Provocation - where to now?

The implications of the *Peniamina* case[1]

The Hon Justice Peter Davis[2]

Introduction

Arona Peniamina brutally killed his wife on 1 March 2016 at their matrimonial home at Kippa Ring on the Redcliffe Peninsula. He was charged with murder but was ultimately convicted of manslaughter. Concern was expressed by various members of the public and interest groups that an injustice had occurred as Mr Peniamina had avoided conviction for murder.

Mr Peniamina's only defence at trial was the partial defence of provocation provided by s 304 of the *Code*. Section 304 reduces what would otherwise be murder to manslaughter where the killing is provoked. Therefore, the defence is available only where there has been an intention to kill or do grievous bodily harm. Peniamina's case raises again questions as to the appropriateness and extent to which provocation ought to partially excuse what would otherwise be the murder of a domestic partner.

The facts of the case

Mr Peniamina was born on 14 April 1980 in Samoa. He moved to New Zealand in 2003.

Mrs Peniamina was born in New Zealand. She met Mr Peniamina in New Zealand. They commenced a romantic relationship from about 2004. They moved to Australia. There are four children of the marriage aged between about 6 and 10 years old at the time of Mrs Peniamina's death. She was 29 years old when she was killed by Mr Peniamina.

On 1 August 2008 in New Zealand, Mr Peniamina was convicted of assaulting Mrs Peniamina. Other than the fact that the offence occurred on 19 March 2008, there were no details of that offending available upon the sentence of Mr Peniamina for Mrs Peniamina's manslaughter. A New Zealand court placed him on a six month good behaviour bond. Other than the conviction for assaulting Mrs Peniamina, Mr Peniamina had no criminal convictions before his conviction for the manslaughter of his wife.

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1 A paper delivered to the Queensland Bar Association Annual Conference 27 March 2022.

2 A judge of the Trial Division of the Supreme Court of Queensland and the President of the Industrial Court of Queensland and the Queensland Industrial Relations Commission.

Two of the children saw parts of Mr Peniamina's lethal assault upon Mrs Peniamina, but most of the details of the killing came from statements made by Mr Peniamina to a detective when interviewed at the scene, and statements made by Mr Peniamina to a police officer who was posing as a fellow prisoner when Mr Peniamina was in custody in the watchhouse.

It is an unavoidable fact that in cases of murder the victim is not available to give evidence. In many cases, an offender's statements to police which either admit to the crime or make partial admissions to the crime, are accompanied by statements in exculpation. It is well-established that the Crown is obliged to lead the entire statement by an offender, not just the inculpatory parts. The result is that there are often exculpatory statements which are made by an offender which remain unchallenged as the only person who can challenge the assertions is the victim who is deceased.[3] This was such a case.

It was independently established that Mrs Peniamina spent some time on holidays in New Zealand. She returned to Australia shortly before she was killed.

Mr Peniamina had become suspicious that Mrs Peniamina had not been faithful to him while in New Zealand. He told police that he had seen text messages on Mrs Peniamina's mobile telephone and had himself telephoned a man in New Zealand. This was a man with whom Mr Peniamina thought Mrs Peniamina was having an affair. Mr Peniamina told police that he had an unpleasant exchange with the man who referred to Mrs Peniamina as his "leftovers".

There was no evidence which corroborated the fact of a conversation between Mr Peniamina and the man in New Zealand and no evidence which corroborated Mr Peniamina's version of that conversation. No relevant text messages could not be recovered from Mrs Peniamina's telephone.

On the day he killed his wife, Mr Peniamina visited a relative whose opinion he respected. This was Ms Leapai. Ms Leapai was called as a witness by the Crown and she gave evidence that Mr Peniamina did visit and did discuss with her his concerns about his wife's alleged infidelity. Mr Peniamina expressed to her that he wished the marriage to continue. He was apparently calm when he left Ms Leapai's house.

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[3] Statements made by the deceased before death may be admissible. *Evidence Act* 1977, s 93B, *R v Lester* [2008] QCA 354, *R v Knight & Ors* [2010] QCA 372, *Sio v The Queen* (2016) 259 CLR 47.

After leaving Ms Leapai, Mr Peniamina went home. He told police that he confronted Mrs Peniamina with the allegation that she had been unfaithful. She told him that he she did not wish to speak about the matter, and he struck her in the face. That blow, Mr Peniamina told police, was sufficient to cause Mrs Peniamina to bleed.

Mr Peniamina told police that Mrs Peniamina then left the room they were in and then he heard a drawer open in the kitchen. He followed her into the kitchen and saw her armed with a knife.

What occurred in the kitchen comes exclusively from Mr Peniamina's accounts to police and physical evidence of the scene. A bent knife was found by police on the floor of the kitchen as was one of Mrs Peniamina's teeth. Blood was splashed and sprayed and smeared in the kitchen. Mr Peniamina told police that Mrs Peniamina attacked him with a knife which he grabbed, and she withdrew the knife cutting his hand. There was medical evidence confirming that Mr Peniamina had a severe cut on his hand consistent with being inflicted by a knife. The significant act of provocation relied upon by Mr Peniamina to raise the partial defence under s 304 was the cutting of his hand with the knife.

Mr Peniamina told police that he lost control of himself and formed a murderous intent to kill his wife. He told police that he stabbed his wife in the kitchen. Two knives were obviously involved because one was found with a bent blade on the kitchen floor and a second was found outside on the driveway where Mrs Peniamina ultimately died. While Mr Peniamina told police that a knife was produced by Mrs Peniamina, there was no evidence as to how the second knife came to be involved.

Mr Peniamina told police that Mrs Peniamina then ran down the corridor and outside the house onto the driveway and hid behind a car. There was evidence from the scene which corroborated this. Blood was found in the hallway and outside. Mrs Peniamina's body was also found outside.

Mr Peniamina told police that he pursued his wife down the hallway and outside where he continued to stab her. He then removed a cement bollard from the garden and thrust it onto her head. It was unclear from the evidence whether there was one blow with the bollard or more than one.

Post-mortem examination revealed 29 identifiable incised wounds on Mrs Peniamina. These were almost all to her head, neck and shoulders. One of the blows had dislodged the tooth that

was found in the kitchen. One of the blows severed her nose. The tip of the knife which was found near the body outside the house had broken off during the attack. The tip of the knife was found imbedded in Mrs Peniamina's skull.

The unchallenged medical evidence was that the cause of death was injury to the brain stem caused by the blow (or blows) with the bollard. That damage led to the shutdown of Mrs Peniamina's heart and lungs and consequently caused her death.

Police arrived on the scene and, as earlier observed, Mr Peniamina gave a version of events. He was arrested and held in the watchhouse. Also as earlier observed, Mr Peniamina gave a version to an undercover police officer in the Watch House.

On 5 November 2018, Mr Peniamina's trial on a charge of murder commenced in the Supreme Court in Brisbane. When arraigned, he pleaded not guilty to murder but guilty to manslaughter. The only matter raised in defence was provocation[4] which, if made out by him, would avoid a conviction for murder but would see him convicted of manslaughter.

Mr Peniamina's case was the first which raised consideration of s 304(3)(c) which excludes the defence of provocation (except in extreme and exceptional circumstances) where a domestic relationship existed between the accused and the victim and "the sudden provocation is based on anything done by the deceased or anything the person believes the deceased has done …" to end or change the nature of the relationship or to indicate the relationship may end or change. The trial judge left that exclusion for the consideration of the jury.

On 12 November 2018, Mr Peniamina was convicted of the murder of his wife and on 13 November 2018, he was sentenced to life imprisonment.

Mr Peniamina appealed his conviction to the Court of Appeal alleging there had been a misdirection as to s 304(3). That, he submitted, led to an effective exclusion of the partial defence of provocation which resulted in a miscarriage of justice.

The Court of Appeal dismissed the appeal by majority, with McMurdo JA in dissent.[5]

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4 *Criminal Code*, s 304.

