

# *Provocation in Sentencing: A Culpability-Based Framework*<sup>†</sup>

Felicity Stewart\* and Arie Freiberg\*\*

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## **Abstract**

In a number of jurisdictions, including Victoria, the partial defence of provocation has been abolished. Provocation will now be considered in the sentencing process, alongside other sentencing factors that the court must take into account to arrive at an appropriate and proportionate sentence. We argue that, rather than being one of the many general mitigating factors that a court must consider, provocation is relevant to the degree of the offender's culpability and that an understanding of the theoretical foundation for assessing culpability should inform a new normative framework for assessing whether and how provocation warrants a reduction in an offender's sentence.

This article argues that the crucial questions for a court are whether the victim's actions gave the offender a justifiable sense of being wronged and the relationship, or proportionality, between the offence and the provocation. Adopting an approach canvassed by the Victorian Law Reform Commission, we propose that conduct that arises out of the victim exercising his or her right to equality should not provide justification for an offender's sense of having been wronged. Under this approach, the personal circumstances of an offender may be relevant to assessing the gravity of provocation. However, the question of whether an offender has a justifiable sense of being wronged by the provocation should be evaluated consistently with contemporary societal notions of equality.

## **The Demise of the Partial Defence of Provocation**

The partial defence of provocation to murder is in its death throes. Already abolished in Tasmania in 2003 and Victoria in 2005 (*Criminal Code Amendment (Abolition of Defence of Provocation) Act 2003* (Tas); *Crimes (Homicide) Act 2005* (Vic)), its demise is being contemplated in Western Australia, Queensland and New Zealand (Law Reform Commission (WA) 2007:222 Recommendation 29; Department of Justice and Attorney-General (Qld) 2007; Law Commission (NZ) 2007:77 (Recommendation 1)) and urged in the United Kingdom (Wells 2000:85). In Victoria, its abolition followed the recommendation in the Victorian Law Reform Commission (VLRC)'s 2004 report,

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† This article is drawn from the Research Paper *Provocation in Sentencing* (2008) by the same authors published by the Sentencing Advisory Council, Victoria. The views expressed are those of the authors alone.

\* Senior Legal Policy Officer, Sentencing Advisory Council, Victoria.

\*\* Chair, Sentencing Advisory Council and Dean, Faculty of Law, Monash University, Australia.

*Defences to Homicide, Final Report*, that the partial defence of provocation be abolished and that the relevant circumstances of an offence, including provocation, instead be taken into account in the sentencing process (VLRC 2004:58 Recommendation 1). This recommendation was motivated in part by concerns about the inequitable operation of the doctrine, in light of the very different circumstances in which men and women charged with murder typically raise the defence (VLRC 2004:[2.18]-[2.25], [2.28], [7.5]; Morgan 2002:21-29; Morgan 1997:247-250, 255-257).

This article examines some of the sentencing policy issues raised by the abolition of the partial defence of provocation in those jurisdictions that have taken this step. With its abolition, the concept of provocation will play a different role in the trial process. It will be considered along with other sentencing factors (such as remorse, youth, prospects of rehabilitation and future risk) that the court must take into account in arriving at an appropriate and proportionate sentence. However, rather than being founded on the uncertain, outdated or unacceptable doctrinal considerations that underpinned substantive provocation, sentencing provocation will need to be justified on its own terms within the broad framework of sentencing theory. The relevant matters to be considered will be found in sentencing legislation and principles rather than in the substantive criminal law.

The move from substantive provocation to provocation as a sentencing factor changes not only its weight as an issue in the trial and sentencing of the offender, but also the application of the rules of evidence. Under the old law, if provocation was raised as an issue in a murder trial, the Crown had to prove beyond reasonable doubt that the offender had not been provoked in the relevant sense (*Masciantonio v The Queen*; *Moffa v The Queen*; *R v Thorpe (No 2)*). In contrast, under the new law, offenders will have to prove on the balance of probabilities that they were provoked by the victim to a sufficient extent so as to justify the mitigation of their sentences (*R v Storey*; Stewart & Freiberg 2008:[5.3.7]-[5.3.11]).

The changes wrought by the abolition of the partial defence are likely to be profound. If the underlying purposes of the proponents of abolition are to be achieved, it is imperative that the problems and flaws of the pre-existing law not be transferred from the substantive criminal law into the law of sentencing. Maitland's observation that old forms of law and ideas, though ostensibly buried, can still rule from their graves, is as pertinent to the law of provocation as it was to the old forms of action to which he was referring (Maitland 1909:1). In the transformation of the law of provocation the partial defence should not re-emerge in a new guise as a particular variety of murder. Many of the old assumptions will need to be discarded and a new normative framework must be developed. In this article, we propose a new framework for considering provocation in sentencing based primarily upon the offender's culpability as a sentencing factor.

## The Partial Defence

In Australia, the partial defence of provocation operated to reduce murder to manslaughter if the following criteria were established: (a) there was evidence of provocative conduct by the victim; (b) the defendant lost self-control as a result of that provocation; (c) the provocation was such that it was capable of causing an ordinary person to lose self-control and form an intention to cause serious bodily harm or death; and (d) the provocation must have actually caused the defendant to lose self-control and the defendant must have acted while deprived of self-control and before he or she had the opportunity to regain his or her composure (*Masciantonio v The Queen* at 66).

The long history of the partial defence has been well rehearsed (see e.g. VLRC 2004:[2.4]; Model Criminal Code Officers Committee 1998:73; Sullivan 1993:422-423). While the original conception of provocation focussed on the wrongfulness of the victim's conduct as a basis for reducing the defendant's culpability, under its later conception it was justified 'on the basis that the accused could not properly control his or her behaviour in the circumstances, and an ordinary person might react similarly' (VLRC 2004:[2.7]). Therefore, the defendant's own loss of self-control was viewed as a reason to partially excuse his or her behaviour and therefore view him or her as less morally culpable than a 'cold-blooded' killer (VLRC 2004:[2.7]; VLRC 2003:n327; The Law Reform Commission (Ireland) 2003:[2.02]).

Provocation was also related to the operation of the death penalty: it was developed to spare 'hot blooded' killers from the severity of a mandatory death sentence (VLRC 2004:[2.3]; Coss 1991:601). With the abolition of the death penalty for murder in all Australian jurisdictions, one of the primary rationales for the partial defence of provocation was removed.<sup>1</sup>

In Victoria, the VLRC concluded that the continued existence of provocation as a partial defence to killings committed in anger was no longer morally acceptable (VLRC 2004:[2.23], [2.95]). They argued that contemporary community standards require people to control their anger and not to kill, even in circumstances where they may have been provoked. The Commission rejected arguments that provocation is a necessary concession to human frailty, asserting that a murder conviction is warranted for a person who kills in response to provocation because of the gravity of the loss of a life and the existence of the defendant's intention to kill or to seriously injure the victim (VLRC 2004:[2.97]).

The VLRC found that gender bias existed in the way the partial defence of provocation was interpreted and applied, particularly in relation to intimate relationship homicides (VLRC 2004:xxv, [2.18]-[2.25], [2.28], [7.5]; see also Morgan 2002:21-30; Morgan 1997:247-250, 255-257). They noted that when men raised provocation in this context the conduct said to be provocation was often that their partner had been unfaithful or taunted them about their sexual prowess. However such allegations, they argued, usually masked the fact that the man was motivated by jealousy and the need to be in control, and such homicides often occurred when his partner was exercising (or attempting to exercise) her right to leave the relationship (VLRC 2004:[2.22]-[2.23]; see also Morgan 2002:21-30; Morgan 1997:247-250). In contrast, many women who raised provocation in the context of intimate sexual relationships had been subjected to violence by their partners. The need to deal with gender bias was a significant factor in the VLRC's recommendation to abolish provocation as a partial defence and in the government's acceptance of that recommendation (see VLRC 2004:[7.5]; Victoria, *Parliamentary Debates*, Legislative Assembly, 6 October 2005, 1349 (Rob Hulls, Attorney-General)).

## Provocation as a Sentencing Factor

### *The Traditional Approach*

To date, provocation as an independent sentencing factor has not loomed large in sentencing law or theory. Outside of 'provocation manslaughter' (also referred to as

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<sup>1</sup> However, mandatory penalties of life imprisonment for murder in some jurisdictions continue to provide a rationale for the retention of provocation: see e.g. Coss 2006:138, 144; Law Reform Commission (WA) 2007.222. Recommendation 29

‘voluntary’ or ‘intentional manslaughter’) it has received only passing reference in judgments and sentencing texts, mostly in the context of non-fatal assaults.

The general principles of sentencing are well-known and are found both in statute (e.g. *Sentencing Act* 1991 (Vic); *Sentencing Act* 1997 (Tas); *Penalties and Sentences Act* 1992 (Qld)) and common law (e.g. Fox & Freiberg 1999). The purposes of sentencing are generally articulated as being punishment, deterrence, rehabilitation, denunciation and the protection of the community from the offender (see e.g. *Sentencing Act* (Vic) s5(1)). The factors that a court must take into account include the maximum penalty prescribed for the offence, current sentencing practices, the nature and gravity of the offence, the offender’s culpability and degree of responsibility for the offence, the impact of the offence on its victim(s) and their personal circumstances, any injury, loss or damage resulting directly from the offence, whether the offender pleaded guilty to the offence, the offender’s previous character and any aggravating or mitigating factor concerning the offender or other relevant circumstances (see e.g. *Sentencing Act* (Vic) s5(2)).

