255 CLR 272, 287, [39] (French CJ, Kiefel, Bell and Keane JJ).

²²² (2014) 119 SASR 320, 380 [235].

²²³ (2015) 255 CLR 272, 301 [84] (Nettle J) quoting *Green v R* (1997) 191 CLR 334, 346 (Brennan J).

²²⁴ See, for example, Kerstin Braun and Anthony Gray, ‘*Green and Lindsay*: two steps forward - five steps back: homosexual advance defence – quo vadis?’ (2016) 41(1) *University of Western Australia Law Review* 91; Kellie Toole, ‘SA should abolish provocation’, *The Advertiser* (online), 2 June 2015 <<http://www.adelaidenow.com.au/news/opinion/kellie-toole-sa-should-abolish-provocation/news-story/8cfdaf87a3ccba0f56bee0961c3a7f15>>.

²²⁵ This view was raised to SALRI in its consultation by some parties, notably Mr Caldicott. As Gray J explained in *R v Lindsay* (2014) 119 SASR 320, 331 [29]: ‘The Judge drew the jury’s attention to the fact that Lindsay was an Aboriginal man, that he was not homosexual, that he was in his own home in the presence of his wife and in the presence of his younger sisters, and that he was confronted with an unwanted sexual advance.’ The fact that Lindsay was Aboriginal was also regarded as significant by the High Court. ‘It was open to a reasonable jury to consider that an offer of money for sex made by a Caucasian man to an Aboriginal man in the Aboriginal man’s home and in the presence of his wife and family may have had a pungency that an uninvited invitation to have sex for money made by one man to another in other circumstances might not possess’: at (2015) 255 CLR 272, 287 [37] (French CJ, Kiefel, Bell and Keane JJ). See also at 300 [81] (Nettle J).

²²⁶ See further below [5.6.1]–[5.6.10] and [7.4.1]–[7.4.3].

5.4.2 This report was commissioned as a result of the Criminal Law Consolidation (Provocation) Amendment Bill 2013 (the ‘Bill’) introduced by the Hon Tammy Franks MLC into the Legislative Council on 1 May 2013.²²⁷ The Bill was designed to limit the defence of provocation so that conduct of a sexual nature by a person does not constitute provocation ‘merely’ because the person was the same sex as a defendant. The Hon Tammy Franks was highly critical of the current law: ‘It is a law that fails to reflect community attitudes that both homophobia and murder cannot and should not be tolerated and that homophobic violence should never be rewarded.’²²⁸

5.4.3 The Bill proposed to amend the *Criminal Law Consolidation Act 1935* (SA) by way of the insertion of a new section 11A. The proposed new section provided:

11A– Limitation on defence of provocation

For the purposes of proceedings in which the defence of provocation may be raised, conduct of a sexual nature by a person does not constitute provocation merely because the person was the same sex as the defendant.

5.4.4 The Bill, in effect, sought to abolish the gay panic aspect of provocation. After debate, the Legislative Council on 30 October 2013 resolved that the Bill would be withdrawn and the issue referred to the Legislative Review Committee for an inquiry and report.²²⁹ Due to the range of issues addressed by submissions to the Committee during its inquiry, the Committee decided to broaden its original terms of reference and conducted a broad examination of the provocation defence, which was not limited to the Bill.²³⁰

5.4.5 The Committee received twelve submissions to the First Inquiry. Four public hearings were held. Although the majority of submissions supported the intent of the Bill (to prohibit the legal argument of a ‘gay panic defence’), the submissions were divided into three distinct groups, being those which:

- did not support the Bill in its current form without addressing further reform;²³¹
- supported the Bill in the context of recommending a broader review or abolition of the provocation defence;²³² and
- did not support the Bill on the basis that the common law has previously addressed the issue contemplated by the Bill, and that the issue the Bill seeks to address no longer exists.²³³

5.4.6 The Committee noted the various criticisms of provocation (including the gay panic aspect, its gender bias and victim blaming).²³⁴ It strongly agreed that homophobic violence should not be tolerated. But the Committee was unable to agree with the submissions suggesting the abolition of provocation. The

²²⁷ South Australia, *Parliamentary Debates*, Legislative Council, 1 May 2013, 3804–3808 (Hon Tammy Franks).

²²⁸ Ibid 3804.

²²⁹ South Australia, *Parliamentary Debates*, Legislative Council, 30 October 2013, 5428–5432.

²³⁰ SA Legislative Review Committee, above n 17, 9.

²³¹ South Australian Police and Youth Affairs Council of South Australia.

²³² Ian Leader-Elliott, Kellie Toole, Professor Ngaire Naffine and Associate Professor Alex Reilly (joint submission); South Australian Commissioner for Victims’ Rights; Dr Kate Fitzgibbon and Victim Support Service.

²³³ Hon John Rau, Attorney-General; South Australian Director of Public Prosecutions; Commissioner for Equal Opportunity [though supporting a wider review of the law]; Legal Services Commission; Law Society of South Australia and SA Bar Association.

²³⁴ See further above [4.2.1]–[4.2.18] for discussion of the victim blaming issue.

majority of the Committee²³⁵ thought that provocation may serve an important function in circumstances such as those involving ‘a high degree of provocation’.²³⁶ The Committee noted that the Court of Criminal Appeal in *Lindsey*²³⁷ thought that provocation should not have been left to the jury in that case. The Committee noted that the court in that case contemplated that homosexuality is now largely accepted as part of contemporary Australian society.

5.4.7 The Committee unanimously supported the position that a non-violent sexual advance should not of itself give rise to any potential defence of provocation. However, the majority of the Committee concluded that the Bill would ‘not achieve meaningful legal reform of the provocation defence’.²³⁸ The Committee, after reviewing the views of the legal community and the case law as it stood at the time, notably the South Australian Court of Appeal decision in *Lindsay*, accepted the view that in South Australia ‘it is highly unlikely that a non-violent homosexual advance will ever be sufficient, of itself, to establish a provocation defence.’²³⁹ The report, finalised prior to the hearing and determination of the High Court appeal in *Lindsay*, was based on the view that the common law had already addressed the gay panic issue and the ‘now settled common law position’ had been set out by the South Australian Court of Criminal Appeal.²⁴⁰

5.4.8 The Committee, based on the evidence presented to it, considered that the gay panic aspect of provocation no longer remained in light of changing social values. The Committee was satisfied that the law in this regard had already been remedied and the Bill should not be supported. The Committee overlooked the fact the High Court could take a different view from the South Australian Court of Appeal. As it transpired, the High Court in *Lindsay* upheld the possibility of a homosexual advance constituting provocation in itself, its judgment going against the recent judicial trend to limit the application of the defence.²⁴¹

5.4.9 The Committee also accepted that it was unlikely that a sexual advance will ever be the only matter relevant to a provocation defence and that a complex evidential matrix will often apply²⁴² (reflecting evidence provided to the Committee).²⁴³ The Committee found that ‘introducing provisions to limit the conduct which may be considered by a court as relevant to a provocation defence at trial will also provide for ineffective reform’.²⁴⁴

5.4.10 The Committee was unable to identify suitable options for reform of the common law of provocation and suggested that the partial defence should be retained in South Australia. It noted that if any reform of provocation is to be pursued in the future, such reform should only take place in conjunction with a wholesale review of any mandatory sentencing laws that apply to persons convicted of murder.²⁴⁵

²³⁵ The Hon John Darley provided a dissenting opinion. See SA Legislative Review Committee, above n 17, 47.

²³⁶ Ibid 43. See also at 8. The situation in *DPP v Camplin* [1978] AC 780 was presented to the Committee as an example of this. See SA Legislative Review Committee, above 17, 36 [6.2.5].

²³⁷ (2014) 119 SASR 320.

²³⁸ SA Legislative Review Committee, above n 17, 8.

²³⁹ Ibid 6.

²⁴⁰ South Australia, *Parliamentary Debates*, House of Assembly, 3 December 2014, 3158 (Ms Digance).

²⁴¹ Braun and Gray, above n 224, 92, 115.

²⁴² SA Legislative Review Committee, above n 17, 7, 8.

²⁴³ This theme was also strongly expressed to the Institute during its consultation. See below [5.6.1]–[5.6.10].

²⁴⁴ SA Legislative Review Committee, above n 17, 8.

²⁴⁵ Ibid. See further below [8.2.1]–[8.2.5].

5.4.11 The High Court’s decision (obviously binding on South Australian courts) contradicted a major rationale for the Committee’s recommendations and it became necessary for the Committee to reconsider the issue. On 15 May 2015, the Legislative Council in light of the High Court’s decision in *R v Lindsay*²⁴⁶ and amid concerns that the High Court, contrary to the earlier view of the Legislative Review Committee, had in fact reopened the door to the gay panic defence, resolved the following: ‘That, as a matter of urgency, the Legislative Review Committee review its Report into the Partial Defence of Provocation tabled in the Legislative Council on 2 December 2014, in light of the recent High Court decision in *Lindsay v The Queen* [2015] HCA 16.’²⁴⁷

5.4.12 The Committee subsequently issued an Interim Report and resolved that it would not be prudent in the circumstances to make any findings or recommendations until the completion of Mr Lindsay’s retrial for murder.²⁴⁸ The Committee formed this view after taking into consideration the views of several witnesses who appeared before the Committee. The Bill had been brought for debate in the Legislative Council on 2 December 2015²⁴⁹ but was defeated in light of both the pending retrial at that stage and the incomplete further review by the Legislative Review Committee.

5.4.13 Lindsay’s retrial concluded on 30 March 2016, and his second appeal against conviction for murder was dismissed by the South Australian Court of Criminal Appeal on 8 December 2016.²⁵⁰ The second Legislative Review Committee review into provocation is ongoing and will presumably now reconvene. SALRI will have careful regard to any further submissions or evidence presented to the Committee as well as its Further Review, when published.

5.4.14 SALRI notes the renewed criticism of the gay panic aspect of provocation in light of the recent Queensland Act and understands that a further Bill may be introduced to the Legislative Council in the near future.²⁵¹

5.5 Criticisms of the Homosexual Advance Defence Specifically

5.5.1 ‘For some years now, the familiar story of a (homicidal) heterosexual hero overpowered by a predatory “poofster” has played to critical acclaim in Australian criminal courtrooms. Judges and juries alike have listened with unquestioning awe to tales of bodily impeachment and male honour, as defence barristers have constructed this primal, almost cinematic, narrative of Australian heterosexual masculinity under attack. The familiar narrative referred to is the Homosexual Advance Defence (“the HAD”).’²⁵²

5.5.2 This is the powerful context provided by one commentator for the operation of the controversial gay panic aspect of provocation. The so-called ‘homosexual advance defence’ essentially involves a male defendant relying on ‘provocative’ conduct comprising of a sexual advance made toward them from another male to reduce their culpability from murder to manslaughter. The homosexual advance is seen to challenge the male defendant’s masculinity and heterosexual identity. There is no evidence of the

²⁴⁶ (2015) 255 CLR 272.

²⁴⁷ South Australia, *Parliamentary Debates*, Legislative Council, 13 May 2015, 703–705. See also at 705–706.

²⁴⁸ South Australia, *Parliamentary Debates*, Legislative Council, 9 March 2016, 3302–3303.

²⁴⁹ South Australia, *Parliamentary Debates*, Legislative Council, 2 December 2105, 2461–2466.

²⁵⁰ *R v Lindsay* [2016] SASFC 129.

²⁵¹ SALRI understands that the Hon Mark Parnell MLC is considering the introduction of a Bill to abolish the partial defence of provocation in South Australia.

²⁵² Golder, above n 195, [1].

provocation defence being successfully run based on a non-violent sexual advance made by a male or female toward a member of the opposite sex.²⁵³

5.5.3 The homosexual advance defence discriminates on the basis of sexual orientation. Implicit in the defence is the notion that being subjected to an unwanted homosexual advance is inherently degrading to the person who is sexually propositioned. This aspect of provocation accepts that being the subject of an unwanted homosexual advance is so insulting and degrading that an ‘ordinary’ person may be capable of losing control and killing in murderous rage.

5.5.4 This reasoning is simplistic and offensive. As recently reported by the Australian Human Rights Commission, the defence effectively sanctions or legitimises violence towards gay people when they express their homosexuality by propositioning others.²⁵⁴ These features of the defence led the Australian Human Rights Commission to recommend that Queensland and South Australia legislate to abolish the gay panic defence. The South Australian Equal Opportunity Commission expressed similar views to the SALRI Audit Report, noting that the common law gay panic defence ‘is no longer reflective of community attitudes in our society today and has no place in our justice system’ and ‘is a relic of a bygone era where homophobic attitudes were tragically rife and accepted in our community.’²⁵⁵ The Equal Opportunity Commission called for its repeal.

5.5.5 Although manslaughter is still a serious offence, as provocation excuses the accused’s conduct, that conduct ‘is viewed to some extent as “understandable” in the circumstances.’²⁵⁶ Therefore, the gay panic ‘defence’ functions as a licence for men to kill other men who they claim made an unwanted sexual advance toward them.²⁵⁷ As Graeme Coss asserts: ‘the message is a simple one: unwanted homosexual overtones are an abomination and the perpetrators deserve everything they get’.²⁵⁸

5.5.6 The existence, rationale and operation of the homosexual advance defence was strongly criticised to SALRI by almost all interested parties and individuals during the consultation process and has been the subject of extensive academic criticism.²⁵⁹ In those jurisdictions such as South Australia, where the homosexual advance defence lingers, ‘the law remains complicit in the argument that the use of fatal violence against gay men is somehow excusable, certainly that it is not so reprehensible as to be labelled as ‘murder’, and that it should be punished less severely.’²⁶⁰

5.5.7 The continued existence of this aspect of provocation is at odds with modern attitudes to homosexuality. The Hon Tammy Franks MLC, drawing attention to the tragic death of Dr George Duncan in 1972, observed in 2013:

²⁵³ NSW Select Committee, above n 11, 40 [4.33].

²⁵⁴ Australian Human Rights Commission, *Resilient Individuals: Sexual Orientation, Gender Identity and Intersex Rights*, National Consultation Report (2015), 64. See also Mack, above n 145.

²⁵⁵ SALRI Audit Report, Submission No 40, 12.

²⁵⁶ Graeme Coss, ‘A Reply to Tom Molomby’ (1998) 22 *Criminal Law Journal* 119, 120.

²⁵⁷ See Adrian Howe, ‘Reforming Provocation (More or Less)’ (1999) 12 *Australian Feminist Law Journal* 127, 130–131; Sewell, above n 162, 79.

²⁵⁸ Coss, above n 195, 8.

²⁵⁹ See, for example, Blore, above n 52; Santo De Pasquale, ‘Provocation and the Homosexual Advance Defence: The Deployment of Culture as a Defence Strategy’ (2002) 26 *Melbourne University Law Review* 110; Golder, above n 195; Mack, above n 145, 167–168, 178–181, 185–186; Sewell, above n 162.

²⁶⁰ Blore, above n 52, 38–39.

There is no doubt, however, that four decades on our attitudes as a society have changed, and attitudes in this place have changed. Then why is it that, four decades on and so many years after the act of homosexuality is no longer deemed illegal, the gay panic defence remains an option for a man who murders another man this state?²⁶¹

5.5.8 As Kirby J also observed 20 years ago (in terms which merit repeating) in his dissent in *Green v R*,²⁶² the homosexual advance defence is outdated and at odds with modern attitudes regarding homosexuality:

In my view, the ‘ordinary person’ in Australian society today is not so homophobic as to respond to a non-violent sexual advance by a homosexual person as to form an intent to kill or to inflict grievous bodily harm. He or she might, depending on the circumstances, be embarrassed; treat it at first as a bad joke; be hurt; insulted. He or she might react with the strong language of protest; might use as much physical force as was necessary to effect an escape; and where absolutely necessary assault the persistent perpetrator to secure escape. But the notion that the ordinary 22 year-old male (the age of the accused) in Australia today would so lose self-control as to form an intent to kill or grievously injure the deceased because of a non-violent sexual advance by a homosexual person is unconvincing. It should not be accepted by this Court as an objective standard applicable in contemporary Australia. If every woman who was the subject of a ‘gentle’, ‘non-aggressive’ although persistent sexual advance, in a comparable situation to that described in the evidence in this case could respond with brutal violence rising to an intention to kill or inflict grievous bodily harm on the male importuning her, and then claim provocation after a homicide, the law of provocation would be sorely tested and undesirably extended. A neutral and equal response to the meaning of [s 231] requires the application of the same objective standard to the measure of self-control which the law assumes, and enforces in an unwanted sexual approach by a man to a man. Such an approach may be ‘revolting’ to some. Any unwanted sexual advance, heterosexual of homosexual, can be offensive. It may intrude on sexual integrity in an objectionable way. But this Court should not send the message that, in Australia today, such conduct is objectively capable of being found by a jury to be sufficient to provoke the intent to kill or inflict grievous bodily harm. Such a message unacceptably condones serious violence by people who take the law into their own hands.²⁶³

5.5.9 These discriminatory features of the defence led the Australian Human Rights Commission to recommend that Queensland and South Australia legislate to abolish the homosexual advance defence.²⁶⁴

5.5.10 SALRI notes the cogent view presented by Dr Justin Koonin, Co-Convenor of the NSW Gay and Lesbian Rights Lobby to the NSW Select Committee:

a non-violent sexual advance should never by itself form the basis for a partial defence against murder, regardless of the sex or gender or sexuality of the people involved. In practice, the defence has only ever applied in the case of a non-violent advance from a male to another male. As we know, it has been applied 11 times [in NSW] between 1990 and 2004.²⁶⁵ It has never been applied to an advance from a male to a female or from a female to a male, and nor should it be. What we are seeking is an end to the differential treatment to gay males in the legal system which has otherwise delivered inequality.²⁶⁶

²⁶¹ South Australia, *Parliamentary Debates*, Legislative Council, 1 May 2013, 3807.

²⁶² *Green v R* (1997) 191 CLR 334.

²⁶³ *Ibid* 415–416.

²⁶⁴ Australian Human Rights, above n 254, 3, Rec 6.

²⁶⁵ See Indyk, Donnelly and Keane, above n 82, 43–45. See further below n 271.

²⁶⁶ Justin Koonin, Evidence, 28 August 2012, 26, cited in NSW Select Committee, above n 11, 41 [4.39].

5.5.11 SALRI finds these views compelling. Whatever the law may be in respect of cases of self-defence and family violence,²⁶⁷ the continued availability of the partial defence of provocation in response to a non-violent homosexual advance is objectionable and outdated. The *Equal Opportunity Act 1984* (SA) was enacted to protect minority groups from discrimination, harassment and abuse. SALRI is clear that, as foreshadowed in its Audit Report, South Australia should no longer retain this aspect of the present law.

5.5.12 Cases such as *Green*, *Lindsay* and *Pearce and Meerdick* are not unique instances of the contentious use of a homosexual advance as provocation.²⁶⁸ In the 2009 New Zealand case of *R v Ambach*,²⁶⁹ Ferdinand Ambach successfully argued that an alleged homosexual advance by Ronald Brown during a drinking session at Brown's home provoked him to violently attack and kill Brown. The attack was so violent that part of a banjo was inserted in Brown's throat.²⁷⁰

5.5.13 The successful case of the gay panic advance as provocation is far from unique.²⁷¹ The NZLC, as recently as 2007, noted that its review of a sample of homicide cases over a five-year period found that half of the cases in which provocation was successful were homosexual advance or gay panic cases.²⁷²

5.5.14 SALRI considers that the case is overwhelming for legislative reform to ensure that at least a non-violent homosexual advance cannot amount to provocation so as to reduce to manslaughter what would otherwise be a conviction of murder. However, SALRI also considers that there are major problems with the operation of a simple repeal or revision of the current partial defence being confined to a non-violent homosexual advance.²⁷³

5.6 Excluding a Non-Violent Sexual Advance as Provocation

5.6.1 The option of discarding the gay panic aspect of provocation was the model in the Criminal Law Consolidation (Provocation) Amendment Bill 2013 introduced into the South Australian Legislative Council by the Hon Tammy Franks.²⁷⁴ It has been employed in the ACT, the Northern Territory and NSW (though in these jurisdictions it extends to excluding any non-violent sexual advance) and is now incorporated in Queensland in the Act that passed on 21 March 2017. In passing, SALRI echoes the caution of the Queensland Attorney-General that any such amendments 'that touch on criminal defences

²⁶⁷ See further below [9.1.1]–[9.1.17].

²⁶⁸ A NSW Working Party examined NSW Supreme Court data for the period from 1993 to 1998, finding that there were at least 13 homicide cases in which an allegation of a homosexual advance was made. See NSW Attorney General's Department, Criminal Law Review Division (1998) *Homosexual Advance Defence: Final Report of the Working Party* [3.4].

²⁶⁹ *R v Ambach* (2009) HC AK CRI-2007-004-027374.

²⁷⁰ NSW Select Committee, above n 11, 29 [3.42].

²⁷¹ See, for example, *R v Meerdink and Pearce* [2002] QSC 158; Blore, above n 52, 38, n 10; Howe, above n 195, 467–468; New South Wales Attorney-General's Working Party on the Review of the Homosexual Advance Defence, *Review of the Homosexual Advance Defence* (1996); Sewell, above n 162, 51, 80–81; Statham, above n 195, 301, n 3. A study of the 75 cases in which provocation was successfully raised as a defence in NSW between 1990 and 2004 (58 by men, 17 by women) found that 11 cases relied on an alleged homosexual advance as the provocation. See Indyk, Donnelly and Keane, above n 82, 43–45.

²⁷² NZLC (2007), above n 54, 97 [49].

²⁷³ NSW Select Committee, above n 11, 97 [6.41], 106–111 [6.87]–[6.105]. See further below [5.6.1]–[5.6.10].

²⁷⁴ South Australia, *Parliamentary Debates*, Legislative Council, 1 May 2013, 3804–3808 (Tammy Franks).

are always highly complex and technical and must strike the right balance between protecting the community while also protecting the rights of the individual accused’.²⁷⁵

5.6.2 This option has some appeal to SALRI. It would remove an objectionable and discriminatory aspect of the law. All parties in consultation with SALRI agreed that, if the South Australian Parliament is to abolish the homosexual advance aspect of provocation, it should be abolished in terms that would include all non-violent sexual advances, rather than being confined to homosexual advances. SALRI considers this approach (if this option were to be adopted) is preferable and would make any change consistent and entirely non-discriminatory. However, SALRI notes that such a change (whether confined to excluding a gay sexual advance or any non-violent sexual advance from amounting to provocation) is problematic and its practical effect has been widely doubted.²⁷⁶

5.6.3 It was highlighted to the South Australian Legislative Review Committee that provocation, when argued by an accused, will likely be founded on a variety of factors, of which a gay sexual advance is likely to be just one relevant factor. The South Australian DPP, Adam Kimber SC, explained to the Committee that a multitude of factors will always be relevant in considering if provocation is made out in any case.²⁷⁷ John Wells, a highly experienced criminal lawyer (now a Magistrate), noted ‘that it is rare in a murder trial that the issues will be clear and compartmentalised because things flow into one another frequently.’²⁷⁸ The South Australian Attorney-General similarly submitted to the Committee, ‘[i]t is almost impossible to imagine a case involving a homosexual advance by the deceased upon the accused where the respective sexes of the deceased and the accused will be the only matter that is relevant in assessing whether provocation should be a consideration at trial.’²⁷⁹

5.6.4 The views expressed to South Australian Legislative Review Council on this point accord with those expressed to SALRI who found little support (even amongst LGBTIQ groups) in its consultation for this approach. All consultees accepted that to abolish the gay panic aspect of provocation would serve an important statement of non-discriminatory principle but its practical effect would be strictly limited. It was highlighted in consultation to SALRI that simply discarding the gay panic aspect of provocation will have little practical effect and will do nothing to prevent the victim blaming that provocation tends to encourage in such cases. It was noted in consultation to SALRI that provocation arguments are often not just based on a non-violent sexual advance, but a combination of circumstances said to be provocative, of which a sexual advance is likely to just be one. Indeed, it was highlighted that rarely, if ever, will a gay sexual advance exist in isolation and it will be combined with other factors. The context will be crucial. Both *Lindsay*²⁸⁰ and *Green*²⁸¹ were discussed as examples where the accused argued that a number of circumstances, not just the unwanted gay advance, needed to be properly considered in combination when assessing the nature of the ‘provocative’ conduct,

²⁷⁵ Queensland, *Parliamentary Debates*, Legislative Assembly, 11 May 2016, 1654 (Hon YM D’Ath, Attorney-General); Queensland, *Parliamentary Debates*, Legislative Assembly, 21 July 2016, 26 (Hon YM D’Ath, Attorney-General).

²⁷⁶ See, for example, NSW Select Committee, above n 11, 107–109 [6.88]–[6.100].

²⁷⁷ SA Legislative Review Committee, above n 17, 34 [6.2.2].

²⁷⁸ Ibid 34. Ms Redmond MP, a member of the SA Legislative Review Committee, highlighted she ‘found the evidence given by Mr John Wells to be particularly useful and compelling in my consideration of the committee’s report’: South Australia, *Parliamentary Debates*, House of Assembly, 3 December 2014, 3159.

²⁷⁹ Ibid. Mr Caldicott concurred with this view in consultation with SALRI, noting that in his 37 years of practice, he had never encountered a case where a gay advance would have existed in isolation from other factors.

²⁸⁰ *R v Lindsay* (2015) 255 CLR 272.

²⁸¹ *R v Green* (1997) 191 CLR 334.

5.6.5 In circumstances where the provocative conduct comprises (as it is likely to be in practice) of a combination of offensive things said and done, it was noted in consultation to SALRI that juries will have difficulty ignoring the fact of a gay sexual advance if they were directed to do so and directed only to focus on the other conduct by the deceased said to be provocative. Several interested parties, including Mr Caldicott, related to SALRI that this approach is artificial and unrealistic.

5.6.6 As an example of this risk, reference was made to the recent English experience of reform. The British Parliament abolished the common law defence of provocation and enacted a limited statutory defence of ‘loss of control’, excluding certain conduct from being considered as provocative, such as sexual infidelity. The decision of the English Court of Appeal in *R v Clinton*²⁸² in 2012 reveals how the intentions of exclusionary approaches to reform can be undermined in practice. The Court of Appeal in *Clinton* concluded that in circumstances where other words or acts beyond the alleged sexual infidelity were argued to constitute the qualifying trigger for loss of control, the UK legislation still permitted, and ought to permit, the judge and jury to consider those words or acts in the context of evidence of sexual infidelity. The Court of Appeal explained:

Our approach has ... been influenced by the simple reality that in relation to the day to day working of the criminal justice system events cannot be isolated from context. ... [t]o seek to compartmentalise sexual infidelity and exclude it when it is integral to the facts as whole is not only much more difficult, but is unrealistic and carries with it the potential for injustice ... we do not see how any sensible evaluation of the gravity of the circumstances or their impact on the defendant could be made if the jury, having, in accordance with the legislation, heard the evidence, were then to be directed to excise from their evaluation of the qualifying trigger the matters said to constitute sexual infidelity, and to put them into distinct compartments to be disregarded. In our judgment, where sexual infidelity is integral to and forms an essential part of the context in which to make a just evaluation whether a qualifying trigger properly falls within the ambit of [the qualifying trigger provisions] the prohibition [on sexual infidelity] does not operate to exclude it.²⁸³

5.6.7 SALRI accepts that to abolish the gay panic aspect of provocation would act as an important legislative declaration of non-discrimination and would, in theory at least, remove an objectionable feature of the criminal law.

5.6.8 However, SALRI accepts the major problems of such a change. SALRI acknowledges the force of the strong views outlined to both it and the South Australian Legislative Review Committee that the practical effect of such a change would be strictly limited, if not illusory. SALRI concurs with the view of the South Australian Legislative Review Committee that the exclusion of specific factors (whether a non-violent sexual advance or sexual infidelity) within an often complex factual matrix is unlikely to provide an effective legal mechanism.²⁸⁴ It would be artificial and unrealistic, as outlined to SALRI in its consultation and supported by the English decision in *Clinton*, to expect juries to ‘compartmentalise’ their reasoning and have regard to a permissible factor and to discount an impermissible factor.

5.6.9 SALRI accepts that merely discarding the gay panic aspect of provocation (or even extending to exclude any non-violent sexual advance) would amount to well-intentioned but largely futile legislative

²⁸² [2012] 3 WLR 515.

²⁸³ Ibid 527–528 [39]. See also NSW Select Committee, above n 11, 107–109 [6.88]–[6.100]. For strong criticism of the court’s approach in *Clinton*, see Dennis Baker and Lucy Zhao, ‘Contributory Qualifying and Non-Qualifying Triggers in the Loss of Control Defence: A Wrong Turn on Sexual Infidelity’ (2012) 76 *Journal of Criminal Law* 254.

²⁸⁴ SA Legislative Review Committee, above n 17, 41. The Committee also noted that ‘it is not the role of Parliament to enact laws of no meaningful legal effect, aimed solely at conveying a message to the community. There are other mechanisms at the disposal of Parliament to achieve that end’: at 40.

tinkering. Despite the laudable aim of this change, it is strongly doubted that it would have any real practical impact.

5.6.10 It will be seen on further analysis that there are differing alternative courses that might be followed, including the repeal of provocation as a defence in its entirety. Some of these options are discussed below along with other discriminatory aspects of the law of provocation. However, the repeal of provocation in its entirety must be considered as a possible option because of its discriminatory (on the grounds of both sexual orientation and gender) and other impacts in practice. Whether such repeal is limited to the gay panic aspect or is of general application, there are other significant consequences which must be considered, particularly for the law of sentencing for what would then be a conviction of murder. Until SALRI can complete its analysis of the possible repeal of provocation and related issues, as is proposed in stage 2 of this Report, it would be premature to proceed with any legislative reform to deal, probably ineffectively or unsatisfactorily, with only the gay panic aspect of the defence.

Recommendation 3

That any legislative measure to provide that a non-violent sexual advance cannot amount to provocation so as to reduce to manslaughter what would otherwise be a conviction of murder be deferred until further recommendations can be made by SALRI in Stage 2 of this Report.

PART 6 – Gender Bias and Provocation

6.1 Provocation: A Man's Law?

6.1.1 A strong wider criticism of the present law is that the partial defence of provocation is gender biased and unjust, namely that it is widely perceived to apply unfairly to women accused of murder (especially those who have been subjected to family violence) and to unfairly favour male accused (especially those who have killed a female partner).²⁸⁵ This theme was strongly expressed to SALRI in its consultation by various family violence groups, the Women's Legal Service, Relationships Australia, and academics such as Professor Heath from Flinders University, Professor Sarre from the University of South Australia, Dr Fitz-Gibbon from Monash University and Professor Naffine and Kellie Toole from the University of Adelaide.

6.1.2 Currently, women who kill their abusive domestic partners could potentially argue the partial defence of provocation, the partial defence of excessive self-defence or the complete defence of self-defence. It ought to be considered, when reflecting on reforming the law as regards to provocation, how such a reform may affect those who kill their abusive partners. The acute social problems arising from family violence are well recognised and are a matter of public record.²⁸⁶

6.1.3 The partial defence of provocation as still exists in South Australia has been described as essentially 'legitimising the use of lethal violence by men who kill in unmeritorious circumstances'.²⁸⁷ Provocation has long been argued by men who killed out of jealousy, humiliation and rejection, thus it operates in an inherently gender biased way and often excludes persons who kill in the context of family violence victimisation from accessing this defence.²⁸⁸

6.1.4 The philosophical foundation for the partial defence of provocation rests on:

- First, the accused being in possession of a justifiable feeling of having been seriously wronged due to provocative conduct on the part of the deceased or another person.
- Secondly, the accused being less morally responsible for their violent conduct because people can lose control of their faculties when provoked and, while they have lost control, do things they normally would not do. A consequence of the second point, regarding the necessity of a loss of control and the proximate connection in time needed between the provocation and the killing, is

²⁸⁵ See, for example, Bradfield, above n 88, 5–6, 33–37; Helen Brown, 'Provocation as a Defence to Murder: To Abolish or To Reform?' (1999) 12 *Australian Feminist Law Journal* 137; Graeme Coss, 'Provocation, Law Reform and the Medea Syndrome' (2004) 28 *Criminal Law Journal* 133, 136; Graeme Coss, 'The Defence of Provocation: An Acrimonious Divorce from Reality' (2006) 18(1) *Current Issues in Criminal Justice* 51; Golder, above n 195, [50]–[51]; Hemming, above n 12; Howe, above n 257, 130–131; Morgan, above n 89, 255; Stella Tarrant, 'The "Specific Triggering Incident" in Provocation: Is the Law Gender Biased?' (1996) 26 *University of Western Australia Law Review* 190, 206; Stanley Yeo, 'Resolving Gender Bias in Criminal Defences' (1993) 19 *Monash University Law Review* 104; NZLC, above n 54, 48–49 [96], 58 [121]; VLRC (2004), above n 13, 27–30 [2.18]–[2.25]; QLRC, above n 97, 331–332 [16.1]–[16.9].

²⁸⁶ Victorian Royal Commission, above n 33, 1.

²⁸⁷ Sheradyn Holderhead, 'Attorney-General John Rau considering axing controversial provocation defence measures' *The Advertiser* (online), 29 May 2015 <<http://www.adelaidenow.com.au/news/south-australia/attorneygeneral-john-rau-considering-axing-controversial-provocation-defence-measures/news-story/547b8d4edf4f0015d2d72591f8d3407f> May 29 2015>.

²⁸⁸ Bradfield, above n 88, 5–6, 33–37.

that women who kill their abusers following a pattern of abuse, for reasons other than having ‘lost control’ in response to the abuse, do not properly fall under the provocation defence.