5 *R v Peniamina* [2019] QCA 273.

Special leave to appeal to the High Court was granted. By majority,[6] the appeal was allowed and a retrial was ordered.[7]

The retrial commenced on 14 September 2021. When arraigned, Mr Peniamina, as he had done at the first trial, pleaded not guilty to murder but guilty to manslaughter. Defence counsel sought and was granted leave to make an opening statement after the Crown's opening of the case.[8] In that opening address, Mr Peniamina's counsel told the jury that Mr Peniamina admitted to intentionally killing his wife and that the only issue in the trial was provocation.

There were four elements which had to be proved against Mr Peniamina:

1. that Sandra Peniamina is dead (element 1);

2. that Mr Peniamina caused Mrs Peniamina's death (element 2);

3. that Mr Peniamina killed Sandra Peniamina unlawfully (element 3);

4. that Mr Peniamina intended to kill or to grievous bodily harm to Mrs Peniamina (element 4).[9]

The jury were directed that the evidence did not give rise to any lawful excuse to Mr Peniamina killing Mrs Peniamina. Provocation does not render the killing lawful. Therefore, they were directed that element 3 had been proved.

In the course of the trial, formal admissions were made [10] of element 1 and element 2. No formal admission was made in relation to element 4. The Crown did not contend that defence counsel's opening was a formal admission of that element. Therefore, the two issues which were, as a matter of law, open for the jury's consideration were:

1. intent (element 4); and

2. provocation.

As to the fourth element, the jury were directed as follows.

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6 Bell, Gageler and Gordon JJ; Keane and Edelman JJ in dissent.
7 *Peniamina v The Queen* (2020) 95 ALJR 85.
8 *R v Nona* [1997] 2 Qd R 436.
9 *Criminal Code*, s 302(1)(a).
10 *Criminal Code*, s 644.

> "The fourth element is that Mr Peniamina intended to kill or do grievous bodily harm to Mrs Peniamina. Sometimes persons do things where they have no intention at all. They react to something without thinking about the consequences of their actions. Here, though, the evidence is, but ultimately this is again a matter for you to assess, that Mr Peniamina told police that he wanted to kill Mrs Peniamina. The attack upon Mrs Peniamina consisted of 29 stabs wounds and at least one blow to the head with the bollard, if that's what you find happened. That may indicate at least an intention to do grievous bodily harm to her. Mr Peniamina's barrister, Mr Ryan in his opening and closing remarks, accepted that Mr Peniamina manifested an intention to kill Mrs Peniamina. That concession is not conclusive; ultimately, it's a matter for you."

It could not possibly have been the case that the jury was left in any reasonable doubt as to Mr Peniamina's murderous intent. Provocation was the only real issue.

Ultimately, there were eight acts of provocation which were left for the jury's consideration. These were:

> "1. she[11] swore at him[12];
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> 2. she swore at the children;
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> 3. she dismissed his attempts to speak about her alleged affair;
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> 4. she said she would leave with the children;
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> 5. when he was speaking to her about the affair, she told him to "stop talking shit";
>
> 6. she came at him with the knife;
>
> 7. she attempted to kill him;
>
> 8. when he grabbed the knife, she pulled the knife out of his hand cutting him."

Self-defence was not left for the jury's consideration.[13] There was absolutely no basis upon which it could be said that Mr Peniamina's attack upon his wife was necessary for him to make self-defence.

The jury were directed that provocative acts number 1, 2 and 3 may, depending upon how they view the evidence, have occurred at a time earlier to the day Mrs Peniamina was killed.

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11 Mrs Peniamina.
12 Mr Peniamina.
13 *Criminal Code*, ss 271 and 272.

It is well-established that s 304 incorporates common law notions of provocation.[14]

The jury were directed that provocation gives a partial defence to murder reducing it to manslaughter where:

1. the deceased did acts or said things which were provocative;

2. the person who killed was provoked by the acts or words;

3. when the person did the acts which killed, he was acting while provoked.

It is well-established that the reasonable or ordinary person is one who has reasonable powers of self-control[15] and that the ordinary person is taken to be in the position of the accused. In other words, the seriousness of the provocative conduct and the reaction to it must be assessed from the circumstances in which the accused finds himself.[16] The jury was directed that, on his statements to police, Mr Peniamina understood:

> "1. Mr Peniamina was married to Mrs Peniamina;
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> 2. they had four children;
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> 3. Mrs Peniamina had been unfaithful to Mr Peniamina on several occasions;
>
> 4. there was evidence on Mrs Peniamina's mobile telephone of a recent affair;
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> 5. Mr Peniamina spoke on the telephone to the man who had the affair with Mrs Peniamina and the man was rude, admitted the affair and said that Mr Peniamina could have his leftovers, apparently a reference to Mrs Peniamina."

By s 304, it is only "in circumstances of an exceptional character" that provocation will be available where the provocative act "is based on words alone". In Mr Peniamina's case, there was no suggestion that Mr Peniamina's loss of self-control was caused only by the words said by Mrs Peniamina. Neither barrister suggested that and the concentration, and the real issue in the trial, was the act of provocation of Mrs Peniamina cutting Mr Peniamina with the knife as he alleged.

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14 *R v Sabri Isa* [1952] St R Qd 269, *R v Herlihy* [1956] St R Qd 18, *R v Johnson* [1964] Qd R 1, *R v Buttigieg* (1993) 69 A Crim R 21, *R v Pangilinan* [2001] 1 Qd R 56 and generally *Masciantonio v R* (1995) 183 CLR 58 and *Pollock v The Queen* (2010) 242 CLR 233.

15 *Moffa v R* (1977) 138 CLR 601.

16 *Stingel v The Queen* (1990) 171 CLR 312, *Masciantonio v R* (1995) 183 CLR 58 and *R v Mogg* (2000) 112 A Crim R 417.

In those circumstances, no direction was given pursuant to s 304(2) that provocation was only available in "circumstances of exceptional character" if the provocation consisted of words alone.[17]

As will become evident, a significant question on the issue of the partial defence of provocation was the time between the allegedly provocative act and the act which killed. Mr Peniamina need not establish that the hypothetical ordinary person would have maintained a loss of self-control up until the point of the killing. Mr Peniamina needed to establish that the act of provocation was such that an ordinary person would have lost self-control and formed a murderous intent and that *he* (not the ordinary person) was still in fact in that state of lack of self-control at the time he did the act which killed.[18] On this issue, the jury were directed:

> "The third element is that Mr Peniamina did the act while provoked. If you find that being struck with the bollard caused Mrs Peniamina death, then the act which killed, and therefore the relevant act, is striking Mrs Peniamina with the bollard. So the question is whether at that particular point Mr Peniamina was acting under provocation. That means that at that particular point he was acting without self-control.
>
> You will probably have drawn an inference from the evidence already that there is some time lag between the provocative acts and words which occurred in the kitchen and elsewhere and the doing of the act which killed which is striking Mrs Peniamina with the bollard if that is what you find caused her death. There is perhaps conflicting evidence as to how long that was and the assessment of all that evidence is totally a matter for you.
>
> Because the concept of provocation involves a person, here Mr Peniamina, acting while deprived of the power of self-control, questions emerge as to how long the provocative conduct is operative; or in other words, when does the person, here Mr Peniamina, regain the power of self-control. That then gives rise to consideration of the time lapse between the provocative act or acts and the act which kills.
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> The fact that there is a time gap between the provocative act, or acts, and the act which kills is not of itself fatal to the defence of provocation. The question is whether, when taking into account all the circumstances, including the seriousness of the provocative acts in the context in which they were said or done, and having regard to the background circumstances, Mr Peniamina was still acting under a loss of self-control when the act which killed was done."

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17 As to the duty of a trial judge to leave real issues to the jury, see *R v Spencer* [1987] AC 128, *RPS v R* (2000) 199 CLR 620 and *R v Mogg* (2000) 112 A Crim R 417 at [54].