Traditionally, the consideration of provocation as a sentencing factor has been free of the constraints which were part of substantive provocation. At sentencing, particularly in the context of non-fatal assaults, courts have taken a broader, more flexible approach to determining whether there is sufficient provocation in a particular case to justify a reduction in the offender’s sentence (see e.g. *R v Okutgen* at 264; *R v Kelly* at [13]-[15]; *R v Aboujaber* at 9-10).

This more flexible approach to provocation was adopted in the first Tasmanian case to consider provocation as a sentencing factor in murder under the new law: *Tyne v Tasmania*. Justice Blow outlined the approach to be taken in sentencing an offender for murder where provocation is raised as a mitigating factor:

The circumstances that a sentencing judge should take into account in relation to provocation in a murder case include the nature of the provocation, its severity, its duration, its timing in relation to the killing, any relevant personal characteristics of the offender (eg, in cases of racial abuse), and the extent of the impact of the provocative conduct on the offender. When provocation is taken into account as a mitigating factor for sentencing purposes in relation to a crime other than murder, it is not common for anything to be put to the sentencing judge as to whether an ordinary person would have been deprived of the power of self control, nor as to whether or not there was time for the offender’s passion to cool. Those matters are of course relevant, but the weight to be attached to the provocation can be readily assessed by reference to the factors I have listed. I see no reason why provocation should be dealt with as a mitigating factor any differently in murder cases from the way it is dealt with in other cases (*Tyne v Tasmania* at 229).

### ***A New Approach?***

There are two fundamental issues that arise from the abolition of the partial defence. The first is the effect on homicide sentencing practices. There is a likelihood that, unless the courts radically alter their conception of the offence of murder, the abolition may result in a significant (upward) departure from previous sentencing practices for provoked killers (who would previously have been found guilty of provocation manslaughter), because of the increased maximum penalty and the stigma associated with the offence of murder. Related to this is the possibility that the lower end of the sentencing range for murder may experience a downward departure to reflect the incorporation of ‘provoked murderers’.

Secondly, there is the need to construct a new conceptual framework for assessing the effect of provocation in sentencing. In this article we argue that rather than being one of the myriad of general mitigating circumstances that a judge must consider, provocation is

directly relevant to an offender's culpability for an offence (which in turn is relevant to the overall seriousness of the particular offence which has been committed). For this reason, culpability is the preferred foundation for assessing what categories of provocation should, and should not, have mitigatory weight. We review some of the theoretical approaches that attempt to explain why a reduction in an offender's culpability may be justified in a particular case as a result of circumstances such as provocation. In this context we suggest a new normative framework for assessing provocation in sentencing and explain some of the differences between this and the traditional approach to dealing with provocation in homicide cases.<sup>2</sup>

In the last section of this article, we discuss the impact that mitigating provocation in a particular case may have on the purposes for which a sentence may be imposed.

## The Maximum Penalty and Sentencing Practices

A significant determinant of an offender's sentence is the comparative seriousness of the offence for which he or she has been convicted. The maximum penalty provides legislative guidance as to the relative seriousness of an offence as compared with other offences (*DPP v Aydin* at [8] (Callaway JA)). In Victoria, for example, whereas manslaughter is punishable by a maximum penalty of 20 years' imprisonment, murder carries a maximum life sentence (*Crimes Act 1958* (Vic) s3, s5) and the stigma of being convicted of murder rather than of manslaughter (Morgan 1997:275-276). As a result of the abolition of the partial defence, it might be expected that offenders found guilty of murder under the new law might generally receive more severe sentences than those previously found guilty of provocation manslaughter:

In Tasmania, in the first post-abolition case, the defendant's contention that he should have been sentenced for murder as if provocation had reduced his crime to manslaughter, despite the repeal of the partial defence, was rejected (*Tyne v Tasmania* at 227). Provocation, the court held, was just another factor to be taken into account and the previous disparity between sentencing for murder and provocation manslaughter should either disappear or be narrowed, depending upon the weight given to provocation as a mitigating factor.

In Victoria homicide reforms appear to have had a dual intention in relation to the sentencing of provoked killers. Although the VLRC envisaged increased sentences for some 'provoked killers' convicted of murder under the new law, the Commission was also concerned to ensure that a broader range of penalties remained available in circumstances where the victim had been violent towards the offender (VLRC 2004:[2.101], [7.53]-[7.56]).

An analysis of sentencing outcomes for murder and provocation manslaughter over an eight-year period to 2006/07 reveals a significant difference in the respective sentencing ranges (Stewart & Freiberg 2008:7.3). The most common combination of total effective

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2 These issues are also relevant to provocation as a sentencing factor in non-fatal assaults. They are discussed in more detail in our full report, see further Stewart & Freiberg 2008

3 However, in Victoria, not all people who might previously have been found guilty of provocation manslaughter will necessarily be convicted of murder under the new law. Some may instead be acquitted after successfully raising self-defence, others may be found guilty of defensive homicide or unlawful and dangerous act manslaughter. This may be particularly so in homicide cases involving allegations of past family violence by the victim towards the offender, see amendments made by the *Crimes (Homicide) Act 2005* (Vic) to *Crimes Act 1958* (Vic) ss9AC, 9AD and 9AH.

sentence and non-parole period for murder was 18 years with a 14-year non-parole period, while for provocation manslaughter it was eight years with a six year non-parole period and for other categories of manslaughter it was five years with a three year non-parole period (Stewart & Freiberg 2008:[7.3.5]). There was little overlap between the two categories of offences, although in the last days of the partial defence, sentencing for this class of manslaughter appeared to become more severe.

Based on the Tasmanian experience, it is more likely that the sentences for offenders convicted of murder where provocation exists will be higher than previous sentences these offenders might have faced if they had been convicted of provocation manslaughter. However, notwithstanding this, there may nevertheless be a downward extension of the lower end of the sentencing range for murder to reflect the incorporation of provoked, as well as unprovoked, murders. This has been foreshadowed by the Law Reform Commission of Western Australia:

The Commission agrees that if provocation is abolished, in some cases an offender will receive a higher sentence than would have been imposed if the offender was convicted of manslaughter, but in some cases the offender will be sentenced leniently for murder. Thus, it has been argued that abolishing provocation may lead to 'inconsistent dealings with those who kill after losing self control'. However, this is precisely the point. Not all cases of provocation deserve leniency. A person who kills his wife after discovering she is having an affair is entitled to less mitigation than a person who kills his friend after discovering him sexually abusing his child (Law Reform Commission (WA) 2007:221 (citations omitted)).

## Culpability: A Framework for Considering Provocation in Sentencing

Section 5(2)(d) of the *Sentencing Act* 1991 (Vic) provides that a court must take into account 'the offender's culpability and degree of responsibility for the offence'.

Culpability, or blameworthiness, reflects the extent to which an offender should be held accountable for his or her actions by assessing his or her intention, awareness and motivation in committing the crime (Sentencing Task Force (Vic) 1989:60; von Hirsch 1993:29). Culpability has been described as:

the factors of intent, motive and circumstance that bear on the actor's blameworthiness—for example, whether the act was done with knowledge of its consequences or only in negligent disregard of them, or whether, and to what extent, the actor's criminal conduct was provoked by the victim's own misconduct (von Hirsch 1983:214).

Culpability is one element of the equation that links the severity of a punishment with the seriousness of the crime. The objective seriousness of homicide, as measured by the harm caused (death), is manifest and is identical for both murder and manslaughter. The difference between the two offences lies in the variation in the offender's culpability and degree of criminal responsibility for these offences. Therefore factors that affect an offender's culpability are directly relevant to the subjective seriousness of the particular crime which has been committed. A variety of factors, including provocation, can reduce an offender's culpability or moral responsibility for an offence.<sup>4</sup>

4 For example, an offender's serious psychiatric illness (short of mental impairment in law) or intellectual impairment (particularly where it influences the offender's capacity to fully comprehend the nature or consequences of his or her behaviour): *R v Verdins*, *R v Tsiaras* at 400; *Mason-Stuart v The Queen* at 164, *DPP v Scott* at [19]; Judicial College of Victoria 2005:[10.9.1.1], [10.9.1.3], [10.9.1.2.1]-[10.9.1.2.5], [10.9.1.4]; Fox & Freiberg 1999:[3.708]-[3.711], [3.724]-[3.730]. Provocation has also been held to reduce an offender's culpability (see e.g. *R v Raby* at 4).