6.1.5 Women who kill their abusers in situations of family violence to protect themselves or other family members from future harm do not easily fit the circumstances for which the partial defence was conceived to provide. This is because women tend to kill less instantaneously than men (such as waiting until their partner is asleep or intoxicated), as women may be scared, vulnerable and/or physically inferior to their partners.²⁸⁹ In such circumstances the immediacy requirement required to successfully invoke this defence is often missing in situations of family violence.²⁹⁰

6.1.6 Provocation therefore has limited application to the various contexts within which battered women typically kill, especially women who act ‘calmly and with deliberation’, rather than with the loss of self-control associated with provocation.²⁹¹ The way the test is framed makes it difficult for women to argue it successfully. As the defence was originally conceived to deal with male aggressive responses to provocative conduct, the association of provocation with typical male responses is said to make it a defence which is more suited to male than female defendants. A sudden violent loss of self-control in response to a particular triggering act is seen to be the archetypal male response to provocative conduct.²⁹² As the VLRC concludes, ‘Despite changes that have been made over time, this test remains very difficult for women to use.’²⁹³

6.1.7 A further primary criticism is that provocation is a gendered defence as men are largely the benefactors of its application.²⁹⁴ It is notable that it is mainly men who successfully raise provocation in practice.²⁹⁵ As described by Dr Fitz-Gibbon: ‘The law’s all too ready acceptance of the contexts within which men kill, alongside its historical inability to cater for female-perpetrated scenarios of lethal violence, is unsatisfactory.’²⁹⁶

6.1.8 The South Australian Commissioner for Victims Rights branded the current law as ‘misogynist’ to SALRI. The English Law Commission noted that the central place occupied by the requirement of a sudden response in any claim of provocation ‘privileg[es] men’s typical reactions to provocation over women’s typical reactions.’²⁹⁷

6.1.9 In the NSW case of *Singh*,²⁹⁸ McClellan CJ said the offender lost control as a result of: ‘[u]ltimately, being told that his wife had never loved him and was going to leave him’ and ‘offensive remarks of the

²⁸⁹ VLRC (2004), above n 13, 62 [3.11].

²⁹⁰ Kellie Toole, ‘Self-Defence and the Reasonable Woman: Equality before the New Victorian Law’ (2012) 36(1) *Melbourne University Law Review* 250, 271.

²⁹¹ Fitz-Gibbon and Stubbs, above n 58, 324.

²⁹² VLRC (2004) above n 13, 27–28 [2.19].

²⁹³ *Ibid* 28 [2.19].

²⁹⁴ Graeme Cross, to Criminal Law Review, NSW Department of Attorney-General and Justice, 15 November 2013, 5; Thomas Crofts and Danielle Tyson, ‘Homicide Law Reform in Australia: Improving Access to Defences for Women Who Kill their Abusers’ (2013) 39 *Monash University Law Review* 864, 866.

²⁹⁵ The VLRC examined a sample of 182 people charged with homicide offences. Of the 109 who chose to proceed to trial, at least 27 raised provocation as a defence of whom 24 were male and only three were female. See VLRC, *Defences to Homicide: Options Paper* (2003) 51. This is unsurprising as in Australia in 2005-06, a total of 88% of homicide offenders were male. See Hemming, above n 12, 4, n 8.

²⁹⁶ Fitz-Gibbon, *Homicide Law Reform, Gender and the Provocation Defence*, above n 47, 264–265.

²⁹⁷ English Law Commission, *Murder, Manslaughter and Infanticide* (2006) 81.

²⁹⁸ [2012] NSWSC 637.

deceased's brother-in-law.²⁹⁹ This trigger caused the offender to lose self-control and strangle his wife before he 'cut her throat at least eight times with a box cutter.'³⁰⁰ In *Singh*, the jury 'was not satisfied that an ordinary person would not respond in the manner alleged.'³⁰¹ As a result, the offender was acquitted of murder and convicted of manslaughter. He was sentenced to a non-parole period of six years with a balance term of two years.

6.1.10 SALRI is troubled at such an outcome in a modern and non-discriminatory system of criminal justice. SALRI notes the views of the NSW Select Committee:

The community outrage at the killing [in *Singh*] being described as "manslaughter" not "murder", and the sentence length is certainly understandable. It is difficult to comprehend how a man who kills his wife in such circumstances could be entitled to even a partial defence to murder.³⁰²

6.1.11 *Singh* was not unique. Rather it was the last of a line of cases³⁰³ where males had successfully argued they were provoked into killing their female partners, to uphold their 'honour'.³⁰⁴ Research undertaken by Dr Kate Fitz-Gibbon found that in the ten year period immediately prior to the 2014 NSW reforms (1 January 2005 to 31 December 2014) of the 20 cases of provocation on the basis of manslaughter, seven involved a male perpetrator who killed a current or estranged female partner, and three cases involved a male perpetrator who killed a male who was in a sexual relationship with the defendant's current or former partner.³⁰⁵ In each of these cases the homicide occurred in the context of relationship separation and/or sexual infidelity (actual or alleged).³⁰⁶

6.1.12 SALRI considers such findings deeply troubling. It notes the comments of Graeme Coss to the NSW Select Committee:

Context is vital, and so it is essential to recognise the very different circumstances in which men kill, and women kill, and thus the very different circumstances in which they may raise the defence of provocation. Men mostly kill other men in confrontational social interactions, as retaliation to an insult to honour; when men kill women, it is usually an intimate, routinely driven by proprietariness, and again as retaliation to an insult to honour. Women mostly kill an intimate male partner, and invariably out of fear and desperation to protect themselves and/or their children ... it would be an obscenity to treat as equivalent the case of a jealous man who kills his partner who threatens to leave him, and the case of a battered woman who kills to stay alive. And yet the courts have often done just that — or worse, shown greater compassion to the jealous male.³⁰⁷

²⁹⁹ Ibid [29].

³⁰⁰ Ibid [30].

³⁰¹ Ibid [2].

³⁰² NSW Select Committee, above n 11, x.

³⁰³ See, for example, *R v Keogh* (Unreported, Supreme Court of Victoria, Hampel J 15 February 1989); *R v Butay* [2001] VSC 417; *R v Hamoui (No 4)* [2005] NSWSC 279; *R v Ramage* [2004] VSC 391 (8 October 2004); *R v Sebo; ex parte Attorney-General (Qld)* (2007) 179 A Crim R 24; *R v Stevens* [2008] NSWSC 1370 (18 December 2008).

³⁰⁴ Paul Bibby and Josephine Tovey, 'Six years for killing sparks call for law review', *Sydney Morning Herald* (online), 8 June 2012 <<http://www.smh.com.au/nsw/six-years-for-killing-sparks-call-for-law-review-20120607-1zz2r.html>>; *Stabbing case questions a provocative defence* (7:30 Report, Australian Broadcasting Commission, 2012) 1:25.

³⁰⁵ Fitz-Gibbon, *Homicide Law Reform, Gender and the Provocation Defence*, above n 47, 151–153.

³⁰⁶ Ibid, 151–153. See also above n 88, the earlier discussion of the successful use of provocation in male perpetrated intimate partner homicides.

³⁰⁷ NSW Select Committee, above n 11, 36 [4.15]. See also at 36 [4.16].

6.1.13 Dr Kate Fitz-Gibbon has raised similar concerns about the courtroom narratives in such provocation cases that may allow the victim to be somehow ‘blamed’ for what happened to them:

When a partial defence of provocation is raised, it is undoubtedly the victim’s behaviour and actions, as opposed to that of the defendant, that are put in focus. This is highly problematic and is further compounded in cases of male-perpetrated intimate homicide and homosexual advance defence where the experiences and actions of the victim are inevitably considered through a gendered lens that all too often privileges the male defendant’s account.³⁰⁸

6.1.14 Dr Fitz-Gibbon referred the NSW Select Committee to her research which highlights the concerns around gender bias in the application of the defence and the subsequent legitimisation of male violence.³⁰⁹ In her 2014 submission to the South Australian Legislative Review Committee, Dr Fitz-Gibbon reiterated this point, stating:

By its very design the law of provocation encourages the legal delegitimation of the victim. This is a key problem with the foundations of the defence that cannot be overcome through reform and/or restriction. In raising provocation, the offender seeks to put the words or actions of the victim on trial in order to illustrate how their use of lethal violence was provoked. In the majority of cases this occurs in situations where no one is able to contest the defendant’s version of what occurred in the period immediately prior to their use of lethal violence. Consequently, the victim of homicide — often female — is put on trial in cases where this partial defence is raised.³¹⁰

6.1.15 Dr Fitz-Gibbon’s analysis of NSW sentencing judgments from the period immediately prior to the 2014 reforms in that jurisdiction highlights the dangers of victim blaming in cases of male perpetrated intimate partner homicide where the partial defence of provocation is successfully raised such as *Singh* and the 2008 case of *Stevens*.³¹¹ In these cases, she has argued that the court’s response partially legitimises the killing of a woman in response to threats to male honour, sexual jealousy and a man’s loss of control over a relationship.

6.1.16 In contrast to the successful use of the provocation defence in cases of male perpetrated intimate homicide, research has consistently observed how the defence operates to the detriment of female defendants.³¹² The requirement for a loss of self-control has been criticised as failing to accommodate the circumstances of victims of family violence who may well experience a slow-burn effect.³¹³ For these women ‘it is not so much loss of control but a deeply emotional, troubled and concerned action’.³¹⁴

³⁰⁸ Fitz-Gibbon, *Homicide Law Reform, Gender and the Provocation Defence*, above n 47, 265. See also NSW Select Committee, above n 11, 36 [4.16]. See also below [4.2.1]–[4.2.18].

³⁰⁹ See NSW Select Committee, above n 11, 36–37 [4.17]; Kate Fitz-Gibbon, ‘Provocation in New South Wales: The Need for Abolition’ (2012) 45 *Australian and New Zealand Journal of Criminology* 194.

³¹⁰ Kate Fitz-Gibbon, Submission on the Criminal Law Consolidation (Provocation) Amendment Bill 2013 (Legislative Review Committee, 2014). See also above [4.2.1]–[4.2.18].

³¹¹ *R v Stevens* [2008] NSWSC 1370 (18 December 2008).

³¹² See, for example, Bradfield, above n 88; Fitz-Gibbon, *Homicide Law Reform, Gender and the Provocation Defence*, above n 47, 76–81; Fitz-Gibbon and Stubbs, above n 58, 318–336; Jeremy Horder, *Provocation and Responsibility* (Clarendon Press, 1992).

³¹³ Graeme Cross, to Criminal Law Review, NSW Department of Attorney-General and Justice, 15 November 2013, 3; See Tarrant, above n 285, 194 for discussion on the ‘slow burn effect’; New South Wales, *Parliamentary Debates*, Legislative Council, 25 March 2014, 27690 (David Shoebridge).

³¹⁴ New South Wales, *Parliamentary Debates*, Legislative Council, 25 March 2014, 27691 (David Shoebridge).

Equally, this requirement is generally criticised for being unrecognised in science³¹⁵ and failing to reflect modern society.³¹⁶

6.1.17 It has also been argued that for persons who kill in response to prolonged family violence, typically a woman defendant, a conviction for manslaughter by reason of provocation is not a satisfactory outcome and raises broader questions about why such defendants are not better catered for under the complete defence of self-defence.³¹⁷ ‘The law of self-defence is capable of accommodating the experiences of women who kill abusive partners.’³¹⁸

6.1.18 It has also been noted, often with concern, that many female victims of family violence who kill their abusive partners may pragmatically plead guilty to alternative counts of manslaughter or similar counts on the basis that they are unwilling to take the risk of proceeding to trial and facing a conviction for murder (especially in a jurisdiction such as South Australia that retains a general mandatory sentence for murder).³¹⁹

³¹⁵ Graeme Cross, to Criminal Law Review, NSW Department of Attorney-General and Justice, 15 November 2013, 3.

³¹⁶ NSW Select Committee, above n 11, 193 [9.17]; Evidence to Select Committee on the Partial Defence of Provocation, NSW Parliament, Sydney, 28 August 2012, 4 (Helen Campbell, Executive Officer, Women’s Legal Service).

³¹⁷ See, for example, Patricia Easteal, ‘Battered Women Who Kill: A Plea of Self-Defence’ in Patricia Easteal and Sandra McKillop (eds), *Women and the Law* (Australian Institute of Criminology, 1993) 37.

³¹⁸ Toole, above n 290, 250.

³¹⁹ Julia Tolmie, ‘Provocation or Self-defence for Battered Women Who Kill?’ in Stanley Yeo (ed), *Partial Excuses to Murder* (Federation Press, 2005) 38. See also Fitz-Gibbon, (2017, forthcoming) above n 83. A further concern that has been raised interstate is in relation to prosecution charging and plea bargaining practices to victims of family violence facing homicide charges. See VLRC (2004), above n 13, 105–110 [3.116]–[3.128]. In Victoria, for example, there was criticism over the use of defensive homicide as a ‘halfway house’ in cases resolved by guilty pleas: see Asher Flynn and Kate Fitz-Gibbon, ‘Bargaining with Defensive Homicide: Examining Victoria’s Secretive Plea Bargaining System Post-Law Reform’ (2011) 35 *Melbourne University Law Review* 908. Whilst some commentators saw the use of plea bargains as beneficial in saving time, resources and anxiety (Flynn and Fitz-Gibbon, at 919–920), others argued the lack of transparency in the process undermined public confidence (at 921–922). This criticism is not unique to defensive homicide: see Kellie Toole, ‘In Plea Bargaining, Who Really Gets the Bargain?’, *The Conversation* (online), 14 November 2014 <<https://theconversation.com/in-plea-bargaining-who-really-gets-the-bargain-34010>>; Asher Flynn, ‘Bargaining with Justice: Victims, Plea Bargaining and the Victims’ Charter Act 2006 (Vic)’ (2011) 37 *Monash University Law Review* 73. The NSW Select Committee after considering the research (see Elizabeth Sheehy, Julie Stubbs and Julia Tolmie, ‘Battered Women Charged with Homicide in Australia, Canada and New Zealand: How do they Fare?’ (2012) 45(3) *Australian and New Zealand Journal of Criminology* 383; Tolmie, above n 117, 25; NSW Select Committee, above n 11, 158–166 [8.14]–[8.47] and its consultation) noted two interrelated concerns when dealing with these types of defendants, at 166 [8.48]:

‘First, there is concern that murder is being charged inappropriately, in circumstances where there are defensive elements or where the intent is less than is required for murder. It was suggested that in some of these cases, manslaughter is a more appropriate charge. The second concern, which flows from the first, is that the “battered woman” defendant is under immense pressure to plead guilty to manslaughter when charged with murder because the risk of running self-defence is too high if unsuccessful.’

The suggestion that was raised is that, even where provocation is abolished, family violence could be taken into account when selecting the appropriate charge. See NSW Select Committee, above n 11, 167–168 [8.54], and see generally at 157–168 [8.09]–[8.56]; VLRC (2004), above n 13, 105–110 [3.116]–[3.128]. This could be achieved by amending prosecutorial guidelines in relation to homicides occurring in a family context to provide clear directions to assist prosecutors in determining the appropriate charge to prefer (or accept) against defendants, particularly in circumstances where there is a history of violence toward the defendant. See NSW Select Committee, above n 11, 167 [8.54], 168 Rec 1; see also VLRC (2004), above n 13, 109–110 [3.125]–[3.128]. SALRI is unaware if the concerns expressed to, and by, the NSW Select Committee are also a concern in South Australia. The importance of a broad degree of prosecutorial discretion in an adversarial system has often been noted. See, for example, *DPP v Chow* (1992) 63 A Crim R 316, 325–326 (Kirby J); *R v Power* (1994) 89 CCC (3d) 1, 15–17 (L’Heureux-Dubé J); *Maxwell v R* (1996) 184 CLR 501, 512 (Dawson and McHugh JJ), 533–535 (Gaudron and Gummow JJ); *R v Cook* (1997) 146 DLR (4th) 437, 444–445. The issue of prosecutorial discretion is beyond this Report.

6.1.19 The NSW Select Committee noted that the concerns about the gender bias of provocation ‘were undoubtedly one of the most significant issues raised by Inquiry participants who were critical of the partial defence of provocation’.³²⁰ The Select Committee accepted these concerns raised during the Inquiry about gender bias were ‘understandable’ in light of the outcomes in some of the cases considered by the Committee and ‘specifically the Committee notes the concerns of some Inquiry participants that the defence enables biased courtroom narratives that allow the focus of the trial to be shifted onto the conduct of the deceased victim.’³²¹ The Committee acknowledged concerns that provocation, while it is sometimes successfully used by women who kill intimate partners, is not designed to accommodate or recognise the experiences of women who kill in the context of family violence and therefore may not offer an appropriate response to those experiences.³²²

6.1.20 The view was presented to the NSW Select Committee that there is ‘nothing in the formulation of the defence [that] involves gender bias’.³²³ Chrissa Loukas SC, representing the NSW Bar Association, similarly stated ‘provocation is not a male defence or a female defence—it is a human defence.’³²⁴

6.1.21 SALRI is unable to accept this position. The situation of female defendants highlights the inherent and objectionable gender bias of the current law and presents the overwhelming case that any reform of the present law of provocation must also address this gender bias. Provocation is, and remains, predominantly a ‘male’ defence. It has an inherent and inevitable gender bias. The comments of the former Tasmanian Attorney-General, the Hon Judy Jackson, in introducing the Bill to abolish provocation in Tasmania are apposite:

[T]he defence of provocation is gender biased and unjust. The suddenness element of the defence is more reflective of male patterns of aggressive behaviour. The defence was not designed for women and it is argued that it is not an appropriate defence for those who fall into the “battered women syndrome”. While Australian courts and laws have not been sensitive to this issue, it is better to abolish the defence than to try to make a fictitious attempt to distort its operation.³²⁵

6.1.22 SALRI concurs, reflecting the wider research, with the reasoning and view of the former Tasmanian Attorney-General as to the inherent gender bias of the present law of provocation. SALRI considers that, reflecting that its terms of reference include gender bias, reform is necessary of the current law to address its gender bias. SALI concludes that in many cases, abused women who kill should be primarily protected by a different kind of defence, rather than treated under the same rubric as other scenarios giving rise to provocation.

6.2 Residual Provocation in Family Violence and Elsewhere

6.2.1 There is a division of opinion in SALRI’s consultation to date about retaining the residual category of provocation to cater for those ‘truly deserving’ cases in which self-defence cannot be raised. One view is that the problems of provocation are such that it is futile to try and formulate a residual category of

³²⁰ NSW Select Committee, above n 11, 45 [4.56].

³²¹ Ibid 45 [4.57].

³²² Ibid 45 [4.58].

³²³ Stephen Odgers SC, Chair of the Criminal Law Committee, NSW Bar Association, Evidence, 29 August 2012, 34, quoted by NSW Select Committee, above n 11, 37 [4.19]. See also at 37–38 [4.18]–[4.25].

³²⁴ Chrissa Loukas SC, Barrister, Public Defender and Member of the Bar Council, Evidence, 29 August 2012, 37, quoted by NSW Select Committee, above n 11, 37 [4.20].

³²⁵ Tasmania, *Parliamentary Debates*, House of Assembly, 20 March 2003, 60 (Judy Jackson, Attorney General).

provocation and the mitigating features of such cases are more appropriately reflected in sentence. The other view is that such truly deserving or extreme cases illustrate the need for retention of, at least, a revised form of provocation and it is unfair to label such cases as ‘murder’ and inappropriate to leave the mitigation of such cases to be reflected in the sentencing stage.

6.2.2 Concern was expressed by some parties in SALRI’s consultation (notably Mr Caldicott and the Bar Association) that if provocation is abolished, then there will be no defence available in extreme circumstances, where provocation may legitimately assist a deserving defendant, including victims of family violence. This view has been expressed elsewhere.³²⁶ Some commentators express the view that at least some form of provocation should be retained as it ‘recognises that not all actions are done with the same intention or a rational mind’.³²⁷ There will be circumstances where a battered woman does not necessarily kill their abuser in self-defence³²⁸ and provocation is said to provide a potential and long-awaited window of mercy for victims of family violence.³²⁹

6.2.3 Further, it was put forward to SALRI in its consultation that there will be truly deserving, even extreme, cases where self-defence (even with the revised model SALRI proposes in this Report) will not be available and provocation (albeit in a revised form) serves a vital role as it would be unfair for an accused to be convicted of murder.³³⁰ In such cases, a conviction for murder may appear unjust. This argument was ultimately accepted by both the NSW Select Committee³³¹ and the South Australian Legislative Review Committee³³² as supporting the retention of at least a revised form of provocation.

6.2.4 The English case of *DPP v Camplin*³³³ was raised to the South Australian Legislative Review Committee by one submission as an example of where some form of provocation is necessary.³³⁴ The extreme case of *R v Butler*³³⁵ was presented to SALRI during its consultation as supporting the case for

³²⁶ See, for example, Crofts and Loughnan, above n 130, 34–36; Letter from the NSW Law Society to the NSW Department of Attorney General and Justice, 18 November 2013, 2; SA Legislative Review Committee, above n 17, 36–37 [6.2.5]–[6.2.6]; NSW Select Committee, above n 11, 87 [5.97]–[5.98]; QLRC, above n 97, 469, [21.24], 471 [21.36], 490 [21.129], 491 [21.137], 500 [21.176]–[21.177].

³²⁷ James Trevallion, Submission No 14 to *Select Committee on the Partial Defence of Provocation*, 9 August 2012, 1; Winston Terracini, Submission No 33 to *Select Committee on the Partial Defence of Provocation*, 8 August 2012, 3.

³²⁸ Tolmie, above n 117, 45.

³²⁹ Crofts and Tyson, above n 294, 865.

³³⁰ The Aboriginal Legal Rights Movement raised the situation of Aboriginal accused in this context to SALRI. See also below Appendix 1, 101–102 and Appendix 2, 109.

³³¹ NSW Select Committee, above n 11, 87 [5.97]–[5.98].

³³² SA Legislative Review Committee, above n 17, 43.

³³³ [1978] AC 705. Camplin, a 15 year old boy, killed a middle aged man by hitting him over the head with a heavy kitchen pan. At his murder trial, Camplin raised the defence of provocation stating that the deceased had raped him and then laughed at him at which point he lost his control and hit him. The trial judge directed the jury on provocation that they should consider whether a reasonable adult would have done as the defendant did and told them that they should not take account of Camplin’s actual age. The jury convicted Camplin of murder and he appealed contending the trial judge was wrong to direct the jury that age was irrelevant. The House of Lords allowed the appeal and held that the age of the defendant was relevant to the objective limb of provocation. Lord Diplock noted ‘the reasonable man ... is a person having the power of self-control to be expected of an ordinary person of the sex and age of the accused’ [1978] AC 705, 718.

³³⁴ SA Legislative Review Committee, above 17, 36 [6.2.5]. See also NSW Select Committee, above n 11, 91–92 [6.16]–[6.18].

³³⁵ [2012] NSWSC 1227 (11 October 2012). The defendant was a female prostitute who had been sexually abused as a child. During a sexual encounter with a client she had never met before, the defendant was spoken to about child sex and was shown a video depicting child sexual abuse by her client. It was found that the defendant had lost self-control as a result of her past experiences and she ultimately killed the victim, once he expressed his fetishes. The NSW DPP accepted a plea to manslaughter on the basis of provocation. Butler’s solicitor noted that ‘in this case there could not

retention of at least a revised form of provocation as the type of case where provocation served a valid role in reducing murder to manslaughter.

6.2.5 However, it is difficult to formulate a fair and effective replacement model of provocation to specifically cater for these very rare situations that would not be open to the same problems and type of misuse as seen in Victoria’s much criticised example of defensive homicide. The preferable solution to the situations in cases such as *Camplin* and *Butler* may be to ensure a court in sentencing possesses the flexibility to reflect the culpability of the offender and any genuine mitigating features (whether such provocative conduct from the deceased and/or an offender’s cognitive impairment or intellectual disability).

6.2.6 SALRI notes that s 32A of the *Criminal Law (Sentencing) Act 1988* may provide some flexibility to recognise such extreme provocation from the deceased as in *Camplin* and *Butler*.³³⁶ Whether this provision provides sufficient flexibility in sentence warrants further consideration. This will be examined by SALRI in the second stage.

6.2.7 SALRI is aware that the position of victims of family violence needs to be carefully addressed. SALRI reiterates that the reforms to the law of self-defence and related issues recommended in this Report can and should be undertaken regardless of whether provocation is retained, reformed or repealed. It wishes to consider further if additional changes to the law are necessary, whether to the law of provocation, sentencing or some other law (such as a partial defence of diminished responsibility) to provide for the residual category of case with egregious provocation, especially in a context of family violence, where the defences of excessive self-defence and self-defence are unavailable.

6.3 Marital Coercion

6.3.1 For the sake of completeness, SALRI notes the often overlooked defence of marital coercion. Section 328 A of the *Criminal Law Consolidation Act 1935* (SA) provides that, whilst any presumption of law that an offence committed by a wife in the presence of her husband is committed under the coercion of the husband is abolished,³³⁷ ‘on a charge against a wife for any offence other than treason or murder, it shall be a good defence to prove that the offence was committed in the presence, and under the coercion, of the husband.’³³⁸ A similar defence exists in Victoria³³⁹ and may still exist in NSW and the ACT.³⁴⁰

have been any other defence, and yet any fair minded member of the community, hearing the facts of the case would not want her [the defendant] convicted of murder’: Harriet Alexander, ‘Kill Case Relied on Provocation’, *Sydney Morning Herald* (online), 19 October 2012, <<http://www.smh.com.au/nsw/kill-case-relied-on-provocation-20121018-27txl.html>>.

³³⁶ *R v Narayan* [2011] SASCFC 61, [46]–[48]; *R v Li* [2016] SASCFC 152, [28], [37]–[38] (Stanley J), [50]–[54], [61]–[74], [123]–[126] (Lovell J).

³³⁷ This was an old common law rule dating from medieval times. ‘This doctrine of the presumption of marital coercion originated in very early times when a wife’s subjection to her husband was severe’: Victorian Law Reform Commissioner, *Criminal Liability of Married Persons (Special Rules)* (Working Paper No 2) (January 1975) 6 [6].

³³⁸ It is usually thought that the burden of proof lays on the defence to prove marital coercion on the balance of probabilities: see *R v Shortland* [1996] 1 Cr App R 116; *R v Cairns* [2003] 1 WLR 796. For duress, the burden is on the prosecution to *disprove* duress beyond reasonable doubt. In *R v Pryce* (Unreported, Southwark Crown Court, 7 March 2013), Sweeney J held that in light of the *Human Rights Act 1998* (UK) and art 6(2) of the *European Convention on Human Rights*, the burden provided by the comparable English section, s 328A of the *CLCA*, did not remain a persuasive burden on the defence (as construed in *Shortland* and *Cairns*) but rather as placing only an evidential burden on the defendant (see at <<http://www.iclr.co.uk/marital-coercion-the-ruling-in-r-v-pryce/>>). It is assumed that the position in South Australia is that the burden of proof remains on the defence to prove marital coercion on the balance of probabilities. See *Goddard v Osborne* (1978) 18 SASR 481, 495.

³³⁹ *Crimes Act 1958* (Vic) s 336.

³⁴⁰ Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (Thomson Reuters, 3rd ed, 2010) 361 [6.130].

6.3.2 This defence has medieval origins. ‘Marital coercion dates to an old legal presumption, when women had no rights and no independent means of support, so any wife committing a crime in the presence of her husband had a “presumption of innocence” under coercion.’³⁴¹ The presumption of innocence is abolished in s 328A of the *Criminal Law Consolidation Act 1925* but the right to use it in South Australia as a defence remains (except for murder and treason).

6.3.3 This defence is wider than duress. Duress requires a threat to kill or cause serious harm to a person,³⁴² whilst marital coercion need not involve either physical force or the threat of force. It requires the wife’s will to be overborne as a result of pressure from the husband.³⁴³

6.3.4 The defence was recently explained in the controversial trial in England of Vicky Pryce³⁴⁴ by Sweeney J in the following terms:

Thus it was common ground that the law recognises, via the defence of marital coercion, that a wife is morally blameless if she committed an offence (other than murder or treason) only because her husband was present and coerced her — that is put pressure of some sort on her to commit the offence in such a way that, as a result, her will was overborne (in the sense that she was impelled to commit the offence because she truly believed that she had no real choice but to do so). There was also no dispute that, as to the wife’s will being overborne, the issue is entirely subjective. It was equally common ground that a wife’s will would not have been overborne (in the sense that I have just described) if, for example, she was persuaded by force of argument to choose (albeit reluctantly) to commit the offence rather than to take another course, or if she was persuaded (albeit reluctantly) to commit the offence out of love for, or loyalty to, her husband or family, or to avoid inconvenience (whether to herself or others). Her will must have been overborne (ie overcome) in the sense that she was impelled (ie forced) to commit the offence because she truly believed that she had no real choice but to do so.³⁴⁵

6.3.5 The VLRC noted that ‘retention of the defence may be justified because of the high rate of violence by men against their partners and the difficulties which women experience in seeking effective protection against such violence.’³⁴⁶ The Commission acknowledged that some women who are subjected to psychological and physical abuse may be forced to commit crimes by their husbands.³⁴⁷

³⁴¹ Caroline Davies, ‘Vicky Pryce defence of marital coercion “incompatible with gender equality”’, *The Guardian* (online), 8 March 2013, <<https://www.theguardian.com/law/2013/mar/07/vicky-pryce-marital-coercion-equality>>.

³⁴² *R v Hurley and Murray* [1967] VR 562.

³⁴³ *Goddard v Osborne* (1978) 187 SASR 481; *R v Shortland* [1996] 1 Cr App R 116; *R v Cairns* [2003] 1 WLR 796.

³⁴⁴ Vicky Pryce was charged with perverting the course of justice by falsely claiming she had been driving to enable her husband, a prominent politician, to escape a speeding fine. Ms Pryce’s claim of marital coercion from her husband was not accepted by the jury. It was noted that Ms Pryce was an unlikely person to raise the defence. See Siobhan Weare, ‘Marital Coercion’ (2014) 178 *Justice of the Peace Notes* 455. ‘Vicky Pryce was a well-educated, affluent and powerful woman, and a distinguished economist whose job had been to advise on the affairs of nations at top government level’: Davies above n 341. The notion, as prosecution counsel submitted in closing address, that ‘such a powerful and successful woman’ could have been ‘forced to become a quivering jelly’ was dubious. See Weare, above n 344, 455.

³⁴⁵ *R v Pryce*, (Unreported, Crown Court, 7 March 2013), (Sweeney J), <<http://www.iclr.co.uk/marital-coercion-the-ruling-in-r-v-pryce/>>.

³⁴⁶ Stanley Yeo, ‘Coercing Wives into Crime’ (1992) 6(3) *Australian Journal of Family Law* 214, 215. See also VLRC (2004), above n 13, 122 [3.168]. One author raises the continued benefit of the defence for wives ‘under the patriarchal rule of the husband’ given the restrictions of the common law defence of duress. See Susan Edwards, ‘The “Straw Woman” at Law’s Precipice: An Unwilling Party’ in Alan Reed and Michael Bohlander (eds), *Participation in Crime: Domestic and Comparative Perspectives* (Routledge, 2013) 59, 64. See also Weare, above n 344, 455–456.

³⁴⁷ VLRC (2004), above n 13, 122 [3.168].

6.3.6 The existence and operation of this defence are problematic. It must be proved that the defendant is the legal wife of the man who coerced her. A civil, de facto or domestic partnership does not suffice. A husband cannot claim marital coercion and it is not open in a same sex marriage. The VLRC noted ‘that it is anomalous that the defence currently applies only to married women and not to women in de facto relationships’.³⁴⁸ There are obvious difficulties with the discriminatory operation of the defence, especially given the focus of SALRI’s current reference which includes discrimination on the basis of both gender and sexual orientation. As one commentator notes, this ‘rare and archaic defence is incompatible with gender equality’.³⁴⁹ The prosecution counsel, Mr Edis QC, aptly observed at Vicky Pryce’s trial, ‘[t]he idea that someone’s criminal liability depends on whether they are man or woman or within a marriage or long-term cohabitation is, to all modern sensibilities, absurd.’³⁵⁰

6.3.7 There has been ‘considerable opposition’ to the retention of the defence.³⁵¹ Sweeney J in *Pryce*³⁵² noted the defence is rarely raised³⁵³ and its abolition had been recommended on more than one occasion.³⁵⁴ As early as 1946, Viscount Simon in *DPP v Holmes*³⁵⁵ remarked, ‘we have left behind us the age when the wife’s subjection to her husband was regarded by the law as the basis of the marital elation.’³⁵⁶ The defence has been criticised as a ‘truly idiotic’³⁵⁷ law and is ‘widely regarded as a relic of a bygone age’.³⁵⁸ The offence was abolished in England on 13 May 2014.³⁵⁹

6.3.8 For completeness and consistency, it is logical that the recommendations of this Report relating to the explicit role of family violence and social framework evidence should apply to marital coercion. However, the continued existence and role of the defence of marital coercion gives rise to real concerns, notably the fact that it is confined to married woman. It might also be thought the defence of marital coercion is unnecessary and the issue of pressure from a domestic partner overbearing the will of another

³⁴⁸ Ibid 122 [3.168]. See, for example, *Brennan v Bass* (1984) 35 SASR 311.

³⁴⁹ Davies, above n 341.

³⁵⁰ Paul Peachey, ‘Pryce Guilty: Marital Coercion – a defence that faces major change’, *The Independent* (online), 8 March 2013, <<http://www.independent.co.uk/news/uk/crime/pryce-guilty-marital-coercion-a-defence-that-faces-major-change-8524739.html>>.

³⁵¹ Edwards, above n 346, 64.

³⁵² *R v Pryce*, (Unreported, Southwark Crown Court, 7 March 2013), (Sweeney J), <<http://www.iclr.co.uk/marital-coercion-the-ruling-in-r-v-pryce/>>.

³⁵³ See, for example, *R v Anne and John Darwin* [2009] EWCA Crim 860, where a married couple engaged in a fraudulent life insurance conspiracy and the husband staged his apparent death at sea in a boating accident. The wife’s defence of marital coercion was rejected as she was not coerced. At the time of *Darwin*, it was noted that the defence had only been raised in five reported cases in England since 1925. See Frances Gibbs, ‘Anne Darwin: “marital coercion” defence extremely rare’, *The Times* (online), 24 July 2008, <<http://www.thetimes.co.uk/tto/law/article2211720.ece>>. *R v Whelan* [1937] SASR 237; *Goddard v Osborne* (1978) 18 SASR 481 and *Brennan v Bass* (1984) 35 SASR 311 are the only reported South Australian examples that could be discovered. See also *R v Dempsey* [2000] VSC 527.

³⁵⁴ See, for example, Law Commission, *Reports on Defences of General Application*, Law Comm No 3, (1977) [3.1]–[3.9]; Joshua Rozenberg, ‘The Vicky Pryce case highlights why “marital coercion” should be thrown out’, *The Guardian*, 8 March 2013 (online), <<https://www.theguardian.com/commentisfree/2013/mar/07/vicky-pryce-marital-coercion-thrown-out>>.

³⁵⁵ [1946] AC 588.

³⁵⁶ Ibid 600.

³⁵⁷ *BBC News* (online), ‘Marital Coercion Defence “to be scrapped”’, 22 January 2014, <<http://www.bbc.com/news/uk-25852073>>.