18 *Pollock v The Queen* (2010) 242 CLR 233 at [60]-[62].

In order to assist the jury, an attempt was made to identify the real issues on the question of provocation. These directions were based primarily on the evidence from Mr Peniamina's accounts to police. No doubt, those accounts were coloured and very much represented Mr Peniamina's point of view. The cold reality is that Mrs Peniamina was dead, so the only evidence came from Mr Peniamina. The jury were told:

> "The first element of provocation is whether Mrs Peniamina did provocative acts. I've identified the statements or acts of provocation. The only direct evidence of those acts and statements comes from the various statements made by Mr Peniamina to police.
>
> However, as to the cutting of Mr Peniamina's hand, there is evidence which at least partially supports his account. That evidence is that he had a severe cut to his hand.
>
> Mr Peniamina's account to police is that the provocative statements occurred in the context of him challenging his wife about an alleged affair. You have evidence of Mr Peniamina's conversations with family members prior to 31 March 2016 about his concerns that Mrs Peniamina was having an affair. So you might conclude that it was likely that topic was raised.
>
> You also have evidence of a severe reaction to whatever occurred in the house. It's entirely a matter for you, but you may have little difficulty in concluding that there were some statements and/or acts done by Mrs Peniamina within the house which caused a severe reaction from Mr Peniamina.
>
> The second element is whether Mr Peniamina was provoked. You might have little difficulty in concluding that he reacted. By that I mean that what Mrs Peniamina said and did was the catalyst of what followed.
>
> The real questions you might think are;
>
> i. whether at the time of doing that act which killed Mrs Peniamina, which the Crown says is striking her with the bollard, Mr Peniamina was acting in a state of loss of self-control;
>
> ii. whether an ordinary person, as I have described that notion, in the circumstances of Mr Peniamina, could have reacted and killed Mrs Peniamina."

The jury were directed that there were two paths which could lead to a conviction for manslaughter but not murder. The jury were directed:

> "The first three of those elements[19] are the elements of an unlawful killing. Proof of them beyond reasonable doubt without proof of the fourth element[20] would

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19 Mrs Peniamina is dead; Mr Peniamina caused Mrs Peniamina's death; the killing was unlawful.

20 Intent to kill or do grievous bodily harm to Mrs Peniamina.

> prove the offence of manslaughter. Manslaughter is an inherent alternative charge to murder but it only becomes available as an alternative in the event that you find the defendant not guilty of murder.
>
> You may return a verdict of manslaughter in this case in one of two circumstances. If you were satisfied beyond reasonable doubt of elements 1, 2 and 3, but you were not satisfied beyond reasonable doubt that Mr Peniamina intended to kill or do grievous bodily harm to Sandra Peniamina, then he would be guilty of manslaughter, not murder, and it would not be necessary for you to consider provocation. That is the first way in which you could return a verdict of guilty of manslaughter.
>
> The second way you may return a verdict of guilty of manslaughter is if you were satisfied of all four elements of murder, but you found that when Mr Peniamina unlawfully and intentionally killed Sandra Peniamina, he was acting under provocation. I will return to provocation shortly."

Because there was no formal admission of intent, it was necessary to leave to the jury the possibility that they may not be satisfied beyond reasonable doubt that the Crown had proved element 4, that is intent, although, for the reasons already explained, that was more a hypothetical than real possibility given the way the case was conducted.

The jury deliberated for three days before concluding that they could not reach a unanimous verdict on the charge of murder. Sections 59 and 59A of the *Jury Act* 1995 provide that a majority verdict can be received on a charge of manslaughter but not on a charge of murder. Somewhat difficult questions arise where a majority verdict is sought in circumstances where the real issue is whether the accused has proved a defence. In both provocation under s 304 and diminished responsibility under s 304A, the defences do not arise for consideration unless and until the jury is otherwise satisfied beyond reasonable doubt of all four elements of murder.[21] Issues as to the proper directions to be given to a jury who are unable to reach a unanimous verdict on a charge of murder, but where manslaughter is open, are beyond the scope of this paper but the ruling is published as *R v Peniamina*.[22]

The jury were unable to reach a unanimous verdict on murder but were able to reach a majority verdict on manslaughter. The jury convicted Mr Peniamina of manslaughter on that basis.

Section 17 of the *Code* statutorily provides for the defences of *autrefois acquit* and *autrefois convict*. It provides:

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21 See generally *R v Smith (aka Stella)* [2021] QCA 139, [2021] 27 QLR.

22 [2021] QSC 250.

> "**17 Former conviction or acquittal**
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> It is a defence to a charge of any offence to show that the accused person has already been tried, and convicted or acquitted upon an indictment on which the person might have been convicted of the offence with which the person is charged, or has already been acquitted upon indictment, or has already been convicted, of an offence of which the person might be convicted upon the indictment or complaint on which the person is charged."

As murder was open on the indictment, the conviction for manslaughter means that Mr Peniamina could plead *autrefois convict* on any further charge of murdering Mrs Peniamina and rely upon the manslaughter conviction. The only way the Crown could have avoided that consequence was to seek the return of the indictment to enter a *nolle prosequi* and thereby prevent the manslaughter conviction. Given that this was a second trial, the first had miscarried because of an incorrect position taken by the Crown as to the operation of s 304(3), and the fact that Mr Peniamina had been in custody for almost six years, such a course may have faced difficulties.[23]

Mr Peniamina was sentenced to a period of 16 years imprisonment. By force of ss 161A and 161B the *Penalties and Sentences Act* 1992 and s 182 of the *Corrective Services Act* 2006, the imposition of a sentence of more than 10 years for an offence of manslaughter means that Mr Peniamina will not be eligible for parole until he has served 80% of the sentence. His time in custody was declared as time served on the sentence.[24] The sentencing remarks are published as *R v Peniamina (No 2)*.[25]

Reaction to the verdict

There were many comments made in both mainstream media and social media criticising the result of the trial.

Some of the comments in social media criticised the jury. This is clearly unfair. As already observed, Mr Peniamina's version of events was left to the jury and was largely unchallenged. That was simply a consequence of what evidence was available given Mrs Peniamina's death. Provocation was clearly raised on the evidence. Mr Peniamina explained that he was provoked by Mrs Peniamina cutting his hand and he explained how he lost his temper. The jury were

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23 *R v Ferguson, ex parte Attorney-General* [1991] 1 Qd R 35 and *R v Jell; ex parte Attorney-General* [1991] 1 Qd R 48.

24 *Penalties and Sentences Act* 1992, s 159A.

25 [2021] QSC 282.

very hard working and spent three days of their lives deliberating on the case. There was no complaint by either barrister as to the legal directions given to the jury. The verdict was open. If the result offends the community's sense of what is right and just, then the problem is with the law, not the jury.

As to social media comments, they include:

> "Why oh why are we going backwards to entertain this provocation bullshit?"
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> "Anyone with an ounce of humanity must surely be angry … over the fact that a bloke who repeatedly stabbed and then beat a woman until she died escaped a murder charge."[26]
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> "Jealousy as an excuse to bludgeon to death and get away with it in Queensland. So, to get away with murder, just say you were convinced they cheated."
>
> "Arona Peniamina who stabbed then bashed his NZ wife to death found not guilty of murder in a Queensland court because 'he was provoked'. Guilty of manslaughter instead. Seriously?!!!"
>
> "This 'provocation' law needs to change. 'You made me angry' is not a defence for taking someone's life. Civilised people know this."
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> "Disgusting. Unforgiveable. When will it end!? For info: perpetrators will often irrationally, obsessively, inaccurately accuse their wives or girlfriends of cheating. Hold him accountable."
>
> "Provocation as a defence should be abolished! Arona Peniamina is a murderer and should be jailed for life."
>
> "Why the f… is the defence of 'provocation' still allowed???"
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> "Sandra Peniamina's partner, Arona Peniamina, stabbed her repeatedly around the face and head before chasing her into their Kippa Ring home's driveway. As Sandra struggled to find safety, this brutal thug beat her with a block of concrete until she was dead."
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> "Shocking reason man who killed Kiwi wife was found 'not guilty'. He stabbed her 29 times - but has been found not guilty on the grounds he was provoked."
>
> "Arona Peniamina punched, kicked, repeatedly stabbed and then bludgeoned the mother of his children to death with a chunk of concrete - but he can't be convicted of murder."
>
> "His sentence was reduced because she defended herself and this enraged him? Is this what it is saying?"
>
> "Australia in the Dark Ages still.