Under the previous law, provocation was treated as a factor that was directly relevant to an offender's culpability but, unlike other factors relevant to culpability, it was capable of reducing the offence of murder to the lesser offence of manslaughter, despite the offender's intention to kill the victim. This was one of the objections raised by the VLRC, which recommended that, rather than providing the basis for partial defences to homicide, 'differences in degrees of culpability for intentional killings should be dealt with at sentencing' (VLRC 2004:[2.1]; see also [1.29], [2.32]-[2.33], [2.93]-[2.94], xxvii, Recommendation 1; Neave 2005:33). More recently, the Law Reform Commission of Western Australia reached a similar conclusion:

Unlike the substantive criminal law, sentencing is a flexible process—it can accommodate the wide variety of circumstances that arise in homicide cases. Dealing with issues affecting culpability during sentencing allows those issues to be considered at the same time as other relevant sentencing factors. ... the sentencing process is uniquely suited to identifying those cases of provocation that call for leniency and those that do not ... because [it] is flexible and is accustomed to taking into account both aggravating and mitigating factors (Law Reform Commission (WA) 2007:220-221).

### ***When should Culpability be Reduced by Provocation?***

Not all conduct that provoked an offender was considered legally 'provocative' for the purposes of the partial defence. Nor will it be for sentencing purposes. Under the new law when should provocative conduct by the victim warrant a reduction in the offender's culpability? Is it necessary that the provocation caused the offender to lose self-control or is there a better approach to considering provocation at sentencing? Should there be a proportionate link between the provocation and the offender's response? Are prevailing values or the offender's perceptions and personal characteristics relevant considerations in assessing the degree of provocation? We argue that the answers to these questions will in part be determined by an understanding of the theoretical foundation for assessing culpability.

A number of broad theoretical approaches have been identified which attempt to justify or explain why provocation should reduce an offender's culpability. The three upon which we focus are (1) character theory; (2) objective capacity theory; and (3) the reasons-based approach.

#### **Character Theory**

Character theory proposes that the actions of a person who has lost his or her self-control are partially excused on the basis that those actions were uncharacteristic or atypical of the person and therefore are unlikely to be repeated. In the context of provocation, it is argued that when a person is acting under the influence of a loss of self-control 'it is not really "him" or "her"—not his or her "true" self—acting' (Horder 2004:118). Because the offender's character when angry is unlike that while calm, '[a]ctions done in that state do not reflect as badly upon [his or] her settled character as if they had been done whilst calm' (Tadros 2001:507). On this rationale, sentencing purposes such as specific deterrence may be viewed as less important because the offender is unlikely to repeat the behaviour.

While 'good character' is a mitigating factor which courts must take into account in sentencing offenders (*Sentencing Act* 1991 (Vic) s5(2)(f), s6), the use of character theory as a basis for determining degrees of culpability has been criticised on the basis that it presupposes that a person's character is 'settled', as otherwise it is difficult to assert or deny that particular behaviour was aberrant to that person's character (Horder 2004:122-123). However, the concept of character is more complex and nuanced. Using character theory as a basis for determining culpability is problematic in situations such as where a perpetrator

of family violence appears ‘charming’, ‘personable’ or even ‘a pillar of the community’ (VLRC 2006:[2.47]). If a person who acts violently towards a certain family member, but behaves non-violently and politely towards other people, eventually kills the victim of his or her violence, it is difficult to characterise that killing as ‘out of character’ simply because others testify as to his or her non-violent nature. Perpetrators can appear of ‘good character’ to everyone but the family member or members upon whom they are perpetrating violence (VLRC 2006:[2.42], [2.47]).

### **Objective Capacity Theory**

The emergence of the ‘ordinary person’ component of the test for substantive provocation was founded on what has been termed ‘objective capacity’ theory (Horder 2004:123). Capacity theory is a means of assessing the moral blameworthiness of an offender by reference to the capacity of the offender to avoid criminal behaviour. The subjective version of capacity theory looks at the actual ability of a particular person to avoid offending, given that person’s circumstances and behaviour prior to that time. The objective version compares the person’s behaviour to a ‘morally salient standard’ but allows that standard to be adjusted to reflect the person’s age to ensure a fair assessment of their culpability (Horder 2004:125). Supporters of an objective, rather than subjective, approach argue that ‘it makes little moral sense to excuse wrongdoing on the grounds that although D failed miserably to come up to an adequate standard, he or she came up to the standards he or she sets for him- or herself’ (Horder 2004:127).

Critics of character theory advocate objective capacity theory as a preferred approach to assessing culpability. Commenting on the ‘ordinary person test’, Horder observes ‘the law now experiences little difficulty in handling provocation pleas by children and young people [because] it adopts the objective version of the capacity theory, rather than the character theory’ (Horder 2004:123 (citations omitted)).

Horder notes that as this approach requires assessing whether the defendant met the standard of self-control expected of someone of his or her age, ‘one need know nothing at all about [his or her] character development—such as it has been—to date’ (Horder 2004:123 (citations omitted)).

Capacity theory is also reflected in sentencing. A number of existing sentencing considerations reflect the view that offenders who lack the capacity to control or understand their conduct may, in some circumstances, be considered to be less morally culpable. Youth, mental disorder, intellectual incapacity, emotional stress, drugs, alcohol or other addictions, have at various times, and to various degrees, been recognised as mitigating factors in sentencing (Fox & Freiberg 1999:[3.708]-[3.711], [3.724]-[3.730]; Judicial College of Victoria 2005:[10.9.1.1], [10.9.1.1.3], [10.9.1.2.1]-[10.9.1.2.5], [10.9.1.4], [10.10.3.3]). However, in relation to some of these circumstances, courts may not only take into account the lesser moral culpability, but also the countervailing fact that such people may, on account of their inability to control their conduct, present a *greater* danger to the community (see e.g. Fox & Freiberg 1999:[3.724], [3.728]). And while recognising that factors such as addiction may, at the moment of committing the offence explain the offender’s conduct, it may not excuse it if the court believes that prior to committing the offence the offender had some degree of choice or control over their behaviour.

Capacity theory has also been criticised as a foundation for provocation because it presupposes that a person acting in the heat of passion caused by a provocation is incapable, or less capable, of controlling their conduct, and therefore less culpable. It is:



based on an understanding of emotions as things we cannot control, but which control us. For example, the excuse of provocation is based on the notion that an emotion such as anger or jealousy can so overwhelm people that they are unable to control their behaviour. This approach assesses people's reasons for acting and the emotions behind those reasons as evidence only of those people's ability to control their behaviour (VLRC 2003:[7.24] (citations omitted)).

The criticisms of objective capacity theory are closely tied to criticisms of the requirement for a 'loss of self-control' in substantive provocation. In its report on homicide the VLRC proposed a different approach to assessing culpability that instead focussed on the reasons for the offence, including the gravity of the provocation and the justifiability of the offender's response.

### **A Reasons-Based Approach to Culpability in Sentencing**

The VLRC proposed looking beyond the act and the circumstances of the act to why people killed, in order to make judgments about the values and views that drove the defendant's decision to act. This approach, which the Commission characterised as a 'reasons-based' approach, was intended to provide a framework for considering the moral or social dimensions of culpability. The VLRC argued that:

emotion is not an uncontrollable irrational force. Instead our emotions embody judgments and ways of seeing the world for which we can and should be held to account. If we accept that emotions can be objectively assessed and judged, then arguably it is also possible to assess culpability based on people's reasons for behaving (and the emotions underlying those reasons) (VLRC 2003:[7.24]-[7.25] (citations omitted)).

The VLRC argued that changing provocation from a partial-defence to a sentencing consideration would have the advantage of:

readily allow[ing] reasons to be taken into account along with the specific contexts and individual circumstances. ... Reasons-based sentencing could then evaluate a defendant's reasons for killing along with their life circumstances to arrive at an appropriate sentencing outcome (VLRC 2003:[7.37]).

The reasons-based approach looks at the gravity of the provocation, the emotions behind the offender's response to it, such as desperation, fear, anger or jealousy, and the reasons for these emotions. It recognises that human emotions are complex: for example a woman who kills her husband after years of violence may be as much motivated by anger and resentment as by desperation and fear. The focus, therefore, is on the reasons for the responsive emotions. The offender's conduct is mitigated, and the sentence reduced, only when the reasons for being frightened, angry or resentful are good reasons, though fear, anger or resentment in some cases may have led to excessive or inappropriate behaviour. This approach provides a useful foundation for assessing whether, in the circumstances of a particular case, the offender's culpability for murder should be reduced as a result of provocation. A reasons-approach marks a return to provocation's original rationale to the extent that it focussed on the wrongfulness of the victim's actions and the justifiability of the offender's grievance, rather than the offender's inability or refusal to exercise self-control.<sup>5</sup>

If the reasons-approach is to be preferred, the next question is how this translates into a framework for considering provocation in sentencing. This requires examining the concept of provocation afresh, free of the formal requirements of the substantive defence of provocation but with an awareness of the practical or common sense understandings of what it means to act 'under provocation' or when provoked.

This raises the following questions:

1. Must the offender have 'lost self-control' for provocation to reduce an offender's culpability?
2. Is a preferable approach that the provocation caused the offender to have a justifiable sense of being wronged?
3. What degree of provocation (as shown by its nature and duration) will justify the offender's aggrievement?
4. Should the degree of provocation necessary to reduce the offender's culpability be commensurate, or proportionate, with the gravity of the offence?
5. Must the provocation cause the offence?