³⁵⁸ Joshua Rozenberg, ‘Defence of marital coercion used by Vicky Pryce to be abolished’, *The Guardian* (online), 17 January 2014, <<https://www.theguardian.com/law/2014/jan/17/defence-marital-coercion-vicky-pryce-abolished>>.

³⁵⁹ *Anti-Social Behaviour, Crimes and Policing Act 2014* (UK) s 177.

is better dealt within the common law defence of duress, especially with the refinements to explicitly recognise evidence of family violence and social framework recommended in this Report.

4. For Further Review

The consideration of the problematic defence of marital coercion in s 328A of the *Criminal Law Consolidation Act 1935* (SA) (which is confined to a wife in a marriage) with a view to its retention, reform or repeal.

6.4 Killing for Preservation in an Abusive Domestic Relationship

6.4.1 SALRI notes that this Report has not considered the merits and operation of the Queensland partial defence of killing for preservation in an abusive domestic relationship set out in s 304B of the *Criminal Code 1899* (Qld). The defence was introduced as part of a broader package of reforms to address concerns relating to family violence in February 2010, following the publication and recommendations of the 2009 *Homicide in Abusive Relationships: A Report on Defences*.³⁶⁰ Where successfully argued, the defence reduces what would otherwise be murder to manslaughter. The justification for the new partial defence is well captured by Douglas, who explains:

In theory at least, what distinguishes this defence from existing defences of self-defence and provocation in Queensland is that the preservation defence does not rely on the accused person responding to a specific assault or imminent threat from the deceased person and there is no emphasis on the timeframe between the actions of the deceased and the killing by the accused person (Exp, notes, 2009: 9). In practice, however, judicial developments in Queensland self-defence law, accentuated subsequent to the reforms, suggest that the role of the preservation defence may be extremely limited. The reforms did not include a specific evidentiary provision.³⁶¹

6.4.2 The introduction of the new partial defence sought to address the well-established concerns surrounding the inadequacy of legal responses to persons (often women) who kill in response to prolonged family violence, including the restrictive nature of the complete defence of self-defence.³⁶²

6.4.3 In the five years since its introduction, the partial defence has been raised in only a small number of cases.³⁶³ The defence was first raised in *Falls*,³⁶⁴ a case in which the female defendant was subsequently acquitted of murder on the basis of self-defence.

6.4.4 The partial defence has received mixed appraisals, with several commentators cautioning the unintended consequences of creating new legal categories.³⁶⁵ Michelle Edgeley and Elena Marchetti have

³⁶⁰ Geraldine Mackenzie and Eric Colvin, *Homicide in Abusive Relationships: A Report on Defences* (6 July 2009). See also QLRC, above n 97, 500 Rec [21.4].

³⁶¹ Heather Douglas, 'A Consideration of the Merits of Specialised Homicide Offences and Defences for Battered Women' (2012) 45 *Australian and New Zealand Journal of Criminology* 367, 374, Citing Exp. Notes: Criminal Code (Abusive Domestic Relationship Defence and Another Matter) Amendment Bill 2009: Explanatory Notes (2009).

³⁶² See also above [9.1.1]–[9.1.17].

³⁶³ Crofts and Tyson, above n 294, 864.

³⁶⁴ For further details on the *Falls* case, see Elizabeth Sheehy, Julie Stubbs and Julia Tolmie, 'Securing Fair Outcomes for Battered Women charged with Homicide: Analysing Defence Lawyering in *R v Falls*' (2014) 38 *Melbourne University Law Review* 666; Douglas, above n 361, 374.

³⁶⁵ See, for example, Douglas, above n 361; Anthony Hopkins and Patricia Easteal, 'Walking in Her Shoes: Battered Women Who Kill in Victoria, Western Australia and Queensland' (2011) 35 *Alternative Law Journal* 132.

criticised the Queensland approach to reform.³⁶⁶ Describing it as ‘ineffective’,³⁶⁷ Edgeley and Marchetti argue the defence fails to address the gender bias inherent in the operation of the complete defence of self-defence, noting that the introduction of this abusive-specific partial defence further entrenches such gender bias in the operation of defences to homicide and may impede women’s access to the complete defence of self-defence. Other commentators have questioned the extent to which the partial defence will be used in practice, including Professor Heather Douglas whose analysis of case law noted an initial trend towards accessing the complete defence of self-defence as opposed to the new partial defence.³⁶⁸

5. For Further Review

The consideration of the operation of the Queensland defence of killing for preservation in an abusive domestic relationship and the extent to which its initial operation has achieved its aim of improving legal responses for persons who kill in response to prolonged family violence.

³⁶⁶ Michelle Edgely and Elena Marchetti, ‘Women who Kill their Abusers: How Queensland’s New Abusive Domestic Relationships Defence Continues to Ignore Reality’ (2011) 13 *Flinders Law Journal* 125, 125.

³⁶⁷ *Ibid.*

³⁶⁸ Douglas, above n 361.

PART 7 – Alternative Models: Provocation

7.1 England

7.1.1 The UK Supreme Court has observed that ‘the law relating to provocation is flawed to an extent beyond reform by the courts’.³⁶⁹ It is in this light that the British Parliament has made recent major reforms to abolish the common law defence of provocation in England and Wales and replace it with a new partial defence of ‘loss of self-control’. The English model is of significance.

7.1.2 The recent British legislative reforms were particularly designed to enhance the legal protection available in England and Wales to battered defendants. Whilst the partial defence of provocation had long been available under the English common law, the requirement of suddenness made it extremely difficult in practice for abused women to successfully raise provocation.³⁷⁰ In *R v Ahluwalia*,³⁷¹ for example, a defendant who set her abusive husband alight failed to raise provocation at trial as she was unable to point to a sudden and temporary loss of self-control. Instead, the defendant had to rely on diminished responsibility: a partial defence that has been criticised for its ‘mental-illness stigma’³⁷² (and is unavailable in South Australia).³⁷³ In *R v Thornton*,³⁷⁴ the court reached a similar result, affirming that, even if a defendant can establish that she was suffering from battered women’s syndrome (BWS) at the time of the killing, an element of suddenness had to be present to establish provocation.

7.1.3 In 2009, the British Parliament sought to address the gender bias inherent in the traditional law of provocation, by replacing provocation³⁷⁵ with a new partial defence of ‘loss of self-control’.³⁷⁶ The new partial defence seeks to better accommodate cases involving battered women, by removing the requirement of suddenness,³⁷⁷ and extending the defence to individuals who kill in response to a ‘fear of serious violence’.³⁷⁸ The defence does not apply where the defendant kills in response to sexual infidelity³⁷⁹ or in a ‘considered desire for revenge’.³⁸⁰

7.1.4 Whilst the removal of the requirement of suddenness has attracted praise in its application to battered defendants,³⁸¹ the need for a loss of self-control remains a core component of the new defence.³⁸²

³⁶⁹ *Attorney General for Jersey v Holley* [2005] 2 AC 580, 594 [27]. See also Law Commission of England and Wales, above n 48, [2.10].

³⁷⁰ Kesar Zaman, ‘Is the Defence of Loss of Control a “Better” Defence for Female Victims of Domestic Abuse Than Provocation?’ (2015) 1(1) *University of Bradford Student Law Journal* 1, 5. See further above [6.6.1]–[6.1.22].

³⁷¹ [1992] 4 All ER 889.

³⁷² Zaman above n 370, 7.

³⁷³ Mr Charles of the Aboriginal Legal Rights Movement and Mr Caldicott in their consultation with SALRI urged consideration of diminished responsibility as a substitute partial defence should provocation be abolished. See further below [11.1.1]–[11.1.7].

³⁷⁴ [1992] 1 All ER 306.

³⁷⁵ *Coroners and Justice Act 2009* (UK) c 1, s 56.

³⁷⁶ *Ibid* s 54.

³⁷⁷ *Ibid*.

³⁷⁸ *Ibid* s 55(3).

³⁷⁹ *Ibid* s 55(6)(c).

³⁸⁰ *Ibid* s 54(4).

³⁸¹ Amanda Clough, ‘Loss of Self-Control as a Defence: The Key to Replacing Provocation’ (2004) 74 *Journal of Criminal Law* 118, 123.

³⁸² *Coroners and Justice Act 2009* (UK) c 1, s 54(1)(a).

The retention of loss of self-control is problematic, as it arguably excludes a significant proportion of battered defendants from the protection of the defence.³⁸³ It is established that when a battered woman kills, she is more likely to use a weapon, or to strike when her abuser is unconscious.³⁸⁴ Whilst the killing might be preceded by an act of abuse, the risk to the defendant might not necessarily be fatal.³⁸⁵ When a woman kills in these circumstances, it is unlikely that she will be able to demonstrate the requisite ‘physical signs of outburst’ typically associated with a loss of control.³⁸⁶ This has sparked some concern in the UK that loss of self-control reflects a mere ‘rebranding’ under a new guise of provocation with all its previous problems (notably gender bias), rather than any substantial change in the operation of the law.³⁸⁷

7.1.5 Other commentators, in contrast, have suggested that the *Coroners and Justice Act 2009* (UK) went too far in rectifying the gendered operation of the law of provocation.³⁸⁸ McDonagh, for example, suggests that the legislative reforms have the potential to create a double standard, whereby female perpetrators of violence receive more lenient treatment than male perpetrators.³⁸⁹ Given that loss of self-control is a relatively new defence, it is too soon to determine whether these criticisms are valid.³⁹⁰ Thus, whilst it is generally accepted that the new model has improved the situation for battered women who kill their abusers, the overall effect of the reforms will only become apparent as a body of case law evolves.³⁹¹

7.1.6 The Law Society of South Australia has suggested that if it is ‘inevitable’ that its preferred option for the retention of the present law of provocation is not acceptable, then the English model of loss of control should be considered as an alternative.³⁹² It is significant that the English model has attracted criticism owing to its drafting and complexity.³⁹³ Lawyers and judges have described the new law as ‘an incredibly complicated piece of legislation’, even ‘a dog’s breakfast’.³⁹⁴

³⁸³ Kate Fitz-Gibbon, ‘Replacing Provocation in England and Wales: Examining the Partial Defence of Loss of Control’ (2013) 40 *Journal of Law and Society* 280, 291; Nicola Wake, ‘Battered Women, Startled Householders and Psychological Self-Defence: Anglo-Australian Perspectives’ (2013) 77 *Journal of Criminal Law* 433, 437, 456.

³⁸⁴ See, for example, VLRC (2004), above n 13, 62 [3.11]; Wake, above n 383, 456; Julia Tolmie, ‘Battered Defendants and the Criminal Defences to Murder – Lessons from Overseas’ (2002) 10 *Waikato Law Review* 91, 94; Bruce Robertson, ‘Battered Woman Syndrome: Expert Evidence in Action’ (1998) 9(2) *Otago Law Review* 277, 279.

³⁸⁵ Edwards, above n 53, 233, 240.

³⁸⁶ *Ibid* 224.

³⁸⁷ See, for example, Ellis Kewley, ‘Should the Loss of Control Defence be Maintained?’ (2015) 3 *North East Law Review* 55; Fitz-Gibbon, *Homicide Law Reform, Gender and the Provocation Defence*, above n 47, 183–187; Fitz-Gibbon, above n 383, 296–298.

³⁸⁸ Zaman, above n 370, 10; Clough, above n 381, 126.

³⁸⁹ Melanie McDonagh, ‘An Unjust, Feminist View of Murder’, *The Times* (online), 30 July 2008 <<http://www.thetimes.co.uk/tto/law/columnists/article2047464.ece>>; Fitz-Gibbon, above n 383, 288.

³⁹⁰ Zaman, above n 370, 11.

³⁹¹ *Ibid* 12. See also Horder and Fitz-Gibbon, above n 88.

³⁹² SA Legislative Review Committee, above 17, 39. See Law Society Submission dated 2 June 2015, Inquiry into the Partial Defence of Provocation’, <https://www.lawsocietysa.asn.au/pdf/Submissions/020615_Inquiry_into_the_Partial_Defence_of_Provocation.pdf>.

³⁹³ Fitz-Gibbon, *Homicide Law Reform, Gender and the Provocation Defence*, above n 47, 137–139, 145–148, 226–228.

³⁹⁴ *Ibid* 227. One view is the new law is ‘highly problematic’ and ‘may prove even worse’ than the previous common law model of provocation: Oliver Quick and Celia Wells, ‘Partial Reform of Partial Defences: Developments in England and Wales’ (2012) 45(3) *Australian & New Zealand Journal of Criminology* 337, 345–346. See also Fitz-Gibbon, above n 383, 299–302.

7.1.7 SALRI recognises the need for any new model to be simpler than the current overly complex law.³⁹⁵ For this reason, the English model may not be ideal.

7.1.8 SALRI notes that the English model, despite the Law Society’s qualified support, may not be suitable in a South Australian context and further examination is required. SALRI proposes to consider the English model and others in more detail in the second stage.

7.2 New South Wales

7.2.1 An option for South Australia is to retain the provocation defence, but reform it in an attempt to remove both the homosexual advance defence and other inappropriate features. An illustrative example is New South Wales, which has recently reformed its law of provocation to provide a more limited partial defence; that of ‘extreme provocation’.

7.2.2 On 13 June 2014, NSW enacted the *Crimes Amendment (Provocation) Act 2014* (NSW) which introduced the concept of ‘extreme provocation’. Under extreme provocation, for a charge of murder to be reduced to manslaughter, the provocative conduct must constitute a serious indictable offence.³⁹⁶ The catalyst for the NSW reform was the controversial case of *R v Singh*.³⁹⁷ Another consideration for the changes was the need for the defence to be accessible to women who may be provoked into killing their male abusers in a family violence context.³⁹⁸

7.2.3 The terms of reference of the NSW Select Committee on the Partial Defence of Provocation³⁹⁹ required ‘the Committee to consider whether the partial-defence should be retained, abolished, or whether the elements of the partial defence should be amended in light of proposals in other jurisdictions’.⁴⁰⁰ The Committee recognised the inherent gender bias of provocation⁴⁰¹ and its other criticisms but recommended that provocation should be retained to ‘allow for cases that have defensive elements but fall short of self-defence or excessive-self-defence’.⁴⁰² The Committee recommended that provocation be retained in a revised form of ‘gross provocation’.⁴⁰³

³⁹⁵ See further above [4.1.4]–[4.1.13].

³⁹⁶ *Crimes Act 1900* (SA) s 23(2)(b).

³⁹⁷ [2012] NSWSC 937 (7 June 2012). (The facts of *Singh* are set out above at [6.1.9]). In *Singh*, the defendant was successfully able to rely on provocation, after he killed his wife by slashing her throat with a box cutter. The defendant successfully argued at trial he was ‘provoked’ into killing his wife, after she told him that she never loved him, was in love with another man and would have him deported. See NSW Select Committee, above n 11, x.

³⁹⁸ NSW Select Committee, above n 11, 191 [9.5]; Women’s Electoral Lobby, Submission No 10 to *Select Committee on the Partial Defence of Provocation*, 7 August 2012, 1; Justice Action, Submission No 24 to *Select Committee on the Partial Defence of Provocation*, 10 August 2012, 2.

³⁹⁹ The Committee members were the Hon Reverend Frederick Nile (Christian Democratic Party, Chair), the Hon Trevor Khan (National Party), the Hon David Clarke (Liberal Party), Scot McDonald (Liberal Party), the Hon Adam Searle (Australian Labor Party), David Shoebridge (the Greens) and Helen Westwood (Australian Labor Party). The Committee delivered its final unanimous report on 23 April 2013, and had regard to 52 written submissions.

⁴⁰⁰ NSW Select Committee, above n 11, 2 [1.6].

⁴⁰¹ *Ibid* 45 [4.56]–[4.61]. See further above [6.1.1]–[6.1.22].

⁴⁰² *Ibid* 195 [9.30].

⁴⁰³ *Ibid*.

7.2.4 The NSW Attorney General, supported the Committee’s intention to retain the defence to assist victims of family violence, but formed the view that ‘extreme provocation’ was the best model to achieve that intent.⁴⁰⁴ This model of extreme provocation is now confirmed in s 23 of the *Crimes Act 1900* (NSW).⁴⁰⁵

7.2.5 The NSW changes narrowed the provocation defence by only making it applicable in circumstances where the provocative conduct of the deceased was itself a ‘serious indictable offence’ (an offence carrying more than five years’ imprisonment).⁴⁰⁶ Further, the new NSW model specifically excludes the homosexual advance defence with the provision, ‘Conduct of the deceased does not constitute extreme provocation if the conduct was only a non-violent sexual advance to the accused or the accused incited the conduct in order to provide an excuse to use violence against the deceased’.⁴⁰⁷

7.2.6 In relation to the question of persons who kill those who abuse them, the NSW Parliament intended that the new model of extreme provocation would also help to remedy the gender bias of the common law model, which requires that the loss of control and killing occur immediately or very soon after the provocative conduct.⁴⁰⁸ Section 23(4) of the *Crimes Act 1900* (NSW) provides that ‘conduct of the deceased may constitute extreme provocation even if the conduct did not occur immediately before the act causing death’.

7.2.7 SALRI notes the aspect of the NSW model that prevents any non-violent sexual advance from amounting to extreme provocation — the NSW model avoids characterising the exclusion as being limited to non-violent homosexual advances. SALRI considers (as did all its consultees) that it is preferable that in this regard, the law applies equally to all types of non-violent sexual advances.

7.2.8 The NSW model also avoids assuming, in contrast to the traditional law of provocation, the sexuality of the person making the advance and the person subject to the advance, just because of the biological sex of both parties. This development is appropriate because the law ought to recognise that human sexuality is broader than the simple duality of homosexual or heterosexual, but encompasses bisexual, queer, intersex, and transgender sexuality.⁴⁰⁹

7.2.9 However, the NSW reform, whilst an improvement on the common law in this context, is open to criticism in several important respects. First, the NSW model may not completely close the door to the problematic gay panic defence.⁴¹⁰ This is because rarely would the allegedly provocative conduct consist only of the sexual advance. It may well be linked with other conduct that may undermine the effectiveness of the exclusionary provision. The NSW model which prevents a non-violent sexual advance from amounting to extreme provocation may not apply in a factual scenario where the non-violent sexual advance is accompanied by provocative conduct that amounts to a serious indictable offence such as certain threats or assaults (although an indecent assault in itself does not amount to a serious indictable offence). It would seem that, in such circumstances under the NSW model, extreme provocation can be

⁴⁰⁴ NSW Department of Attorney General and Justice, *Reform of the Partial Defence of Provocation* (Discussion Paper, 2013) 2–3.

⁴⁰⁵ See Thomas Crofts and Arlie Loughnan, ‘Provocation, NSW Style: Reform of the Defence of Provocation in NSW’ [2014] *Criminal Law Review* 109, for discussion of the differences between the Committee’s model and that in s 23.

⁴⁰⁶ *Crimes Act 1900* (NSW) s 23(2)(d). A ‘serious indictable offence’ in NSW is an offence carrying more than five years’ imprisonment (*Crimes Act 1900* (NSW) s 4). In South Australia, it is termed as a ‘major indictable offence’.

⁴⁰⁷ *Crimes Act 1900* (NSW) 23(3). See also below Appendix 4, 117.

⁴⁰⁸ Fitz-Gibbon, *Homicide Law Reform, Gender and the Provocation Defence*, above n 47, 80–81.

⁴⁰⁹ This theme was noted to SALRI in its consultation by LGBTIQ groups.

⁴¹⁰ See also above [5.5.1]–[5.5.14].

raised as a defence and the non-violent sexual advance may still be considered as part of the wider factual matrix that forms the alleged provocative conduct.⁴¹¹ It is therefore unclear if a non-violent sexual advance would be excluded from consideration in such circumstances.

7.2.10 Secondly, the NSW model arguably does not fully address the gender bias of the current law and sufficiently cater for victims of family violence who kill.⁴¹² While it does away with the need for the provocative conduct and the lethal response to be proximate in time, it has no explicit focus in its language on family violence scenarios. Further, removing the need for immediacy of retaliation to provocative conduct substantially changes the nature of provocation from the common law model, which requires a near immediate loss of control. Given the recent nature of the NSW reforms, their impact in practice is yet to emerge in case law.

7.2.11 Thirdly, the NSW model of ‘extreme provocation’ is complex. If a new, potentially more complex statutory model is implemented in South Australia, there is a real risk of uncertainty in its application. Problems may arise such as inadequate judicial directions to juries regarding the resolution of the serious indictable offence, the partial defence not being correctly applied by juries and consequential appeals and retrials. The prospect under the NSW model of two effective trials within the one trial, one to resolve the commission of a ‘serious indictable offence’ and one to resolve whether murder or manslaughter has been made, raised real concerns to Mr Caldicott and other experienced lawyers in SALRI’s consultation. It was emphasised to SALRI that the NSW model is likely to result in even further complexity and uncertainty than under the present law. It was pointed out to SALRI that, when a criticism of the current law of provocation is its complexity and difficulty in application,⁴¹³ it is problematic to introduce a potentially even more confusing and complex model of provocation as with the NSW model.⁴¹⁴

7.2.12 There are further concerns with the NSW model. To establish extreme provocation, the provocative conduct must have both caused the defendant⁴¹⁵ *and* an ordinary person⁴¹⁶ to lose self-control. This deviation from the previous test, which necessitated an assessment from the perspective of an ordinary person in the position of the accused, has been criticised for focusing too much on objective considerations.⁴¹⁷ The subjective experiences of family violence are seldom understood by ordinary people,⁴¹⁸ and hence this test may well omit important considerations from the trial.⁴¹⁹

⁴¹¹ See also above [5.6.1]–[5.6.10].

⁴¹² See further above [6.1.1]–[6.1.22].

⁴¹³ See further above [4.1.4]–[4.1.13].

⁴¹⁴ Similarly, the English model of ‘loss of control’ to replace the common law model of provocation appears to be overly complex. See further above [7.1.1]–[7.1.8].

⁴¹⁵ *Crimes Act 1900* (NSW) s 2(c).

⁴¹⁶ *Ibid* s 2(d).

⁴¹⁷ Letter from the Law Society of New South Wales to the NSW Department of Attorney General and Justice, 18 November 2013, 2; Legal Aid NSW Submission to NSW Department of Attorney General and Justice, *Response to Exposure Draft Bill to the Crimes Amendment (Provocation) Bill 2013*, November 2013, 2-3; Graeme Cross, to Criminal Law Review, NSW Department of Attorney-General and Justice, 15 November 2013, 3.

⁴¹⁸ Women’s Legal Services NSW, Submission to NSW Department of Attorney General and Justice, *Response to Exposure Draft Bill to the Crimes Amendment (Provocation) Bill 2013*, 14 November 2013, 6.

⁴¹⁹ Julie Stubbs, to Criminal Law Review, NSW Department of Attorney-General and Justice, 20 November 2013, 8.

7.2.13 Retaining the requirement for a loss of self-control, has also been criticised, especially as it may fail to accommodate victims of family violence who experience a slow-burn effect and/or who kill in circumstances where their abuser does not present an immediate threat.⁴²⁰

7.2.14 Critics of extreme provocation have argued that provocation ought to have been abolished altogether, as even revised models will retain provocation's inherent flaws.⁴²¹ It has also been noted that victims of family violence who kill their abuser are likely to be better assisted by the complete and partial defences of self-defence and excessive self-defence rather than any revised model of provocation.⁴²²

7.2.15 SALRI notes that the NSW model, despite its advantages over the present law, may not be suitable in a South Australian context⁴²³ and further examination is required. SALRI proposes to consider the NSW model and others in more detail in the second stage.

7.3 NSW Model: Provocative conduct as a serious indictable offence

7.3.1 The NSW model of 'extreme provocation' is an illustrative example for South Australia. However, SALRI's consultation and research to date has identified potential problems with the NSW approach.⁴²⁴

7.3.2 The NSW model requires the provocative conduct of the deceased to amount to a serious indictable offence. This has been highlighted to SALRI as a particular concern. Commentators have expressed concern about requiring the provocative conduct to be a serious indictable offence as a threshold test.⁴²⁵ For the NSW Attorney-General, this was to achieve the policy intent of restricting the availability of the defence, while retaining it for victims of domestic violence as 'ongoing domestic violence will generally involve serious indictable offences' both physical and psychological.⁴²⁶ SALRI also notes that the modern concept of family or domestic violence extends to financial or emotional abuse.⁴²⁷

7.3.3 The principal concern, however, with this threshold is that it has 'restricted [provocation] to the point of redundancy'.⁴²⁸ Many victims of family violence who are subjected to multiple and persistent acts of abuse, which may not necessarily constitute serious indictable offences, may well fail to meet that

⁴²⁰ Graeme Cross, to Criminal Law Review, NSW Department of Attorney-General and Justice, 15 November 2013, 3; See Tarrant, above n 285, 194, for discussion on the 'slow burn effect'; New South Wales, *Parliamentary Debates*, Legislative Council, 25 March 2014, 27690 (David Shoebridge).

⁴²¹ Fitz-Gibbon, (2017, forthcoming) above n 83; Kate Fitz-Gibbon, to Criminal Law Review, NSW Department of Attorney General and Justice, 15 November 2013, 7.

⁴²² Moshides, above n 38, iii; Redfern Legal Centre, Submission No 42 to Select Committee on the Partial Defence of Provocation, 24 August 2012, 4. See also below, Appendix 1, 105 and Appendix 2, 112.

⁴²³ See further below [7.3.1]–[7.3.11].

⁴²⁴ See above [7.2.9]–[7.2.14].

⁴²⁵ Kate Fitz-Gibbon, to Criminal Law Review, NSW Department of Attorney-General and Justice, 15 November 2013, 3; Julie Stubbs, to Criminal Law Review, NSW Department of Attorney-General and Justice, 20 November 2013, 3; Graeme Cross, to Criminal Law Review, NSW Department of Attorney-General and Justice, 15 November 2013, 5.

⁴²⁶ NSW Department of Attorney General and Justice, above n 404, 3.

⁴²⁷ See the definition of 'family violence' in s 8 of the *Intervention Orders (Prevention of Abuse) Act 2009* (SA). See below Appendix 6, 123.

⁴²⁸ See below Appendix 1, 104 and Appendix 2, 111. A study completed by Kate Fitz-Gibbon reveals that the majority of cases in the period January 2005 to June 2013 where the defendant successfully relied on provocation, would not be able to suffice this threshold and hence extreme provocation under the NSW model: Dr Kate Fitz-Gibbon, to Criminal Law Review, NSW Department of Attorney-General and Justice, 15 November 2013, 2. See also Fitz-Gibbon, (2017, forthcoming) above n 83.

threshold.⁴²⁹ For example, typical family violence offences such as contravention of an intervention order,⁴³⁰ affray,⁴³¹ stalking,⁴³² various types of assault⁴³³ and even assault causing harm⁴³⁴ would not amount to a major indictable offence in South Australia. To eliminate such a wide range of significant criminality from satisfying the threshold for extreme provocation to apply greatly restricts the purpose and utility of such a partial defence. The NSW model also fails to have regard to such forms of indirect family violence such as emotional or financial abuse that ordinarily will not amount to an indictable offence.

7.3.4 Family violence also takes the form of a cumulative series of offences that have typically failed to be criminalised by the criminal justice system.⁴³⁵ Related to this, a defendant may also need, under the NSW model, to prove that the victim's conduct did indeed constitute a 'serious indictable offence' (which raises its own difficulties),⁴³⁶ such that 'a trial within a trial' may well have to occur.⁴³⁷

7.3.5 The common law position is already confusing⁴³⁸ and the NSW requirement that a defendant may need to prove that they themselves were the direct victim of a serious indictable offence and not some other less serious act brings only further complication to the law.⁴³⁹ This is likely, as was pointed out to SALRI in its consultation, to prove neither simple nor straightforward and may lead to further confusion and complexity for the jury at trial. The prospect under the NSW model of two effective trials, one to resolve the commission of a serious indictable offence and one to resolve whether murder or manslaughter has been made, may well complicate proceedings.⁴⁴⁰

⁴²⁹ Julie Stubbs, to Criminal Law Review, NSW Department of Attorney-General and Justice, 20 November 2013, 3; Dr Kate Fitz-Gibbon, to Criminal Law Review, NSW Department of Attorney-General and Justice, 15 November 2013, 3 (Dr Fitz-Gibbon also highlights that if a person, and particularly a victim of domestic abuse, is a victim of a major indictable offence then they should be able to access a full defence); Letter from the Law Society of New South Wales to the NSW Department of Attorney General and Justice, 18 November 2013, 1.

⁴³⁰ *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 31.

⁴³¹ *Criminal Law Consolidation Act 1935* s 83C.

⁴³² *Ibid* s 19AA.

⁴³³ *Ibid* s 20.

⁴³⁴ *Ibid* s 20(4).

⁴³⁵ Women's Legal Services NSW, Submission to NSW Department of Attorney General and Justice, Response to Exposure Draft Bill to the Crimes Amendment (Provocation) Bill 2013, 14 November 2013, 3; Legal Aid NSW Submission to NSW Department of Attorney General and Justice, Response to Exposure Draft Bill to the Crimes Amendment (Provocation) Bill 2013, November 2013, 2. The Commission also did not advocate for such a threshold test on the grounds that it 'did not recognise the true nature of abusive relationships'; NSW Select Committee, above n 11, [6.28]–[6.35].

⁴³⁶ There are often no witnesses to the family violence bar the victim. Victims of family violence are also often too scared to report an act of their abuser. See Women's Legal Services NSW, Submission to NSW Department of Attorney General and Justice, Response to Exposure Draft Bill to the Crimes Amendment (Provocation) Bill 2013, 14 November 2013, 4; New South Wales, Parliamentary Debates, Legislative Council, 25 March 2014, 27690 (David Shoebriidge).

⁴³⁷ Julie Stubbs, to Criminal Law Review, NSW Department of Attorney-General and Justice, 20 November 2013, 5; Women's Legal Services NSW, Submission to NSW Department of Attorney General and Justice, Response to Exposure Draft Bill to the Crimes Amendment (Provocation) Bill 2013, 14 November 2013, 4. See also below Appendix 1, 105 and Appendix 2, 111.

⁴³⁸ James Moshides, Submission No 50 to Select Committee on the Partial Defence of Provocation, 8 August 2012, 3; *R v Mankotia* (2001) 120 A Crim R 492, 495 [18]–[19].

⁴³⁹ Julie Stubbs, to Criminal Law Review, NSW Department of Attorney-General and Justice, 20 November 2013, 3.

⁴⁴⁰ This theme was strongly expressed to SALRI in its consultation. See below Appendix 1, 105 and Appendix 2, 111.

7.3.6 In a similar vein, where an exclusionary model exists, the trier of fact may still need to determine what act constituted the provocative conduct — the excluded conduct or some other conduct.⁴⁴¹ This issue is exemplified by the English case of *R v Clinton*.⁴⁴²

7.3.7 SALRI was initially attracted to the NSW model. It is a significant improvement over the current common law model. It has three distinct benefits. First, ‘extreme provocation’ cannot be constituted by conduct that is only a non-violent sexual advance.⁴⁴³ This removes (or at least seeks to remove) the offensive gay panic aspect of provocation. Secondly, the NSW model also purports to provide for victims of family violence in removing the need for immediacy of the act done in response to the provocation.⁴⁴⁴ Thirdly, by confining ‘extreme provocation’ to a serious indictable offence (that is major indictable offence in South Australia), slights as in controversial cases such as *Singh* and *Ramage* would be unable to amount to provocation.

7.3.8 However, on further scrutiny, there are major concerns with the NSW model. It received little support during SALRI’s consultation. All attendees at the two roundtable consultation sessions viewed the NSW model as too restrictive and/or overly complex.⁴⁴⁵

7.3.9 It was noted that while the NSW model offers initial appeal for the reasons noted above, it is also encumbered by drawbacks. It was noted that the NSW approach heavily restricts provocation and renders it an inflexible defence, requiring as it does under s 23(2)(b) that the provocative conduct itself constitutes a serious indictable offence. Concerns were expressed that this requirement may restrict the defence to the point of redundancy.⁴⁴⁶ It was noted victims of family violence who kill their abusers may be unable to establish the commission of a serious indictable (as opposed to some lesser) offence by their abuser. A retrospective study undertaken by one participant in SALRI’s roundtables highlighted that the majority of cases in which the partial defence of provocation was successfully raised in NSW in the ten years prior to the changes would be excluded from the remit of the new model of ‘extreme provocation’. Roundtable participants believed that if one of the main justifications for retaining a partial defence of provocation is to offer an accessible avenue away from murder for persons who kill in response to prolonged family violence, then the NSW model will likely present major barriers for such defendants.

7.3.10 The extreme provocation model was also criticised by roundtable participants as unclear — if extreme provocation cannot be argued when the conduct was *only* a non-violent sexual advance, this potentially leaves the door open for a homosexual advance argument to be advanced if the provocative conduct was a non-violent sexual advance combined with some other offensive conduct amounting to a serious indictable offence.

7.3.11 SALRI considers that, although the NSW model has some benefits at face value, it has major problems of both policy and practice. SALRI notes that the NSW model may not be suitable in a South

⁴⁴¹ See below Appendix 2, 111.

⁴⁴² [2012] 3 WLR 515. In *Clinton*, a husband killed his wife after she had confessed to infidelity and taunted him about suicide. At the time, England had enacted the ‘partial defence of loss of self-control’ to replace provocation. This was likewise an exclusionary model, which explicitly excluded infidelity from being a ‘trigger’ to murder. However, on appeal, the court determined that the infidelity trigger could not be considered in isolation, where there are other potential triggers. See also NSW Select Committee, above n 11, 107–109 [6.88]–[6.100]. See further above [3.7.15]–[3.7.23].

⁴⁴³ Section 23(3)(a) *Crimes Act 1900* (NSW).

⁴⁴⁴ *Ibid* s 23(4).

⁴⁴⁵ See below Appendix 1, 105–105 and Appendix 2, 111–112.

⁴⁴⁶ See below Appendix 1, 104 and Appendix 2, 111. See also Fitz-Gibbon, (2017, forthcoming) above n 83.

Australian context and further examination is required. SALRI proposes to consider the NSW model and others in the second stage.

6. For Further Review

The further consideration of such alternative models to abolishing provocation as the NSW model of ‘extreme provocation’ as set out in s 23 of the *Crimes Act 1900* (NSW) and ‘loss of control’ in England as set out in s 54 of the *Coroners and Justice Act 2009* (UK).