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[26] The author means "conviction".

> Arona Peniamina viciously and violently murdered his wife and the judge said it was her fault. Sandra Peniamina, you didn't do anything wrong."
>
> "Arona Peniamina stabbed his wife 29 times, including 15 in the head, then chased her down the driveway when she tried to escape and bashed her skull in. But a jury could not find him guilty of her murder."
>
> "Strengthen the Murder Law. It is now only manslaughter because she attempted to defend herself? Outrageous."

Some of the social media comments call for the abolition of provocation as a defence to murder. As later explained, there are difficulties with that approach. In a series of articles, journalist, Vanessa March, of the *Courier Mail*, analysed the case and quoted various commentators and parties interested in the case.

In her article of 30 October 2021, Ms Marsh quoted Carnetra Potter, Mrs Peniamina's sister. Ms Potter provided a victim impact statement for the purposes of the sentencing. While the victim impact statement explained the massive effect that Mrs Peniamina's death had upon her family, the victim impact statement was measured and insightful. Ms Marsh, in her article, said this:

> "Ms Potter (pictured),[27] who cares for the couple's four young sons in New Zealand, said the partial defence was another blow for the grieving families of victims and that it should not be open for defendants such as Peniamina.
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> 'There are instances where this would help those who were provoked and were protecting themselves,' Ms Potter said. 'But it in this case did not work in our favour. I believe the (law) should be looked at as a whole.'"

In the same article, Ms Marsh observed:

> "The case has previously attracted criticism from domestic violence campaigners who have called for the 'outdated' legal defence to be overhauled, saying while there is a place for it, it should not be open to defendants such as Peniamina."

In her earlier article of 25 September 2021, Ms Marsh opined:

> "Sandra Peniamina died an unimaginably violent death.
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> She was stabbed almost 30 times and 15 of those stab wounds were to her head. The knife was wielded with such force that her nasal septum was split open, a tooth was knocked from her mouth and the blade shattered, leaving the tip lodged in her skull.

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[27] A photograph of Ms Potter appeared in the article.

> Terrified and bleeding, she fled from the home she shared with her husband Arona and their four children. But she only made it to the driveway before he caught up and used a concrete bollard to smash her skull into the ground.
>
> There was no dispute that the prosecution had proved all of the elements required to convict Peniamina of murder.
>
> But he has avoided a murder conviction after he successfully argued the partial defence of provocation, under which he must be instead found guilty of the lesser charge of manslaughter.
>
> A murder conviction carries a mandatory sentence of life imprisonment. The maximum sentence for a charge of manslaughter is also life, but unlike murder it is not mandatory and, according to a report by the Queensland Sentencing Advisory Council, the most common period of imprisonment imposed for the offence is just eight years.
>
> Peniamina was found guilty of Sandra's murder at a 2018 trial but that conviction was quashed by the High Court in December after it found the judge had improperly directed the jury about how it could apply the provocation defence.
>
> The decision sparked calls for Queensland's 'outdated' provocation laws to be revised.
>
> Juries, judges and the legal system as a whole can only make decisions within the bounds of the law.
>
> But it's time for this outdated law that lessens the culpability of killers like Arona Peniamina to be reviewed.
>
> This is a man who punched, kicked, repeatedly stabbed and then bludgeoned the mother of his children to death with a chunk of concrete. The community expects better, for Sandra and all of the other victims of this horrifying violence."

The Women's Safety and Justice Taskforce Report one - *Hear her voice - Addressing coercive control and domestic and family violence in Queensland*, considered Mr Peniamina's case and observed:

> "One of the reforms introduced in the 2011 Amendment Act[28] was the introduction of the new defence of killing in an abusive relationship under section 304B Criminal Code. In chapter 1.5, we noted that there are no reported cases where a jury found an accused person guilty of manslaughter only and not guilty of murder on the basis of section 304B. It may be, however, that section 304B is used when defence lawyers and prosecutors negotiate pleas of guilty to manslaughter in cases where murder was originally charged.
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> Another reform contained in the 2011 Amendment Act was an amendment to the partial defence of provocation to reduce the scope of the defence available to those who kill out of sexual possessiveness or jealousy. In chapter 1.6 we highlighted

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28 *Criminal Code and Other Legislation Amendment Act* 2011.

> the recent killing of Sandra Peniamina, whose husband accused her of having a sexual relationship with someone else. Sandra's husband nevertheless used the partial defence of provocation by successfully arguing that when Sandra defended herself from his violence during a confrontation about her alleged infidelity this could be an act of provocation. He was found guilty of manslaughter and not murder on this basis. For some members of the public, this was an unattractive result given her husband stabbed her more than 20 times, chased her and hunted her from a hiding place before finally killing her by hitting her over the head with a concrete bollard that he had ripped out of a garden bed.
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> By contrast, the decision of *R v Falls* has been identified as a case which illustrates the difficulties battered women have with raising self-defence, particularly 'where a physical attack is not actually in progress or 'imminent'.'
>
> It is apparent to the Taskforce that the presently available defences and excuses do not reflect current knowledge about the effects of domestic and family violence and coercive control and the damaging impact these have on victims over time.
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> As noted in chapter 1.6, the Taskforce could not fairly consider amendments to the partial defence of provocation without a thorough examination of the mandatory minimum sentence of life imprisonment for murder in the Criminal Code which does not exist in many other Australian jurisdictions. Queensland's mandatory life imprisonment for murder is consistently cited as the reason why Queensland should retain the defence of provocation. Reform of the mandatory minimum sentence of life imprisonment for murder and of defences and excuses under the Criminal Code will impact cases far beyond coercive control and domestic and family violence.
>
> A proper consideration of these matters requires a broader framework than this Taskforce's gendered terms of reference. Nor does the Taskforce have the time or resources to conduct this important review."

Provocation as a partial defence to murder in Queensland

Sir William Blackstone's *Commentaries on the Laws of England* were first published between 1765 and 1770. Those writings recognised provocation as an excuse for assault and also as a partial defence reducing murder to manslaughter. It was there explained that killing upon provocation where there has been time for the passion to cool and reason to prevail, is an act of deliberate revenge "and not heat of blood, and accordingly … murder". However, where the act is taken immediately upon the provocation, "there is no previous malice" and the offence committed is manslaughter. An example is given of a man who catches another in an act of adultery with his wife and kills him upon the spot. That is manslaughter.

The distinction between provocation as a defence to assault and provocation as a partial defence to murder was reflected in the original draft of the Griffith's Code. Section 275 provided a

definition of provocation. Section 276 provided that a person is not criminally responsible for an assault committed upon provocation. Those provisions ultimately became ss 268 and 269 of the *Code* to which I will later refer. It is unnecessary to further consider their legislative history.

Section 312 of the draft Code was in these terms:

> "312. When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute wilful murder or murder, does the act which causes death in the heat of passion caused by sudden provocation, and before there is time for his passion to cool, he is guilty of manslaughter only."

It ultimately became s 304 of the *Code*.

Section 309 of the draft Code defined "wilful murder" and s 310 defined "murder". Those sections became ss 301 and 302 of the *Code* respectively. In 1971, by *The Criminal Code and the Offenders Probation and Parole Act Amendment Act* 1971, the distinction between "wilful murder" and "murder" was abolished and consequential amendments were made to s 304. The section was then in these terms:

> "**304. Killing on provocation.** When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation, and before there is time for his passion to cool, he is guilty of manslaughter only."