### ***Loss of Self-Control***

The element of a loss of self-control is commonly considered to be the essence of provocation. One of the grounds on which provocation, either as a partial defence or as a mitigating factor in sentencing, has been justified has been that the offender has, because of his or her loss of self-control, been less responsible for his or her actions (see e.g. Judicial College of Victoria 2005:[9.10.2]-[9.10.3], [20.6.5.2], [20.6.3]; Fox & Freiberg 1999:[12.216]; *R v Alexander* at 144). The requirement of a loss of self-control, and the emergence of the ordinary person test, marked a change from provocation as a partial justification, to provocation as a partial excuse. While at the time provocation was first introduced, men acting under provocation were viewed as acting rationally in response to being wronged, over time greater emphasis came to be placed on the defendant's emotional response to that provocation, and whether an ordinary person faced with provocation of similar gravity, might have reacted as the defendant did.

Loss of self-control as an element of substantive provocation reflected the influence of character theory and objective capacity theory on the development of the partial defence. However, under a reasons-based approach 'loss of self-control' plays a lesser and different role.

The VLRC argued that the requirement of loss of self-control in the test for substantive provocation added to the gender bias in its operation (VLRC 2004:[2.28], [2.86]-[2.90], [2.103]; see also VLRC 2006:[2.42]). It has been argued that in intimate partner killings, rather than losing control of themselves, 'the real "loss of control" is that the men have lost control of their women' (Coss 2006:52). In the VLRC's homicide consultation the:

conceptualisation of men's behaviour as a loss of self-control was also criticised as misconceived. Rather than a loss of self-control, the use of anger and violence by men against women is often instrumental—a deliberate and conscious process—intended to gain compliance and control. Those who inflict violence, including in the context of a relationship of sexual intimacy ... generally make a decision to act or not to act (VLRC 2004:[2.28]).

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5 On the difference between 'justification' and 'excuse' the Law Reform Commission (Ireland) commented: 'The partial justification rationale is based on the theory that the killing was to some extent warranted by words said or acts done by the provoker to the accused. The idea is that a portion of the responsibility for the killing is transferred to the deceased on the grounds that he or she was partially to blame for his or her own demise. In contrast, the partial excuse rationale is based on the assumption that the accused should not be held fully accountable for his or her actions by reason of loss of control caused by provocation' (The Law Reform Commission (Ireland) 2003:[2.02]).

Loss of self-control as an element of the test for provocation as a partial defence was similarly criticised by the United Kingdom Law Commission in its final report on partial defences to murder:

The term loss of self-control is itself ambiguous because it could denote either a failure to exercise self-control or an inability to exercise self-control. ... those who give vent to anger by 'losing self-control' to the point of killing another person generally do so in circumstances in which they can afford to do so. An angry strong man can afford to lose his self-control with someone who provokes him, if that person is physically smaller and weaker. An angry person is much less likely to 'lose self-control' and attack another person in circumstances in which he or she is likely to come off worse by doing so (Law Commission (UK) 2004:[3.28]; see also McSherry 2005:917; Sullivan 1993:426-427; Morgan 1997:257-262).

The UK Law Commission recommended against including 'loss of self-control' in the test for provocation, preferring an approach that focussed instead on the nature and gravity of the provocation and its impact on the offender: 'words or conduct which caused the defendant to have a justifiable sense of being seriously wronged' (Law Commission (UK) 2006:[5.11]). This approach is more consistent with the earlier conception of provocation which focussed on the gravity of the victim's conduct and the reasons it caused the offender to commit the offence, rather than on whether or not the conduct caused the offender to lose self-control.

### ***Justifiability***

In its 2004 report on partial defences to murder, the United Kingdom Law Commission attempted to articulate the rationale for provocation and its relationship to culpability:

The preferred moral basis for recognising a partial defence of provocation is that the defendant had legitimate ground to feel strongly aggrieved at the conduct of the person at whom his/her response was aimed, to the extent that it would be harsh to regard their moral culpability for reacting as they did in the same way as if it had been an unprovoked killing (Law Commission (UK) 2004:[3.68]).

The UK Commission identified a number of key elements which should be required to establish the partial defence, the first of which was that:

the moral blameworthiness of homicide may be significantly lessened where the defendant acts in response to gross provocation in the sense of words or conduct (or a combination) giving the defendant a justified sense of being severely wronged (Law Commission (UK) 2004:[3.63]).

In its subsequent 2006 report: *Murder, Manslaughter and Infanticide*, the UK Commission identified 'the essence of gross provocation' as 'words and/or conduct which caused the defendant to have a justifiable sense of being seriously wronged (Law Commission (UK) 2004:[3.68] (emphasis added)).

In our view, the UK Commission's broad conception of substantive provocation can hold equally well as the basis of mitigation of sentence and is consistent with the reasons-based approach advocated by the VLRC. With provocation in the sentencing arena, the key determinant of the offender's culpability should be the reasons for the commission of the offence, including the gravity of the victim's provocative conduct and the justifiability of the offender's grievement. The conception of provocation as having some legal force when a defendant is justifiably aggrieved by the provocation has the result that actual loss of self-control (or a perception of loss of self-control) will not be of special importance in sentencing, except where it is relevant to the degree of premeditation.<sup>6</sup>

The UK Commission's formulation limited the partial-defence of provocation to murder to 'gross provocation' which gave the offender a justifiable sense of being 'seriously' wronged. However, given the more flexible approach to provocation in sentencing and its application to a full spectrum of offences against the person, the question arises as to the requisite degree of provocation to justify the offender's aggrievement. Should reductions in culpability only be warranted in cases of serious provocation or should the required degree of provocation be commensurate with the gravity of the offence?

### *Degree of Provocation*

#### **Relevance to Culpability**

A number of jurisdictions have emphasised the logical relationship between the degree of provocation and the degree to which a reduction in the offender's culpability is warranted. For example, the UK Sentencing Advisory Panel in providing advice on sentencing for provocation manslaughter to the Sentencing Guidelines Council, suggested that an assessment of the *degree* of provocation as shown by its nature and duration is 'the critical factor in the sentencing decision' (Sentencing Advisory Panel (UK) 2005:[30]). The UK Panel supported an approach that classified provocation into different levels and allowed commensurate reductions in culpability and sentence:

The provocation does not itself have to be a wrongful act but where it involves gross and extreme conduct on the part of the victim, for example in some instances of domestic violence, it is viewed as being a more significant mitigating factor than conduct which, although significant, is not as extreme. ... Court of Appeal decisions have identified degrees of provocation ... such as 'great or intense', 'moderate' or 'little or low' to indicate the weight attached to the provocation in individual cases. These ... directly impact on the sentencing range into which a case will fall (Sentencing Advisory Panel (UK) 2005:[30] (citations omitted)).<sup>7</sup>

We advocate a modified version of the UK Commission's formulation that looks at whether the offender had a justifiable sense of being wronged and the degree to which his or her response to the provocation was disproportionate (taking into account the surrounding circumstances). Therefore, the degree of provocation necessary to warrant a reduction in the offender's culpability will be commensurate with the gravity of the offence. Where the offender reacted particularly violently or intentionally caused serious harm or death, only the most serious examples of provocation are likely to reduce the offender's culpability. Where the harm caused by the offender is less serious, a lower degree of provocation may warrant a reduction in the offender's culpability (on proportionality see further page 299 below).

The degree of provocation is determined by both its nature and duration. Evaluating the nature of the provocation requires consideration of both the offender's relevant personal characteristics on the one hand, and the expectations of society, on the other.

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6 The *Victorian Sentencing Manual* states that: '[g]enerally, premeditated killings are regarded as more serious than spontaneous killings on the basis that an offender has the opportunity fully to consider the nature and consequences of his or her act before it is committed. The offender has time to make a reasoned choice in relation to his or her future actions': Judicial College of Victoria 2005:[19.6.1]. This view was taken in *Iddon v The Queen* in which the court held that: 'a distinction is to be drawn between premeditated murder and murder committed in a momentary act of passion': at 328 (Crockett, Murray and Hampel JJ).

7 This approach is reflected in the subsequent Guideline: Sentencing Guidelines Council (UK) *Manslaughter by Reason of Provocation, Guideline* (November 2005) at [3.2].

## The Nature of Provocation

### Public Policy and Protecting Prevailing Values

In some circumstances, courts have considered that mitigation of an offender's sentence for causing death or injury is not warranted, even if the offender maintained that he or she had been acting under the influence of what he or she considered to be gross provocation. Courts have done so where public policy reasons outweigh individual considerations that may tend to mitigation.<sup>8</sup>

The 2005 changes to the law of provocation in Victoria leave open the question of whether there remains a place for the ordinary person in assessing provocation in sentencing or whether there is a better approach in light of the public policy reasons for abolishing the partial defence.

We have argued that the key to whether a reduction in the offender's culpability is warranted is the *justifiability* of the offender's aggrievement in light of the degree of the provocation. In assessing whether the conduct gave the offender a justifiable sense of being wronged, of what relevance is public policy and the need for normative behavioural change and how may this be reflected in assessing the provocation? If there is a normative aspect to considering provocation, will the personal characteristics of the offender be a relevant consideration?