7.4 Excluding a Non-Violent Sexual Advance as Provocation

7.4.1 The model of excluding a non-violent homosexual advance or any non-violent sexual advance from amounting to provocation has been employed in the ACT, the Northern Territory and NSW and is now incorporated in Queensland in the Act passed on 21 March 2017.⁴⁴⁷

7.4.2 The new Queensland model provides that a non-violent sexual advance cannot amount to provocation unless it is of an ‘exceptional’ character. SALRI notes that, although the new Queensland provision is an important legislative expression of non-discrimination, it still raises problems. The difficulty in separating a non-violent sexual advance from its likely wider factual matrix remains. The Queensland model also does not completely close the door to the problematic gay panic aspect of provocation if the non-violent sexual advance from the deceased is of an ‘exceptional’ character. Just what would separate an ‘exceptional’ non-violent sexual advance from an unexceptionable non-violent sexual advance is unclear. SALRI notes the comments of the Queensland Attorney-General that no examples are provided of what circumstances might fall within the definition of an ‘exceptional character’. The Attorney-General explained that it ‘will be a matter for the trial judge to assess on a case-by-case basis. ... This in no way is intended to limit the circumstances of an exceptional character to which consideration may be had.’⁴⁴⁸

7.4.3 SALRI agrees that the current law of provocation in South Australia needs reform to make sure, at the least, that any non-violent sexual advance (not confined to a gay sexual advance) should not be capable of amounting to provocation. However, as previously discussed,⁴⁴⁹ although such a provision will serve as an important legislative statement of non-discriminatory intention, SALRI considers that its practical value will be strictly limited, if not illusory. SALRI does not propose any model confined to excluding a non-violent sexual advance from the ambit of provocation. Wider reform is necessary.

⁴⁴⁷ See also the Criminal Law Consolidation (Provocation) Amendment Bill 2013 introduced into the South Australian Legislative Council by the Hon Tammy Franks South Australia, *Parliamentary Debates*, Legislative Council, 1 May 2013, 3804–3808 (Tammy Franks).

⁴⁴⁸ Queensland, *Parliamentary Debates*, Legislative Assembly, 30 November 2016, 4698. See also Queensland, *Parliamentary Debates*, Legislative Assembly, 21 March 2017, 602–603.

⁴⁴⁹ See above [5.6.1]–[5.6.10].

PART 8 – Issue of Sentence

8.1 Issue for the Court and ‘Labels’

8.1.1 A strong, though not universal, view presented to SALRI during its consultation to date is that provocation is inherently flawed and should be abolished and the issue of any provocative conduct from the deceased should be left to the court to address in mitigation on sentence.⁴⁵⁰ The argument is based on the fact that as provocation is dealt with purely as a sentencing factor in all other crimes and sufficient flexibility in sentencing practices should provide adequate recognition of differing levels of culpability.⁴⁵¹

8.1.2 Various law reform agencies have expressed this view. The Model Criminal Code Officers’ Committee suggested:

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.⁴⁵²

8.1.3 The VLRC expressed a similar view:

Generally the label ‘murder’ applies to those who kill intentionally or who intentionally cause serious injury which results in death, while the label ‘manslaughter’ covers unintentional killings. The partial defence of provocation is the main exception to this principle. Our view is that where the accused has an intention to kill or to cause serious injury, the accused should be labelled a murderer. The fact that a person kills because they have lost self-control (as in the case of provocation) or because they are suffering from a mental condition such as depression, which does not amount to a mental impairment, is not sufficient to distinguish them from other intentional killers.⁴⁵³

8.1.4 The VLRC accordingly recommended that ‘the partial defence of provocation should be abolished [and] relevant circumstances of the offence, including provocation, should be taken into account at sentencing as they currently are for other offences.’⁴⁵⁴

⁴⁵⁰ There is a division of opinion in SALRI’s consultation to date about the abolition of provocation in South Australia. Many of the participants in the roundtable meetings favoured the abolition of the partial defence of provocation, with some members expressing strong support for this option. Participants criticised the homosexual advance defence as being archaic, outdated, offensive and liable to encourage victim blaming. Participants also noted that the operation of the provocation defence was problematic in other respects, such as its gender bias. There was support for provocation being wholly abolished, as participants considered that reform of the homosexual advance aspect of the defence alone could fail to remove the discriminatory aspects of the defence (whether in terms of sexual orientation or gender) in practice. Many participants opposed ‘tinkering’ or refinement of the defence. In contrast, some roundtable participants did not support abolition of the provocation defence on the basis that it could lead to a situation of unfairness where any new statutory law might not be as flexible as the current common law. South Australia retains a general mandatory minimum sentence for murder. If the defence were abolished, and if a South Australian court heard a murder case involving mitigating circumstances of a nature that would otherwise give rise to a provocation defence, the court should possess sufficiently flexible sentencing options, so judges may adequately take into account any mitigating circumstances on sentence. See below Appendix 1, 101-102 and Appendix 2, 108.

⁴⁵¹ See, for example, Horder, above n 312, 157; Model Criminal Code Officers’ Committee, above n 126, 107; NZLC, above n 54, 13, 77 [183]; VLRC (2004), above n 13, 55–56 [2.92]–[2.94], 57 [2.100], 58 Rec 1; Tasmania, *Parliamentary Debates*, House of Assembly, 20 March 2003, 60 (Judy Jackson, Attorney General).

⁴⁵² Model Criminal Code Officers’ Committee, above n 126, 105.

⁴⁵³ VLRC (2004), above n 13, 9 [1.21].

⁴⁵⁴ *Ibid* 58 Rec 1.

8.1.5 The LRCWA reached a similar conclusion.⁴⁵⁵ The Commission did not consider that ‘the label of murder is unfair or misleading for a provoked killing’ and instead ‘adopted the approach that issues affecting culpability for intentional killings should be dealt with in sentencing’ as for all other offences.⁴⁵⁶ The Commission expressed its belief that the usual sentencing process is ‘uniquely suited to identifying those cases of provocation that call for leniency and those that do not’ in light of the flexibility of the sentencing process and that it ‘is well accustomed to taking into account both aggravating and mitigating factors.’⁴⁵⁷

8.1.6 The contrary argument presented to both SALRI and other law reform bodies is that the partial defence allows for suitable recognition of an offender’s lesser culpability.⁴⁵⁸ Mr Caldicott noted to SALRI that offenders should not be labelled as murderers unless their conduct truly deserves that label.⁴⁵⁹ The NSWLRC similarly asserted that provoked killings ‘committed as a result of a loss of self-control, do not fall within the worst category of unlawful homicide, and therefore should not be classified as “murder”.’⁴⁶⁰ The Law Society of South Australia argued to the South Australian Legislative Review Committee that it may be ‘unfair and unjust’ to label an offender as guilty of murder where they have acted under provocation and there is an ‘infinite’ number of situations where the culpability of the offender is viewed as less than murder.⁴⁶¹ There is thus benefit it is asserted to retain the partial defence.

8.1.7 It is argued that, to abolish the partial defence in favour of dealing with provocation at sentencing, fails to acknowledge the importance of offence labels in distinguishing between the differing levels of culpability of offenders who commit manslaughter as opposed to murder.⁴⁶² Associate Professor Crofts explained to the NSW Select Committee of the importance of labelling in the criminal law: ‘Labels are incredibly important in criminal law. Criminal law is stigmatising. If we think a person deserves some sort of reduced sentence because they are less culpable, that should be reflected in what they are called.’⁴⁶³

8.1.8 However, the NSW Director of Public Prosecutions, Mr Babb QC, disagreed, arguing that where an offender intentionally kills in circumstances where self-defence is not available, the offence is appropriately dealt with as murder and not manslaughter.⁴⁶⁴ Mr Babb explained how, in his view, provocation is essentially a factor that may impact upon the culpability of an offender, and such factors

⁴⁵⁵ LRCWA, above n 141, 221–222.

⁴⁵⁶ *Ibid* 218.

⁴⁵⁷ *Ibid* 220–221.

⁴⁵⁸ See, for example, Crofts and Tyson, above n 294, 873–874; NSW Select Committee, above n 11, 68 [5.8], 69 [5.10]–[5.11], [5.12]–[5.13].

⁴⁵⁹ See also Law Society submission to the Hon Tammy Franks dated 26 June 2013, [7]–[9], <https://www.lawsocietysa.asn.au/submissions/130626_Abolition_of_the_Defence_of_Provocation_in_South_Australia.pdf>; Law Society of South Australia submission 2 June 2015 to Inquiry into the Partial Defence of Provocation, 1–2, <https://www.lawsocietysa.asn.au/pdf/Submissions/020615_Inquiry_into_the_Partial_Defence_of_Provocation.pdf>.

⁴⁶⁰ NSWLRC, above n 10, 26 [2.36].

⁴⁶¹ SA Legislative Review Committee, above n 17, 37 [6.2.6].

⁴⁶² See, for example, Crofts and Loughnan, above n 130, 27–30, 41; NSW Select Committee, above n 11, 69 [5.10]; SA Legislative Review Committee, above n 17, 35–36 [6.2.4]; Crofts and Tyson, above n 294, 873–874.

⁴⁶³ Associate Professor Thomas Crofts, University of Sydney Law School, Evidence, 29 August 2012, 80, quoted by NSW Select Committee, above n 11, 69 [5.11]. See also SA Legislative Review Committee, above n 17, 35–36 [6.2.4].

⁴⁶⁴ NSW Select Committee, above n 11, 69 [5.12].

are appropriately considered by the sentencing judge (as they are in sentencing for all offences other than murder).⁴⁶⁵

8.1.9 New South Wales has a regime of standard minimum non-parole periods under the *Crimes (Sentencing Procedure) Act 1999*. The NSW Select Committee noted that a number of participants to its Inquiry felt that the NSW sentencing legislation was sufficiently flexible to reflect mitigating factors. But the Select Committee was concerned that simply moving consideration of provocation to sentencing may result in injustices, particularly for victims of prolonged family violence who kill their violent abusers.⁴⁶⁶ The Committee also considered the issue of appropriate labelling and accepted the view put by Professor Crofts and others that there is an appropriately different level of stigma and moral opprobrium attached to the offence of ‘murder’, as opposed to manslaughter.⁴⁶⁷ The Committee was concerned that if the partial defence of provocation were abolished and that provocative conduct was to be considered only as a sentencing factor, there is a risk that some offenders with arguably a ‘lesser’ level of moral culpability would be convicted of murder and would consequently carry that stigma with them, even in the event that a ‘lenient’ sentence were imposed.⁴⁶⁸

8.1.10 SALRI expresses no final view at this stage on the issue of labelling and sentence. SALRI considers that it is closely linked with the vital question of mandatory sentencing for murder and the need to ensure that there is sufficient flexibility in sentencing for the offence of murder.

8.2 Interaction with Mandatory Sentencing

8.2.1 The general mandatory minimum sentence of 20 years imprisonment in South Australia for murder is material to the rationale and retention of the partial defence of provocation. It is widely (though not universally)⁴⁶⁹ accepted that provocation retains significance to allow flexibility in sentencing in a regime where the offence of murder attracts a mandatory sentence. Various Law Reform Commissions have studied the partial defence of provocation and have concluded that where the sentence for murder is mandatory life imprisonment, the defence should be retained.⁴⁷⁰ The South Australian Legislative Review Committee took a similar view and in 2014 recommended that ‘if reform of the provocation defence is to be pursued in future, such reform should only take place in conjunction with a wholesale review of any mandatory sentencing provisions that may also apply to persons convicted of murder.’⁴⁷¹ Jurisdictions such

⁴⁶⁵ Ibid 69 [5.13]. The South Australian DPP, Adam Kimber SC, similarly told the SA Legislative Review Committee there were ‘very good arguments for getting rid of provocation’, noting ‘it often gets left in circumstances, in my opinion, where what you’re really talking about is that it’s just a motive for the killing that should be taken into account in sentencing.’ See ‘Gay Rights Groups want “Gay Panic” Murder Defence to be Abolished in South Australia’, *The Advertiser* (online), 25 June 2016, <<http://www.adelaidenow.com.au/news/south-australia/gay-rights-groups-want-gay-panic-murder-defence-to-be-abolished-in-south-australia/news-story/f561e86f121d2fc039e79316a2ec56e4>>.

⁴⁶⁶ NSW Select Committee, above n 11, 73 [5.29].

⁴⁶⁷ Ibid 73 [5.30].

⁴⁶⁸ Ibid 73 [5.31].

⁴⁶⁹ See, for example, Hemming, above n 12, 2–3, 26, 43–44.

⁴⁷⁰ See, for example, QLRC, above n 97, 474 [21.48]–[21.49] ([G]iven the constraint of the Government’s stated intention to make no change to the existing penalty of mandatory life imprisonment for murder, the Commission recommend that the partial defence of provocation to murder contained in s 304 *Criminal Code* (Qld) remain, but recommends amendments to it’: at 500 Rec [[21.1]); Law Commission of England and Wales, above n 48; LRCWA, above n 141, 218–219.

⁴⁷¹ SA Legislative Review Committee, above n 17, 44.

as Victoria, Western Australia and Tasmania that have abolished provocation do not have a mandatory life sentence for murder.

8.2.2 Section 32A of the *Criminal Law (Sentencing) Act 1988* (SA) allows a court, if the offence is at the lower end of objective seriousness and ‘special reasons’ exist, to avoid the general mandatory 20 year minimum sentence for murder.⁴⁷² Special reasons include where ‘the offence was committed in circumstances in which the victim’s conduct or condition substantially mitigated the offender’s conduct’. In some circumstances, this expression clearly could apply to provocative conduct from the deceased.⁴⁷³

8.2.3 The issue of mandatory sentencing is now under consideration by the South Australia Sentencing Advisory Council.⁴⁷⁴ The role and operation of the mandatory sentence for murder in South Australia is beyond the remit of SALRI’s current review. It is a contentious area. The South Australian Legislative Review Committee observed that ‘the appropriateness or otherwise of mandatory sentencing has been the subject, in itself, of a significant body of academic work’ and the Committee refrained from any recommendation for sentencing in respect of murder.⁴⁷⁵

8.2.4 SALRI offers no comments at this stage on the role and operation of mandatory sentencing (as with the South Australian Legislative Review Committee). It considers that any suggestion to abolish provocation must consider whether under the current law or with any revised model (noting whatever may follow any review of the Sentencing Advisory Council), a court possesses sufficient flexibility to sentence an offender for murder to fairly reflect the culpability of the offender, especially genuinely provocative conduct by the deceased such as in such cases as *DPP v Camplin*⁴⁷⁶ and *R v Butler*.⁴⁷⁷

⁴⁷² 32A—Mandatory minimum non-parole periods and proportionality

- (1) If a mandatory minimum non-parole period is prescribed in respect of an offence, the period prescribed represents the non-parole period for an offence at the lower end of the range of objective seriousness for offences to which the mandatory minimum non-parole period applies.
- (2) In fixing a non-parole period in respect of an offence for which a mandatory minimum non-parole period is prescribed, the court may—
 - (a) if satisfied that a non-parole period that is longer than the prescribed period is warranted because of any objective or subjective factors affecting the relative seriousness of the offence, fix such longer non-parole period as it thinks fit; or
 - (b) if satisfied that special reasons exist for fixing a non-parole period that is shorter than the prescribed period, fix such shorter non-parole period as it thinks fit.
- (3) In deciding whether special reasons exist for the purposes of subsection (2)(b), the court must have regard to the following matters and only those matters:
 - (a) the offence was committed in circumstances in which the victim's conduct or condition substantially mitigated the offender’s conduct.

⁴⁷³ *R v Narayan* [2011] SASCFC 61, [46]–[48]; *R v Li* [2016] SASCFC 152, [28], [37]–[38] (Stanley J), [50]–[54], [61]–[74], [123]–[126] (Lovell J). The South Australian Legislative Review Committee acknowledged this point but noted the weight of the submissions that it had received ‘indicates to the Committee that mandatory sentencing for murder remains a matter of concern and that a high level of caution must be exercised when considering any reform of the provocation defence: SA Legislative Review Committee, above n 17, 35 [6.2.3]. Contrast the egregious provocative conduct from the deceased in *R v Narayan* [2011] SASCFC 61 which was held to fall within s 32A with *R v Lindsay* (2014) 119 SASR 320, [71], [78], [258]–[261] where it was held that the deceased’s conduct did not fall within s 32A. Bampton J reached the same conclusion in resentencing Lindsay. See *R v Lindsay*, 2 September 2016 (Bampton J) No. SCCRM-12-16, Supreme Court Criminal Jurisdiction: Adelaide.

⁴⁷⁴ Kemp, above n 41. The new consolidated Sentencing Bill presently before Parliament to replace the *Criminal Law (Sentencing) Act 1988* (SA), the Sentencing Bill 2016, restates s 32A in clause 47.

⁴⁷⁵ SA Legislative Review Committee, above n 17, 42.

⁴⁷⁶ [1978] AC 705.

⁴⁷⁷ [2012] NSWSC 1227 (11 October 2012).

8.2.5 The current law in South Australia for sentencing murder is ‘a complicated process’,⁴⁷⁸ SALRI, in stage 2, will examine in detail the current law for sentencing for the offence of murder and its intersection with the issue of provocation.

7. For Further Review

In the context of abolishing the partial defence of provocation, an examination of the need to ensure that a court possesses (whether under the current law or under any revised model) sufficient flexibility in sentencing to properly reflect an offender’s culpability and any genuine mitigating factors in sentence.

⁴⁷⁸ *R v Narayan* [2011] SASCFC 61, [48]. See generally *R v Barnett* (2009) 198 A Crim R 251; *R v Hallcroft* [2016] SASCFC 137; *R v Li* [2016] SASCFC 152. This complexity has been compounded by the significance to be accorded to a plea of guilty. See further *R v Hallcroft* [2016] SASCFC 137.

PART 9 – Self-Defence

9.1 Criticisms of the Current South Australian Law of Self-Defence

9.1.1 SALRI considers that regardless of whether the current law of provocation is ultimately retained, revised or abolished (indeed, SALRI's recommendations in relation to self-defence are such that it is argued that they can, and should, be implemented regardless of whether provocation is ultimately abolished, revised or retained), it is also necessary to consider whether the other available defences are appropriate in scope to accommodate the needs of defendants who may have genuine claims to reduced culpability. This includes consideration of the complete defence of self-defence, and especially how this defence may operate in the context of family violence situations, where the current defence of provocation arises. This also includes consideration of the common law defences of duress and necessity and their application in the context of family violence.

9.1.2 The issues of provocation and self-defence, especially in the context of family violence, are closely linked. As Dr FitzGibbon observes:

there is a clear need for any reform to the law of provocation to also consider potential reform to the complete defence of self-defence ... particularly for homicides that occur in the context of family violence, these two defences and their accessibility are inextricably linked. With this in mind ... it is arguably extremely difficult to achieve meaningful reform without considering both.⁴⁷⁹

9.1.3 The problems encountered by victims of family violence who kill their abusers in claiming self-defence have been the focus of much academic commentary, criticism and law reform activity in Australia and other jurisdictions. It has, as one commentator puts it, become 'trite' to point out that the defences to murder, including self-defence, do not equitably accommodate the circumstances in which victims of family violence, typically women, tend to kill their abusers.⁴⁸⁰

9.1.4 The current South Australian law of self-defence is highly problematic regarding victims of family violence. This theme was widely expressed to SALRI during its consultation process by various family violence groups, the Women's Legal Service, Relationships Australia, and such academics as Professor Mary Heath from Flinders University, Professor Sarre from the University of South Australia and Professor Ngaire Naffine and Kellie Toole from the University of Adelaide. Aspects of the current South Australian law of self-defence have the potential to unfairly impact victims of family violence and are in need of clarification and reform.

9.1.5 In accordance with SALRI's reference that extends to gender discrimination, it is appropriate to use this opportunity to consider reforms in the closely linked space of self-defence and family violence. Indeed, a strong theme to emerge from all the roundtable consultation sessions undertaken by SALRI (reflecting the wider research) are the particular problems confronting victims of family violence who kill in response to prolonged abuse and seek to access the complete defence of self-defence.

⁴⁷⁹ Fitz-Gibbon, *Homicide Law Reform, Gender and the Provocation Defence*, above n 47, 201. See also at 84–88.

⁴⁸⁰ Tolmie, above n 384. See also NZLC (2016), above n 93, 7 [22]. A succession of Australian studies has found that a high proportion of women who kill an intimate partner are responding to long-term violence by the partner. See, for example, Alison Wallace, *Homicide: The Social Reality* (Bureau of Crime Statistics and Research, 1986) 97, 103; Patricia Easta, *Killing the Beloved: Homicide between Adult Sexual Intimates* (Australian Institute of Criminology, 1993) 73–74; Jenny Mouzos, *Homicidal Encounters: A Study of Homicide in Australia 1989–1999* (Australian Institute of Criminology, 2000) 119; VLRC (2004), above n 13, 2, n 8.

9.1.6 In the common law world, battered women who kill their abusers have traditionally received limited protection from full criminal liability.⁴⁸¹ Whilst a woman who kills her partner in response to family violence might argue that she was acting in self-defence or in response to provocation, the courts have generally been reluctant to apply these defences to cases involving battered women. This reluctance appears to stem from the fact that both self-defence and provocation were developed with reference to male violence.⁴⁸² The defences focus on an immediate actual or perceived threat or an immediate response and a loss of self-control. To some degree the higher rates with which male defendants access the partial defences to murder is expected given that the overwhelming majority of homicides in Australia are committed by men. It is, however, still important to note as it contextualises the difficulty that female defendants face in meeting the needs of these traditionally male-centric defences. ‘Although self-defence is technically equally available to both men and women, it is argued that in practice the defence is usually only useful to men.’⁴⁸³

9.1.7 A claim of self-defence presents particular problems for female victims of family violence. As Tyson and Crofts explain:

In order to understand what aspects of self-defence make its use difficult for women who kill in response to abuse, it is important to understand the social context of domestic homicide and the history of violence.⁴⁸⁴ Research has shown that when women kill they usually do so in the context of a long history of family violence⁴⁸⁵ and typically their emotional response is one of fear and the need for self-preservation. However, self-defence raises a number of difficult issues for those subjected to family violence who kill their abusers, including the legal requirement for immediacy, proportionality and duty to retreat.⁴⁸⁶

9.1.8 ‘These realities’ of family violence, as the New Zealand Law Commission highlights, ‘tend to preclude any claim of self-defence from being successful.’⁴⁸⁷

9.1.9 The unsatisfactory result for female victims of family violence in seeking to utilise the defence of self-defence was made clear by Kellie Toole:

The actions of abused women, therefore, often lack both immediacy and proportionality. While that is not a formal basis for the defence to fail, the absence can cast doubt on whether the defendant’s belief in the need for lethal violence was genuine and/or reasonable, which can legitimately defeat the defence⁴⁸⁸ ... When an abused woman is convicted of murder on this basis, she has been denied the protection of self-defence because her actions do not conform to established patterns of male

⁴⁸¹ See, for example, Douglas, above n 361, 368, 377–378; Elisabeth McDonald, ‘Defending Abused Women: Beginning a Critique of New Zealand Criminal Law’ (1997) 27 *Victoria University of Wellington Law Review* 673, 673; Sheehy, Stubbs and Tolmie, above n 319, 383–384; Sheehy, Stubbs and Tolmie, above n 58, 468; Robertson, above n 384, 277; Tolmie, above n 384, 91.

⁴⁸² Zaman, above n 370, 2; Kwong-Leung Tang, ‘Battered Woman Syndrome Testimony in Canada: Its Development and Lingering Issues’ (2003) 47(6) *International Journal of Offender Therapy and Comparative Criminology* 618, 618.

⁴⁸³ VLRC (2004), above n 13, 63 [3.14].

⁴⁸⁴ It is widely acknowledged in academic research that, while most family violence is perpetrated by men against their female partners (see also above n 31), it ‘can occur in the context of any close personal relationship, including women against male partners, between same-sex partners, children and parents or grandparents, and other family and non-family members’: VLRC (2004), above n 13, 61.

⁴⁸⁵ See further LRCWA, above n 141, 278; Jenny Morgan, *Who Kills Whom and Why: Looking Beyond Legal Categories* (VLRC, 2002) 25–30.

⁴⁸⁶ Crofts and Tyson, above n 294, 879. See further VLRC, above n 295, ch 4.

⁴⁸⁷ NZLC (2016), above n 93, 7 [23].

⁴⁸⁸ Hopkins and Eastale, above n 365.

violence. [This] constitutes a gender bias in the interpretation and application (although not the framing) of the defence, which is inconsistent with the bedrock principle of equality before the law.⁴⁸⁹

9.1.10 No explicit reference is made to family violence in the present South Australian statutory provisions covering self-defence.⁴⁹⁰ Accordingly, the South Australian law may not be as inclusive as it could be, and SALRI considers that it would benefit from statutory provisions explicitly addressing the role and range of family violence as in the current Victorian model (see Part IC of the *Crimes Act 1958* (Vic)). SALRI considers that such clarification and reform to the law of self-defence is preferable in trying to solve the problems relating to victims of family violence through any reform of provocation.

9.1.11 The common law model, requiring as it does an imminent threat to allow self-defence to be successfully argued, is criticised as inadequate for women who kill in self-defence following prolonged family violence and is at odds with the known dynamics of family violence and the extreme circumstances in which a victim of family violence may act to kill their abuser.⁴⁹¹

9.1.12 As the Queensland Taskforce on Women and the Criminal Code suggests, the use of force in circumstances of abuse can be characterised as an extension of self-defensive behaviour used by those in abusive relationships:

According to those who work with domestic violence survivors many survivors are really exercising a form of “self-defence” for much of the relationship — often, by remaining “passive” in the face of physical, emotional and other types of abuse. It also tends to include complying with the on-going and ever-present demands of their abuser (for example having dinner ready on time, not eating until he arrives no matter how long the wait is, keeping the children quiet, taking a beating, concealing a beating). One day some of these women choose a different kind of self-defence — attack. This is often a kind of self-preservation or final desperate act and does not always happen when there appears to be a present threat — as would usually happen in a ‘man-to-man combat’ situation.⁴⁹²

9.1.13 In such situations of family violence, an imminent threat from the abuser may well not be present.⁴⁹³ This is because, as noted above, some may kill their abuser only when defensive action seems rational or available to them, such as when the abuser is retreating, asleep or otherwise incapacitated.⁴⁹⁴ In some instances this may be reflective of the power imbalance between the victim and abuser.

9.1.14 The need for an immediate, or at least imminent, requirement in South Australia is uncertain. It is unclear if the current model set out in s 15 of the *Criminal Law Consolidation Act 1935* (SA) restates the

⁴⁸⁹ Toole, above n 290, 257. It is significant that Indigenous women encounter particular difficulty in being able to successfully raise self-defence. See Julie Stubbs and Julia Tolmie, ‘Battered Women Charged with Homicide: Advancing the Interests of Indigenous Women’ (2008) 41 *Australian and New Zealand Journal of Criminology* 138, 143.

⁴⁹⁰ *Criminal Law Consolidation Act 1935* (SA) Div 2. See also below Appendix 3, 114.

⁴⁹¹ See, for example, Tolmie, above n 319; Yeo, above n 285; Sheehy, Stubbs and Tolmie, above n 319.

⁴⁹² Office for Women, Department of the Premier and Cabinet, Queensland Government, *Report of the Taskforce on Women and the Criminal Code* (2000) 149. Similar themes were expressed to SALRI; see below Appendix 1, 105–106 and Appendix 2, 112–113.

⁴⁹³ In a study of intimate partner homicides in NSW between 1968 and 1986, it was found that in 52% of cases where women had killed their husbands, there was an ‘immediate threat or attack by the victim’, suggesting that in 48% there was no ‘immediate threat or attack’. See Wallace, above n 480, 97.

⁴⁹⁴ See, for example, *R v R* (1981) 28 SASR 321; *R v Secretary* (1996) 86 A Crim R 119; *Osland v R* (1998) 197 CLR 316. See also *R v Sijernqvist* (Unreported, Queensland Supreme Court, Cairns Circuit Court, Derrington J, 19 June 1996) ‘in which a jury in Queensland in 1996 took only 15 minutes to acquit the accused on the basis of self-defence after she shot her violent husband in the back as he walked away from her’: Sheehy, Stubbs and Tolmie, above n 58, 480. See also Carolyn Ramsey, ‘Provoking Change: Comparative Insights on Feminist Homicide Law Reform’ (2010) 100 *Journal of Criminal Law and Criminology* 33, 61–62; VLRC (2004), above n 13, 62 [3.11].

common law requirement for an imminent threat before a claim of self-defence can be allowed. Indeed, the Criminal Law Consolidation (Self-Defence) Amendment Bill 1991 contained a reference to immediacy, which was removed during parliamentary debate because it was viewed as too restrictive.

9.1.15 The *Criminal Law Consolidation Act 1935* (SA) is silent on the issue, but a line of South Australian cases seems to reintroduce the common law requirement for immediacy into the law of self-defence. This approach to imminence was applied in *R v O*⁴⁹⁵ and in *Police v Hailemariam*⁴⁹⁶ where Mullighan J found that ‘[t]he necessary conditions for self-defence had not been fulfilled’ in the case of an accused who returned, armed, to the scene of a previous attack on him because ‘there was no attack upon him in existence or imminent’.⁴⁹⁷ Mullighan J stated that ‘[t]he condition of existing attack or imminent danger has long been regarded as essential for self-defence to afford lawful excuse for violence’.⁴⁹⁸

9.1.16 The effect of these cases is problematic as was raised during one of the roundtable consultation sessions held by SALRI. It was noted that these cases potentially reintroduce an element of the common law that creates particular difficulties and potential injustice for abused women who kill because they consider themselves or their family to be at risk of harm from their abuser at some stage in the future.⁴⁹⁹

9.1.17 In SALRI’s view, the law should recognise that those who kill their abusive domestic partners may kill for reasons that are specific to the domestic relationship and the prolonged abuse suffered. Options for law reform in this respect are examined below.

9.2 Self-Defence in Other Jurisdictions

Canada

9.2.1 When compared to other common law jurisdictions, Canada provides perhaps the most comprehensive protection to defendants who kill in response to prolonged family violence. Whilst the partial defence of provocation is recognised in Canadian law,⁵⁰⁰ most cases and academic commentary on defendants who kill in response to prolonged family violence instead centre upon self-defence.

9.2.2 In Canada, self-defence has long been recognised as a full defence to murder.⁵⁰¹ Prior to 1990, Canadian courts adopted a rather restrictive interpretation of self-defence. In *R v Whynot (Stafford)*,⁵⁰² for example, the Nova Scotia Court of Appeal held that self-defence was not available to an accused who shot her abusive husband while he was passed out, as there was no imminent threat at the time of the shooting. In the court’s view, self-defence would only be available if the accused were responding to an attack that was about to occur or was already occurring; anticipatory self-defence would not suffice.⁵⁰³

⁴⁹⁵ [1997] SASC 213.

⁴⁹⁶ [1999] SASC 96.

⁴⁹⁷ Ibid [24].

⁴⁹⁸ Ibid.

⁴⁹⁹ See also Mary Heath, ‘Chapter 10: Self-defence’ in David Caruso, Rhain Buth, Mary Heath, Ian Leader-Elliott, Patrick Leader-Elliott, Ngaire Naffine, David Plater and Kellie Toole, *South Australian Criminal Law and Procedure* (Lexis Nexis, 2nd ed, 2016) 353, 368 [10.31]; VLRC (2004) above n 13, 77–79 [3.52]–[3.55].

⁵⁰⁰ *Criminal Code*, RSC 1985, c C-46, s 232.

⁵⁰¹ Ibid s 34(1).

⁵⁰² (1983) 61 NSR (2nd) 33 (Nova Scotia Court of Appeal).

⁵⁰³ Martha Shaffer, ‘The Battered Woman Syndrome Revisited: Some Complicating Thoughts Five Years after *R v Lavallee*’ (1997) 47 *University of Toronto Law Journal* 1, 3.

9.2.3 The landmark decision of the Supreme Court of Canada in *R v Lavallee*⁵⁰⁴ is regarded as an important step towards making the law of self-defence more responsive to the distinctive, if not unique, circumstances of women who kill in response to prolonged family violence⁵⁰⁵ (a point also noted to SALRI in its consultation with Associate Professor Reilly at the University of Adelaide). *Lavallee* recognised that one must assess the acts of an accused woman who has been victim of family violence from the perspective of that woman taking into account what she has endured in her violent relationship with the male deceased partner. *Lavallee* also recognised that expert testimony indicating that an accused was suffering from BWS at the time of the crime could be taken into account in assessing the reasonableness of her claim to self-defence.⁵⁰⁶ As Wilson J explained, the circumstances faced by battered women are largely ‘foreign to the world inhabited by the hypothetical “reasonable man”’.⁵⁰⁷ As such, in murder cases involving defendants who kill in the context of prolonged family violence, the standard of ‘reasonableness’ must be adapted,⁵⁰⁸ to reflect the realities faced by victims of family violence.⁵⁰⁹

9.2.4 The ‘contextual approach’⁵¹⁰ to self-defence advocated in *Lavallee* was followed in a series of subsequent cases involving defendants who killed in response to prolonged family violence.⁵¹¹ In 2013, the reasoning in *Lavallee* was codified in a series of amendments to the Canadian *Criminal Code*.⁵¹² Consistent with *Lavallee*, the new law adopts a broad approach to self-defence, listing factors such as the personal characteristics of the parties, prior threats or uses of force and the history of the relationship between the parties, as relevant factors to be considered in assessing the reasonableness of self-defence.⁵¹³ Subsequent case law affirms that any claim of self-defence should be evaluated with reference to all the circumstances surrounding the use of force.⁵¹⁴

9.2.5 The decision in *Lavallee* was significant as it recognised that a victim of family violence need not ‘wait until the knife is uplifted, the gun pointed or the first clenched’, before acting to protect herself.⁵¹⁵ Any requirement that a victim of family violence must wait until the physical assault is ‘underway’ before her apprehension can be validated as lawful self-defence would be tantamount to sentencing her to ‘murder by instalment’.⁵¹⁶

9.2.6 Nevertheless, whilst *Lavallee* and the subsequent Canadian legislative reforms are widely regarded as an important shift away from traditional, gender-biased conceptions of self-defence,⁵¹⁷ some

⁵⁰⁴ [1990] 1 SCR 852 (*Lavallee*).

⁵⁰⁵ Martha Shaffer, ‘*R v Lavallee*: A Review Essay’ (1990) 22 *Ottawa Law Review* 607, 609.

⁵⁰⁶ [1990] 1 SCR 852, 871, 882, 890 (Wilson J). This is often referred to as ‘social framework’ evidence. See further below [9.6.1]–[9.6.14].

⁵⁰⁷ *Ibid* 874.