In September 2008, the Queensland Law Reform Commission delivered its report, "*A Review of the Excuse of Accident and the Defence of Provocation*". It is unnecessary for present purposes to analyse the report. Of some present importance was the catalogue of cases then available where murder had been reduced to manslaughter based on provocation.[29] Also of interest is the analysis of the cases then available where women had been convicted of manslaughter of an intimate partner.[30] It was observed that killing on provocation is more prevalent in men, especially where jealousy is a feature,[31] but killing on provocation is not the sole domain of men. This raises broader considerations of battered wife cases and the general

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29 Report, pages 234-259.

30 Report, pages 265-275.

31 For example, *R v Sebo*, Indictment No 977 of 2006, sentenced on 30 June 2007 and on appeal, *R v Sebo; ex parte Attorney-General (Qld)* [2007] QCA 426.

inadequacy of the classic defences such as provocation and self-defence to avail women who have killed after enduring domestic abuse.[32]

The Law Reform Commission's recommendation was to call for the abolition of the defence of provocation but only on terms that mandatory life imprisonment for murder is abolished. The Commission expressed the following opinion:

> "21.176 The Commission's recommendations about changes to provocation must be considered subject to the qualification that the Commission was unable to consider the alternative option of abolishing mandatory life imprisonment for murder and allowing provocation to be considered in mitigation of sentence.
>
> 21.177 The partial defence of provocation to murder contained in section 304 of the Criminal Code (Qld) should be abolished, but it must not be abolished while a conviction of murder is punishable by a mandatory sentence of imprisonment for life. Unless mandatory life imprisonment for murder is replaced with presumptive life imprisonment for murder, so that circumstances that might otherwise give rise to the partial defence could be taken into account on sentencing, then the partial defence of provocation to murder should remain."

That recommendation was not followed but several were, culminating in the introduction of the *Criminal Code and Other Legislation Amendment Bill* 2010. The explanatory memorandum to the Bill, relevantly to provocation, was as follows:

> "*Provocation - section 304, Criminal Code*
>
> A person who is otherwise guilty of murder may instead be convicted of manslaughter, if the jury decides that the murder was committed while the accused was provoked. This partial defence is found in section 304 of the Criminal Code and applies where a person does the act which causes death in the heat of passion caused by sudden provocation, and before there is time for the person's passion to cool. If raised on the evidence, the onus is upon the prosecution to negative the defence beyond a reasonable doubt.
>
> As outlined in the QLRC report at page 225, it is not uncommon for men who kill their intimate partners to raise the defence of provocation on the basis that they were provoked to kill by their partner's infidelity, insults or threats to leave the relationship. Further, at page 465 the QLRC states that the 'defence operates in favour or those in positions of strength at the expense of the weaker. The application of the defence has produced different outcomes in cases that involve comparable circumstances. In accordance with authority, trial judges play their role as 'gate-keeper' with caution. And it is at least arguable that the defence has been left to the jury, contrary to authority, in those cases in which the provocative conduct consisted only of words.'

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[32] For example, see *R v Falls*, unreported, Applegarth J.

> The QLRC recommended that the defence be recast to address its bias and flaws, in particular: to include a provision to the effect that, other than in circumstances of an extreme and exceptional character, the defence cannot be based on words alone or conduct that consists substantially of words; to include a provision that has the effect that, other than in circumstances of an extreme and exceptional character, provocation cannot be based upon the deceased's choice about a relationship; and to place the onus of proof upon a defendant seeking to rely on the partial defence.
>
> The amendments will: remove insults and statements about relationships from the scope of the defence; recognise a person's right to assert their personal or sexual autonomy; and will reduce the scope of the defence being available to those who kill out of sexual possessiveness or jealousy.
>
> The reversal of the onus of proof takes into account:
>
> - the prosecution is often not in a position to contest the defendant's claims because the only other 'witness' is the deceased;[33]
> - it will lead to more clearly articulated claims of provocation, which is fairer to all concerned including the jury;
> - it enhances the capacity of the trial judge to prevent unmeritorious claims being raised; and
> - an analogy with diminished responsibility, which also reduces murder to manslaughter, and where the defendant bears the onus."

By the time the *Criminal Code and Other Legislation Amendment Act* 2011 enacted various of the recommendations of the Law Reform Commission's report, s 304B was in force. That was enacted by the *Criminal Code (Abuse Domestic Relationship Defence and Another Matter) Amendment Act* 2010. It has since been amended in 2011[34] and 2012,[35] but it is unnecessary to consider that legislative history. In its current form, s 304B provides:

> "**304B Killing for preservation in an abusive domestic relationship**
>
> (1) A person who unlawfully kills another (the ***deceased***) under circumstances that, but for the provisions of this section, would constitute murder, is guilty of manslaughter only, if—
>
> (a) the deceased has committed acts of serious domestic violence against the person in the course of an abusive domestic relationship; and
>
> (b) the person believes that it is necessary for the person's preservation from death or grievous bodily harm to do the act or make the omission that causes the death; and

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33 Clearly a real issue in Mr Peniamina's case.
34 *Criminal Code and Other Legislation Amendment Act* 2011.
35 *Domestic and Family Violence Protection Act* 2012.

(c) the person has reasonable grounds for the belief having regard to the abusive domestic relationship and all the circumstances of the case.

(2) An ***abusive domestic relationship*** is a domestic relationship existing between 2 persons in which there is a history of acts of serious domestic violence committed by either person against the other.

(3) A history of acts of serious domestic violence may include acts that appear minor or trivial when considered in isolation.

(4) Subsection (1) may apply even if the act or omission causing the death (the ***response***) was done or made in response to a particular act of domestic violence committed by the deceased that would not, if the history of acts of serious domestic violence were disregarded, warrant the response.

(5) Subsection (1)(a) may apply even if the person has sometimes committed acts of domestic violence in the relationship.

(6) For subsection (1)(c), without limiting the circumstances to which regard may be had for the purposes of the subsection, those circumstances include acts of the deceased that were not acts of domestic violence.

(7) In this section—

domestic violence see the *Domestic and Family Violence Protection Act 2012*, section 8."

The amendments to s 304 effected in 2011 were:

1. to introduce subsection (2) providing specifically that provocation cannot be constituted by words alone except in exceptional circumstances;

2. by introducing subsection (3);

3. by placing the onus of proof of the defence of provocation upon the accused;[36]

4. making various consequential amendments.

Section 304, as it appeared after the 2011 amendments, is as follows:

"**304 Killing on provocation**

(1) When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder,

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[36] Section 304(7).

does the act which causes death in the heat of passion caused by sudden provocation, and before there is time for the person's passion to cool, the person is guilty of manslaughter only.

(2) Subsection (1) does not apply if the sudden provocation is based on words alone, other than in circumstances of a most extreme and exceptional character.

(3) Also, subsection (1) does not apply, other than in circumstances of a most extreme and exceptional character, if—

(a) a domestic relationship exists between 2 persons; and

(b) one person unlawfully kills the other person (the ***deceased***); and

(c) the sudden provocation is based on anything done by the deceased or anything the person believes the deceased has done—

(i) to end the relationship; or

(ii) to change the nature of the relationship; or

(ii) 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.

(4) For subsection (3)(a) a domestic relationship between 2 persons may be constituted by an intimate personal relationship as defined under the *Domestic and Family Violence Protection Act 1989*, section 12A(2), even if the persons' lives are not enmeshed as mentioned in section 12A(2)(b) of the Act.

(5) Subsection (3)(c)(i) applies even if the relationship has ended before the sudden provocation and killing happens.

(6) For proof of circumstances of a most extreme and exceptional character mentioned in subsection (2) or (3) regard may be had to any history of violence that is relevant in all the circumstances.