### Equality Principles: The Preferred Approach

In its Homicide review, the VLRC explored incorporating an equality analysis into the test for substantive provocation to 'attempt to ensure that legal rules operate without reinforcing systemic or historically discriminatory perspectives' (VLRC 2003:[3.163]). The VLRC described this as modifying the law 'to ensure that it is compatible with the right to equality' (VLRC 2003:[3.163]). The VLRC sets out three ways of incorporating an equality analysis:

- (i) Inclusive test: 'Provocative conduct' could be limited to conduct that undermines the accused's equality rights (e.g., racist taunts, crimes of homophobia, violence against women);
- (ii) Exclusive test: The defence could exclude alleged 'provocative conduct' that arose due to the deceased exercising equality rights. Such a test could exclude, for example, the possibility of provocation based on infidelity or a non-violent homosexual advance, on the basis that the deceased had a right to sexual autonomy;
- (iii) Modification of the ordinary person test: In determining how the 'ordinary person' may have reacted to the provocative conduct, behaviour motivated by stereotypes of sex, race, sexual orientation, age or disabilities would not be considered 'reasonable'. The 'ordinary person' could be defined as having knowledge of equality rights and behaving consistently with these rights (VLRC 2003:[3.164]).

Although the VLRC canvassed the equality framework in relation to *substantive* provocation, its approach can be of assistance in determining the values that should inform the assessment of the gravity of the victim's conduct, whether it justifies the offender's

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8 For example, sentencing courts have on occasion incorporated an objective element in assessing provocation at sentencing: (Judicial College of Victoria 2005:[20.6.5.2]) The Victorian Sentencing Manual provides that: 'When assessing the seriousness of the offence a sentencer may take into account whether the reasonable person would have been provoked by the conduct of the victim and, if so, to what degree. The higher the objective provocation offered by the victim, the less serious the offence' (Judicial College of Victoria 2005:[20.6.5.2]). See e.g. *R v Redman* at 13, *R v Sanerive* at 28.

sense of being wronged, and whether it should therefore appropriately reduce the offender's culpability.

As the VLRC pointed out, each approach to an equality analysis 'has its own strengths and weaknesses' (VLRC 2003:[3.167]). For example, while a benefit of the inclusive test was that it limited the use of the partial defence to those who were 'deserving' because they had fought back in response to the violation of their rights, a weakness of this approach was that it may 'be unduly restrictive, and may exclude from its scope other cases which are as deserving' (VLRC 2003:[3.167]). In contrast, a strength of the exclusive approach was that it carried less risk of excluding 'deserving' cases. Under this approach, only conduct associated with the exercise of equality rights by the victim would be excluded for public policy reasons from the operation of the partial defence (VLRC 2003:[3.168]).

We advocate the 'exclusive test' as a mechanism for delineating categories of conduct by the victim which should *not* be sufficient to justify an offender's sense of aggrievement and thus warrant the reduction of the offender's culpability. An equality analysis of potentially mitigating provocation would disqualify behaviour that arose out of the victim exercising his or her equality rights, such as the right to personal autonomy (including conduct associated with leaving an intimate relationship, forming new social or intimate relationships, choosing to work or gain an education, or other assertions of independence).

The Commission also noted concerns that because an equality-based approach relied on 'notions of "equality" that are foreign to Australian jurisprudence', Australia not having a bill of rights, there may be inconsistency in approach or a lack of understanding about rights and their incorporation. However, the Commission pointed out that 'although Australia does not have a bill of rights, there is a history of equality legislation, which could be drawn upon if this were the preferred option' (VLRC 2003:n431). With the recent introduction in Victoria of the *Charter of Human Rights and Responsibilities*, some of these concerns may be resolved. Furthermore, although there may be objections to including morally uncertain concepts such as 'equality' or 'justifiability' on the grounds that the courts are not necessarily the best institutions to decide what may be political or moral issues, in fact, courts have long been invested with such powers in other legal contexts such as self-defence and, in our view, can properly do so in the area of provocation.

### The Ordinary Person Test

Under our suggested approach, there is little room for the traditional 'ordinary person' test which formed part of the test for substantive provocation. There were two aspects of the ordinary person test:

1. assessing the gravity of the provocation by reference to the relevant characteristics of the defendant (including age, sex, ethnicity, physical features, personal attributes, personal relationships and past history),<sup>9</sup> and
2. asking the question whether provocation of that degree of gravity could (or might: *R v Thorpe (No 2)* at 724) cause an ordinary person to lose self-control and act in a manner

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<sup>9</sup> *Masciantomo v The Queen* at 67. Assessing the gravity of provocation by reference to the relevant personal characteristics of the defendant was justified as follows: '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': at 67. See also *Stingel v The Queen*.

which would encompass the defendant's actions (the only attribute of the accused that could be taken into account in asking this question was age).<sup>10</sup>

The ordinary person test attracted much criticism. For example, Coss comments that 'ordinary people, when affronted, do not resort to lethal violence ... it is clear that the ordinary person does not kill. Only the *most extraordinary* person does' (Coss 2006:142 (emphasis in original)).

Historically, the approach to assessing provocation at sentencing was less restrictive than the test for substantive provocation; for example it was not essential to establish that the provocation was capable of causing an ordinary person to lose self-control (Judicial College of Victoria 2005:[9.10.1]). However elements of the partial defence occasionally 'crept back' into sentencing (Judicial College of Victoria 2005:[20.6.5.2]).

In *Tyne v Tasmania*, Justice Blow emphasised that under the new law in Tasmania, provocation should be treated as a sentencing factor in murder cases in the same way that it was for crimes other than murder. He said that although the issues of whether an ordinary person would have been deprived of the power of self-control, and whether or not there was time for the offender's passion to cool are relevant to the assessment of provocation as a sentencing factor, these issues are not frequently raised before the sentencing judge (*Tyne v Tasmania* at 229). This would seem to suggest that while it is not necessary to evaluate an offender's conduct in a particular case by reference to the hypothetical ordinary person, the provocation may carry greater weight if it can be demonstrated that an ordinary person would also have been provoked. Although it is clearly necessary to assess provocation by reference to social norms and values to determine whether there is justification for reducing the offender's culpability, we argue that, rather than attempting to determine what an ordinary person might have done, a better approach is to assess the provocation according to equality principles.

Even if an equality-based approach is introduced to assess provocation at sentencing, the question remains as to what relevance the personal characteristics of the offender should have on this assessment.

#### The Offender's Personal Characteristics

There is some authority that in assessing the extent to which the provocation contributed to the offence and the weight, if any, to be given to it in sentencing, the relevant personal characteristics of the offender should be taken into account by the sentencing judge (*Pearce v The Queen* at 150; *R v Tuimauga* [12]-[14]; *R v Khan* at 556-558). In some cases, the offender's personal characteristics may assist in placing the provocative conduct in context (Judicial College of Victoria 2005:[10.4.1]; *Tyne v Tasmania* at 229). For example, if the conduct consists of grave racial vilification, the fact that the provoked person is a member of the vilified race is relevant to the assessment of gravity.

The relevance of an offender's personal characteristics was acknowledged by the UK Sentencing Advisory Panel which advised that:

the court must consider whether, in the individual circumstances of the case, the actions of the victim would have had a particularly marked effect on the offender. For example, taunting or defamatory words used by a victim may have a particular significance for an

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<sup>10</sup> *Masciantonio v The Queen* at 66-67. For some time there was debate over whether the second limb of the ordinary person test could encompass personal characteristics of the offender such as ethnicity or race. Ultimately it was held that the only characteristic that could be taken into account was the accused person's age.

individual offender in all the circumstances of a given case (Sentencing Advisory Panel (UK) 2005:[38] (citations omitted, emphasis removed)).

However, in the context of substantive provocation, the issue of culture or race often arose through a suggestion that because of the offender's culture – in particular the culture's attitude to women – the behaviour of a partner such as leaving the offender or commencing another relationship, was serious provocation. Even other exercises of equality rights, such as joining the workforce or forming social relationships were elevated to mitigating provocation in some cases due to considerations of the offender's race or culture (see e.g. *R v Estabillo* at 2). There is doubt as to whether these generalised claims about a particular culture were or are true (Morgan 1997:267-273). However, there is no doubt that these generalisations had the effect of diminishing the rights of the women of a particular culture:

To assume that there is one relevant ethnic experience within each group leaves out of account that members of any ethnic group, as well as having an ethnicity, also have a class status, a sexual orientation, a particular physical ability, and, of course ... a sex. ... [A]ny useful description of an ethnic group will need to encompass the experience of all of its members, not just some (Morgan 1997:267).

Although there is a need to contextualise provocation, including by reference to the offender's personal characteristics, the overriding consideration should be whether the offender's grievement at this conduct is justified in the circumstances. Thus an appropriate approach would be to ask whether the victim's conduct gave the offender a justifiable sense of being wronged, judged not only by reference to the offender's personal circumstances, but also in accordance with equality principles. Where the victim's conduct arose from him or her asserting the right to equality (such as the right to leave a relationship, form new relationships, engage in employment or otherwise assert his or her independence) the personal background and circumstances of the offender should not be interpreted to justify the offender's sense of being wronged by that conduct. If an equality-based approach is adopted, it is unlikely that the culpability of an offender for an offence against the person will ever be reduced because he or she claims to have been provoked by the victim's enjoyment of equality rights, regardless of whether the offender can point to personal characteristics that caused him or her to find such behaviour provocative.