⁵⁰⁸ *Ibid*.

⁵⁰⁹ Shaffer, above n 505, 610.

⁵¹⁰ Vanessa MacDonnell, ‘The New Self-Defence Law: Progressive Development or Status Quo?’ (2013) 92 *Canadian Bar Review* 301, 302.

⁵¹¹ See, for example, *R v Malott* [1998] 1 SCR 123, 140–141, 43 (Major J); *R v Pétel* [1994] 1 SCR 3, 11 (Gonthier J); *R v Hernando* (2009) 243 Man R (2d) 161.

⁵¹² RSC 1985, c C-46.

⁵¹³ *Ibid* s 34(2).

⁵¹⁴ See, for example, *R v Kahnapace* (Unreported, Supreme Court of British Columbia, Gerow J, 6 March 2014) [169]; *R v Knott* (Unreported, Court of Queen’s Bench of Manitoba, Perlmutter ACJQB, 16 April 2014) [115], [119], [147]; *R v Rabut* (Unreported, Provincial Court of Alberta, Judge Fradsham, 26 May 2015) [53].

⁵¹⁵ [1990] 1 SCR 852, 883 (Wilson J).

⁵¹⁶ *Ibid* [27] (Wilson J) quoting *State v Gallegos* (1986) 719 P2d 1268, 1271.

⁵¹⁷ Shaffer, above n 505, 609.

commentators have expressed concern that admitting BWS evidence might have unintended consequences for battered defendants. Sheehy⁵¹⁸ and Shaffer,⁵¹⁹ for example, contend that the decision in *Lavallee* might promote a view of domestic violence victims as sufferers of a ‘syndrome’. This ‘[s]yndromisation’⁵²⁰ of women who experience family violence might undermine women’s agency, by depicting women as ‘powerless’ and ‘paralysed’.⁵²¹ Some commentators have also expressed concern that placing excessive reliance upon BWS evidence might leave defendants who do not exhibit the characteristics of the archetypal ‘battered woman’ outside the ambit of the defence.⁵²² Thus, despite the positive developments brought about by the decision in *Lavallee* and the subsequent legislative reforms, Canada continues to face challenges in accommodating the claims of such defendants without promoting a narrow view of female defendants as disempowered and mentally impaired.⁵²³

New Zealand

9.2.7 New Zealand has adopted a ‘conservative’ approach to women who kill their abusers.⁵²⁴ In 2007, the NZLC concluded that the partial defence of provocation, both conceptually and in practice, was ‘irretrievably flawed’.⁵²⁵ The Commission recommended that the partial defence of provocation should be abolished and the issue of provocation should be dealt with as a matter of sentencing.⁵²⁶ In response to these recommendations, the partial defence of provocation was abolished in New Zealand in 2009. There are now no other legislative partial defences to murder and as a result, self-defence is now the primary defence in New Zealand available to women who may kill their abusers.

9.2.8 The law of self-defence is set out in s 48 of the *Crimes Act 1961* (NZ). Whilst the provision contains no requirement that the actual or perceived attack be ‘imminent’ for self-defence to be available,⁵²⁷ the New Zealand courts have tended to adopt a relatively narrow interpretation of the provision.⁵²⁸ In *R v Wang*,⁵²⁹ for example, the New Zealand Court of Appeal held that a woman who killed her violent husband while he was asleep could not rely on self-defence, as she faced ‘no imminent danger’ requiring ‘instant’ action. *Wang* established that a successful claim of self-defence requires an immediate threat and a lack of alternative options.⁵³⁰

9.2.9 In the early 1990s, the narrow interpretation of imminence from *Wang* appeared to relax.⁵³¹ In *R v Oakes*,⁵³² for example, the Court of Appeal accepted that the perception of danger of a woman who has

⁵¹⁸ Elizabeth Sheehy, ‘Battered Woman Syndrome: Developments in Canadian Law after *R v Lavallee*’ in Julie Stubbs (ed), *Women, Male Violence and the Law* (Institute of Criminology, 1994) 174, 182–183.

⁵¹⁹ Shaffer, above n 505, 610, 619–622.

⁵²⁰ *Ibid* 619.

⁵²¹ Sheehy, above n 518, 183.

⁵²² Shaffer, above n 505, 619, 622–623. The concept of ‘battered women syndrome’ as a recognised psychiatric condition is contentious. See, for example, *Osland v R* (1998) 197 CLR 316, 370–378 [158]–[169] (Kirby J).

⁵²³ Sheehy, above n 518, 182–188; Shaffer, above n 505, 610, 619–623.

⁵²⁴ Sheehy, Stubbs and Tolmie, above n 58, 471.

⁵²⁵ NZLC, above n 54, 42 [78].

⁵²⁶ *Ibid* 13 Rec 1, 2.

⁵²⁷ *Crimes Act 1961* (NZ) s 48.

⁵²⁸ Sheehy, Stubbs and Tolmie, above n 58, 471.

⁵²⁹ [1990] 2 NZLR 529, 539 (Bisson J) (*‘Wang’*).

⁵³⁰ *Ibid* 534.

⁵³¹ NZLC (2016), above n 93, 78.

⁵³² [1995] 2 NZLR 673, 676 (Hardie Boys J).

experienced family violence might reasonably differ from that of the average person. The court held that such a woman's claim to self-defence should be evaluated 'in light of her perception'.⁵³³ The court adopted a similar approach in *R v Zhou*,⁵³⁴ a case involving a defendant who drugged, tied up and dismembered her husband, after he had raped her, beaten her, and threatened her. Although the defendant arguably had alternative options available to her when she tied her husband up,⁵³⁵ the court accepted that she had still acted in self-defence. *Zhou* suggests a relaxation of the 'lack of alternatives' element of self-defence.

9.2.10 Since *Wang* was decided in 1987, the decision has not been applied in any subsequent cases involving family violence.⁵³⁶ Nevertheless, a series of recent Court of Appeal decisions containing general statements about the law of self-defence suggest that *Wang* remains the authoritative test for self-defence in New Zealand.⁵³⁷ This means that an imminent danger seemingly remains a core component of a successful claim of self-defence.⁵³⁸

9.2.11 The narrow approach to self-defence in New Zealand has attracted criticism from both commentators and law reform agencies.⁵³⁹ As noted by the NZLC, the emphasis upon immediacy requires the judge and jury to focus on a danger that is 'close at hand',⁵⁴⁰ potentially confining a court's inquiry to individual, 'one-off' acts of violence.⁵⁴¹ This approach is inconsistent with the recent research on the dynamics of family violence, which suggests that domestic violence is often characterised by 'constant' and 'cumulative' acts of abuse.⁵⁴² The limited legal protection available to defendants who kill in response to prolonged family violence in New Zealand has been compounded by the abolition of provocation, leaving many women involved in 'non-traditional' acts of self-defence at risk of full criminal liability.⁵⁴³

9.2.12 The law of homicide in New Zealand was most recently reviewed in 2016, when the Law Commission after detailed consideration concluded that the partial defence of provocation should not be reintroduced.⁵⁴⁴ The Commission 'found no empirical evidence from our case review to conclude that repeal of provocation in New Zealand [in 2009] has in practice adversely affected the position of victims of family violence who kill their abusers.'⁵⁴⁵ The Commission was troubled by the apparent insistence for a threat be imminent for self-defence to arise, and recommended that the law be amended to make it clear that in cases involving family violence, the threat need not be imminent.⁵⁴⁶

⁵³³ Ibid.

⁵³⁴ (Unreported, High Court of New Zealand, 4 October 1993).

⁵³⁵ NZLC (2016), above n 93, 53.

⁵³⁶ Ibid 78.

⁵³⁷ Ibid citing *Vincent v R* [2015] NZCA 201 (27 May 2015); *Afamasaga v R* [2015] NZCA 615 (18 December 2015); *Leason v Attorney-General* [2013] NZCA 509 (25 October 2013); *R v Kneale* [1998] 2 NZLR 169.

⁵³⁸ NZLC (2016), above n 93, 80.

⁵³⁹ See Sheehy, Stubbs and Tolmie, above n 58, 471–472; Tolmie, above n 384, 93–95.

⁵⁴⁰ NZLC (2016), above n 93, 8 [25].

⁵⁴¹ Ibid 7 [23].

⁵⁴² Ibid 8 [25], 29 [2.27]. See also Sheehy, Stubbs and Tolmie, above n 58, 471–472; Edwards above n 53, 228, 234; Quick and Wells, above n 394, 338.

⁵⁴³ Sheehy, Stubbs and Tolmie, above n 58, 489.

⁵⁴⁴ NZLC (2016), above n 93, 11 Rec 9.

⁵⁴⁵ Ibid 10 [35].

⁵⁴⁶ Ibid 8 [24]–[28], 9 Rec 5.

9.3 The Partial Defence of Excessive Self-Defence

9.3.1 Section 15(2) of the *Criminal Law Consolidation Act 1935* (SA) provides as a partial defence to a charge of murder (reducing the offence to manslaughter) if a defendant ‘genuinely believed that the conduct to which the charge relates to be necessary and reasonable for a defensive purpose; but 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.’ The partial defence of excessive defence in South Australia thus allows a person who has an honest or genuine belief in the need to use defensive force, but who is unable to establish the reasonableness or proportionality of his or her actions in the circumstances, to be convicted of manslaughter rather than murder.⁵⁴⁷

9.3.2 The partial defence of excessive self-defence recognises a difference between the moral culpability of someone who commits murder, and someone who kills for a defensive purpose, but misjudges the level of force necessary in the circumstances. It applies when ‘an error of judgment on the part of the accused ... deprives him of the absolute shield of self-defence’ and generally results in a conviction for manslaughter.⁵⁴⁸

9.3.3 Excessive self-defence has been described as ‘imperfect’,⁵⁴⁹ ‘unreasonable’,⁵⁵⁰ or ‘mistaken’ self-defence,⁵⁵¹ and has enjoyed a chequered history in Australian criminal law for over half of a century. It was first recognised in Australia by the Victorian Supreme Court in 1957.⁵⁵² It was adopted by the High Court the following year in 1958,⁵⁵³ rejected by the Privy Council in 1971,⁵⁵⁴ recognised by the High Court again in 1978,⁵⁵⁵ discarded by it in 1987,⁵⁵⁶ and later reintroduced by statute in South Australia,⁵⁵⁷ New South Wales,⁵⁵⁸ and Western Australia.⁵⁵⁹

9.3.4 Excessive self-defence is likely to have particular application for victims of family violence and can operate in combination with the complete defence of self-defence.⁵⁶⁰ As Kellie Toole explains:

In extreme circumstances, a lethal response to a threat from an abusive partner can be reasonable, and a woman will be protected by self-defence, and completely acquitted. In other circumstances, a violent relationship can skew a woman’s assessment of a violent situation. She might genuinely believe she needs to use lethal force to prevent death or really serious injury, but her belief is not

⁵⁴⁷ VLRC (2004), above n 13, 60 [3.4].

⁵⁴⁸ For a discussion of excessive self-defence, see Stanley Yeo, ‘Revisiting Excessive Self-Defence’ (2000) 12 *Current Issues in Criminal Justice* 39.

⁵⁴⁹ Ramsey, above n 494, 42; Alafair Burke, ‘Rational Actors, Self-Defense, and Duress: Making Sense, Not Syndromes, Out of the Battered Woman’ (2002) 81 *North Carolina Law Review* 211, 240.

⁵⁵⁰ Victoria, *Parliamentary Debates*, Legislative Assembly, 26 October 2005, 1842 (Robert Clark).

⁵⁵¹ Marianne Giles, ‘Self-Defence and Mistake: A Way Forward’ (1990) 53 *Modern Law Review* 187, 187.

⁵⁵² *R v McKay* [1957] VR 560. See also *R v Howe* (1958) SASR 95, 121–122 (Mayo J).

⁵⁵³ *R v Howe* (1958) 100 CLR 448.

⁵⁵⁴ *Palmer v R* [1971] AC 814.

⁵⁵⁵ *R v Viro* (1978) 141 CLR 88, 146.

⁵⁵⁶ *Zecenic v Director of Public Prosecutions* (1987) 162 CLR 645.

⁵⁵⁷ See *Criminal Law Consolidation Act 1935* (SA) ss 15(1)(b), (2).

⁵⁵⁸ *Crimes Act 1900* (NSW) s 421.

⁵⁵⁹ *Criminal Code Act Compilation Act 1913* (WA) sch 1 s 248. See also Toole, above n 47, 478–479.

⁵⁶⁰ VLRC (2004), above n 13, 102 [3.106]–[3.107].

reasonable, even in the context of the violent relationship. In such a situation, she is convicted of defensive homicide rather than murder.⁵⁶¹

9.3.5 SALRI supports the retention of the partial defence of excessive self-defence.⁵⁶² SALRI concurs with the view of the VLRC ‘that a person who has an honest belief in the need to use force in self-protection, or to protect others, is in a different position from those who kill intentionally in other situations and this should be recognised in the crime that person is convicted of.’⁵⁶³ This may especially arise, as Ms Toole notes above, in the context of family violence.⁵⁶⁴

9.4 Providing for Victims of Family Violence – Victoria

9.4.1 In 2005, Victoria abolished the common law defence of provocation,⁵⁶⁵ after the controversial case of *Ramage* on the basis that provocation was outdated and condoned male aggression towards women.⁵⁶⁶ The 2004 VLRC Report on defences to homicide,⁵⁶⁷ recommended the abolition of provocation⁵⁶⁸ and that statutory self-defence provisions should be expanded to include situations where the person believes harm is inevitable, provided the reaction is necessary and reasonable.⁵⁶⁹

9.4.2 In response to *Ramage*, the Victorian Government announced that provocation would be abolished, explaining it ‘[lends] to a culture where the victim is blamed rather than the perpetrator’. Alongside abolition, various other changes were implemented in order to better recognise the experience of women who kill in response to family violence.⁵⁷⁰ These amendments included redefining the law of self-defence in relation to homicide, establishing a new offence of defensive homicide⁵⁷¹ and importantly

⁵⁶¹ Toole, above n 47, 483.

⁵⁶² See also VLRC (2004), above n 13, 101 [3.103]-[3.105], 105 Rec 9.

⁵⁶³ Ibid 60 [3.4].

⁵⁶⁴ Ibid 102 [3.106]-[3.107].

⁵⁶⁵ *Crimes (Homicide) Act 2005* (Vic) s 3B. Provocation became especially controversial in Victoria after the 2004 trial of James Ramage, who successfully relied on provocation after killing his estranged wife, Julie, after she had left him. See *R v Ramage* [2004] VSC 391 (8 October 2004) (*‘Ramage’*). ‘Ramage claimed that he “lost control and attacked” his estranged wife, following a discussion during which Julie dismissed the progress of the renovations as insignificant and then in response to his pleas for her to return to the marriage allegedly told Ramage that sex with him “repulsed her and screwed up her face and either said or implied how much better her new [boy]friend was”’ (Fitz-Gibbon, *Homicide Law Reform, Gender and the Provocation Defence*, above n 47, 1, quoting *R v Ramage* [2004] VSC 508, [22] (Osborn J)). As a result of the murder charge being reduced to manslaughter, Ramage was sentenced to 11 years’ imprisonment: Jamie Berry, ‘Wife Killer May Be Free in 7 years’, *The Age* (online), December 10 2004 <<http://www.theage.com.au/news/National/Wife-killer-may-be-free-in-7-years/2004/12/09/1102182427079.html>>. Ramage served eight years in prison: Paul Millar, ‘Wife Killer to be Released’, *The Age* (online), July 7 2011 <<http://www.theage.com.au/victoria/wife-killer-to-be-released-20110707-1h3yt.html>>. The result in *Ramage* was labelled by one academic as an ‘obscurity’: see, Coss, ‘The Defence of Provocation: An Acrimonious Divorce from Reality’, above n 285, 55.

⁵⁶⁶ Victoria, *Parliamentary Debates*, Legislative Assembly, 6 October 2005, 1349 (Rob Hulls, Attorney-General).

⁵⁶⁷ VLRC (2004), above n 13, 39 [2.47].

⁵⁶⁸ Ibid 58.

⁵⁶⁹ Ibid 81.

⁵⁷⁰ Victorian Department of Justice, *Review of the Offence of Defensive Homicide*, Discussion Paper (2010) 5.

⁵⁷¹ Defensive homicide operated as an alternative charge to murder where a person believed subjectively that their actions were necessary in self-defence, but had no objectively reasonable grounds for holding that belief. See *Crimes (Homicide) Act 2005* (Vic) s 9AD. The offence proved highly problematic in practice, especially after the controversial case of *R v Middendorp* [2010] VSC 202. While the rationale of defensive homicide was to provide better protection to persons who killed in a domestic or family context, in practice most cases using the defence took place between non-family members, with the majority of offenders being male who had a history of violence (evidenced by their previous convictions: see Victorian Department of Justice, *ibid*, 64–72. It was observed that defensive homicide ‘has expanded

(as also raised to SALRI)⁵⁷² clarifying the law of evidence to ensure that relevant evidence about family violence and its effects (social framework evidence) was admissible in homicide proceedings.⁵⁷³

Self-defence as a Framework – Victoria

9.4.3 In 2014, Victoria abolished the offence of defensive homicide and instead set out a ‘clearer and simpler’ test for self-defence in a bid to better protect and support victims of family violence. The amendments in relation to self-defence in Victoria also incorporated amending the *Jury Directions Act 2013* (Vic) so that a judge can now direct a jury on a range of factors about family violence in order to ‘help juries better assess self-defence in a family violence context, so that where the actions of family violence victims are genuine and reasonable in the circumstances as the victim sees them, they will be acquitted altogether’.⁵⁷⁴

9.4.4 Victoria, whilst having abolished provocation, has made special provision for the operation of self-defence for victims of family violence. The Victorian law makes it explicit that evidence of family violence can be relied upon in establishing self-defence. Since these reforms in 2014, there is now improved protection in Victoria for those who commit violent offences (including homicide) when done in self-defence in the context of family violence due, in large part, to the introduction of social context evidence reforms (first in 2005 and extended in 2014) as well as improved jury directions on family violence. Sections 322J and 322M of the *Crimes Act 1958* (Vic) specify the evidence that may be adduced about the history of the relationship and the nature of the violence in the relationship to prove both the accused’s belief that using force was necessary and to prove whether the conduct said to occur in self-defence was a reasonable response in the circumstances as the accused believed them to be.

9.4.5 The Victorian law provides that killing another in self-defence in the context of family violence may be a reasonable response, and an accused may believe his or her conduct is necessary, even if they were responding to a harm that was not immediate, or their response involved the use of force in excess of the force harming them (or that was threatened to harm them). Both ‘family member’ and ‘violence’ are broadly defined. A single act or a number of acts can make up the ‘abuse’ that constitutes ‘violence’ that an accused is responding to when they kill. A person is not required to wait until an attack is in progress or immediately threatened before using defensive force. Relevant to determining whether the accused believed their actions were necessary and whether their response was reasonable may include:

the range of legal options available to violent men, despite being part of a reform package designed to narrow those options through the abolition of the partial defence of provocation’: Toole, above n 47, 503. In 2010, the Victorian Department of Justice, *ibid*, 43–44 [171]–[176], echoed concerns that the offence had been used in unexpected situations and also noted concern that jury instructions were proving too complex: at 45 [185]. In 2013, the Victorian Department of Justice once again found that ‘there is no clear evidence that defensive homicide is working in the way intended to support women who kill in response to family violence’ (Victorian Department of Justice, *Defensive Homicide: Proposals for Legislative Reform*, Consultation Paper (September 2013) 26) and noted that the offence had not assisted family violence victims: at 14–16. After wide criticism, in 2014 the offence was abolished by the *Crimes Amendment (Abolition of Defensive Homicide) Act* in Victoria. In announcing the repeal of defensive homicide, the Government conceded that the law ‘had failed to work as intended,’ instead allowing offenders to escape full responsibility in situations where a conviction for murder would have been deserved, see Johnson, above n 92, 1. Indeed, it was noted that defensive homicide had proved to be ‘provocation by new name’: Fitz-Gibbon and Pickering, above n 86, 169. Though cf Ulbrick, Flynn and Tyson, above n 92.

⁵⁷² See below Appendix 1, 105–106 and Appendix 2, 112–113.

⁵⁷³ Victorian Department of Justice (2010), above n 570, 21. See also below Appendix 5, 118–122.

⁵⁷⁴ R Clark, Attorney-General, ‘Defensive Homicide Abolition to Stop Killers Getting Away With Murder’ (Media Release, 22 June 2014).

- The history of the relationship between the accused and the deceased family member, including violence that occurred in the family and who perpetuated the violence against whom;
- The cumulative effect, including psychological effect, the violence caused to the accused or another family member;
- Social, cultural or economic factors that impact on the accused or a family member who has been affected by family violence; and
- The general nature and dynamics of relationships affected by family violence, including the possible consequences of separation from the abuser.⁵⁷⁵

9.4.6 It is SALRI’s position that this model offers an appealing option and South Australia should adopt a similar model. Adopting similar provisions would demonstrate that South Australia takes family violence seriously, because such provisions support and validate the experience of victims of family violence. It is significant that almost universal support was expressed to SALRI in its consultation for adopting the Victorian model of self-defence.⁵⁷⁶

9.4.7 There is only limited evidence to date of the effect of reforms to the law of self-defence in Victoria. Only two cases have been brought to SALRI’s attention.

9.4.8 The first case involved a teenage girl who shot her stepfather after being threatened by him with a shotgun, and forced to perform sexual acts over a course of four years.⁵⁷⁷ Due to the overwhelming evidence of sexual abuse against the teenager, which included 10 000 photographic images of the sexual abuse taken by the deceased on a digital camera, the Victorian DPP decided to discontinue the prosecution (presumably on the basis that a claim of self-defence under the new Victorian law was unlikely to be rebutted).⁵⁷⁸

9.4.9 The second case involved a 57-year-old woman who killed her abusive husband in response to an immediate, violent attack.⁵⁷⁹ Prior to the immediate threat, the deceased had subjected his wife to 30 years of sustained physical and psychological abuse. In this case, the Magistrate at committal took the unusual course of action (given it would usually be an issue of fact for the jury) of dismissing the proceedings on the basis of insufficient evidence to negate the issue of self-defence, or for a jury to convict her of defensive homicide, murder or manslaughter.⁵⁸⁰

9.4.10 Although neither of these cases proceeded to trial, they point to the initial effect of the new Victorian self-defence model as the references to the reformed self-defence provisions in both cases

⁵⁷⁵ See below Appendix 5, 118–122.

⁵⁷⁶ See below Appendix 1, 105–106 and Appendix 2, 112–113.

⁵⁷⁷ Note this woman cannot be identified due to being a teenager at the time and the victim of sexual abuse (“Case 1 [2009]”).

⁵⁷⁸ Michael Turtle, ‘Charges dropped against teenager who killed her stepfather’, *ABC PM* (Friday, 27 March 2009) <<http://www.abc.net.au/pm/content/2008/s2528412.htm>>. See also Toole, above n 290, 267–268.

⁵⁷⁹ *DPP v Freda Dimitrovski* (2009). See also Toole, above n 290, 268–269; Danielle Tyson, ‘Victoria’s New Homicide Laws: Provocative Reforms or More Stories of “Women Asking for It”’ (2011) 23 *Current Issues in Criminal Justice* 203, 211–212.

⁵⁸⁰ Kim Stevens, ‘Wife walks free – Magistrate dismisses all charges against abused mother’, *Shepparton News* (Shepparton), 7 May 2009, 1.

indicate that the reforms were in fact relevant to the DPP and Magistrate’s respective decisions to discontinue the proceedings.⁵⁸¹

9.5 Modifying the Law of Self-Defence in South Australia to Better Provide for those who Kill in Response to Family Violence

9.5.1 SALRI considers that regardless of the retention, reform or repeal of provocation, specific reform is necessary to adequately provide for people in South Australia who kill their partners in the context of extreme or ongoing family violence. SALRI is anxious to ensure that the reform options it examines take into account how any changes to the law could affect persons who kill their abusive intimate partner, as well as the experience of victims of family violence, including fatal family violence.

9.5.2 From both publicised cases and academic research, it can be seen that the provocation defence has rarely been used in aid of vulnerable women who kill abusive men, but rather in aid of men who kill vulnerable women. This must be taken into account when looking at any reform.

9.5.3 Women are disproportionately the victims of domestic abuse and violence.⁵⁸² To the extent that those who suffer domestic abuse and who ultimately kill their abusive partners are women, the criminal law (whether by provocation or preferably elsewhere), should serve to protect these abused women by recognising in law (whether via a complete defence, a partial defence and/or in sentencing) the difficult situation these women were in when they killed their abusive partners. ‘Historically, responses to family violence have been marked by a tendency to dismiss, trivialise and misunderstand family violence.’⁵⁸³ It is necessary that any changes in this area of the law recognise and reflect the particular issues and context of family violence.⁵⁸⁴

9.5.4 Historically, self-defence required that the attack or threat that a person was defending themselves against was imminent. This constituted, as previously discussed, a significant obstacle to battered women who killed in non-confrontational situations, since they were unlikely to be able to defend themselves in a direct confrontation with their abuser.⁵⁸⁵

9.5.5 The common law insistence on an imminent threat to be able to raise self-defence is at odds with the dynamics of family violence. The tension between the law of self-defence and the experiences of

⁵⁸¹ Victorian Department of Justice (2013), above n 571, 33.

⁵⁸² Though men are clearly victims of family violence, ‘Family violence disproportionately affects women and children, and a disproportionate number of men are perpetrators’: Victorian Royal Commission, above n 33, 57. See further at 57–58.

⁵⁸³ Ibid 27.

⁵⁸⁴ It was noted to SALRI in consultation that the implications of family violence for LGBTIQ communities is significant but often overlooked. This accords with the findings of the Victorian Royal Commission: ‘The family violence experiences of lesbian, gay, bisexual, transgender and intersex people and the barriers they face in obtaining services are distinct from those of other victims of family violence. They also differ within these various communities. LGBTIQ people may also experience distinct forms of family violence, including threats to ‘out’ them. Although there has been little research into family violence in LGBTIQ relationships, the existing research suggests that intimate partner violence may be as prevalent in LGBTIQ communities as it is in the general population. The level of violence against transgender and intersex people, including from parents and other family members, appears to be particularly high. There are a variety of barriers to LGBTIQ people reporting and seeking help, including homophobia, transphobia and a fear of discrimination. The level of awareness of LGBTIQ experiences and needs is limited among police, in the courts, among service providers and in the community generally. As a result, LGBTIQ people can feel invisible in the family violence system’: *ibid* 35.

⁵⁸⁵ Fitz-Gibbon and Stubbs, above n 58, 318–336. See also above [9.1.1]–[9.1.17].

women who kill abusive partners has been discussed.⁵⁸⁶ The VLRC summarised the difficulty as arising from ‘[t]he traditional association of self-defence with a one-off spontaneous encounter, such as a pub brawl scenario between two people (usually men) of relatively equal strength’.⁵⁸⁷ Where men kill in self-defence, they generally respond to a threat immediately and in a proportionate manner. While neither immediacy nor proportionality is necessarily required for self-defence to be established, the association between these characteristics and the defence is very strong. When women kill to prevent further violence from their abusive partners, they often need to use a weapon, have assistance from another person, or strike while the abuser is not an immediate threat (such as sleeping).⁵⁸⁸ The lack of immediacy and proportionality in these responses can lead juries to doubt that such a defendant held a genuine belief their actions were necessary, or to find that their belief was unreasonable, and deem their actions to be premeditated killings.⁵⁸⁹ The VLRC concluded that ‘[a]lthough self-defence is technically equally available to both men and women ... in practice the defence is usually only useful to men’.⁵⁹⁰

9.5.6 Roundtable participants also noted to SALRI that provocation is ill suited to catering for those who kill in response to family violence, particularly women who kill, as such people typically do not respond to an immediate threat when doing so and therefore do not exhibit the traditional characteristics of a loss of control. The requirements of provocation were noted to more naturally favour the contexts within which men kill. It was considered that those who kill in the context of family violence would be better catered for in South Australia under the partial defence of excessive self-defence⁵⁹¹ and/or the complete defence of self-defence. However, it was noted that the current law of self-defence in South Australia⁵⁹² does not specifically provide for those who kill or use force in the context of family violence.

9.5.7 There is now widespread agreement that self-defence should be able to be fairly applied to cases in which women kill an abusive intimate partner, although traditionally cases in which victims of family abuse kill in non-confrontational circumstances have faced obstacles in the application of self-defence.⁵⁹³

9.5.8 Roundtable participants suggested that any revised model of self-defence for family violence should not be confined to spouses or domestic partners. SALRI agrees with this view. As the VLRC noted, ‘[f]amily violence ... can occur in the context of any close personal relationship’.⁵⁹⁴ The Victorian Royal Commission noted that family violence can occur in any familial relationship — for example, between current or former intimate partners who are or were married or in de facto relationships, in heterosexual and same-sex relationships, between parents (or step-parents) and children, between siblings, and between grandparents, grandchildren, uncles, aunts, nephews, nieces and cousins.⁵⁹⁵ The Royal Commission noted

⁵⁸⁶ See, for example, Tolmie, above n 384, 91; Easteal, above n 317, 37; Julie Stubbs and Julia Tolmie, ‘Defending Battered Women on Charges of Homicide: The Structural and Systemic versus the Personal and Particular’ in Wendy Chan, Dorothy Chunn and Robert Menzies (eds), *Women, Madness and the Law: A Feminist Reader* (GlassHouse Press, 2005) 19. See further above [9.1.1]–[9.1.17].

⁵⁸⁷ VLRC (2004), above n 13, 61 [3.8].

⁵⁸⁸ Ibid 62 [3.11]. See also Ramsey, above n 494, 61–62.

⁵⁸⁹ VLRC (2003), above n 295, 54–5 [5.18]–[5.20].

⁵⁹⁰ VLRC (2004), above n 13, 63 [3.14].

⁵⁹¹ *Criminal Law Consolidation Act 1935* (SA) s 15(2).

⁵⁹² Ibid Division 2.

⁵⁹³ Fitz-Gibbon and Stubbs, above n 58, 318.

⁵⁹⁴ VLRC (2004), above n 13, 61 [3.9].

⁵⁹⁵ Victorian Royal Commission, above n 33, 2.

that it can also occur in relationships that are considered to be ‘family-like’ — for example, in certain cultural traditions.⁵⁹⁶

9.5.9 The most common manifestation of family violence is intimate partner violence committed by men against their current or former female partners. But such violence, as noted above, is not confined to this context. Family violence in the context of other relationships — including in extended families, against children, by siblings, against men and in same-sex relationships — is also covered by such legislation as the *Intervention Orders (Prevention of Abuse) Act 2009* (SA) (see s 8(8)).⁵⁹⁷

9.5.10 It was strongly expressed in consultation to SALRI that the family relationships covered by any revised model of self-defence to recognise family violence should accord with such Acts. SALRI supports this approach.

9.5.11 Recent reforms in Australia relating to self-defence and excessive self-defence seek to rely on the jury or judicial officer in cases of family violence being able to hear and understand victims’ stories, and in courts exercising sentencing discretion with due regard to the full context of the offence.⁵⁹⁸

9.5.12 Roundtable participants considered whether South Australia could suitably adopt a model to deal with family violence issues similar to the current Victorian model.⁵⁹⁹ This model provides that whilst the response of the accused must remain reasonable, evidence of family violence⁶⁰⁰ may be adduced in homicide and other cases where self-defence⁶⁰¹ and/or duress⁶⁰² are raised. It further provides that an immediate threat is unnecessary for self-defence to be available as a defence if the offence occurred in circumstances of family violence.⁶⁰³ It also provides that self-defence is still available as a defence in circumstances of family violence where the accused’s ‘response involves the use of force in excess of the force involved in the harm or threatened harm’.⁶⁰⁴

9.5.13 The Victorian model also provides that evidence of family violence may be relevant in self-defence in either determining whether an accused has carried out conduct while believing it to be necessary in self-defence (the subjective limb) or to assess if the conduct is a reasonable response in the circumstances as an accused perceives them (the objective limb).⁶⁰⁵

9.5.14 There was strong support from all roundtable participants for the Victorian model of self-defence and that the South Australian law should to be amended to make it clear that there is no requirement of an imminent threat to argue self-defence for offences occurring in the context of family violence.⁶⁰⁶ Participants considered this should be of general application and not limited to homicide offences.

⁵⁹⁶ Ibid.

⁵⁹⁷ See below Appendix 6, 123–125.

⁵⁹⁸ Fitz-Gibbon and Stubbs, above n 58, 318.

⁵⁹⁹ *Crimes Act 1958* (Vic) ss 322G–322T.

⁶⁰⁰ Ibid s 322J.

⁶⁰¹ Ibid s 322M.

⁶⁰² Ibid s 322P.

⁶⁰³ Ibid s 322M(1)(a).

⁶⁰⁴ Ibid s 322M(1)(b). This refinement is unnecessary in South Australia as it is already explicit. See *Criminal Law Consolidation Act 1935* s 15B.

⁶⁰⁵ *Crimes Act 1958* (Vic) s 322M(2).

⁶⁰⁶ See NZLC (2016), above n 93, 9 Rec 5.

Roundtable participants also strongly supported law reform which would explicitly provide that evidence of family violence is relevant to assess whether the amount of force used is reasonable or proportionate.

9.5.15 SALRI strongly agrees with these suggestions.

9.5.16 Participants expressed the view that any reforms to self-defence in family violence scenarios in South Australia ought not to adopt the ‘genuine belief even if unreasonable force’ test, but that the test should be both a genuine belief as to the necessity for self-defence (the subjective limb) and that the force employed should continue to be reasonably proportionate to meet the threat as genuinely perceived by the accused (the objective limb). This is subject to making due allowance for self-defence in a family violence context. SALRI concurs with this view. A purely subjective approach (as exists with home invasions in South Australia)⁶⁰⁷ is too wide in its application⁶⁰⁸ and risks misuse.⁶⁰⁹ ‘People who kill in the context of family violence clearly should not have an automatic claim to self-defence.’⁶¹⁰ The existing hybrid test of self-defence in South Australia combining objective and subjective limbs (with the refinements recommended in this Report) is preferable and represents a fair and effective balance.

Recommendation 4

SALRI recommends that the current law of self-defence set out in Division 2 of the *Criminal Law Consolidation Act 1935* (SA) should be amended for all offences of violence (not confined to homicide) to incorporate the Victorian model of self-defence in circumstances of family violence as set out in Part IC of the *Crimes Act 1958* (Vic).