(7) On a charge of murder, it is for the defence to prove that the person charged is, under this section, liable to be convicted of manslaughter only.

(8) When 2 or more persons unlawfully kill another, the fact that 1 of the persons is, under this section, guilty of manslaughter only does not affect the question whether the unlawful killing amounted to murder in the case of the other person or persons."

Section 304 was amended again in 2017. The background of that is described in the Explanatory Notes to the *Criminal Law Amendment Bill* 2016 which became the *Criminal Law Amendment Act* 2017. The Explanatory Memoranda stated:

> "**Exclusion of unwanted sexual advance as basis for defence of killing on provocation**
>
> Section 304 (Killing on provocation) of the Criminal Code 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 carries mandatory life imprisonment, whereas the offence of manslaughter carries a maximum penalty of life imprisonment.
>
> In April 2011, section 304 was amended to address its perceived bias and flaws following recommendations of the Queensland Law Reform Commission (QLRC) contained in its 2008 report, *A review of the excuse of accident and the defence of provocation*. While not specifically dealing with the issue of an unwanted sexual advance, the 2011 amendment to exclude 'words alone' applies to a sexual proposition, unaccompanied by physical contact. Further, the 2011 amendments reversed the onus of proof to a defendant. However, the partial defence of provocation continued to be criticised on the basis that it could be relied upon by a man who has killed in response to an unwanted homosexual advance from the deceased.
>
> In November 2011, under the former Labor Government, an expert committee (the Committee) was tasked with reviewing section 304 regarding its application to an unwanted homosexual advance. The Committee was chaired by the Honourable John Jerrard, former judge of the Queensland Court of Appeal (the Chair). The Committee was equally divided about an amendment to section 304 on this matter; however ultimately the Chair recommended an amendment to exclude an unwanted sexual advance from the ambit of the partial defence, other than in circumstances of an exceptional character. The report records the Chair's part 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.
>
> The Chair also recommended amending the existing provisos in section 304 of 'circumstances of a most extreme and exceptional character' to omit the requirement that the circumstances be of 'a most extreme' character; to remove potential ambiguity and given that such an amendment would not have the effect of lowering the threshold.
>
> While the former Labor Government announced its intention to amend section 304 to give effect to the Chair's recommendation, the ensuing change of government in 2012 meant the proposed amendments were not progressed."

An example of a case where an unwanted sexual advance was recognised as legally capable of constituting provocation is *Green v The Queen*.[37] There, a man killed upon provocation constituted by an uninvited homosexual proposition.

The *Criminal Law Amendment Act* 2017 led to the insertion of subsections 3A, 6A and 9 and consequential amendments,[38] and the renumbering of the various subsections.[39]

Section 304, in its present form, is as follows:

> "**304 Killing on provocation**
>
> (1) When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation, and before there is time for the person's passion to cool, the person is guilty of manslaughter only.
>
> (2) Subsection (1) does not apply if the sudden provocation is based on words alone, other than in circumstances of an exceptional character.
>
> (3) Also, subsection (1) does not apply, other than in circumstances of an exceptional character, if—
>
> (a) a domestic relationship exists between 2 persons; and
>
> (b) one person unlawfully kills the other person (the ***deceased***); and
>
> (c) the sudden provocation is based on anything done by the deceased or anything the person believes the deceased has done—
>
> (i) to end the relationship; or
>
> (ii) to change the nature of the relationship; or
>
> (iii) 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.
>
> (4) Further, subsection (1) does not apply, other than in circumstances of an exceptional character, if the sudden provocation is based on an unwanted sexual advance to the person.
>
> (5) For subsection (3)(a), despite the *Domestic and Family Violence Protection Act* 2012, section 18(6), a domestic relationship includes a

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37 (1997) 191 CLR 334.

38 An amendment had also been effected by s 217 of the *Domestic and Family Violence Protection Act* 2012; see now s 304(5).

39 Section 304(3A) became s 304(4); s 304(6A) became s 304(7) and s 304(9) became s 304(11).

relationship in which 2 persons date or dated each other on a number of occasions.

(6) Subsection (3)(c)(i) applies even if the relationship has ended before the sudden provocation and killing happens.

(7) For proof of circumstances of an exceptional character mentioned in subsection (2) or (3) regard may be had to any history of violence that is relevant in all the circumstances.

(8) For proof of circumstances of an exceptional character mentioned in subsection (4), regard may be had to any history of violence, or of sexual conduct, between the person and the person who is unlawfully killed that is relevant in all the circumstances.

(9) On a charge of murder, it is for the defence to prove that the person charged is, under this section, liable to be convicted of manslaughter only.

(10) When 2 or more persons unlawfully kill another, the fact that 1 of the persons is, under this section, guilty of manslaughter only does not affect the question whether the unlawful killing amounted to murder in the case of the other person or persons.

(11) In this section—

unwanted sexual advance, to a person, means a sexual advance that—

(a) is unwanted by the person; and

(b) if the sexual advance involves touching the person—involves only minor touching."[40]

Scope of this paper

Domestic violence is an enormous social problem which has been the subject of government action over a substantial period. It is a complex issue impacting many areas of the criminal law. The Taskforce has attempted to deal with various issues as have others before them. The scope of this paper is much narrower than the broad issues of domestic violence generally.

The jury's verdict in *Peniamina* raised public concern. That concern is that the law has not produced a result which reflects current community standards. It is for others to determine whether the concerns that have been expressed are valid and ought to be acted upon. What I have attempted to do is to identify the concerns and explain how the law in its present form is relevant to those concerns, and suggest avenues of reform to investigate.

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[40] Legislative examples removed.

The concerns with the verdict

Various themes emerge from the public comments. The first is that provocation as a partial defence to murder is outdated, at least as it relates to murders in a domestic situation and ought to be abolished.

The second is that the provocative act alleged against Mrs Peniamina was an act which occurred while she was defending herself.

Third is the outpouring of public outrage as to the severity of Mr Peniamina's attack upon his wife. Of course his behaviour is abhorrent. The issue is whether the severity of the attack *per se* ought to exclude the partial defence of provocation. But this raises questions of proportionality, namely the proportionality of the reaction compared to the alleged act of provocation.

Fourthly, there is the lapse of time between the provocative act as alleged by Mr Peniamina, namely the cutting of him with the knife, and the act which killed, namely the striking of Mrs Peniamina with the bollard. It is one thing to say that a person can act on the sudden, but what are the limits of "on the sudden"?

Should provocation as a defence to murder be repealed?

Killings in domestic relationships are not limited to cases where the deceased is female and the accused is male. There are many examples of women in domestic relationships killing. It is a sad reflection on society that such cases are common enough to have attracted a name, namely "battered women" cases.[41]

Until the introduction of provisions such as s 304B, battered women have had to rely on the defences of provocation and self-defence. As can be seen from cases like *Osland v The Queen*,[42] women who have killed as an ultimate reaction to long-term abuse often face difficulty in raising a defence of provocation or self-defence. To raise self-defence, the danger of death must be imminent and to raise provocation, the act which kills must be done on the sudden. The realities of domestic violence are such that the abuser sometimes reacts and kills the abuser in circumstances other than as traditionally provided by those defences.

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41 They are digested, at least up to 2008, in the Law Reform Commission Report at Chapter 15.

42 (1998) 197 CLR 316.

Section 304B provides a partial defence where the killing occurs in the context of domestic abuse and the abuser "believes that it is necessary for the person's preservation from death or grievous bodily harm to [kill the abuser]".[43] The necessity to show that an immediate danger of death has manifested itself before the act which kills the abuser is removed. However, s 304B is only a partial defence reducing murder to manslaughter.

One can easily imagine cases where a woman is abused for years and finally "snaps" and on the sudden does an act which kills the abuser. The well-publicised case of *R v Kina*[44] is an example.

If provocation was abolished but mandatory life for murder was retained, women may have no defence and receive the same mandatory sentence as a person convicted of a premeditated murder where any moral justification or mitigation is absent.