### **The Duration of the Provocation**

The duration of the provocation is also relevant to its degree. A long course of conduct by a victim may be viewed as more 'provocative' than an isolated incident (*R v Alexander*). Even prior to the abolition of substantive provocation, it was recognised that the effect of provocation can be a gradual process caused by the cumulative effect of 'unalleviated pressure' from a series of provocative incidents (*Parker v The Queen*). Thus, it was accepted that a 'sustained course of cruelty may build up to and ultimately precipitate an explosion of passion' (Nash 1996:[s3.135] (citations omitted)). In these types of cases, 'the whole chain of events, and not merely the concluding episode was relevant to the question of adequacy of provocation' (*R v Jeffrey* at 484 (Smith J)). This also has relevance for assessing the degree of provocation in sentencing.

This principle is reflected in the UK Sentencing Guideline which provides that 'whether the provocation was suffered over a *long or short* period is important to the assessment of gravity' (Sentencing Guidelines Council (UK) 2005:3.2(b)). The UK Guideline emphasises that 'the impact of provocative behaviour on an offender can build up over a period of time' and that 'consideration should not be limited to acts of provocation that occurred immediately before the victim was killed' (Sentencing Guidelines Council (UK) 2005:3.2(b)).



### ***Proportionality***

Whether an offender's culpability should be reduced by provocation should not only depend on the degree of the provocation but also on the severity of the offender's reaction, including the offence committed and the offender's state of mind in committing that offence. Although proportionality was not a separate component of the test for substantive provocation, it has often been identified as a relevant factor in considering provocation in sentencing for non-fatal offences.<sup>11</sup> However, proportionality as a concept has its limitations. The fact that an offender has been convicted of a violent offence suggests, as a starting point, that his or her response to the victim's conduct was *disproportionate*. From that point, it could be argued, 'one can only move to increasingly shocking degrees of disproportionality'.<sup>12</sup>

In our view proportionality should remain a central consideration in determining whether the provocation in a particular case is of a sufficient degree that the law should recognise the offender's reduced culpability for acting as he or she did. The degree of provocation necessary to warrant a reduction in the offender's culpability should be commensurate with the gravity of the offence which has been committed. Where the offender intentionally caused serious harm or death, only the most serious examples of provocation should be sufficient to reduce the offender's culpability for sentencing purposes.

### ***Provocation as an Operative Cause of Offending***

#### **Causation**

For provocation to reduce an offender's culpability for an offence there must be a *causal nexus* between the behaviour of the victim and that of the perpetrator. In *R v Taueki*, the New Zealand Court of Appeal held that for provocation to reduce the seriousness of a grievous bodily harm offence 'the sentencing Judge will need to be satisfied that there was serious provocation which was an *operative cause of the violence* inflicted by the offender, and which remained an operative cause throughout the commission of the offence' (*R v Taueki* at [32]). If this approach is accepted, the question of the *timing of the provocation* in relation to the offence becomes even more salient (see further Blow J in *Tyne v Tasmania*).

#### **Delay**

In the test for substantive provocation, a delay between the provocation and the defendant's response was relevant to the issue of whether the defendant acted while experiencing a loss of self-control, which is not an element of provocation in sentencing. Delay did not necessarily negate the provocation, but the longer the delay the more difficult it was to establish that the offender committed the offence while under a loss of self-control (*R v Ahluwalia* at 64). Therefore the existence of a 'cooling off' period between the provocation and the offence was significant (*R v Rushby*; *DPP v North*). In *Masciantonio v The Queen*, it was held that the trial judge could leave provocation to the jury even where the 'loss of

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11 See for example: *R v Winter* at [33]. In the test for substantive provocation there was no need to separately consider proportionality, as it was absorbed into the ordinary person test which '[insisted] that the mode of retaliation be objectively proportionate to the provocation': *Masciantonio v The Queen* at 80, 67 (Brennan, Deane, Dawson & Gaudron JJ) See further *Johnson v The Queen* (1976); Bronitt & McSherry 2005:263–264.

12 Ian Leader-Elliott, Adelaide University Law School (personal correspondence).

self-control did not follow immediately upon, or as the result of a specific incident of, provocative conduct' (at 71 (McHugh J)). However, in *Parker v The Queen*, it was held that:

some provocative act must not be seized upon by the accused (who does not as a result act suddenly and in the heat of passion) as providing an appropriate moment and a convenient excuse for carrying out some previously existing purpose or acting upon an old grudge (at 681).

The tension between allowing provocation in some cases where the offender's response was delayed and excluding it in others on the basis that the offender's passion had cooled reflected the courts' struggle to address gender bias in the operation of the partial defence, particularly in cases where women killed their violent partners.

In assessing the weight to be given to provocation in sentencing, the period of time between the provocation and the offence is likely to remain relevant (*R v Alexander; R v Rushby; Morabito v The Queen*). Where this period is short, the offender may be more likely to be viewed as responding directly to the provocation which may increase its mitigatory weight (*R v Alexander* at 144; *R v Stavreski* at 49). Similarly, a significant delay between the cessation of the provocative conduct and the offender's response may suggest that, rather than committing the offence while provoked, the offender was in fact motivated by a desire for vengeance (*Morabito v The Queen* at 86). For this reason, a significant delay or evidence of premeditation and planning may minimise or negate the impact of the provocation (*Morabito v The Queen*).

However the significance of any such delay will depend on the surrounding circumstances. There may be cases in which provocation is found to be an operative cause of an offence notwithstanding a significant delay between it and the offending behaviour. In certain circumstances provocation can have a cumulative impact, eventually causing the offender to react; for example where the victim has perpetrated family violence upon the offender over a long period. This issue was raised by the UK Panel which commented:

Although there will usually be less culpability when the retaliation to provocation is sudden, it is not always the case that greater culpability will be found where there has been a significant lapse of time between the provocation and the killing. It is for the sentencer to consider the impact on a defendant of provocative behaviour that has built up over a period of time (Sentencing Advisory Panel (UK) 2005:[45]).

In cases involving cumulative provocation, the culpability of an offender may be reduced, even significantly, despite a delay between the last provocation and the offence. The degree of provocation and justifiability of the offender's grievement are likely to be highly significant in assessing the relevance of delay in a particular case.

### ***Assessing Provocation in Practice***

The application of these principles to accepted categories of substantive provocation raises a number of policy considerations. We briefly outline our views.<sup>13</sup>

#### **Actual or Anticipated Violence**

Conduct such as actual or anticipated violence by the victim against the offender or an associate of the offender (including the victim's use or threatened use of a weapon) is likely to be viewed as serious provocation, capable of reducing the culpability of an offender who

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<sup>13</sup> For a fuller discussion, see Stewart & Freiberg (2008).

has committed an offence against the person in response to such provocation (see further Stewart & Freiberg 2008:[8.10.2]-[8.10.5]).

### **Sexual Advances and Sexual Assaults**

Sexual assault and other unlawful sexual predatory conduct towards the offender by the victim is likely to warrant a reduction in the offender's culpability. As with other categories of provocation, sexual conduct by the victim towards the offender must be considered in context, including past conduct of the victim towards the offender, or the offender's family or friends, in deciding whether the victim's conduct caused the offender to have a justifiable sense of being wronged (see further Stewart & Freiberg 2008:[8.10.2]-[8.10.5]).

Although conduct by the victim such as an actual or threatened sexual assault or violation is likely to warrant a reduction in the offender's culpability, it is necessary to ensure that the plea in mitigation does not provide camouflage for homophobic prejudice. Prior to the abolition of the partial defence there were occasions in which men who had deliberately targeted and fatally assaulted homosexual men, escaped a murder conviction on the grounds that they had been 'provoked' by a sexual advance (see further Tomsen 2002:57; Tomsen & George 1997:62). In the absence of a threat of assault or other unlawful violation, a sexual advance, however unwelcome or offensive, should not reduce an offender's culpability for a crime of violence committed in response to such conduct. It is important to ensure that prejudicial attitudes are not permitted to flourish under the guise of 'provocation', either in the substantive law or in sentencing.

Sexual conduct falling short of a threatened or actual sexual assault or other unlawful sexual predation will be unlikely to provide sufficient justification for the offender's grievance unless there were contextual reasons why the conduct was particularly harmful to the offender, for example where the victim had previously been sexually violent towards the offender (see further Stewart & Freiberg 2008:[8.10.8]-[8.10.23]).

### **Family Violence**

Like other types of violent conduct, family violence is likely to be viewed as serious provocation. Factors relevant to considering such conduct include:

- the context in which it occurs, including past violence by the victim towards the offender or other family members;
- the danger presented or reasonably perceived by the offender;
- the balance of power between the victim and the offender;
- the relative size and strength of the victim and the offender and other relevant physical characteristics (see further Stewart & Freiberg 2008:[8.10.37]-[8.10.53]).