Recommendation 5

SALRI recommends that, in particular, the current law of self-defence in Division 2 of the *Criminal Law Consolidation Act 1935* (SA) should be amended to clarify that in cases involving family violence, the actual or perceived threat need not be immediate or imminent.

⁶⁰⁷ Where there is no need for reasonable proportionality as a genuine but unreasonable belief in the need for self-defence (even if unreasonable) provides a complete defence. See *Criminal Law Consolidation Act 1935* s 15C.

⁶⁰⁸ The wide latitude accorded to people in South Australia who use violence to defend themselves or their homes by removing any requirement for reasonableness or proportionality between the threat and defensive context in a home invasion context is notable. The logic of allowing householders who experience a criminal trespass in their home to use any degree of force, no matter how unreasonable has been questioned as has the justification for providing this extended form of self-defence to householders but not to other groups such as women subjected to family violence in their homes. See Heath, above n 499, 358, [10.10], 374 [10.44]. The Aboriginal Legal Rights Movement in consultation with SALRI also noted ‘with concern that the existing s 15 of the *Criminal Law Consolidation Act* privileges alleged victims of home invasion over victims of domestic violence.’

⁶⁰⁹ The law clearly should not allow killings, even by abused spouses, in retaliation or revenge to amount to self-defence. As was observed in the Canadian case of *R v Craig* (2011) 276 OAC 117 [35] (Doherty JA) in relation to the not dissimilar Canadian law of self-defence in a family violence context: ‘Not every killing by an abused person in response to prolonged abuse is justified under the self-defence provisions of the *Criminal Code*. Self-defence is a justification for what would otherwise be culpable homicide, based on the necessity of self-preservation. It is a recognition that in the circumstances described in the various self-defence provisions of the *Criminal Code* society accepts that a person is justified in killing another to save one’s self. A person who kills another to escape from a miserable life of subservience to that person does not act in self-defence absent reasonably perceived threats of significant physical harm and reasonably held beliefs that the killing is necessary to preserve one’s self from significant physical harm or death.’ See also, *The Queen v R* (1981) 28 SASR 321, 325–326 (King CJ): ‘The law of a well-ordered and civilized society cannot countenance deliberate killing, even to the extent of treating it as extenuated, as a response to the conduct of another however abhorrent that conduct might be. Nor can society countenance killing as a means of averting some apprehended harm in the future.’

⁶¹⁰ VLRC (2004), above n 13, 68 [3.28].

Recommendation 6

SALRI recommends that, in particular, the current law of self-defence in Division 2 of the *Criminal Law Consolidation Act 1935* (SA) should be amended to provide that evidence of family violence is relevant and may be taken into account to prove both the accused's belief that using force was necessary (the subjective limb) and to prove whether the conduct said to occur in self-defence was a reasonable or proportionate response in the circumstances as the accused believed them to be (the objective limb).

9.5.17 The term 'family violence' was preferred by interested parties to 'domestic violence' because it recognises that instances of violence occur through an entire family. The term also is more compatible with modern blended family and Indigenous kinship relationships.⁶¹¹ The Roundtables also noted that family violence is a problem that is experienced by women with disabilities, and that any definitions in the legislation ought to take into account carer/client abuse and violence.

9.5.18 It was emphasised in consultation to SALRI that a broad view should be accorded to family violence in accordance with modern understanding and that the range of abuse defined within s 8 of the *Intervention Orders (Prevention of Abuse) Act 2009* (SA) should be captured. Under that Act, 'domestic abuse' is broadly defined to specifically refer to physical, sexual, emotional, psychological or economic abuse. Section 8 states that an act is an act of abuse against a person if it results in or is intended to result in: physical injury; emotional or psychological harm; an unreasonable and non-consensual denial of financial, social or personal autonomy; or damage to property in the ownership or possession of the person or used or otherwise enjoyed by the person. Emotional or psychological harm includes mental illness, nervous shock and distress, anxiety or fear that is more than trivial.

9.5.19 It was highlighted to SALRI in consultation during roundtable discussion that, for consistency and best practice, the existing definitions used in South Australian legislation relating to family violence (see s 8 of the *Intervention Orders (Prevention of Abuse) Act 2009*)⁶¹² should accord with any changes.

9.5.20 SALRI supports this approach. It is important not to confine family violence to direct physical violence. Research supports the modern wider definition of family violence. As Crofts and Tyson explain: 'It is now well recognised that family violence can take many forms, not just physical violence but also psychological and emotional abuse which may include intimidation, harassment, stalking, economic abuse, social isolation, and threats of damage to property and pets.'⁶¹³

9.5.21 SALRI considers that, as emphasised to SALRI by family violence groups, family violence is not confined to direct physical violence. Family violence can take many forms. Such violence, as noted above, includes emotional and psychological abuse; physical and sexual violence; financial abuse; technology-facilitated abuse and stalking.⁶¹⁴ Any definition should include such forms of violence. Though the terms and definitions used in the Victorian Act are a helpful guide, they cannot necessarily be uplifted to a South Australian Act. SALRI suggests that the existing model of 'family violence' in s 8 of the *Intervention Orders (Prevention of Abuse) Act 2009* (SA) should be adopted.

⁶¹¹ This view was also noted to SALRI in consultation by the Aboriginal Legal Rights Movement.

⁶¹² See also below Appendix 6, 123–125.

⁶¹³ Crofts and Tyson, above n 294, 872–873.

⁶¹⁴ Victorian Royal Commission, above n 33, 23–31.

Recommendation 7

SALRI recommends that, in light of modern understanding, the definition of ‘family violence’ should be given a wide definition and not be confined to direct physical violence and ‘family violence’ should also be given a wide definition in relation to the relationships caught within it (especially to include Indigenous kinship) and not be confined to spouses or ‘domestic partners’. The model provided in Part IC of the *Crimes Act 1958* (Vic) is helpful but it is additionally suggested that, for consistency, the existing model of ‘family violence’ in s 8 of the *Intervention Orders (Prevention of Abuse) Act 2009* (SA) should be adopted.

9.6 Social Framework Evidence

9.6.1 The benefits of amending the *Evidence Act 1929* (SA) to provide explicitly that evidence of family violence and its effects (often called social framework evidence) may be admissible were highlighted to SALRI in its consultation. Such a reform would confirm to legal and other practitioners, the judiciary and investigators that such evidence, including expert evidence regarding the effects of family violence, is admissible. It was noted that not only direct evidence as to the family violence suffered by a typically female accused but also wider, usually expert, evidence to explain the nature and implications of that violence, whether specifically to that accused or generally may well be appropriate.

9.6.2 The NSW Select Committee examined the potential benefit of evidence of the circumstances of (usually) women who experience family violence and who either kill an abusive partner, or who are killed by their abuser. Noting that this type of evidence is often referred to as ‘social framework evidence’, the Select Committee defined such evidence in the following terms:

Social framework evidence is evidence that provides context to the experiences of victims of domestic and family violence. It includes information about the general nature and dynamics of relationships affected by family violence and the cumulative effect on the person or a family member of that violence. Such evidence includes not only evidence of, for instance, the history of violence relating to the specific case, but also contextual information relevant to the experiences of victims of domestic violence to assist the court and the jury to understand the specifics of the case and the common myths and misconceptions about family violence. For example, social framework evidence could be used help a jury understand the difficulties faced by abused women deciding whether to leave a violent situation, countering the contention that she “should just leave”. Similarly, it could explain circumstances where abused women “snap”, killing an abuser in a non-confrontational situation knowing that future violence against her or her children is inevitable and imminent, even if not immediately so.⁶¹⁵

9.6.3 Such evidential provisions play a substantial role in shaping the accounts that are given of homicides but are not always given due emphasis in law reform initiatives. While the legal requirements for self-defence are now reasonably open and should be able to accommodate the circumstances of a victim of family violence who kills to preserve herself or others, the outcome of a case may well rely on relevant evidence being introduced to assist in determining whether a defendant’s use of violence was reasonable and necessary.⁶¹⁶ In such cases the extent to which evidence of family violence can be admitted

⁶¹⁵ NSW Select Committee, above n 11, 178 [8.103].

⁶¹⁶ See, for example, VLRC (2004), above n 13, 159–160 [4.82]–[4.85], 169–178 [4.86]–[4.110], 188 Rec 2; Fitz-Gibbon, *Homicide Law Reform, Gender and the Provocation Defence*, above n 47, 124–125.

will likely be crucial to the outcome of the case as it provides important contextual understanding for the defendant's actions.⁶¹⁷

9.6.4 Expert evidence on domestic violence has been admitted in cases across Australia, but it is often narrowly focused. There is agreement that broader evidence on family violence and its effects, is desirable and useful to both judicial officers and juries in these cases.⁶¹⁸

9.6.5 In summary, social framework evidence will ensure the jury has an 'adequate understanding of domestic violence',⁶¹⁹ more so than that offered by expert evidence regarding BWS.⁶²⁰

9.6.6 In 2004, the VLRC recommended a legislative provision to clarify or confirm the use of such evidence in cases of homicide involving family violence.⁶²¹ The Commission explained that the introduction of this reform would:

clarify that expert evidence is admissible about the general nature and dynamics of abuse and social factors that impact on people in violent relationships. This evidence could be given by people with expertise on family violence and would assist jurors to better understand what it is like to live in a situation of ongoing abuse, and what may be reasonable for a person living in this situation.⁶²²

9.6.7 The VLRC noted that 'social framework evidence' could include '[g]eneral dynamics of abusive relationships, the cycle of violence, the complex reasons women stay in violent relationships and why some women do not report violence and why a woman might plan to kill in order to protect herself.'⁶²³

9.6.8 In Victoria, drawing on the work of the VLRC, legislative reforms introduced to improve legal responses to homicide over the last decade have sought to bolster evidence laws to ensure that family violence evidence is permissible in court to provide important context to a person's lethal actions and explain the nature and dynamics of family violence. Labelled 'social framework evidence', the initial reforms in Victoria in 2005⁶²⁴ established the relevance and permissibility of family violence evidence in cases where a person committed the homicide after being abused by the deceased. The 2005 evidence reforms were expanded through the *Crimes Amendment (Abolition of Defensive Homicide) Act 2014* (Vic) which relocates the relevant provision ('evidence of family violence') to s 322J of the *Crimes Act 1958*.⁶²⁵

⁶¹⁷ Fitz-Gibbon, *Homicide Law Reform, Gender and the Provocation Defence*, above n 47, 208–210.

⁶¹⁸ Heather Douglas, 'Social Framework Evidence: Its Interpretation and Application in Victoria and Beyond' in Kate Fitz-Gibbon and Arie Freiberg (eds) *Homicide Law Reform in Victoria: Retrospect and Prospects* (Federation Press, 2015) 94–109; Debbie Kirkwood, Mandy McKenzie and Danielle Tyson, 'Justice or Judgement? The Impact of Victorian Homicide Law Reforms on Responses to Women Who Kill Intimate Partners' (Domestic Violence Resource Centre Victoria, Discussion Paper No 9, 2013).

⁶¹⁹ Julie Stubbs, to Criminal Law Review, NSW Department of Attorney-General and Justice, 20 November 2013, 5. See further above [9.6.1]–[9.6.14].

⁶²⁰ Women's Legal Services NSW, Submission to NSW Department of Attorney General and Justice, *Response to Exposure Draft Bill to the Crimes Amendment (Provocation) Bill 2013*, 14 November 2013, 6.

⁶²¹ VLRC (2004), above n 13, 142 Rec 25. See further at 139–142 [4.25]–[4.35], 183–187 [4.125]–[4.136]. See also Australian Law Reform Commission/NSW Law Reform Commission (ALRC/NSWLRC), *Family Violence – A National Legal Response*, Report 118 (2011) [14.105]–[14.107], Recs 14.1, 14.2, 14.5.

⁶²² VLRC (2004), above n 13, xxxiv–xxxv.

⁶²³ Ibid 173.

⁶²⁴ *Crimes (Homicide) Act 2005* (Vic) s 9AH. See Victoria, *Parliamentary Debates*, Legislative Assembly, 6 October 2005.

⁶²⁵ Douglas, above n 618, 94. See further below Appendix 5, 118–122.

9.6.9 Research conducted in Victoria in 2013 found that, in the initial period following the 2005 reforms, the social framework evidence provisions had not been widely used by legal practitioners.⁶²⁶ However, following the further 2014 reforms to family violence evidence laws in Victoria, the value of this evidence has been recognised by leading scholars in the field. Professor Heather Douglas, for example, has stated that such evidence may ‘help to ensure that the contexts of the lives of abused women who kill are better understood and heard throughout the criminal justice process’.⁶²⁷

9.6.10 The NSW Select Committee examined at some length the use of such evidence in cases of family violence and the desirability of an explicit legislative provision confirming the admissibility of such evidence.⁶²⁸ Such evidence, it was argued to the Select Committee, (consistent with the views also expressed to SALRI in its consultation) will ‘go some way toward addressing the level of understanding about the dynamics and nature of family violence perceived to be lacking among key players in the criminal justice system, including the judiciary, legal counsel and perhaps most significantly, the jury.’⁶²⁹ The role of social framework evidence was said ‘in relation to women who kill after domestic abuse was argued to be vital in ensuring that the complete defence of self-defence was considered in appropriate circumstances.’⁶³⁰

9.6.11 The NSW Select Committee concluded that, notwithstanding that some social framework evidence may already be able to be admitted under current NSW law, ‘there is merit’ in explicitly providing for such evidence to be adduced in homicide cases.⁶³¹ It recommended that, using the Victorian model as an example, the NSW Government introduce an amendment ‘to explicitly provide that evidence of domestic and family violence may be adduced in homicide matters’.⁶³²

9.6.12 Though there may be a view such a provision is unnecessary as it is already allowed under the present law,⁶³³ SALRI notes the contrary view that ‘while the current law may allow for such evidence to be adduced, in practice it fails to adequately do so and therefore a specific provision [is] desirable.’⁶³⁴ As Professor Stubbs (in terms which were also relayed to SALRI in its consultation) explained to the NSW Select Committee:

While evidence concerning domestic violence can be admitted where relevant ... this relies on the prosecution, defence and judiciary having a good understanding of domestic violence and its context ... A legislative provision [similar to that adopted in Victoria] would make the relevance and value of such evidence clear to all parties, and may assist in making self-defence more readily available to battered women in appropriate cases.⁶³⁵

9.6.13 SALRI supports the reasoning provided by both the NSW Select Committee and the VLRC (as cited above). SALRI sees real and tangible benefit in such a provision to provide explicit statutory authority

⁶²⁶ Kirkwood, McKenzie and Tyson, above n 618.

⁶²⁷ Douglas, above n 618, 378. See also Fitz-Gibbon, (2017, forthcoming) above n 83.

⁶²⁸ NSW Select Committee, above n 11, 178–186 [8.102]–[8.138].

⁶²⁹ *Ibid* 180 [8.110].

⁶³⁰ *Ibid* 181 [8.114].

⁶³¹ *Ibid* 185 [8.134].

⁶³² *Ibid* 186 [8.138]. See also ALRC/NSWLRC, above n 621, [14.13], [14.77]–[14.78], [14.87]–[14.88], [14.105]–[14.107], Rec 14.5; NZLC (2016), above n 93, 8–9 [29], 9 Rec 7.

⁶³³ NSW Select Committee, above n 11, 182 [8.120]–[8.122].

⁶³⁴ *Ibid* 184 [8.128].

⁶³⁵ Response to Options Paper, Professor Julie Stubbs, 7, quoted by NSW Select Committee, above n 11, 184 [8.128].

in offences of violence (not confined to homicide)⁶³⁶ for the admissibility of family violence and related social framework evidence. Such a provision was widely supported in SALRI's consultation. It was pointed out to SALRI that such a change would have both legal and cultural effect and play an important educative role⁶³⁷ and not only recognise, but encourage the greater use of such evidence. Though the common law strictly allows the use of 'social framework' evidence,⁶³⁸ in practice such evidence is rarely employed.⁶³⁹ It was pointed out to SALRI in consultation that explicit statutory authority for the legitimacy and use of such evidence is preferable to relying on the common law.

9.6.14 SALRI suggests that South Australia should adopt a model similar to the Victorian model of self-defence which explicitly takes into account family violence evidence and its context. This Recommendation can, and should, be implemented independently of whether provocation is revised, retained or repealed (see Recommendation 11 below). Universal support was expressed to SALRI during its consultation for adopting the Victorian model of self-defence, including social framework evidence.

Recommendation 8

SALRI recommends that either Division 2 of the *Criminal Law Consolidation Act 1935* (SA) or the *Evidence Act 1929* (SA) should be amended in terms similar to Part IC of the *Crimes Act 1958* (Vic) to explicitly provide that evidence of family violence and related evidence (including 'social framework' evidence as to the nature and effect of family violence) is admissible and may be adduced in any case involving family violence (not confined to homicide) with potential defences of self-defence, duress or necessity.

9.6.15 Finally, roundtable participants stated that any legislative reforms in South Australia should be accompanied by education of legal practitioners, the judiciary and community groups to ensure that any reforms have maximum impact in practice and can effectively assist victims of family violence, including women who kill those who commit family violence against them.⁶⁴⁰ The importance of training and education for judicial officers, the legal profession and investigators about the nature and dynamics of family violence (and to help counter some of the many myths and misconceptions in this area)⁶⁴¹ was expressed, notably by specialist family violence groups, to SALRI.

9.6.16 It was noted to SALRI that, changing the law, whilst an important and welcome measure, is not necessarily enough to bring about real change in practice. The NSW Select Committee similarly noted that

⁶³⁶ ALRC/NSWLRC, above n 621, [14.108]–[14.109], Recs 14.2, 14.5. The ALRC 'consider[ed] that State and Territory governments should review whether criminal legislation should expressly allow defendants to lead evidence about family violence in the context of defences to non-fatal offences against the person': at [14.109].

⁶³⁷ See also NSW Select Committee, above n 11, 182 [8.119]; Douglas, above n 618, 109.

⁶³⁸ See, for example, *R v Runjanjic and Kontinnen* (1991) 53 A Crim R 362; *R v Chhay* (1994) 72 A Crim R 1; *R v Secretary* (1996) 86 A Crim R 119; *R v Thornton (No 2)* [1996] 1 WLR 1174; *R v Oakes* [1995] 2 NZLR 673, 675; *Osland v R* (1998) 197 CLR 316, 337–338 [55]–[57] (Gaudron J). *Osland v R* (1998) 197 CLR 316, 377 [166] (Kirby J): 'Although BWS does not enjoy universal support, there 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'. See also *Evidence Act 1929* (SA) s 34P as to the use in criminal proceedings by any party of discreditable conduct evidence to show 'background', 'relationship', 'context' or 'narrative'. See further South Australia, *Parliamentary Debates*, House of Assembly, 6 April 2011, 3291 (John Rau). The defence if seeking to use such evidence are likely to be subject to a more liberal test of admissibility than the prosecution. See at 3293–3294.

⁶³⁹ See the SALRI roundtable consultation event held on 12 May 2016 (Appendix 2, 113). See also Crofts and Tyson, above n 294, 873, n 57.

⁶⁴⁰ See also ALRC/NSWLRC, above n 621, [14.99]–[14.102]; NZLC (2016), above n 93, 7 Recs 1-4.

⁶⁴¹ See VLRC (2004), above n 13, 161–169, for a summary of some of these common myths.

the success of such proposals ‘rely heavily on their acceptance by key players in the criminal justice system’.⁶⁴² The NSW Select Committee quoted the following comments of Professor Stubbs: ‘The difficulty is that whatever you come up with you will need to persuade the legal profession to come on board. [The effectiveness of any] recommendation you make ... will depend very much on how the legal profession interprets and applies this. Having them on board is very important.’⁶⁴³

9.6.17 In 2004, the VLRC examined the importance of education and training for the judiciary, legal profession and police in the nature and dynamics of family violence.⁶⁴⁴ The VLRC supported such education⁶⁴⁵ and viewed it as:

essential to the effective operation of defences and informed decisions being made concerning pleas and sentencing. The issue of legal education goes beyond whether defence lawyers and members of the judiciary understand the relevance of a history of violence to self-defence — the dynamics and nature of family violence, and social circumstances of people in violent relationships, are generally not well understood. Professional education may assist to overcome the myths and stereotypes that we all share, and increase understanding by legal practitioners and judges about the nature of violent relationships and their long-term effects.⁶⁴⁶

9.6.18 Whatever laws we have, as the 2016 Victorian Royal Commission commented, will only be as effective as those who enforce, prosecute and apply them. Improving these practices — through education, training and embedding best practice and family violence expertise in the courts — is likely to be more effective than simply creating new offences⁶⁴⁷ (or defences).

Recommendation 9

SALRI recommends that the South Australian Government consider the development and implementation of an education package on the nature and dynamics of domestic and family violence targeting the legal sector and the community more broadly.

⁶⁴² NSW Select Committee, above n 11, 188 [8.146].

⁶⁴³ Professor Stubbs, Evidence, 28 August 2012, 58–59, quoted by NSW Select Committee, above n 11, 188 [8.146].

⁶⁴⁴ VLRC (2004), above n 13, 194–199 [4.153]–[4.168].

⁶⁴⁵ Ibid 202 Recs 35–36. See also Danielle Tyson, Debbie Kirkwood, Mandy McKenzie and Bronwyn Naylor, ‘The Effects of the 2005 Reforms on Legal Responses to Women who kill Intimate Partners’ in Kate Fitz-Gibbon and Arie Freiberg (eds) *Homicide Law Reform in Victoria: Retrospect and Prospects* (Federation Press, 2015) 76, 92–93; NZLC (2016), above n 93, 7 Recs 1–4.

⁶⁴⁶ VLRC (2004), above n 13, 199–200 [4.169]. The VLRC (at 202 Rec 36) noted such professional training on family violence could aim to assist judges and lawyers ‘to understand the nature of family violence and could include discussion of issues such as: common myths and misconceptions about family violence; the nature and dynamics of abusive relationships; the social context in which family violence occurs; barriers to disclosure of abuse and seeking the assistance of police and other service agencies, including the additional barriers faced by persons who are Indigenous, from a culturally and linguistically diverse background, who live in a rural or remote area, who are in a same-sex relationship, who have a disability and/or have a child with a disability; the emotional, psychological and social impact of family violence; the relationship between family violence and other offences, including murder and manslaughter; how expert evidence about family violence may assist in supporting a plea of self-defence or duress [or necessity] and the use of expert reports on family violence in sentencing.’

⁶⁴⁷ Victorian Royal Commission, above n 33, 27.

PART 10 – Duress and Necessity

10.1.1 It is also necessary for consistency and completeness to examine the application of the common law defences of duress and necessity in family violence context. There is a close relationship between the four main defences discussed in this Report, namely provocation, self-defence, duress and necessity. As noted by the VLRC, '[a]ll are based on a necessity to act in self-protection or to protect others from harm.'⁶⁴⁸

10.1.2 If a person commits an offence because another person has threatened them with death or serious harm, they may be able to rely on the common law defence of duress.⁶⁴⁹ A person who commits an unlawful act because circumstances (rather than another person) force them to do so to avoid a greater harm may be able to rely on the common law defence of necessity.⁶⁵⁰ Both duress and necessity contemplate that the criminal act must be a reasonable and proportionate response to an imminent peril or threat of a grave nature such as death or serious harm.

10.1.3 Although necessity and duress are available as defences to most crimes, the common law rule is that they cannot be relied upon as defences to murder⁶⁵¹ (and potentially attempted murder).⁶⁵² This omission has been much criticised.⁶⁵³ The VLRC recommended in 2004 that the defences of duress and necessity should be extended to murder and attempted murder.⁶⁵⁴ The Victorian Parliament accepted these recommendations and abolished the common law defences of duress (s 322Q of the *Crimes Act 1958* (Vic)) and necessity (see s 322S of the *Crimes Act 1958* (Vic)) and introduced replacement defences of statutory duress (s 322O of the *Crimes Act 1958* (Vic)) and sudden or extraordinary emergency (s 322R of the *Crimes Act 1958* (Vic)). The replacement defences extend to both murder and attempted murder.⁶⁵⁵

⁶⁴⁸ VLRC, above n 13, 59 [3.1].

⁶⁴⁹ For the requirements which must be satisfied, see *R v Hurley and Murray* [1967] VR 526. See further Rhain Buth, 'Chapter 11: Duress and Necessity' in David Caruso, Rhain Buth, Mary Heath, Ian Leader-Elliott, Patrick Leader-Elliott, Ngaire Naffine, David Plater and Kellie Toole, *South Australian Criminal Law and Procedure* (Lexis Nexis, 2nd ed, 2016), 383–390 [11.8]–[11.19]. The perceived uncertainty as to the scope of the law relating to duress has been the subject of frequent English judicial comment. In *R v Abdul-Hussain* [1999] Crim LR 570, the Court of Appeal, for the fourth time in five years, emphasised 'the urgent need for legislation to define the defence of duress with precision'.

⁶⁵⁰ For the requirements which must be satisfied, see *R v Loughnan* [1981] VR 443, 448. See further Buth, above n 649, 393–398 [11.23]–[11.30]. For an example of necessity, a truck driver who deliberately drives into a building when his brakes fail, in order to avoid colliding with another car and killing the passengers, could rely on the defence of necessity to avoid criminal culpability. See VLRC (2004), above n 13, 11 [3.132].

⁶⁵¹ *R v Dudley and Stephens* (1884) 14 QBD 273 (necessity) (cf *Re: A (Children)* [2001] 2 WLR 480); *R v Harding* [1976] VR 129; *R v Brown and Morley* [1968] SASR 467; *R v Darrington and McGauley* [1980] VR 353; *R v Howe* [1987] 1 All ER 771.

⁶⁵² *R v Gotts* [1992] 2 AC 412. Contrast *R v Goldman [Ruling No 4]* (2004) 147 A Crim R 472.

⁶⁵³ See, for example, Kenneth Arenson, 'Expanding the Defences to Murder: A More Fair and Logical Approach' (2001) 5 *Flinders Journal of Law Reform* 129; Rupert Cross, 'Murder Under Duress' (1978) 28 *University of Toronto Law Journal* 369; Ian Dennis, 'Duress, Murder and Criminal Responsibility' (1980) 96 *Law Quarterly Journal* 208; Miriam Gur-Arye, 'Should the Criminal Law Distinguish Between Necessity as Justification and Necessity as an Excuse?' (1986) 102 *Law Quarterly Review* 71; Stanley Yeo, 'Necessity under the Griffith Code and the Common Law' (1991) 15 *Criminal Law Journal* 17; VLRC (2004) above n 13, 117–118 [3.150]–[3.153].

⁶⁵⁴ VLRC (2004), above n 13, 118, 123, Rec 9. See also Law Reform Commissioner of Victoria, *Duress, Necessity and Coercion*, Report 9 (1980) [2.15] (duress) and [3.33] (necessity); Law Reform Commission of Victoria, *Homicide*, Report 40 (1991) [244] Rec 31.

⁶⁵⁵ See further below Appendix 5, 118–122.

10.1.4 The extension of duress and necessity to murder raises complex moral and legal issues.⁶⁵⁶ It is beyond SALRI's current reference to consider whether duress and necessity should be so extended. SALRI considers that further research is necessary to consider the scope of the common law defences of duress and necessity and whether they should be extended to attempted murder and murder as they are in Victoria, notably in the context of family violence.⁶⁵⁷

8. For Further Review

The consideration of the scope of the existing common law defences of necessity and duress (beyond that contained in Recommendation 10 of this Report).

10.1.5 The defences of duress and necessity may arise in situations of family violence in which a person's response to a threat is affected by the prior violent history of the persons involved.⁶⁵⁸

10.1.6 In the South Australian case of *R v Runjajic and Kontinnen*,⁶⁵⁹ for example, two women who had lived with a very violent man claimed they had been acting under his duress when they seriously injured and falsely imprisoned another woman. The South Australian Court of Criminal Appeal held that the women should have been allowed to rely on expert evidence of BWS to support their claim of duress. The Court explained that in assessing whether the defence of duress applied, it was necessary to consider whether a woman of reasonable firmness in the situation of the accused women would have acted in the way they did. Expert evidence of BWS was held to be admissible in answering this question.⁶⁶⁰

10.1.7 *R v Lorenz*⁶⁶¹ is a vivid example of where duress and necessity may apply in a context of family violence. The accused robbed a supermarket employee while armed with a knife, obtaining \$360. She fully admitted her involvement in the offence when interviewed by the police. At trial, the only issue was whether she was entitled to an acquittal on the grounds of duress or necessity. The basis of these defences was a threat from her abusive de facto partner, that if she did not obtain enough money for him to be able to re-register his car, approximately \$550, he would kill her. She was at the time of the offence pregnant with his third child. The trial judge, Crispin J accepted that the accused had previously been subjected to repeated family violence⁶⁶² and that the threat to kill her was made.

⁶⁵⁶ See, for example, *R v Dudley and Stephens* (1884) 14 QBD 273, 287–288; George Christie, 'The Defence of Necessity Considered from the Legal and Moral Points of View' (1999) 48 *Duke Law Journal* 975.

⁶⁵⁷ *Crimes Act 1958* (Vic) s 322P. See also Victoria, *Parliamentary Debates*, Legislative Assembly, 6 October 2005, 1351–1352.

⁶⁵⁸ See Elizabeth Sheehy, Julie Stubbs and Julia Tolmie, 'When Self-defence Fails' in Kate Fitz-Gibbon and Arie Freiberg (eds) *Homicide Law Reform in Victoria: Retrospect and Prospects* (Federation Press, 2015) 110, 120–126.

⁶⁵⁹ (1991) 53 A Crim R 362.

⁶⁶⁰ See also VLRC (2004), above n 13, 121 [3.164].

⁶⁶¹ (1980) 146 FLR 369.

⁶⁶² *Ibid.* The catalogue of violence described by the accused was graphic. 'This threat followed a pattern of violent and threatening behaviour towards her over a number of years. She met Mr Henshaw when she was 15 and became pregnant to him when she was just over 16. He began to become violent about a year later. Thereafter she was frequently beaten. The beatings extended to being hit, kicked, jumped on and thrown against walls. On at least one occasion she was threatened with a machete and on another she was attacked with a baseball bat which had nails and screws protruding from it. She said that she had been admitted to hospital as a result of assaults by Mr Henshaw at least four or five times because of injuries which he had inflicted. The assaults often occurred after he had been drinking and frequently related to arguments about money. She said that he was very jealous and exerted considerable control over her lifestyle, refusing to allow her to go out socially without him, contacting her by telephone at lunchtime each day to ensure that she was still at home and demanding receipts for everything that she spent': at 371.

10.1.8 The extent of the violence was made clear by Crispin J:

Having regard to all of the evidence I am satisfied that the accused was subjected to repeated violence, abuse and intimidation over a period of several years up to the date of the robbery. I am also satisfied that Mr Henshaw was a violent and perhaps dangerously unbalanced young man who had assaulted the accused with a baseball bat embedded with nails and screws, threatened her and other members of her family with one or more machetes and threatened her aunt with a samurai sword. I have no doubt that in the context of this history the accused would have been extremely frightened if he had threatened to kill her especially if that threat was contingent upon a demand for money she did not have.⁶⁶³

10.1.9 The accused’s failure to leave her partner was explained by the evidence of BWS, in which victims develop a ‘learned helplessness with reliance on the abusive relationship as offering the only source of love in their life’.⁶⁶⁴

10.1.10 Crispin J stated that a diagnosis of BWS does not of itself give rise to any defence. The criminal law does not recognise any general principle that people should be absolved from criminal conduct because they had been beaten or abused or because a psychological condition caused by such violent treatment may have led them to commit the offences with which they are charged. Nonetheless, Crispin J noted that evidence that such a person may have had a psychological condition of this kind may be relevant to several defences such as duress.⁶⁶⁵

10.1.11 Crispin J held that no defence of duress was available in this case as the threat did not direct the accused to commit the particular offence with which she was charged. The defence was limited to cases in which the threats had been made to coerce the accused into committing the act which was the basis of the offence with which he or she was charged.⁶⁶⁶ There were public policy reasons for confining the defence of duress in this manner. As a matter of public policy, Crispin J observed, it is important to ensure that the ambit of the defence is not expanded to relieve people from criminal responsibility for offences to which the coercion was not directed.⁶⁶⁷

10.1.12 Crispin J also held that the threat made by the accused’s partner did not create such an imminent danger as to give rise to the defence of necessity.

10.1.13 *Runjajic and Kontinnen* and *Lorenz* highlight that the common law defences of duress and necessity may arise in the context of family violence.

10.1.14 The application of both duress and necessity (as with self-defence) as a defence is problematic for women in the context of family violence, including the need for an immediate (or at least imminent) threat and the question of proportionality.⁶⁶⁸ Recent research undertaken by Elizabeth Sheehy, Julie Stubbs and Julia Tolmie suggests that the common law defences of duress and necessity are ill suited to the particular circumstances in which persons kill in response to prolonged family violence and as such do little to

⁶⁶³ Ibid 373.

⁶⁶⁴ Ibid 369.

⁶⁶⁵ Ibid 375.

⁶⁶⁶ *R v Hurley* [1967] VR 526, 542; *R v Dawson* [1978] 1 VR 536, 538.

⁶⁶⁷ (1980) 146 FLR 369, 377.

⁶⁶⁸ See, for example, Martha Schaffer, ‘Coerced into Crime: Battered Women and the Defence of Duress’ (1999) 4 *Canadian Criminal Law Review* 271; Sheehy, Stubbs and Tolmie, above n 658, 120–126.

alleviate the law of recognised limitations in the operation of the complete defence of self-defence. Sheehy, Stubbs and Tolmie conclude:

Battered women may be caught between a rock and a hard place ... They may be denied duress or necessity because their actions are cast as self-defensive, even when self-defence is barred on the facts ... The poor fit of the alternate defences for women who kill and the limited scope for their reform takes us back to where we started — to self-defence.⁶⁶⁹

10.1.15 In seeking to address limitations in the existing law, the VLRC accepted that the defence of duress should be modified in the context of family violence (including the use of social framework evidence).⁶⁷⁰ SALRI concurs with this approach and recognises the value of reforming the common law defences of both duress and necessity to better accommodate the circumstances within which persons may offend in response to family violence. There seems no reason to distinguish in this regard between self-defence, duress and necessity.

Recommendation 10

SALRI recommends that, for consistency with Recommendations 4, 5 6 and 7, the common law defences of duress and necessity in South Australia should be amended in respect of all offences, to clarify that in cases involving family violence, the actual or perceived threat need not be immediate and to provide that the fact of family violence should be taken into account in considering the reasonableness or proportionality of the response employed. The model in Part IC of the *Crimes Act 1958* (Vic) provides a suitable model.