Both the 2008 Law Reform Commission and the Taskforce linked any consideration of the abolition of provocation to consideration of the abolition of mandatory life imprisonment.

While there certainly were public calls for the abolition of the partial defence of provocation, the majority of the public comments in the wake of Mr Peniamina'a verdict expressed concern that in the particular circumstances of Mr Peniamina's killing, provocation should be unavailable. There was no groundswell in favour of the total abolition of the partial defence, rather an expression of outrage that the defence was available to Mr Peniamina.

Should the partial defence be available where the allegedly provocative act was raised in self-defence?

There is no doubt that in the episode which culminated in Mrs Peniamina's death, it was Mr Peniamina who was the aggressor. He was the one who formed the view that she was not being faithful to him. He was the one who put those allegations to her. She refused to discuss it as was her right. He immediately rose to violence and struck her. When she withdrew to the kitchen, he pursued her. He told police that she armed herself so as to attack him. For the purposes of sentence that was rejected. He was the aggressor, she had withdrawn. An inference is that she armed herself preparing for the necessity of self-defence. That is hardly unreasonable given that she had already been assaulted to the point of bleeding because she dared disobey his command to discuss his allegations of her infidelity.

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43 Section 304B(1)(b).
44 [1993] QCA 480.

On Mr Peniamina's version, he grabbed the knife and she withdrew it thereby cutting him. The exact circumstances of that are vague but it is unrealistic to think that the necessity for him to grab the knife was a circumstance caused by her. It is far more likely that he was cut while approaching her aggressively. Therefore, he created the situation which then partially justified him killing her.

It is easy also to imagine the circumstances where the act of provocation by the deceased to the accused has itself been provoked by some action by the accused to the deceased.

Whether a provocative act which is itself provoked, or a provocative act amounting to self-defence, ought or ought not be capable of founding the partial defence of provocation, is a matter of policy for legislators. However, it would be quite easy to remove such acts as forming a basis for the partial defence in the same way other acts have been removed. In this respect, see the position of words alone,[45] acts done when ending or varying a relationship,[46] and an unwanted sexual advance.[47]

Sections 271 and 272 of the *Code* provide the defence of self-defence. A distinction is drawn between self-defence against a provoked assault and self-defence against an unprovoked assault.

As earlier observed, the *Code* provides for provocation as an excuse to assault and also as a partial excuse for murder reducing the verdict to manslaughter. For the purposes of s 269, the defence of provocation against a charge of assault, s 268 defines "provocation":

> "**268 Provocation**
>
> (1) The term ***provocation***, used with reference to an offence of which an assault is an element, means and includes, except as hereinafter stated, any wrongful act or insult of such a nature as to be likely, when done to an ordinary person, or in the presence of an ordinary person to another person who is under the person's immediate care, or to whom the person stands in a conjugal, parental, filial, or fraternal, relation, or in the relation of master or servant, to deprive the person of the power of self-control, and to induce the person to assault the person by whom the act or insult is done or offered.
>
> (2) When such an act or insult is done or offered by one person to another, or in the presence of another to a person who is under the immediate

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45 Section 304(2).
46 Section 304(3).
47 Section 304(4).

> care of that other, or to whom the latter stands in any such relation as aforesaid, the former is said to give to the latter provocation for an assault.
>
> (3) A lawful act is not provocation to any person for an assault.
>
> (4) An act which a person does in consequence of incitement given by another person in order to induce the person to do the act, and thereby to furnish an excuse for committing an assault, is not provocation to that other person for an assault.
>
> (5) An arrest which is unlawful is not necessarily provocation for an assault, but it may be evidence of provocation to a person who knows of the illegality."

Sections 268 and 269 only apply to offences where "assault is an element". That has been construed as referring to a legal element. The offence of assault,[48] assault occasioning bodily harm,[49] and serious assaults[50] are all examples. Doing grievous bodily harm is not an offence where "assault is an element", even though the act[51] which constitutes the offence[52] might be an assault.[53]

Section 269 then provides:

> "**269 Defence of provocation**
>
> (1) A person is not criminally responsible for an assault committed upon a person who gives the person provocation for the assault, if the person is in fact deprived by the provocation of the power of self-control, and acts upon it on the sudden and before there is time for the person's passion to cool, and if the force used is not disproportionate to the provocation and is not intended, and is not such as is likely, to cause death or grievous bodily harm.
>
> (2) Whether any particular act or insult is such as to be likely to deprive an ordinary person of the power of self-control and to induce the ordinary person to assault the person by whom the act or insult is done or offered, and whether, in any particular case, the person provoked was actually deprived by the provocation of the power of self-control, and whether any force used is or is not disproportionate to the provocation, are questions of fact."

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48 *Code*, s 335.
49 *Code*, s 339.
50 *Code*, s 340.
51 *Code*, s 2.
52 *R v Barlow* (1997) 188 CLR 1.
53 *R v Williams* [1971] Qd R 414, *R v Kapronowski* [1972] Qd R 465 and on appeal *Kapronowski v R* (1973) 133 CLR 209.

Section 268 provides that a lawful act (eg self-defence) cannot be a provocative act for the purposes of the defence.

Proportionality

Section 269 introduces the concept of proportionality of the assault to the insult.

Section 304 is a peculiar section. Although it is a section within a statute codifying the criminal law, the meaning of the term "provocation" is taken, not from s 268 or any other provision within the *Code*, but from the common law. The common law definitions include an objective element, namely that the provocation given must be such as to cause a reasonable man to lose self-control "to the degree and method and continuance" of the violence causing death.[54]

In *Johnson v The Queen*,[55] the High Court accepted that the nature of the acts done by an accused upon the provocation may be considered in determining whether the accused was acting in a state of loss or self-control at the time of the doing of the act that killed. Barwick CJ explained:

> "To take into account the mode and extent of retaliation when determining whether an ordinary man, subjected to the like acts of provocation in all the circumstances in which the accused then stood, would have lost self-control to the point of doing something akin to what the accused has done is one thing. To require that it be established positively and, as a separate issue or element, whether the act of the accused was in fact proportionate to the provocation, is quite another; or to require the Crown as a specific matter to negative that proportion is quite another. This is particularly so if it be assumed that it has already been concluded that the accused had relevantly lost self-control. In considering whether an ordinary man would have lost self-control so as to form an intent to kill and to kill in the manner in which the accused did so, the jury may think the provocation was such that an ordinary man might react in the way in which the accused reacted. After all, it is the induced intent to kill rather than the induced fatal act which is the critical consideration."[56]

The issue was revisited in *Masciantonio v The Queen*[57] where Brennan, Deane, Dawson and Gaudron JJ said:

> "Whether an ordinary person could have reacted in the way in which the appellant did would pose a more difficult question for a jury. However, if a jury were to

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54 *Stingel v The Queen* (1990) 171 CLR 312 at 325 explained in *Pollock v The Queen* (2010) 242 CLR 233 at [60].

55 (1976) 136 CLR 619.

56 At 639.

57 (1995) 183 CLR 58.