### **Sexual Jealousy**

Conduct by the victim which involves the exercise of equality rights, including the right to personal autonomy (such as leaving an intimate relationship, forming or continuing other intimate or social relationships, or engaging in employment or an education) should not provide justification for an offender's grievance. Therefore such conduct should not reduce an offender's culpability, regardless of whether the offender's personal characteristics contributed towards his or her feeling provoked by this conduct or whether it caused the offender to lose self-control (see further Stewart & Freiberg 2008:[8.10.54]-[8.10.91]; Leader-Elliott 1997; Morgan 1997:267-276; VLRC 2004:[7.48]).

These principles also apply to offences in the context of other intimate or family relationships where the offender claims to have committed the offence because he or she was provoked by the victim's enjoyment of equality rights.

### **Trivial Conduct or Offensive Words**

Provocation which is annoying or trivial in nature will not generally provide justification for the offender's aggravation and will therefore not reduce his or her culpability for a subsequent offence (see e.g. *R v Davies*). Offensive words spoken by the victim towards the offender or the offender's family or friends should generally be considered low level provocation, insufficient to have given an offender who has killed or assaulted the utterer of the words a justifiable sense of being wronged and consequently warranting a reduction in the offender's culpability (see further Stewart & Freiberg 2008:[8.10.24]-[8.10.30]).

However, there may be circumstances where offensive words do justify the offender's aggravation, particularly when they occur in the context of an abusive relationship or involve threats of violence made against the offender or others (see e.g. *R v R*). Sometimes words or actions that, viewed alone, seem inoffensive take on significance when placed in context (*R v R* at 326 (King CJ)). Proportionality is likely to be a key consideration in determining whether a reduction in the offender's culpability is warranted in such cases.

### **Racial Abuse**

Conduct of the victim consisting of a single racial taunt, while deplorable, may not be sufficient in itself to lessen the culpability of an offender who responds with malicious intent and kills or seriously injures the utterer of the comment. However, the context of the comment, including whether it contained threatening undertones or occurred against a background of discrimination, and the degree of disproportionality between the comment and the offence, are relevant to whether – and to what degree – the offender's culpability should be reduced (see further Stewart & Freiberg 2008:[8.10.31]-[8.10.36]).

### **Sentencing Purposes**

Once the presence of mitigating provocation is established in a case involving an offence against the person, the question remains as to what impact (if any) this should have on the purposes of the sentence which is to be imposed. The various sentencing purposes will be given different weight in relation to different offences and the varying circumstances in which crimes can be committed. The abolition of substantive provocation means that in cases in which provocation exists, an offender who kills his or her 'provoker' may be convicted of murder, rather than the lesser crime of manslaughter. Murder is considered the most serious crime that comes before the courts in acknowledgement of the sanctity of life (see e.g. *R v Hill*). Consequently, sentencing purposes such as denunciation, punishment, deterrence and the protection of the community are likely to be the dominant considerations (*R v Gemmill*). Mitigating provocation by the victim will be only one of the many factors that will influence the relative weight to be given to these and other purposes such as rehabilitation.

### ***Punishment or Retribution***

One of the purposes for which a sentence may be imposed is to punish the offender to an extent and in a manner which is just in all of the circumstances (see e.g. *Sentencing Act 1991* (Vic) s5(1)(a); see further Fox & Freiberg 1999:[3.402]). The concept of just deserts, or retribution, is linked to both the objective and subjective seriousness of the crime which has been committed. Punishment should generally be commensurate with the seriousness of the

crime. The objective seriousness of homicide, as measured by the harm caused (death), is manifest and is identical for both murder and manslaughter. The difference between the two offences lies in the variation in the offender's culpability and degree of criminal responsibility for these offences. As we explored above, culpability, or blameworthiness, reflects the extent to which an offender should be held accountable for his or her actions by assessing his or her intention, awareness and motivation in committing the crime. Therefore factors that affect an offender's culpability are directly relevant to the subjective seriousness of the particular crime which has been committed.

### ***General Deterrence***

One of the purposes of sentencing is to use the threat of legal punishment to discourage persons who might find themselves in similar situations to the offender from committing similar crimes. Although general deterrence is frequently emphasised in homicide cases, under the previous law it was argued that in some circumstances in which the offender had been provoked, general deterrence should be less relevant (*R v Okutgen* at 266 (Starke J)). The contrary view taken in other provocation cases was that general deterrence should remain highly significant despite any provocation; for example in sentencing violent, abusive or controlling offenders who had killed their partner or former partner.<sup>14</sup>

### ***Specific Deterrence***

Specific deterrence has been defined as the 'application of a criminal sanction in order to dissuade the offender from repeating his or her offence' (Fox & Freiberg 1999:[3.405]). The existence of provocation as an explanation of offending may reduce the weight to be given to specific deterrence (see e.g. *R v Randall* at [44]-[45]). Conversely, there may be circumstances where the offender's response to the provocation calls for this sentencing purpose to be 'emphasised rather than limited' (Judicial College of Victoria 2006:[9.10.3]) for example, where an offender responds unreasonably to a minor or imagined provocation or where the response of the offender is disproportionate (see e.g. *R v Winter* at [31]-[34]).

### ***Denunciation***

Sentencing also serves a symbolic function (see e.g. *Sentencing Act* 1991 (Vic) s5(1)(d)). The denunciatory function of the law may play a more significant role in the sentencing of murderers where the law becomes more normative (that is, expects changes of behaviour) than reflective or accepting of existing behaviours or attitudes (a concession to human frailty). Judicial pronouncements can contribute to the creation of new values where the law changes. The historical rationalisation of the partial defence of provocation as a concession to human frailty may carry little or no weight in circumstances where public policy changes so that particular forms of homicidal conduct are no longer accepted or tolerated. Where, for example, a court considers that the prevalence of intimate relationship homicides by jealous men calls for the imposition of deterrent and denunciatory sentences in order to maintain strong social barriers against resorting to violence in response to non-violent threats or non-violent harms, it will do so despite the fact that a particular offender's culpability may be lessened by other factors.

As with punishment and deterrence, the effect of provocation in a particular case may result in denunciation being viewed as a less important consideration than it might have been had the offender's actions been unprovoked. However, in homicide and other cases

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14 See for e.g. *R v Ramage* at [49]; *R v Hunter* at [9]; *R v Goodwin* at [42]; *R v Culleton* at [29]; *R v Pashalay* at [12]; *DPP v Mitrovic* at 7-9. See also *R v Lupoi* at 190 in which the offender's use of a gun also caused general deterrence to be emphasised

involving serious injury, even where there has been serious provocation which greatly reduces an offender's culpability, it is likely that denunciation will remain a highly relevant purpose to reflect the level of harm caused by the offender.

### ***Rehabilitation***

Rehabilitation is almost always a consideration in sentencing though for offences like murder and serious assaults, it is likely to be subsumed by other sentencing purposes such as deterrence and punishment. However, there may be cases in which it is appropriate to emphasize the rehabilitation of the offender to reflect the fact that his or her actions were motivated by provocation. This may be particularly so in cases in which an offender of prior good character was subjected to severe provocation by the victim prior to committing the offence.

### **Conclusion**

The abolition of the partial defence of provocation in Tasmania, Victoria and elsewhere has raised a number of policy issues relating to the law of sentencing for murder and other offences against the person. We have suggested an approach to provocation in sentencing that is justified within the framework of sentencing theory and will hopefully prevent the deficiencies of the partial defence of provocation from re-emerging in a sentencing context.

Sentencing legislation already identifies a number of factors to which a court must have regard in sentencing an offender, from which the relevance of provocation will need to be inferred. We have argued that, rather than being one of a myriad of general mitigating factors, provocation has particular relevance to the degree of an offender's culpability, and it must be assessed in this context. The culpability of the offender reflects the extent to which an offender should be held accountable for his or her actions and is an important measure of the seriousness of the offence.

For this reason we suggest that the formulation of principles governing the circumstances in which provocation should mitigate sentence should be guided by theories of culpability; which attempt to explain why some acts are more blameworthy than others. Provocation should only mitigate an offender's sentence if a reduction in the offender's culpability for the offence is justified by the nature and duration of the provocation, regardless of whether the same conduct would have afforded the offender a partial defence under the previous law.

In our view, the central issues to determining whether, and to what extent, an offender's culpability should be reduced by provocation should be:

1. The degree of provocation, that is whether, in all of the circumstances of the case, the provocation caused the offender to have a justifiable sense of being wronged, considering:
  - (a) the nature and context of the provocation, including whether it consisted of the victim exercising his or her equality rights; and
  - (b) the duration of the provocation.
2. The degree to which the offender's response was disproportionate to the provocation: the greater the disproportionality the lower the reduction in the offender's culpability. For the most serious examples of offences against the person, only serious provocation should warrant a reduction in the offender's culpability.

3. Whether the provocation was an operative cause of the offence, and remained an operative cause throughout the duration of the offence.

The impact on sentencing outcomes of the reforms initiated by the VLRC Homicide Report for offenders who otherwise might have been convicted of provocation manslaughter is still uncertain and will only become apparent in years to come. It is likely that some of these offenders will be found guilty of murder under the new law and face the full impact of the higher maximum penalty and sentencing range that applies to this offence. Others may be acquitted altogether on the grounds of self-defence, or instead be found guilty of defensive homicide, particularly in cases involving family violence by the victim towards the offender. Yet others may be convicted of other types of manslaughter, such as unlawful and dangerous act manslaughter or negligent manslaughter.