10.1.16 SALRI notes that it has already recommended that either Division 2 of the *Criminal Law Consolidation Act 1935* (SA) or the *Evidence Act 1929* (SA) should be amended in terms similar to Part IC of the *Crimes Act 1958* (Vic) to explicitly provide that evidence of family violence and related evidence (including ‘social framework’ evidence as to the nature and effect of family violence) is admissible and may be adduced in any case involving family violence (not confined to homicide) with potential defences of self-defence, duress or necessity.

Recommendation 11

SALRI recommends that Recommendations 3 to 10 above can, and should, be undertaken, regardless of whether provocation is ultimately retained, revised or abolished in South Australia.

⁶⁶⁹ Sheehy, Stubbs and Tolmie, above n 658, 127.

⁶⁷⁰ VLRC (2004), above n 13, 121 [3.65], 142 Rec 25. See also at 139–142 [4.25]–[4.35], 183–187 [4.125]–[4.136].

PART 11 – Diminished Responsibility

11.1.1 Mr Charles of the Aboriginal Legal Rights Movement and Mr Caldicott in their consultation with SALRI urged consideration of diminished responsibility in South Australia as a substitute partial defence should provocation be abolished. Diminished responsibility is a partial defence which acts to reduce an offence of murder to manslaughter. It was originally conceived to avoid two mandatory dispositions: indeterminate detention for the legally ‘insane’ and life imprisonment, or the death penalty, for convicted murderers.⁶⁷¹

11.1.2 Diminished responsibility exists as a partial defence in the UK, the ACT, New South Wales, Queensland and the Northern Territory. It does not exist as a partial defence in South Australia.

11.1.3 The partial defence of diminished responsibility or ‘substantial impairment’ (as it is now known in NSW) provides what otherwise would be murder will be reduced to manslaughter in cases where it can be established, on the balance of probabilities, that the defendant’s ‘capacity to understand events, or to judge whether the person’s actions were right or wrong, or to control himself or herself, was substantially impaired by an abnormality of mind arising from an underlying condition.’⁶⁷² Diminished responsibility is premised on the notion that if insanity can completely excuse an intentional killing, then ‘partial insanity’ should reduce the criminal responsibility of the accused in relative proportion. The rationale for this partial defence reflects the view that there should be recognition of reduced levels of culpability for some defendants who would otherwise be guilty of murder, based on the fact that their state of mind was impaired at the time of the killing.⁶⁷³ The Model Criminal Code Officers’ Committee explained that the rationale for this defence is:

the desire for increased flexibility in dealing with defendants who display some kind of mental dysfunction, albeit not serious enough to establish the complete defence of insanity. As its name suggests, diminished responsibility partially excuses such persons on the basis that the fault element necessary to found a murder conviction, although present, is of diminished quality.⁶⁷⁴

11.1.4 Though diminished responsibility is of general application, the particular application and suitability of this partial defence to women who may kill their abuser in the context of family violence has been noted.⁶⁷⁵

11.1.5 Mr Charles accepted the problems of the present law of provocation in consultation with SALRI but powerfully noted the need to recognise the particular situation of persons with an intellectual disability or cognitive impairment who may kill someone (including and especially in the Aboriginal community). Mr Charles highlighted:

⁶⁷¹ LRCWA, above n 141, 249.

⁶⁷² *Crimes Act 1900* (NSW) s 23A(1)(a).

⁶⁷³ NSW Select Committee, above n 11, 15 [2.40].

⁶⁷⁴ Model Criminal Code Officers’ Committee, above n 126, 113.

⁶⁷⁵ See, for example, Susan Edwards, *Sex and Gender in the Legal Process* (Blackstone Press Ltd, 1999) 405; Rebecca Bradfield, ‘Women who Kill: Lack of Intent and Diminished Responsibility as the Other “Defences” to Spousal Homicide’ (2001) 13 *Current Issues in Criminal Justice* 143; Judith Kerr, ‘A Licence to Kill or an Overdue Reform? The Case of Diminished Responsibility’ (1997) 9 *Otago Law Review* 1. The NSW Judicial Commission observed that these types of cases ‘emphasise the serious effects of domestic violence on mental health’: Indyk, Donnelly and Keane, above n 82, 45.

the fact that there are regrettably many Aboriginal people throughout South Australia who suffer from intellectual disabilities, whether from the effects of foetal alcohol spectrum disorder, the effects of petrol sniffing or other causes. There are of course many other people in the community who suffer from the same kinds of intellectual disability.⁶⁷⁶

11.1.6 Opinion is divided on the merits of a partial defence of diminished responsibility. The NSWLRC⁶⁷⁷ and the English Law Commission⁶⁷⁸ supported the partial defence. In contrast, the Model Criminal Code Officers' Committee,⁶⁷⁹ the then Law Reform Commission of Victoria,⁶⁸⁰ the current VLRC⁶⁸¹ and the Law Reform Commission of Western Australia⁶⁸² opposed the partial defence.

11.1.7 SALRI accepts that the suggestion of diminished responsibility as a partial defence is not untenable. However, SALRI considers that the question of diminished responsibility as a partial defence is complex and requires expert input and is beyond the remit of this Report. The South Australian Sentencing Advisory Council has recently examined the scope and operation of the linked defence of mental impairment (insanity at common law) and made various recommendations.⁶⁸³ The Criminal Law Consolidation (Mental Impairment) Amendment Bill 2016 is presently before the South Australian Parliament. The Bill makes significant changes to the scope of a 'mental impairment', notably the role of drug induced impairment.⁶⁸⁴ SALRI considers that the complex issue of diminished responsibility is best considered in this context, and additionally, in the intersection with sentencing for the offence of murder (noting that SALRI will be examining the law as to sentencing for murder in stage 2).

9. For Further Review

The consideration of the merits of the partial defence of diminished responsibility in South Australia, in the context of recent or ongoing changes to the linked defence of mental impairment and its intersection with sentencing for the offence of murder.

⁶⁷⁶ Letter from Mr C Charles, Aboriginal Legal Rights Movement to SALRI dated 8 August 2016.

⁶⁷⁷ NSWLRC, above n 68, 27 Rec 2.

⁶⁷⁸ Law Commission of England and Wales, above n 48, 83.

⁶⁷⁹ Model Criminal Code Officers' Committee, above n 126, 131.

⁶⁸⁰ Law Reform Commission of Victoria, above n 654.

⁶⁸¹ VLRC (2004), above n 13, xxxix-xl, 232–243.

⁶⁸² LRCWA, above n 141, 259 Rec 39.

⁶⁸³ Sentencing Advisory Council, *Mental Impairment and the Law: A Report on Part 8A of the Criminal Law Consolidation Act 1935* (Government of South Australia, November 2014).

⁶⁸⁴ See South Australia, *Parliamentary Debates*, House of Assembly, 4 August 2016, 6640–6646 (John Rau, Attorney-General).

PART 12 – Conclusion

12.1.1 The partial defence of provocation is controversial and has been the subject of extensive study and much criticism. The whole issue of provocation is complex (including its interaction with mandatory sentences for murder). The flaws and criticisms of the present law of provocation as discussed in this Report are such that any changes must be an issue for Parliament and not the courts.⁶⁸⁵

12.1.2 SALRI, in accordance with the terms of its reference, has been anxious to identify and explore reform options to ensure that the criminal law applies equally and fairly regardless of a person's gender, gender identity or sexual orientation. To leave the present law intact, in light of the High Court's decision in *Lindsay*, which seems to preserve the discriminatory gay panic aspect of the provocation defence in South Australia, is not recommended. SALRI considers that, as raised in its Audit Report, to leave the present law unchanged would be to accept that the criminal law indirectly sanctions lethal violence against those seeming to exhibit homosexual behaviour.

12.1.3 The homosexual advance aspect of the provocation defence should be removed. Its continued existence tends to indirectly legitimise and sanction lethal violence towards people demonstrating homosexual behaviour. In this regard, it is contrary to South Australia's obligations under both state and Commonwealth legislation not to discriminate on the basis of sexual orientation, gender and gender identity. There is an obvious need for legislative reform of the current South Australian law of provocation to ensure that it does not discriminate on the grounds of sexual orientation. It is fundamental that the law should operate in a fair and non-discriminatory manner. Also, as a basic issue of policy, the law should not accept that in the 21st century, a person might lose self-control and kill someone. 'Angry responses resulting in homicide are completely unacceptable to the community in the 21st century.'⁶⁸⁶

12.1.4 One view is that the strength of objections to the current law is such that it is impossible to formulate an acceptable and viable alternative model of provocation and, in brief, the current law of provocation cannot be reformed and should be abolished.⁶⁸⁷ SALRI considers that any effort at reform should include the option of the full repeal of provocation. It is difficult at this stage to identify any viable alternative model. SALRI's research and consultation to date has revealed that such alternative models of provocation as ensuring a non-violent sexual advance cannot amount to provocation, or the NSW model of extreme provocation, or the English model of 'loss of control' are problematic and may be unlikely to produce a workable and effective model in practice. SALRI especially notes that, removing a homosexual advance from the ambit of provocation, whilst serving as an important legislative declaration of non-discrimination, in practice would have very limited effect. It may be that the preferable solution is to abolish provocation entirely with the important qualification that a court possesses sufficient flexibility to properly reflect on the offender's culpability and any genuine mitigating factors in sentence.

12.1.5 SALRI concludes that, in particular, the current law of provocation in South Australia needs reform to make sure that, at the least, any non-violent sexual advance (not confined to a gay sexual advance) should not be capable of amounting to provocation. However, although such a provision will serve as an important legislative statement of non-discriminatory intention, its practical value will be strictly limited, if not illusory. In light of this fact, the wider problems with the partial defence of

⁶⁸⁵ *Attorney General for Jersey v Holley* [2005] 2 AC 580, 594 [27].

⁶⁸⁶ Hemming, above n 12, 19.

⁶⁸⁷ Adrian Howe, 'Provoking Polemic — Provoked Killings and the Ethical Paradoxes of the Postmodern Feminist Condition' (2002) 10 *Feminist Legal Studies* 39, 43. See also See also Fitz-Gibbon, *Homicide Law Reform, Gender and the Provocation Defence*, above n 47, 273; VLRC (2004), above n 13, 56 [2.98]; NZLC, above n 54, 42 [79].

provocation (notably its inherent gender bias) and the flaws of other potential models of provocation (such as ‘extreme provocation’ in NSW or ‘loss of control’ in England and Wales) that have emerged in its study to date, SALRI is of the view that its Stage 2 Report should further review the general law of provocation and related issues, to identify an effective and non-discriminatory wider solution.

12.1.6 SALRI considers that the various issues, especially sentencing, require further examination to enable it to fully consider the retention, reform or repeal of the partial defence of provocation. SALRI will adopt a two-stage approach to reform, to make certain Recommendations now (largely relating to self-defence and family violence) with certain questions to be the subject of further examination by SALRI in stage 2. SALRI intends to release its Stage 2 Report as soon as possible. SALRI reiterates that it is premature to come to any view about any changes to the current law of provocation until it has completed stage 2 of this review.

12.1.7 Criticisms of the present law of provocation extend beyond the homosexual advance defence, as such SALRI recommends against reform that is confined to discarding this aspect of provocation. In particular, a strong wider criticism of the present law is that the defence of provocation is gender biased and unjust, namely that it is widely perceived to apply unfairly to women accused of murder (especially who have been subjected to family violence) and to unfairly favour male accused (especially those who have killed a female partner). SALRI agrees that the current law fails to adequately reflect the situation of women who experience family violence and who may be driven to kill their abusive domestic partner, or who may be at risk of being killed by their abusive partner. Excluding non-violent sexual advances from provocation, whilst a welcome change, would not, in SALRI’s view do enough to provide legal options for people in South Australia who kill their partners in the context of extreme or ongoing family violence.

12.1.8 SALRI recommends that reform in this area should also address the gender bias of the current law and ensure that victims of family violence who kill their abusive domestic partners are not unfairly prejudiced. This accords with SALRI’s wider remit, as it is charged with looking at how to reform the law to ensure that it operates in a fair and non-discriminatory manner, regardless of gender, gender identity or sexual orientation.

12.1.9 SALRI considers that the existing partial defence of excessive self-defence in South Australia, as well as a reformed version of the complete defence of self-defence as recommended in this Report, are better suited to fairly and effectively cater to the unique context of homicides committed in the situation of family violence than seeking to manipulate and retain the flawed partial defence of provocation for this purpose.

12.1.10 SALRI strongly recommends that South Australia adopt a model similar to the Victorian model of self-defence, duress and necessity which notably makes it clear in cases of family violence that the threat need not be imminent. The Victorian model further explicitly takes into account family violence evidence and makes clear the admissibility and use of such evidence (including social framework evidence as to the nature and effect of family violence). SALRI considers that these Recommendations can, and should, be implemented independently of whether provocation is revised, retained or repealed in South Australia.

12.1.11 This Report has enabled SALRI to hear a wide range of views about the proper role of a modern and non-discriminatory criminal law in our community. SALRI has heard compelling and articulate accounts. SALRI has been struck by the considered and generous participation of many individuals and organisations in the preparation of this Report. SALRI is especially grateful to all those who have shared their personal stories.

12.1.12 The changes proposed in this Report are important. So, too, is the need to continue to review and reform this important area of law, so that it provides an important normative statement about equality and non-discrimination in modern South Australia.

APPENDIX 1

ROUNDTABLE REPORT – 11 MAY 2016



The Roundtable

The independent South Australian Law Reform Institute ('SALRI'), based at the University of Adelaide, in September 2015 published its Audit Report, *Discrimination on the grounds of Sexual Orientation, Gender, Gender Identity and Intersex Status in South Australian Legislation* ('the Audit Report'). The Audit Report examined South Australian laws that discriminate against people on the grounds of sexual orientation, gender, gender identity or intersex status. SALRI identified 146 laws that had this potential effect. The common law partial defence of provocation to homicide and the 'gay panic' or homosexual advance aspect of it, was identified as one law that discriminates against people on the grounds of sexual orientation, gender, gender identity or intersex status. SALRI noted in the Audit Report its intention to consider further several complex areas (including provocation) in more detail to follow on the Audit report to best remove their discriminatory nature, including provocation. The Audit Report noted SALRI's intention to recommend discarding the 'gay panic' aspect of provocation but to do so in a wider way that most fairly removes the discriminatory nature of this law and having regard to its various wider implications (including gender).

As the current remit of SALRI includes the need to identify areas of law reform where the law discriminates against people on the basis of gender, and that most (though not all) family violence is directed against women, it is crucial that SALRI does not solely examine the gay panic aspect of provocation and it also addresses the gender implications of the current law and its application to victims of family violence. An initial consultation roundtable event with representatives of the family violence sector in February 2016 at the Adelaide Law School strongly supported this view.

On 11 May 2016, SALRI hosted a Roundtable of interested parties as well as representatives of the legal and academic sectors. The Roundtable discussed the issues identified in the Audit Report regarding the role and operation of South Australia's partial defence of provocation. The Roundtable meeting focused on its implications for victims of family violence¹ as well as the aspect of the law concerning the killing of a person in retaliation for the making of a gay sexual advance.

The Roundtable was conducted under Chatham House rules. SALRI is grateful for the time and valuable contributions of all participants who provided input from various perspectives. The goodwill and insight of all who attended was notable.

The following report contains the views of the Roundtable. These views are not SALRI's final or confirmed view. However, they provide an important framework for

¹ Though the term 'domestic violence' is also widely used, this Report uses the term 'family violence'.

further consultation (including follow up roundtable events) and research and will help guide SALRI's final Report.

The roundtable noted that SALRI is not examining family violence in general and it is not examining mandatory sentencing as that is beyond its remit and is under current consideration by the South Australian Sentencing Advisory Council. It was discussed that the problems of provocation extend beyond the 'gay panic' aspect and any reform must also address the particular situation of victims of family violence and care must be taken to either avoid abolishing provocation entirely and/or setting up a new model that may have undesirable unintended consequential effects. The Victorian example of its ill-fated defensive homicide law was explained in this context.

The Roundtable discussed the following four options for potential law reform:

1. Abolish the common law partial defence of provocation in South Australia;
2. Discard the gay sexual advance aspect of provocation but otherwise retain the partial defence;
3. Adopt the New South Wales model of 'extreme provocation', which is more limited than the common law of provocation that presently applies in South Australia; and
4. Modify the law of self-defence in South Australia to better provide for those who kill in response to family violence.

Option 1: Abolition of the provocation defence

Some members of the Roundtable noted that they are in favour of abolition of the provocation defence, with a few members expressing strong support for this option.

It was noted that wholesale abolition would be more favourable than reform of the defence, because retaining the defence (in even a changed format) may result in the residual aspect of the law being misused in a way that could mean that the discriminatory features of the current South Australian law could potentially remain. Total abolition sends a clear message that this kind of legal argument has no place in a modern non-discriminatory society. Abolition would also best address the issue of victim blaming and the gendered operation of the offence.

It was also noted that the various problems of provocation, especially its inherent gender bias, were such that the law was beyond tinkering or refinement and outright abolition is the preferred, if not only, solution. Abolition was viewed as the most effective way to address the problem of victim blaming that provocation engenders. The gender bias of the current law was described as one of the main problems in the operation of the partial defence and the highly problematic successful use of the partial defence by males who kill a current or former female partner in the context of relationship separation and/or infidelity was noted.

It was also noted that if the provocation were abolished, those who kill in circumstances where they considered themselves to be at risk of harm would still be able to seek protection from the complete defence of self-defence, and those who kill home invaders would have protection from the laws that particularly apply to that situation in South Australia. Therefore, abolition of provocation would not necessarily leave an unacceptable vacuum of protection for vulnerable accused.

Other members did not support the abolition of provocation, pointing to the capacity of the common law to appropriately deal with cases on their particular facts (though

others doubted this premise). It was noted that as a matter of practice, even if the law were to be replaced by some kind of statutory partial defence, the common law would need to be abolished first. It was noted that there is still a need for provocation as an alternative to murder. Concerns were expressed that outright abolition may lead to a situation where any new statutory law would not be as flexible as the current common law, the latter in theory reflecting changing community standards and public attitudes.

The position of Indigenous accused was noted and concern was expressed that law reform in this area should not lead to undesirable consequential effects on Indigenous communities.

The Roundtable noted that one argument for the partial defence of provocation to play a continued role in South Australia is to mitigate the rigour of the usual mandatory minimum sentence of 20 years for murder. It was noted that there are still 'truly genuine' cases where a conviction less than murder is appropriate and provocation in one form or another serves an important purpose in South Australia.² However, it was acknowledged that, if provocation is to be abolished, it is crucial that the courts possess and exercise flexibility in sentencing. It was noted that the current law as to the usual 'mandatory' 20 year minimum sentence for murder is not wholly inflexible and there is limited room for flexibility under s 32A of the *Criminal Law (Sentencing) Act 1988*.³ However, it is unclear whether a factual matrix of provocation involving a gay sexual advance would or could result in a sentence below the mandatory minimum.

The Roundtable participants acknowledged that the issue of mandatory sentencing is beyond SALRI's current remit. It was noted that, were provocation abolished in South Australia, courts ought to take provocation into account in sentencing. This would at least be a transparent and accountable process through judicial sentencing remarks (in contrast a jury's verdict is not explained). If provocation were abolished, members considered that it ought to be made plain in legislation that provocative circumstances relevant to a killing could be considered during sentencing and that guidelines framing how this be done should be created in the immediate aftermath of its abolition.

Option 2: Discard the homosexual advance aspect of Provocation

The option of Parliament passing an amendment to abolish a non-violent sexual advance as amounting to provocation (there was agreement that it should not be

² The facts in *R v R* (1981) 28 SASR 32 was noted as such an example.

³ 32A—Mandatory minimum non-parole periods and proportionality

(1) If a mandatory minimum non-parole period is prescribed in respect of an offence, the period prescribed represents the non-parole period for an offence at the lower end of the range of objective seriousness for offences to which the mandatory minimum non-parole period applies.

(2) In fixing a non-parole period in respect of an offence for which a mandatory minimum non-parole period is prescribed, the court may—

(a) if satisfied that a non-parole period that is longer than the prescribed period is warranted because of any objective or subjective factors affecting the relative seriousness of the offence, fix such longer non-parole period as it thinks fit; or

(b) if satisfied that special reasons exist for fixing a non-parole period that is shorter than the prescribed period, fix such shorter non-parole period as it thinks fit.

(3) In deciding whether special reasons exist for the purposes of subsection (2)(b)

, the court must have regard to the following matters and only those matters:

(a) the offence was committed in circumstances in which the victim's conduct or condition substantially mitigated the offender's conduct;

confined to a homosexual advance), but retaining the defence in every other respect, was considered by the Roundtable.

This option was unpopular. It was noted that provocation, when argued by an accused, will likely be founded on a variety of factors, of which a gay sexual advance may well be just one relevant factor. For example, the conduct said to constitute the relevant provocation could conceivably be racist conduct or other extremely offensive behaviour. In circumstances where the provocative conduct is comprised of a combination of offensive things said and done, it was considered that juries would have difficulty in ignoring the fact of a gay sexual advance if they were directed to do so and directed only to focus on the other conduct said to be provocative. This approach was said to be artificial and unrealistic. The recent English example was highlighted – where the partial defence of provocation was abolished and a new partial defence of 'loss of control' introduced in 2010. Despite the UK Parliament expressly excluding certain categories of conduct from giving rise to a partial defence of loss of control, including sexual infidelity, the English decision in *R v Clinton*⁴ in 2012 revealed how the intentions of exclusionary approaches to reform can be undermined in practice. The Court of Appeal in *Clinton* concluded that in circumstances where other words or acts beyond the alleged sexual infidelity were argued to constitute the qualifying trigger for loss of control, the UK legislation still permitted, and ought to permit, the judge and jury to consider those words or acts in the context of evidence of sexual infidelity.⁵

It was accepted that an amendment precluding a non-violent sexual advance as amounting to provocation may serve as an important statement of principle of non-discrimination. But in discussion there was no support for this option on practical grounds. It was again pointed out that almost always any provocation would not just be a non-violent sexual advance but it would be combined with some other factor(s). *Lindsay*⁶ and *Green*⁷ were noted as such cases. Despite the laudable aim of this change, it was strongly doubted that it would have any real practical impact

It was also argued that discarding the gay sexual advance aspect of provocation would do nothing to prevent the victim blaming that provocation tends to encourage.

Option 3: Adopting a model similar to the NSW law of extreme provocation

New South Wales in s 23 of its *Crimes Act 1900* provides for a limited form of provocation called 'extreme provocation' that only may be raised if the provocative conduct itself is a serious indictable offence, defined as an offence carrying more than five years imprisonment (s 23(2)(b) *Crimes Act 1900*). Section 23(3)(a) expressly provides that conduct does not constitute 'extreme provocation' if it is 'only a non-violent sexual advance to the accused', constituting an effort to ensure that homosexual advance arguments are no longer run by accused. Further, in a

⁴ [2012] EWCA Crim 2.

⁵ See *Ibid* [39]. 'Our approach has ... been influenced by the simple reality that in relation to the day to day working of the criminal justice system events cannot be isolated from context. ... [t]o seek to compartmentalise sexual infidelity and exclude it when it is integral to the facts as whole is not only much more difficult, but is unrealistic and carries with it the potential for injustice ... we do not see how any sensible evaluation of the gravity of the circumstances or their impact on the defendant could be made if the jury, having, in accordance with the legislation, heard the evidence, were then to be directed to excise from their evaluation of the qualifying trigger the matters said to constitute sexual infidelity, and to put them into distinct compartments to be disregarded. In our judgment, where sexual infidelity is integral to and forms an essential part of the context in which to make a just evaluation whether a qualifying trigger properly falls within the ambit of [the qualifying trigger provisions] the prohibition [on sexual infidelity] does not operate to exclude it.'

⁶ *R v Lindsay* [2015] HCA 16.

⁷ *R v Green* (1997) 191 CLR 334.

provision that seeks to provide some protection to those who kill in response to family violence, s 23(4) provides that conduct of the deceased may constitute 'extreme provocation' even if the conduct did not occur immediately before the act causing death.

The superficial appeal of the NSW approach was noted in that it clearly removes the gay panic aspect of provocation and purports to provide for victims of domestic violence in removing the need for immediacy.

The option of adopting a law similar to that of NSW was examined in detail. The background of the NSW model was explained. In 2014, the common law defence of provocation was abolished in NSW and a new partial defence of 'extreme provocation' was introduced. Under s 23(2)(a)-(d) of the *Crimes Amendment (Provocation) Act 2014* (NSW), an act is committed in response to extreme provocation if:

- a) The act of the accused that causes death was in response to conduct of the deceased towards or affecting the accused, and
- b) The conduct of the deceased was a serious indictable offence, and
- c) The conduct of the deceased caused the accused to lose self-control, and
- d) The conduct of the deceased could have caused an ordinary person to lose self-control to the extent of intending to kill or inflict grievous bodily harm on the deceased.

The conduct of the deceased also cannot constitute extreme provocation if the accused is found to have incited the conduct in order 'to provide an excuse to use violence against the deceased' (s 23[3]).

The problems of the NSW approach were discussed. It was noted that the NSW approach heavily restricts provocation, which one participant described as 'restricted to the point of redundancy'. A retrospective analysis undertaken by one Roundtable participant revealed that the majority of cases in which the partial defence of provocation was successful raised in NSW in the ten years prior to the reforms would be excluded from the remit of the new partial defence. Roundtable participants believed that, if one of the main justifications for retaining a partial defence of provocation is to offer an accessible avenue away from murder for persons who kill in response to prolonged family violence, then the NSW model will likely present similar barriers for such defendants as the complete defence of self-defence. It was discussed that where a 'battered' defendant can access extreme provocation they would be better served by a complete acquittal on the grounds of self-defence.

The 2012 NSW case of *Butler*⁸ was described. In *Butler*, the female defendant was convicted of manslaughter by reason of provocation for the killing of a male client. Butler, a female street prostitute, met the victim on the day of the homicide. During their subsequent sexual encounter, the victim was alleged to have made comments about the 'sexual assault of children', and to have shown the defendant a video depicting a young girl performing sexual acts. Unbeknown to the victim, the offender had been sexually assaulted as a child. The defence argued that the defendant lost self-control and killed the victim following his enunciation of sexual fantasies. The judge ruled the defendant had a 'special sensitivity' to the comments made by the victim immediately prior to his death compounding her loss of self-control.⁹ It was noted by Roundtable participants that, if this scenario had occurred since the 2014

⁸ *R v Butler* [2012] NSWSC 1227 (11 October 2012).

⁹ See further Harriet Alexander, 'Kill Case Relied on Provocation', *Sydney Morning Herald* (online), 19 October 2012, <http://www.smh.com.au/nsw/kill-case-relied-on-provocation-20121018-27txl.html>.

reforms, the partial defence of extreme provocation could arguably be raised, given the victim could be conceived as having committed a serious indictable offence, such as possession of child exploitation material. However, this was not without doubt.

The NSW option was not supported by Roundtable members, as major problems were identified with it. The restriction of provocative conduct to a serious indictable offence was criticised as requiring a trial within a trial to determine whether the provocative conduct amounts to a serious indictable offence. This would make criminal trials even more complex. It was noted that the NSW model would significantly increase (even double) the length of trials. It was also criticised for applying too narrowly and being somewhat unclear – if extreme provocation cannot be argued when the conduct was *only* a non-violent sexual advance, this potentially leaves the door open for a gay sexual advance argument to be advanced if the provocative conduct was a non-violent sexual advance combined with some other offensive conduct.

Option 4: modifying the law of self-defence in South Australia to better provide for those who kill in response to family violence.

This option focused not on the gay sexual advance aspect of provocation, but rather on the fact that victims of family violence may kill in response to situations of family violence. SALRI asked the Roundtable to consider whether the law in South Australia ought to be modified to better provide for those who kill in response to family violence.

It was noted that there are a small but significant number of persons, usually women, who are driven to kill their abusers (typically spouses). It is important that the law caters for such cases. Provocation could presently conceivably assist those who kill their abusers. But it was noted that provocation is ill suited to dealing with persons who kill in response to family violence, particularly females, as they typically do not respond to an immediate threat and do not exhibit the traditional characteristics associated with a loss of control. The requirements of provocation were noted to more naturally favour the contexts within which men typically kill. It was thought that the circumstances of offending by defendants who kill their abuser would be better catered for under the partial defence of excessive self-defence or the complete defence of self-defence.

It was discussed that other defences such as self-defence may be better suited to these situations and would provide a more just outcome for persons who kill following a prolonged period of abuse and where there is a genuine fear for one's life or safety (or the life or safety of another). However, the current law of self-defence set out Division 2 of the *Criminal Law Consolidation Act 1935* ("the CLCA") in South Australia does not specifically cater in its terms for those who kill or use force in situations of family violence. There is no explicit reference to family violence or modification in the CLCA such as to the need for immediacy or assessment of a reasonable response for a family violence context.

The Roundtable considered whether reforms of this nature would be beneficial.

The Roundtable studied the recent Victorian law reform in some detail regarding self-defence. The Victorian law contemplates that evidence of family violence may be received by a court in relation to a self-defence (s 322M *Crimes Act 1958*) or claim of duress (s 322P *Crimes Act 1958*). What evidence of family violence that may be received is set out in some detail in the Act (s 322J). The Victorian law now explicitly provides that evidence of family violence may be adduced in homicide cases.

The Victorian option was strongly supported. However, it was noted that self-defence is a complete defence while provocation is a partial defence only. That is, a successful claim of self-defence results in a complete acquittal whilst a successful use of provocation results in the reduction of murder to that of manslaughter. It was suggested by one participant that to enhance self-defence to cater for those who are subject to family violence could lead to unmeritorious acquittals, as too many people might successfully argue self-defence in cases of family violence. The Victorian option was supported by other members. The South Australian law regarding self-defence should be amended to make it clear that there is no requirement for an imminent threat. This would more adequately provide for those who kill their abusers not immediately before or during an incident of family violence, but wait to kill their abuser at a time when the deceased is vulnerable and not liable to physically overpower the accused (usually a woman). The South Australian law should allow family violence to be used in the assessment of whether the force used by an accused is 'a reasonable response'.

It was noted that any such changes to self-defence in the context of family violence should be of general application and not confined to murder. In cases of murder, these changes would complement and support the existing partial defence of excessive defence in South Australia which reduces murder to manslaughter.

There was also strong support to explicitly include family violence in the self defence provisions in the *CLCA* and to define it in a modern and inclusive manner (using the Victorian model as a starting point). The Victorian use and definition of self-defence is valuable in terms of changing how family violence will be considered by the courts, lawyers and juries. It was noted this would confirm and encourage the use of such evidence and would also accord with the wider linked changes in a family violence context which are currently in progress. It was powerfully explained by one participant that, though this type of evidence is strictly admissible in theory under the current common law, it is rarely used in practice and such an explicit provision as Victoria's would serve an important cultural and educative role and would confirm and encourage the wider use of such evidence. The limited experience to date in Victoria also supports this. Such evidence could be as to the general dynamics and nature of family violence and also have specific application to an individual case.

It was noted that Option 4 could work in conjunction with Option 1, the outright abolition of provocation. Indeed, Option 4 could, and should, be pursued whether provocation is retained, reformed or abolished.

Other suggestions by members included that the *Evidence Act 1929 (SA)* could also be amended in similar terms to specifically provide for the wider adducing and admission of evidence of family violence.

By the conclusion of the meeting, the members of the Roundtable considered that law reform in this area would be very worthwhile. Members supported the use of examples in any law reform report or legislative reform of how the new law could apply and work. Examples were seen to be helpful in illustrating the intention of the drafters, as well as having an important educative role for practitioners and judges.

It was noted that education of the community of any law reform that is made is vital so that legal practitioners and the public in general, as well as those who work with people experiencing family violence, are well apprised of the reforms and their effect.

APPENDIX 2

ROUNDTABLE REPORT – 12 MAY 2016



The Roundtable

The independent South Australian Law Reform Institute ('SALRI'), based at the University of Adelaide, in September 2015 published its Audit Report, *Discrimination on the grounds of Sexual Orientation, Gender, Gender Identity and Intersex Status in South Australian Legislation* ('the Audit Report'). The Audit Report examined laws that discriminate against people on the grounds of sexual orientation, gender, gender identity or intersex status. SALRI identified 146 laws that had this potential effect. The common law partial defence of provocation to homicide and the 'gay panic' or homosexual advance aspect of it, was identified as one law that discriminates against people on the grounds of sexual orientation, gender, gender identity or intersex status. SALRI noted in the Audit Report its intention to consider further several complex areas (including provocation) in more detail to follow on the Audit report to best remove their discriminatory nature, including provocation. The Audit Report noted SALRI's intention to recommend discarding the 'gay panic' aspect of provocation but to do so in a wider way that most fairly removes the discriminatory nature of this law having regard to its various wider implications (including gender).

As the current remit of SALRI includes the need to identify areas of law reform where the law discriminates against people on the basis of gender, and that most (though not all) family violence is directed against women, it is crucial that SALRI does not solely examine the gay panic aspect of provocation and also addresses the gender implications of the current law and its application to victims of family violence. An initial consultation roundtable event with representatives of the family violence sector in February 2016 at the Adelaide Law School strongly supported this view.

On 12 May 2016, SALRI hosted a Roundtable attended by family violence service representatives, representatives of the LGBTIQ sector and interested parties and academics. The Roundtable discussed the issues identified in the Audit Report regarding the role and operation of South Australia's partial defence of provocation. The Roundtable meeting primarily focused on its implications for victims of family violence¹ as well as the aspect of the law concerning the killing of a person in retaliation for their making a gay sexual advance.

The Roundtable was conducted under Chatham House rules. SALRI is grateful for the time and valuable contributions of all participants who provided input from various perspectives. The goodwill and insight of all who attended was notable.

The following report contains the views of the Roundtable. These views are not SALRI's final or confirmed view. However, they provide an important framework for further consultation (including follow up roundtable events) and research and will help guide SALRI's final Report.

¹ Though the term 'domestic violence' is also widely used, this Report uses the term 'family violence'.
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The roundtable noted that SALRI is not examining family violence in general and it is not examining mandatory sentencing as that is beyond its remit and is under consideration by the South Australian Sentencing Advisory Council. It was discussed that the problems of provocation extend beyond the 'gay panic' aspect and any reform must also address the particular situation of victims of family violence and care must be taken to either avoid abolishing provocation entirely and/or setting up a new model that may have undesirable unintended consequential effects. The Victorian example of its ill-fated defensive homicide law was noted.