We recognise that in sentencing, even in cases in which it is established that an offender's culpability should be reduced due to provocation by the victim, the offender's reduced culpability will still need to be balanced with multiple other aggravating and mitigating sentencing factors, in order to arrive at the appropriate sentence. In sentencing, courts will also take into account factors such as the impact of the offence on any victim of the offence or their family, whether a weapon was used, its type and how it became available, the relative size and strength of the victim and the offender and the conduct of the offender after the offence.

Whatever the context in which provocation is raised in sentencing for offences against the person, we hope that this article contributes to the development of a more principled and sophisticated jurisprudence that appropriately reflects changed community standards and expectations.

## Cases

*DPP v Aydin* [2005] VSCA 86 (Unreported, Callaway, Buchanan and Eames JJA, 3 May 2005)

*DPP v Mitrovic* (Unreported, Supreme Court of Victoria, Court of Criminal Appeal, Young CJ, Murphy and Murray JJ, 7 May 1985)

*DPP v North* [2002] VSCA 57 (Unreported, Phillips CJ, Phillips JA and O'Bryan AJA, 18 April 2002)

*DPP v Scott* [2000] VSC 247 (Unreported, Cummins J, 14 June 2000)

*Green v The Queen* (1997) 191 CLR 334

*Iddon v The Queen* (1987) 32 A Crim R 315 (CCA Vic)

*Johnson v The Queen* (1976) 136 CLR 619

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

*Mason-Stuart v The Queen* (1993) 68 A Crim R 163 (CCA SA)

*Moffa v The Queen* (1977) 138 CLR 601

*Morabito v The Queen* (1992) 62 A Crim R 82 (CCA NSW)

*Parker v The Queen* (1963) 111 CLR 610

*Pearce v The Queen* (1983) 9 A Crim R 146 (CCA Vic)

*R v Aboujaber* (Unreported, Supreme Court of Victoria, Court of Criminal Appeal, Tadgell, Ormiston and Kenny JJA, 9 October 1997)

*R v Ahluwalia* [1993] Crim LR 63

*R v Alexander* (1994) 78 A Crim R 141 (SC NSW)

*R v Culleton* [2000] VSC 559 (Unreported, Vincent J, 27 November 2000)

*R v Davies* (Unreported, County Court of Victoria, 15 July 2003)

*R v Estabillo* (Unreported, County Court of Victoria, 21 August 2001)

*R v Gemmill* [2004] VSC 30 (Unreported, Osborn J, 23 January 2004)

*R v Goodwin* [2001] VSC 519 (Unreported, Coldrey J, 21 December 2001)

*R v Hill* (1981) 3 A Crim R 397 (NSW CCA)

*R v Hunter* [2002] VSC 162 (Unreported, Teague J, 14 May 2002)

*R v Jeffrey* [1967] VR 467

*R v Kelly* [2000] VSCA 164 (Unreported, Charles, Buchanan and Chernov JJA, 6 September 2000)

*R v Khan* (1996) 86 A Crim R 552 (CCA NSW)

*R v Lupoi* (1984) 14 A Crim R 183 (SA CCA)

*R v Okutgen* (1982) 8 A Crim R 262 (CCA Vic)

*R v Pashalay* [1998] VSCA 18 (Unreported, Winneke P, Charles and Callaway JJA, 27 July 1998)

*R v R* (1981) SASR 321

*R v Raby* (Unreported, Supreme Court of Victoria, Teague J, 22 November 1994)

*R v Ramage* [2004] VSC 508 (Unreported, Osborne J, 9 December 2004)

*R v Randall* [2007] VSC 35 (Unreported, Whelan J, 28 February 2007)

*R v Redman* (Unreported, Supreme Court of Victoria, Court of Criminal Appeal, 1 December 1977)

*R v Rushby* [2002] VSCA 44 (Unreported, Callaway, Batt and Vincent JJA, 27 March 2002)

*R v Sanerive* (Unreported, Supreme Court of Victoria, Court of Criminal Appeal, Southwell, Ormiston and McDonald JJ, 23 June 1995)

*R v Stavreski* (2004) 145 A Crim R 44 (VSC)



*R v Storey* [1998] 1 VR 359

*R v Taueki* [2005] 3 NZLR 372

*R v Thorpe* [1999] 1 VR 326

*R v Thorpe (No 2)* [1999] 2 VR 719

*R v Tsiaras* [1996] 1 VR 398

*R v Tuimauga* [2003] VSCA 218 (Unreported, Charles, Chernov JJA and Ashley AJA, 9 December 2003)

*R v Tyne* (Unreported, Supreme Court of Tasmania, Crawford J, 7 July 2005)

*R v Verdins; R v Buckley; R v Vo* [2007] VSCA 102 (Unreported, Maxwell P, Buchanan and Vincent JJA, 23 May 2007)

*R v Winter* [2004] VSC 329 (Unreported, Osborn J, 3 March 2004)

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

*Tyne v Tasmania* [2005] TASSC 119

## References

Bronitt S & McSherry B 2005 *Principles of Criminal Law* 2nd ed Lawbook Co

Coss G 2007 'The Defence of Provocation: An Acrimonious Divorce from Reality' *Current Issues in Criminal Justice* vol 18 no 1 pp 51

Coss G 2006 'Provocative Reform: A Comparative Critique' *Criminal Law Journal* vol 30 pp 138

Coss G 1991 "'God is a righteous judge strong and patient: and God is provoked every day'" A Brief History of Provocation in England' 13 *Sydney Law Review* vol 13 pp 570

Department of Justice and Attorney-General Queensland 2007 *Discussion Paper: Audit on Defences to Homicide: Accident and Provocation*

Horder J 2004 *Excusing Crime* Oxford University Press

The Law Reform Commission Ireland 2003 *Consultation Paper on Homicide: The Plea of Provocation* LRC CP 27–2003

Law Commission [UK] 2004 *Partial Defences to Murder* Final Report

Law Commission [UK] 2006 *Murder Manslaughter and Infanticide* Law Com No 304

Law Reform Commission of Western Australia 2007 *Review of the Law of Homicide: Final Report* Project 97

Leader-Elliott I 1997 'Passion and Insurrection in the Law of Sexual Provocation' in Ngaire N & Owens R ed *Sexing the Subject of Law* I.BC Information Services

Maitland FW 1909 *The Forms of Action at Common Law*

- McSherry B 2005 'It's a Man's World: Claims of Provocation and Automatism in "Intimate" Homicides' *Melbourne University Law Review* vol 29 pp 905
- Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General 1998 *Model Criminal Code Chapter 5: Fatal Offences Against the Person* Discussion Paper
- Morgan J 1997 'Provocation Law and Facts: Dead Women Tell No Tales, Tales are Told about Them' *Melbourne University Law Review* vol 21 pp 237
- Morgan J 2002 *Who Kills Whom and Why: Looking Beyond Legal Categories* Victorian Law Reform Commission
- Nash G 1996 *Bourke's Criminal Law Victoria*
- Neave M 2005 'Homicide Sentences: Taking Culpability into Account' *Reform* vol 85 pp 33
- New Zealand Law Commission 2007 *The Partial Defence of Provocation* Report 98
- Sentencing Advisory Panel [UK] 2005 *Manslaughter by Reason of Provocation: The Panel's Advice to the Sentencing Guidelines Council*
- Sentencing Guidelines Council [UK] 2005 *Manslaughter by Reason of Provocation: Guideline*
- Sentencing Task Force Victoria 1989 *Review of Statutory Maximum Penalties in Victoria: Report to the Attorney-General* written for the Task Force by Richard Fox and Arie Freiberg
- Stewart F & Freiberg A 2008 *Provocation in Sentencing* Sentencing Advisory Council
- Sullivan GR 1993 'Anger and Excuse: Reassessing Provocation' *Oxford Journal of Legal Studies* vol 13 pp 421
- Tadros V 2001 'The Characters of Excuse' *Oxford Journal of Legal Studies* vol 21 no 3 pp 495
- Tomsen S 2002 *Hatred Murder and Male Honour: Anti-Homosexual Homicides in New South Wales 1980-2000* Public Policy Series No 43 Australian Institute of Criminology
- Tomsen S & Allen G 1997 'The Criminal Justice Response to Gay Killings: Research Findings' *Current Issues in Criminal Justice* vol 9 pp 56
- Victorian Law Reform Commission 2003 *Defences to Homicide: Options Paper*
- Victorian Law Reform Commission 2004 *Defences to Homicide: Final Report*
- Victorian Law Reform Commission 2006 *Review of Family Violence Laws: Report*
- von Hirsch A 1983 'Commensurability and Crime Prevention: Evaluating Formal Sentencing Structures and Their Rationale' *Journal of Criminal Law & Criminology* vol 74 no 1 pp 209
- von Hirsch A 1993 *Censure and Sanctions* Clarendon Press Oxford
- Wells C 2000 'Provocation: The Case for Abolition' in Ashworth A & Mitchell B eds *Rethinking English Homicide Law* Oxford University Press