The Roundtable discussed the following four options for potential law reform:

1. Abolish the common law partial defence of provocation in South Australia;
2. Discard the homosexual advance aspect of provocation but otherwise retain the partial defence;
3. Adopt the NSW model of 'extreme provocation', which is more limited than the common law of provocation that presently applies in South Australia; and
4. Modifying the law of self-defence in South Australia to better provide for those who kill in response to family violence.

Option 1: Abolition of the provocation defence

The Roundtable members were unified in their objection to the homosexual advance aspect of the partial defence of provocation. They criticised it as archaic, outdated, offensive and encouraging victim blaming. There was strong support for provocation being wholly abolished. Participants expressed the view that reform of the defence would be unlikely to remove the discriminatory aspects of the defence, including the objectionable 'gay panic' aspect.

Some members of the Roundtable especially favoured abolition of provocation. It was noted that the various problems of provocation, especially its inherent gender bias, were such that the law was beyond tinkering or refinement and outright abolition was the preferred, if not only, solution. Abolition is seen as the most effective way to address the problem of victim blaming that provocation engenders. The gender bias of the current law was described as one of the main problems in the operation of the partial defence and the highly problematic successful use of the partial defence by males who kill a current or former female partner in the context of relationship separation and/or infidelity was noted. Another problem identified with the defence was its potential to be used to excuse or condone violent acts arising from discriminatory views or stereotypes, for example, a scenario where a defendant is provoked by the presence or conduct of a transgender person or where a defendant is provoked by a person displaying conduct contrary to an accused's religious, cultural or ethnic beliefs.

It was also noted that, if the provocation defence were abolished, those who kill in circumstances where they considered themselves to be at risk of harm would still be able to seek protection from the complete defence of self-defence, and those who kill home invaders would have recourse to the protection of the laws that particularly apply to that situation in South Australia. Therefore, abolition of provocation would not necessarily leave an unacceptable vacuum of protection for vulnerable accused.

It was noted that the particular situation of victims of family violence killing an abusive spouse or other family member is best addressed not by retaining provocation, but by other legislative changes (notably Option 4, an amended law of self-defence).

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Some concern was noted that abolition could lead to an increase in accused persons relying on the defence of excessive self-defence and there still may be genuine cases (excluding family violence where self-defence provides a more appropriate avenue) where something less than murder is appropriate and provocation in a limited form could still serve an important role (see further Option 3). However, it was acknowledged that, if provocation is to be abolished, it is important that a court should possess flexibility in sentencing to reflect such mitigating circumstances. It was noted that the current law as to the usual 'mandatory' 20 year minimum sentence for murder is not wholly inflexible and there is limited room for flexibility under s 32A.²

The Roundtable noted that if the partial defence is abolished, consequential community education is necessary to educate the legal profession, community service providers, and the public generally about the nature of the change.

Option 2: Discard the homosexual advance aspect of provocation

The option of Parliament passing an amendment to abolish a non-violent sexual advance as amounting to provocation (there was agreement that it should not be confined to a gay sexual advance), but retaining the defence in every other respect, was considered by the Roundtable.

It was noted that such an amendment would serve as an important statement of principle of non-discrimination and that if abolition is not pursued, that any law reform that at least discarded the homosexual advance would be a compromise and an improvement on the current common law of provocation.

However, concern was expressed as to whether the exclusion of non-violence sexual advances would itself be enough to prevent the defence of provocation being relied upon in cases involving hatred against LGBTIQ people. For example, the need to ensure that a reformed version of the provocation defence could not be relied upon to ameliorate violent attacks associated with transgender hatred was emphasised.

But it was noted that it is difficult to legislate to deal with every specific case or situation.

In light of these concerns, the practical value of Option 2 was doubted. It was noted that provocation will likely be founded on a variety of factors, of which a gay sexual advance may well be just one relevant factor. For example, the conduct said to constitute the relevant provocation could conceivably be racist conduct or other

² 32A—Mandatory minimum non-parole periods and proportionality

(1) If a mandatory minimum non-parole period is prescribed in respect of an offence, the period prescribed represents the non-parole period for an offence at the lower end of the range of objective seriousness for offences to which the mandatory minimum non-parole period applies.

(2) In fixing a non-parole period in respect of an offence for which a mandatory minimum non-parole period is prescribed, the court may—

(a) if satisfied that a non-parole period that is longer than the prescribed period is warranted because of any objective or subjective factors affecting the relative seriousness of the offence, fix such longer non-parole period as it thinks fit; or

(b) if satisfied that special reasons exist for fixing a non-parole period that is shorter than the prescribed period, fix such shorter non-parole period as it thinks fit.

(3) In deciding whether special reasons exist for the purposes of subsection (2)(b)

, the court must have regard to the following matters and only those matters:

(a) the offence was committed in circumstances in which the victim's conduct or condition substantially mitigated the offender's conduct;

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extremely offensive behaviour. In circumstances where the provocative conduct is a combination of offensive things said and done, it was noted that any jury would have difficulty in ignoring the fact of a gay sexual advance if they were directed to do so and directed only to focus on the other conduct said to be provocative. This approach is artificial and unrealistic. The recent English example was highlighted – where the partial defence of provocation was abolished and a new partial defence of loss of control introduced in 2010. Despite the UK Parliament expressly excluding certain categories of conduct from giving rise to a partial defence of loss of control, including sexual infidelity, the English decision in *R v Clinton*³ in 2012 reveals how the intentions of exclusionary approaches to reform can be undermined in practice. The Court of Appeal in *Clinton* concluded that in circumstances where other words or acts beyond the alleged sexual infidelity were argued to constitute the qualifying trigger for loss of control, the UK legislation still permitted, and ought to permit, the court to consider those words or acts in the context of evidence of sexual infidelity.⁴ This interpretation of the new partial defence has been criticised as undermining the intention of Parliament at the time of this reform.

It was accepted that an amendment precluding a non-violent sexual advance as amounting to provocation would serve as an important statement of principle of non-discrimination. But there was no support for this option on practical grounds. It was again pointed out that almost always any provocation would not just be a non-violent sexual advance but it would be combined with some other factor(s). *Lindsay*⁵ and *Green*⁶ were noted as such cases. It was also noted that a victim's transgender status in itself would not amount to provocation, even under the existing law.

It was noted that discarding the non-violent sexual advance aspect of provocation would do nothing to prevent the victim blaming that provocation tends to encourage.

Option 3: Adopting a model similar to the NSW law of extreme provocation

New South Wales in s 23 of its *Crimes Act 1900* provides for a limited form of provocation called 'extreme provocation' that only may be argued if the provocative conduct itself was a 'serious indictable offence' (see s 23(2)(b) *Crimes Act 1900*). Section 23(3)(a) expressly provides that conduct does not constitute extreme provocation if it was 'only a non-violent sexual advance to the accused', constituting an attempt to ensure that homosexual advance arguments are no longer run by accused. Further, in an amendment that seeks to provide some protection to those who kill in response to longstanding family violence, s 23(4) provides that conduct of the deceased may constitute extreme provocation even if the conduct did not occur immediately before the act causing death.

³ [2012] EWCA Crim 2.

⁴ See *Ibid* [39]. 'Our approach has ... been influenced by the simply reality that in relation to the day to day working of the criminal justice system events cannot be isolated from context. ... [t]o seek to compartmentalise sexual infidelity and exclude it when it is integral to the facts as whole is not only much more difficult, but is unrealistic and carries with it the potential for injustice ... we do not see how any sensible evaluation of the gravity of the circumstances or their impact on the defendant could be made if the jury, having, in accordance with the legislation, heard the evidence, were then to be directed to excise from their evaluation of the qualifying trigger the matters said to constitute sexual infidelity, and to put them into distinct compartments to be disregarded. In our judgment, where sexual infidelity is integral to and forms an essential part of the context in which to make a just evaluation whether a qualifying trigger properly falls within the ambit of [the qualifying trigger provisions] the prohibition [on sexual infidelity] does not operate to exclude it.'

⁵ *R v Lindsay* [2015] HCA 16.

⁶ *R v Green* (1997) 191 CLR 334.

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The appeal at first glance of the NSW approach was noted in that it clearly removes the 'gay panic' aspect and purports to provide for victims of domestic violence in removing the need for immediacy.

This option of adopting a law similar to that of New South Wales was examined in detail by the Roundtable.

The problems of the NSW approach were discussed. It was noted that the NSW approach heavily restricts provocation, which one participant described as 'restricted to the point of redundancy'. A retrospective study undertaken by one Roundtable participant highlighted that the majority of cases in which the partial defence of provocation was successful raised in NSW in the ten years prior to the changes would be excluded from the remit of the new partial defence. Roundtable participants believed that if one of the main justifications for retaining a partial defence of provocation is to offer an accessible avenue away from murder for persons who kill in response to prolonged family violence, then the NSW model will likely present similar barriers for such defendants as the complete defence of self-defence. It was discussed that where a 'battered' defendant can access extreme provocation they would be better served by a complete acquittal on the grounds of self-defence.

The 2012 NSW case of *Butler*⁷ was described and prompted much discussion. In *Butler*, the female defendant pleaded guilty to manslaughter by reason of provocation for the killing of a male client. Butler, a female street prostitute, met the victim on the day of the homicide. During their subsequent sexual encounter, the victim was alleged to have made comments about the 'sexual assault of children', and to have shown the defendant a video depicting a young girl performing sexual acts. Unbeknown to the victim, the offender had been sexually assaulted as a child. The defence argued that the defendant lost self-control and killed the victim following his enunciation of sexual fantasies. The judge ruled the defendant had a 'special sensitivity' to the comments made by the victim immediately prior to his death compounding her loss of self-control.⁸ It was noted by Roundtable participants that if this scenario had occurred since the 2014 NSW reforms, a partial defence of extreme provocation in *Butler* could arguably be raised, given the deceased could arguably be conceived as having committed a serious indictable offence such as possession of child exploitation material. However, this was not without doubt.

The restriction of provocative conduct to a serious indictable offence was criticised as requiring a trial within a trial to determine whether the provocative conduct amounts to a serious indictable offence. This would make criminal trials even more complex when a secondary criticism of the current law is its complexity. The NSW law was also criticised for applying too narrowly and being unclear – if extreme provocation cannot be argued when the conduct was *only* a non-violent sexual advance, this potentially leaves the door open for a gay sexual advance argument to be advanced if the provocative conduct was a non-violent sexual advance combined with some other offensive conduct amounting to a serious indictable offence.

There were strong doubts whether the NSW approach was suitable for South Australia. But there was still a view that, whilst cases of family violence were better dealt with within the ambit of the law of self defence, there may be extreme cases such as *Butler* where a residual and restricted (certainly narrower than at present) form of provocation (or something like it) would be appropriate to avoid a murder

⁷ *R v Butler* [2012] NSWSC 1227 (11 October 2012).

⁸ See further Harriet Alexander, 'Kill Case Relied on Provocation', *Sydney Morning Herald* (online), 19 October 2012, <http://www.smh.com.au/nsw/kill-case-relied-on-provocation-20121018-27td.html>.

conviction and its consequences. The problem noted is in identifying what would be the criteria for such a residual category to apply.

Option 4: modifying the law of self-defence in South Australia to better provide for those who kill in response to family violence.

This option focused not on the gay sexual advance part of provocation, but rather that sometimes people kill in response to situations of family violence. As the remit of SALRI is to identify areas of law reform where the law discriminates against people on the basis of gender, and that much (though not all) of family violence is perpetrated against women, SALRI asked the Roundtable to consider whether the criminal law in South Australia ought to be modified to better provide for those who kill in response to family violence.

It was noted that there are a small but significant number of persons, usually women, who are driven to kill their abusers (typically spouses). It is important that the law caters for such cases. Provocation could currently conceivably assist those who kill their abusers. But it was noted that provocation is ill suited to dealing with persons who kill in response to family violence, particularly females, as they typically do not respond to an immediate threat and do not exhibit the traditional characteristics associated with a loss of control. The requirements of provocation were noted to more naturally favour the contexts within which men kill. It was considered that the circumstances of offending by defendants who kill their abuser would be better catered for under the partial defence of excessive self defence or the complete defence of self-defence.

Other defences such as self-defence may be better suited to these situations and would provide a more just outcome for persons who kill following a prolonged period of abuse and where there is a genuine fear for one's life or safety (or the life or safety of another). However, the current law of self-defence set out Division 2 of the *Criminal Law Consolidation Act 1935* in South Australia does not specifically cater for those who kill or use force in a family violence context. There is no explicit reference to family violence or modification in the *CLCA* such as to the need for immediacy or assessment of a reasonable response for a family violence context.

The Roundtable considered whether reforms of this nature would be beneficial.

The Roundtable studied the recent Victorian law reform in some detail regarding self-defence. The Victorian law that contemplates that evidence of family violence may be received by a court in relation to a self-defence (s 322M *Crimes Act 1958*) or claim of duress (s 322P *Crimes Act 1958*). What evidence of family violence may be received is set out in some detail in the Act (s 322J). The Victorian law now explicitly provides that evidence of family violence may be adduced in homicide and indeed generally and provides an immediate threat is unnecessary for self defence to arise in cases of family violence and family violence is relevant to assess if a response is reasonable.

The Victorian option and its underlying policy received strong support. However, it was noted that self-defence is a complete defence while provocation is a partial defence only. That is, a successful claim of self-defence results in a complete acquittal whilst a successful use of provocation results in the reduction of murder to that of manslaughter. The South Australian law regarding self-defence should be amended to make it clear that there is no requirement for an imminent threat. This would more adequately provide for those who kill their abusers not immediately before or during an incident of family violence, but wait to kill their abuser at a time when the deceased is vulnerable and not liable to physically overpower the accused

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(usually a woman). The South Australian law should also allow family violence to be used in the assessment of whether the force used by an accused is 'a reasonable response'.

It was noted that any such changes to self-defence in the context of family violence should be of general application and not confined to murder. In cases of murder, these changes would complement and support the existing partial defence of excessive defence in South Australia which reduces murder to manslaughter.

There was strong support to explicitly include family violence in the self defence provisions in the *CLCA* and to define it in a modern and inclusive manner (using the Victorian example as a starting point). The Victorian use and definition of self-defence is valuable in terms of changing how the courts, lawyers and juries consider family violence. It was noted this would confirm and encourage the use of such evidence and accord with wider linked changes in a family violence context. It was explained that, though this type of evidence is strictly admissible, it is rarely used in practice and it was highlighted that an explicit provision such as Victoria's would serve a valuable cultural and educative role and would confirm and encourage the wider use of such evidence. The limited experience to date in Victoria also supports this. Such evidence could be as to the general dynamics and nature of family violence and also have specific application to an individual case.

However, it was noted that the definitions used in South Australian legislation relating to family violence (see s 8(8) of the *Intervention Orders (Prevention of Abuse) Act 2009*) would need to be consistent with whatever law reform is adopted. That is, the terms and definitions used in the Victorian Act cannot necessarily be lifted and used in any South Australian law reform. The term 'family violence' is preferred to 'domestic violence' because it recognises that instances of violence occur through an entire family. The term also is more compatible with modern blended family and Indigenous kinship relationships. The Roundtable also noted that domestic violence is a problem that is experienced by women with disabilities, and that any definitions in the legislation ought to take into account carer/client abuse and violence.

It was highlighted that Option 4 would support and accord with wider developments currently being progressed in South Australia relating to family violence.

It was also suggested that the *Evidence Act 1929* (SA) could be amended to specifically provide for the adducing and admission of evidence of family violence. This would direct the focus of legal practitioners and make it clear that this kind of evidence, including taking evidence from experts regarding the nature of family violence and its effects, does have a valuable and relevant role to play in the courts.

The position of Indigenous accused was noted. It is important that there are not undesirable consequential effects on Indigenous communities in South Australia.

Education of the community of any law reform that is made is vital so that legal practitioners and the public in general, as well as those who work with people experiencing family violence, are well apprised of the reforms.

APPENDIX 3

CRIMINAL LAW CONSOLIDATION ACT 1935 (SA)

SECT 15

15—Self defence

- (1) It is a defence to a charge of an offence if—
 - (a) the defendant genuinely believed the conduct to which the charge relates to be necessary and reasonable for a defensive purpose; and
 - (b) the conduct was, in the circumstances as the defendant genuinely believed them to be, reasonably proportionate to the threat that the defendant genuinely believed to exist.¹
- (2) 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.²
- (3) For the purposes of this section, a person acts for a *defensive purpose* if the person acts—
 - (a) in self defence or in defence of another; or
 - (b) to prevent or terminate the unlawful imprisonment of himself, herself or another.
- (4) However, if a person—
 - (a) resists another who is purporting to exercise a power of arrest or some other power of law enforcement; or
 - (b) resists another who is acting in response to an unlawful act against person or property committed by the person or to which the person is a party, the person will not be taken to be acting for a defensive purpose unless the person genuinely believes, on reasonable grounds, that the other person is acting unlawfully.
- (5) If a defendant raises a defence under this section, the defence is taken to have been established unless the prosecution disproves the defence beyond reasonable doubt.

Notes—

- 1 See, however, section 15C. If the defendant establishes that he or she is entitled to the benefit of that section, this paragraph will be inapplicable.
- 2 See, however, section 15C. If the defendant establishes that he or she is entitled to the benefit of that section, the defendant will be entitled to a complete defence.

15A—Defence of property etc

- (1) It is a defence to a charge of an offence if—
 - (a) the defendant genuinely believed the conduct to which the charge relates to be necessary and reasonable—

- (i) to protect property from unlawful appropriation, destruction, damage or interference; or
 - (ii) to prevent criminal trespass to land or premises, or to remove from land or premises a person who is committing a criminal trespass; or
 - (iii) to make or assist in the lawful arrest of an offender or alleged offender or a person who is unlawfully at large; and
- (b) if the conduct resulted in death—the defendant did not intend to cause death nor did the defendant act recklessly realising that the conduct could result in death; and
- (c) the conduct was, in the circumstances as the defendant genuinely believed them to be, reasonably proportionate to the threat that the defendant genuinely believed to exist.¹
- (2) 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—
 - (i) to protect property from unlawful appropriation, destruction, damage or interference; or
 - (ii) to prevent criminal trespass to land or premises, or to remove from land or premises a person who is committing a criminal trespass; or
 - (iii) to make or assist in the lawful arrest of an offender or alleged offender or a person who is unlawfully at large; and
 - (b) the defendant did not intend to cause death; but
 - (c) 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.²
- (3) For the purposes of this section, a person commits a criminal trespass if the person trespasses on land or premises—
- (a) with the intention of committing an offence against a person or property (or both); or
 - (b) in circumstances where the trespass itself constitutes an offence or is an element of the offence.
- (4) If a defendant raises a defence under this section, the defence is taken to have been established unless the prosecution disproves the defence beyond reasonable doubt.

Notes—

- 1 See, however, section 15C. If the defendant establishes that he or she is entitled to the benefit of that section, this paragraph will be inapplicable.
- 2 See, however, section 15C. If the defendant establishes that he or she is entitled to the benefit of that section, the defendant will be entitled to a complete defence.

15B—Reasonable proportionality

A requirement under this Division that the defendant's conduct be (objectively) reasonably proportionate to the threat that the defendant genuinely believed to exist does not imply that the force used by the defendant cannot exceed the force used against him or her.

15C—Requirement of reasonable proportionality not to apply in case of an innocent defence against home invasion

- (1) This section applies where—
 - (a) a relevant defence would have been available to the defendant if the defendant’s conduct had been (objectively) reasonably proportionate to the threat that the defendant genuinely believed to exist (the *perceived threat*); and
 - (b) the victim was not a police officer acting in the course of his or her duties.
- (2) In a case to which this section applies, the defendant is entitled to the benefit of the relevant defence even though the defendant’s conduct was not (objectively) reasonably proportionate to the perceived threat if the defendant establishes, on the balance of probabilities, that—
 - (a) the defendant genuinely believed the victim to be committing, or to have just committed, home invasion; and
 - (b) the defendant was not (at or before the time of the alleged offence) engaged in any criminal misconduct that might have given rise to the threat or perceived threat; and
 - (c) the defendant’s mental faculties were not, at the time of the alleged offence, substantially affected by the voluntary and non-therapeutic consumption of a drug.

- (3) In this section—

criminal misconduct means conduct constituting an offence for which a penalty of imprisonment is prescribed;

drug means alcohol or any other substance that is capable (either alone or in combination with other substances) of influencing mental functioning;

home invasion means a serious criminal trespass committed in a place of residence;

non-therapeutic—consumption of a drug is to be considered non-therapeutic unless—

- (a) the drug is prescribed by, and consumed in accordance with the directions of, a medical practitioner; or
- (b) the drug is of a kind available, without prescription, from registered pharmacists, and is consumed for a purpose recommended by the manufacturer and in accordance with the manufacturer’s instructions;

relevant defence means a defence under section 15(1) or section 15A(1).

APPENDIX 4

CRIMES ACT 1900 (NSW)

SECT 23 - Trial for murder-partial defence of extreme provocation

23 Trial for murder—partial defence of extreme provocation

- (1) If, on the trial of a person for murder, it appears that the act causing death was in response to extreme provocation and, but for this section and the provocation, the jury would have found the accused guilty of murder, the jury is to acquit the accused of murder and find the accused guilty of manslaughter.
- (2) An act is done in response to extreme provocation if and only if:
 - (a) the act of the accused that causes death was in response to conduct of the deceased towards or affecting the accused, and
 - (b) the conduct of the deceased was a serious indictable offence, and
 - (c) the conduct of the deceased caused the accused to lose self-control, and
 - (d) the conduct of the deceased could have caused an ordinary person to lose self-control to the extent of intending to kill or inflict grievous bodily harm on the deceased.
- (3) Conduct of the deceased does not constitute extreme provocation if:
 - (a) the conduct was only a non-violent sexual advance to the accused, or
 - (b) the accused incited the conduct in order to provide an excuse to use violence against the deceased.
- (4) Conduct of the deceased may constitute extreme provocation even if the conduct did not occur immediately before the act causing death.
- (5) For the purpose of determining whether an act causing death was in response to extreme provocation, evidence of self-induced intoxication of the accused (within the meaning of Part 11A) cannot be taken into account.
- (6) For the purpose of determining whether an act causing death was in response to extreme provocation, provocation is not negatived merely because the act causing death was done with intent to kill or inflict grievous bodily harm.
- (7) If, on the trial of a person for murder, there is any evidence that the act causing death was in response to extreme provocation, the onus is on the prosecution to prove beyond reasonable doubt that the act causing death was not in response to extreme provocation.
- (8) This section does not exclude or limit any defence to a charge of murder.
- (9) The substitution of this section by the *Crimes Amendment (Provocation) Act 2014* does not apply to the trial of a person for murder that was allegedly committed before the commencement of that Act.
- (10) In this section:
act includes an omission to act.

APPENDIX 5

CRIMES ACT 1958 (VIC)

PART IC--SELF-DEFENCE, DURESS, SUDDEN OR EXTRAORDINARY EMERGENCY AND INTOXICATION

SECT 322G

Application of Part

This Part applies to any offence, whether against any enactment or at common law.

SECT 322H

Definitions

In this Part—

evidence of family violence has the meaning given in section 322J;

“really serious injury” includes serious sexual assault.

SECT 322I

Onus of proof

- (1) The accused has the evidential onus of raising self-defence, duress or sudden or extraordinary emergency by presenting or pointing to evidence that suggests a reasonable possibility of the existence of facts that, if they existed, would establish self-defence, duress or sudden or extraordinary emergency (as the case may be).
- (2) If the accused satisfies the evidential onus referred to in subsection (1), the prosecution has the legal onus of proving beyond reasonable doubt that the accused did not carry out the conduct in self-defence, under duress or in circumstances of sudden or extraordinary emergency (as the case may be).

SECT 322J

Evidence of family violence

- (1) Evidence of family violence, in relation to a person, includes evidence of any of the following—
 - (a) the history of the relationship between the person and a family member, including violence by the family member towards the person or by the person towards the family member or by the family member or the person in relation to any other family member;
 - (b) the cumulative effect, including psychological effect, on the person or a family member of that violence;
 - (c) social, cultural or economic factors that impact on the person or a family member who has been affected by family violence;
 - (d) the general nature and dynamics of relationships affected by family violence, including the possible consequences of separation from the abuser;

- (e) the psychological effect of violence on people who are or have been in a relationship affected by family violence;
- (f) social or economic factors that impact on people who are or have been in a relationship affected by family violence.

(2) In this section—

“child” means a person who is under the age of 18 years;

“family member”, in relation to a person, includes—

- (a) a person who is or has been married to the person; or
- (b) a person who has or has had an intimate personal relationship with the person; or
- (c) a person who is or has been the father, mother, step-father or step-mother of the person; or
- (d) a child who normally or regularly resides with the person; or
- (e) a guardian of the person; or
- (f) another person who is or has been ordinarily a member of the household of the person;

“family violence”, in relation to a person, means violence against that person by a family member;

“violence” means—

- (a) physical abuse; or
 - (b) sexual abuse; or
 - (c) psychological abuse (which need not involve actual or threatened physical or sexual abuse), including but not limited to the following—
 - (i) intimidation;
 - (ii) harassment;
 - (iii) damage to property;
 - (iv) threats of physical abuse, sexual abuse or psychological abuse;
 - (v) in relation to a child—
 - (A) causing or allowing the child to see or hear the physical, sexual or psychological abuse of a person by a family member; or
 - (B) putting the child, or allowing the child to be put, at real risk of seeing or hearing that abuse occurring.
- (3) Without limiting the definition of violence in subsection (2)—
- (a) a single act may amount to abuse for the purposes of that definition; and
 - (b) a number of acts that form part of a pattern of behaviour may amount to abuse for that purpose, even though some or all of those acts, when viewed in isolation, may appear to be minor or trivial.

SECT 322K

Self-defence

- (1) A person is not guilty of an offence if the person carries out the conduct constituting the offence in self-defence.
- (2) A person carries out conduct in self-defence if—
 - (a) the person believes that the conduct is necessary in self-defence; and
 - (b) the conduct is a reasonable response in the circumstances as the person perceives them.
- (3) This section only applies in the case of murder if the person believes that the conduct is necessary to defend the person or another person from the infliction of death or really serious injury.

Notes

- 1 See section 322M as to belief in circumstances where family violence is alleged.
- 2 The circumstances in which a person may carry out conduct in self-defence include—
 - the defence of the person or another person;
 - the prevention or termination of the unlawful deprivation of the liberty of the person or another person;
 - the protection of property.

SECT 322L

Self-defence does not apply to a response to lawful conduct

Section 322K does not apply if—

- (a) the person is responding to lawful conduct; and
- (b) at the time of the person's response, the person knows that the conduct is lawful.

SECT 322M

Family violence and self-defence

- (1) Without limiting section 322K, for the purposes of an offence in circumstances where self-defence in the context of family violence is in issue, a person may believe that the person's conduct is necessary in self-defence, and the conduct may be a reasonable response in the circumstances as the person perceives them, even if—
 - (a) the person is responding to a harm that is not immediate; or
 - (b) the response involves the use of force in excess of the force involved in the harm or threatened harm.
- (2) Without limiting the evidence that may be adduced, in circumstances where self-defence in the context of family violence is in issue, evidence of family violence may be relevant in determining whether—
 - (a) a person has carried out conduct while believing it to be necessary in self-defence; or
 - (b) the conduct is a reasonable response in the circumstances as a person perceives them.

SECT 322N**Abolition of self-defence at common law**

Self-defence at common law is abolished.

SECT 322O**Duress**

- (1) A person is not guilty of an offence in respect of conduct carried out by the person under duress.
- (2) A person carries out conduct under duress if—
 - (a) the person reasonably believes that—
 - (i) subject to subsection (3), a threat of harm has been made that will be carried out unless an offence is committed; and
 - (ii) carrying out the conduct is the only reasonable way that the threatened harm can be avoided; and
 - (b) the conduct is a reasonable response to the threat.
- (3) A person does not carry out conduct under duress if the threat is made by or on behalf of a person with whom the person is voluntarily associating for the purpose of carrying out violent conduct.
- (4) This section only applies in the case of murder if the person believes that the threat is to inflict death or really serious injury.

SECT 322P**Family violence and duress**

Without limiting the evidence that may be adduced, in circumstances where duress in the context of family violence is in issue, evidence of family violence may be relevant in determining whether a person has carried out conduct under duress.

SECT 322Q**Abolition of duress at common law**

The defence at common law of duress is abolished.

SECT 322R**Sudden or extraordinary emergency**

- (1) A person is not guilty of an offence in respect of conduct that is carried out in circumstances of sudden or extraordinary emergency.
- (2) This section applies if—
 - (a) the person reasonably believes that—
 - (i) circumstances of sudden or extraordinary emergency exist; and
 - (ii) the conduct is the only reasonable way to deal with the emergency; and
 - (b) the conduct is a reasonable response to the emergency.

- (3) This section only applies in the case of murder if the person believes that the emergency involves a risk of death or really serious injury.

SECT 322S

Abolition of necessity at common law

The defence at common law of necessity is abolished

APPENDIX 6

INTERVENTION ORDERS (PREVENTION OF ABUSE) ACT 2009 (SA)

SECT 8

8—Meaning of abuse—domestic and non-domestic

- (1) *Abuse* may take many forms including physical, sexual, emotional, psychological or economic abuse.
- (2) An act is an *act of abuse* against a person if it results in or is intended to result in—
 - (a) physical injury; or
 - (b) emotional or psychological harm; or
 - (c) an unreasonable and non-consensual denial of financial, social or personal autonomy; or
 - (d) damage to property in the ownership or possession of the person or used or otherwise enjoyed by the person.
- (3) *Emotional or psychological harm* includes—
 - (a) mental illness; and
 - (b) nervous shock; and
 - (c) distress, anxiety, or fear, that is more than trivial.

(4) Emotional or psychological harm—examples

Without limiting subsection (2)(b), an act of abuse against a person resulting in emotional or psychological harm may be comprised of any of the following:

- (a) sexually assaulting the person or engaging in behaviour designed to coerce the person to engage in sexual activity;
- (b) unlawfully depriving the person of his or her liberty;
- (c) driving a vehicle in a reckless or dangerous manner while the person is a passenger in the vehicle;
- (d) causing the death of, or injury to, an animal;
- (e) following the person;
- (f) loitering outside the place of residence of the person or some other place frequented by the person;
- (g) entering or interfering with property in the possession of the person;
- (h) giving or sending offensive material to the person, or leaving offensive material where it will be found by, given to or brought to the attention of the person;
- (i) publishing or transmitting offensive material by means of the Internet or some other form of electronic communication in such a way that the offensive material will be found by, or brought to the attention of, the person;
- (j) communicating with the person, or to others about the person, by way of mail, telephone (including associated technology), fax or the Internet or some other form

of electronic communication in a manner that could reasonably be expected to cause emotional or psychological harm to the person;

- (k) keeping the person under surveillance;
- (l) directing racial or other derogatory taunts at the person;
- (m) threatening to withhold the person's medication or prevent the person accessing necessary medical equipment or treatment;
- (n) threatening to institutionalise the person;
- (o) threatening to withdraw care on which the person is dependent;
- (p) otherwise threatening to cause the person physical injury, emotional or psychological harm or an unreasonable and non-consensual denial of financial, social or domestic autonomy or to cause damage to property in the ownership or possession of the person or used or otherwise enjoyed by the person.

(5) Unreasonable and non-consensual denial of financial, social or personal autonomy—examples

Without limiting subsection (2)(c), an act of abuse against a person resulting in an unreasonable and non-consensual denial of financial, social or personal autonomy may be comprised of any of the following:

- (a) denying the person the financial autonomy that the person would have had but for the act of abuse;
- (b) withholding the financial support necessary for meeting the reasonable living expenses of the person (or any other person living with, or dependent on, the person) in circumstances in which the person is dependent on the financial support to meet those living expenses;
- (c) without lawful excuse, preventing the person from having access to joint financial assets for the purposes of meeting normal household expenses;
- (d) preventing the person from seeking or keeping employment;
- (e) causing the person through coercion or deception to—
 - (i) relinquish control over assets or income; or
 - (ii) claim social security payments; or
 - (iii) sign a power of attorney enabling the person's finances to be managed by another person; or
 - (iv) sign a contract for the purchase of goods or services; or
 - (v) sign a contract for the provision of finance; or
 - (vi) sign a contract of guarantee; or
 - (vii) sign any legal document for the establishment or operation of a business;
- (f) without permission, removing or keeping property that is in the ownership or possession of the person or used or otherwise enjoyed by the person;
- (g) disposing of property owned by the person, or owned jointly with the person, against the person's wishes and without lawful excuse;

- (h) preventing the person from making or keeping connections with the person's family, friends or cultural group, from participating in cultural or spiritual ceremonies or practices, or from expressing the person's cultural identity;
 - (i) exercising an unreasonable level of control and domination over the daily life of the person.
- (6) If a defendant commits an act of abuse against a person, or threatens to do so, in order to cause emotional or psychological harm to another person or to deny another person financial, social or personal autonomy, the defendant commits an act of abuse against that other person.
- (7) A defendant may commit an act of abuse by causing or allowing another person to commit the act or to take part in the commission of the act.
- (8) If the act of abuse is committed by a defendant against a person with whom the defendant is or was formerly in a relationship, it is referred to in this Act as an act of ***domestic abuse***; and for that purpose, 2 persons are in a relationship if—
- (a) they are married to each other; or
 - (b) they are domestic partners; or
 - (c) they are in some other form of intimate personal relationship in which their lives are interrelated and the actions of 1 affects the other; or
 - (d) 1 is the child, stepchild or grandchild, or is under the guardianship, of the other (regardless of age); or
 - (e) 1 is a child, stepchild or grandchild, or is under the guardianship, of a person who is or was formerly in a relationship with the other under paragraph (a), (b) or (c) (regardless of age); or
 - (f) 1 is a child and the other is a person who acts in loco parentis in relation to the child; or
 - (g) 1 is a child who normally or regularly resides or stays with the other; or
 - (h) they are brothers or sisters or brother and sister; or
 - (i) they are otherwise related to each other by or through blood, marriage, a domestic partnership or adoption; or
 - (j) they are related according to Aboriginal or Torres Strait Islander kinship rules or are both members of some other culturally recognised family group; or
 - (k) 1 is the carer (within the meaning of the *Carers Recognition Act 2005*) of the other.
- (9) An act of abuse may be committed by a defendant against a person with whom the defendant is not, and was not formerly, in a relationship (including in circumstances where the defendant imagines such a relationship) and such an act of abuse is referred to in this Act as an act of ***non-domestic abuse***.

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