> conclude, as it might, that the provocation offered by the deceased was, in the circumstances in which the appellant found himself, of a high degree (and there was some evidence to support such a conclusion) then it is possible that a reasonable jury might also conclude that an ordinary person could, out of fear and anger as a result of that provocation, form an intention to inflict at least grievous bodily harm and act accordingly.
>
> In *Stingel* this Court quoted with approval an observation by Viscount Simon in *Holmes v Director of Public Prosecutions* that the wrongful act or insult must have been capable of provoking an ordinary person not merely to some retaliation but 'to the degree and method and continuance of violence which produces the death'. Reliance was placed by the respondent upon the use of the word 'continuance', it being suggested that an ordinary man would not have continued to stab the deceased repeatedly as the appellant did. But this, we think, is to place a wrong interpretation upon the word 'continuance' in the particular context. In that context, the word was not, in our view, intended to indicate more than that the conduct in question must have been capable of provoking an ordinary person to retaliation of the like nature and extent as that of the accused. The question is not whether an ordinary person, having lost his self-control, *would* have regained his composure sooner than the accused nor is it whether he would have inflicted a lesser number of wounds. It is whether an ordinary person *could* have lost self-control to the extent that the accused did. 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. The associated question whether, in the sequence of events, an accused, having lost his self-control, had regained it so that the continued infliction of injury was in fact no longer provoked, is not a question to be answered by reference to the ordinary person. It is to be answered by reference to the conduct of the accused himself and to common experience of human affairs."[58] (emphasis added)

Those principles were confirmed in *Pollock v The Queen*.[59] Therefore, put briefly, the objective requirement is that the act of provocation must be such as would cause a reasonable person to lose self-control and kill. The mode of execution of the killing is irrelevant except for the factual determinations within the test.

Recasting the test so as to incorporate proportionality has its difficulties. Sections 268 and 269 operate where the provocation provokes acts which have a variety of consequences from a mere touching to a fairly serious assault falling short of grievous bodily harm. Notions of proportionality are easily incorporated.

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58 At 69.

59 (2010) 242 CLR 233 at [60].

Section 304 only applies where there has been a particular result; an intentional killing. The introduction of proportionality into such a test is difficult as it invites assessment of different potential modes of killing. That has been shunned in all the High Court cases which have considered the topic. If, objectively speaking, the provocation justifies a loss of self-control and a killing, it hardly matters how violent or gruesome the act which kills is. As the test is presently framed, the jury takes the mode of execution of the killing into effect in determining whether the objective test has been fulfilled.

It is difficult to identify policy reasons to change such a position.

The duration of the attack upon Mrs Peniamina

When summing up to the jury in *Pollock*, the trial judge identified seven propositions relevant to the partial defence of provocation. The jury were directed (at a time when statute placed the onus upon the Crown to exclude the partial defence) that the Crown would secure a conviction for murder if it disproved any of the seven propositions. The seventh was:

> "7. When [Mr Pollock] killed there had been time for his loss of self-control to abate."[60]

That direction introduced an objective element to the test and that was held to be an error. The High Court held:

> "61 The point being emphasised in the joint reasons in *Masciantonio* was that the objective test concerns the nature and extent of the reaction which might be caused in an ordinary person rather than its duration or precise physical form. The question of whether an ordinary person could have formed the intention to kill or to do grievous bodily harm is of greater significance than the question of whether an ordinary person could adopt the means adopted by the accused to carry out the intention. So, too, the duration of the loss of self-control is of lesser significance than the capacity of the provocation to induce in the ordinary person the requisite intention. <u>The determination of whether the prosecution has proved that an ordinary person, provoked to the degree that the accused was provoked, could not have formed the intention to kill or do grievous bodily harm and to have acted as the appellant acted does not require the jury to hypothesise the time that an ordinary person might have taken to regain composure</u>.
>
> 62 The circumstance that an accused had time to reflect before reacting to provocation may show that the later killing was an intentional killing carried out from motives of revenge or punishment. <u>The interval between the deceased's provocative conduct and the killing may tend to show that the</u>

[60] *Pollock v The Queen* (2010) 242 CLR 233 at [3].

> accused had regained control at the time of the killing. These are matters bearing on the determination of whether the killing was in fact caused by provocation and done at a time when the accused was in a state of temporary loss of self-control." (emphasis added)

The direction given to the jury as to the significance of the time gap between the provocative act and the act which killed Mrs Peniamina is set out earlier. The jury must have concluded that Mr Peniamina was still acting in a state of loss of self-control at the time he did the act which killed Mrs Peniamina, namely striking her with the bollard.

Mr Peniamina's attack upon Mrs Peniamina seemingly went on forever. He attacked her in the kitchen, pursued her outside and recovered a part of the landscaping with which to bludgeon her to death. As already explained, the mode of killing in reaction to a provocative act is difficult to regulate objectively. The question as to the duration of the time over which the partial defence may avail an accused is a different matter.

The objective test limits the operation of the defence. It is only when the accused's reaction to form a murderous intent and act upon it accords with what a reasonable person could do that the partial defence is available. There is no apparent legal difficulty in limiting the defence further to acts done over a period where a reasonable person would remain in a state of a lack of self-control.

This is the issue that has probably most caused public concern. It is one thing to say that cutting Mr Peniamina's hand may justify an attack upon Mrs Peniamina, even a lethal one. It is quite another thing to conclude that the cutting justified a sustained lengthy attack involving different weapons with violence inflicted in different parts of the house where surely a reasonable person would have regained control.

Changing the relationship; s 304(3)

As already observed, s 304(3) was an amendment arising from a Law Reform Commission paper. It is worth recording the Law Reform Commission's recommendations and reasons.

On this topic, the Law Reform Commission said:

> "**The deceased who asserts a right to personal or sexual autonomy**
>
> 21.80 As a matter of principle, the Commission was concerned that those who killed out of sexual possessiveness or jealousy had available to them the partial defence of provocation.

21.81 The Commission was particularly concerned about the position of women in seriously abusive relationships who wished to leave or who needed to leave for their own safety or for the safety of their children. Women in seriously abusive relationships who left or attempted to leave had a 75 per cent greater chance of being killed by their abusers than those who stayed. The Commission found it affronting that, if a woman were killed in those circumstances, her abuser might have available to him the partial defence of provocation.

21.82 The Commission recognises that men, parents and children may be the victims of seriously abusive relationships at the hands of a woman, but cannot ignore the fact that overwhelmingly, in intimate partner homicides, it is men who kill women. In the financial year 2005-06, 80 per cent of intimate partner homicides involved men killing women, and in more than half of those cases there was a history of domestic violence in the relationship. The Commission considers it valid therefore to give special consideration to the battered woman who seeks to leave an abusive relationship and is killed for doing so. Should her killer be entitled to rely upon provocation to ameliorate his punishment?

21.83 The Commission considered the arguments of Coss set out in Chapter 16 and the statements made by Coldrey J in *R v Yasso*. In that case, Coldrey J said:

> In our modern society persons frequently leave relationships and form new ones. Whilst this behaviour may cause a former partner to feel hurt, disappointment and anger, there is nothing abnormal about it.
>
> What is abnormal is the reaction to this conduct in a small percentage of instances where that former partner (almost inevitably a male) loses self-control and perpetuates fatal violence with an intention to kill or to cause serious bodily injury.
>
> In my view, this will rarely, if ever, be a response which might be induced in an ordinary person in the twenty-first century. Significant additional provocative factors would normally be required before the ordinary person test could be met.

21.84 This argument has even more force in the case of a woman seeking to leave a seriously abusive relationship.

21.85 The Commission agrees with both aspects of the remarks of Coldrey J, namely that in principle it is wrong that making a choice about a relationship could amount to provocation, but that it is possible that, taken with other unusual factors, the test could be met.

21.86 The Commission's view is that those additional factors should be 'circumstances of an extreme and exceptional character'. This achieves consistency with the recommendation regarding the additional

circumstances that would be required before words could amount to provocation.

21.87 The Commission considers that such a limitation has sufficient flexibility to be workable, and, in combination with the *Buttigieg* limitation for words, would remove the defence of provocation from undeserving cases.

The Commission's view

21.88 For the reasons discussed above, the Commission recommends a limitation on the circumstances in which the deceased's exercise of choice about a relationship may provide a sufficient foundation for the defence of provocation. The Commission recommends that section 304 of the Criminal Code (Qld) be amended to include a provision that has the effect that, other than in circumstances of an extreme and exceptional character, provocation cannot be based on the deceased's choice about a relationship."

Section 304(1) provides a defence (putting aside the objective element incorporated from the common law) where the act of the accused which kills was done in a state of loss of self-control "caused by sudden provocation". Section 304(3) excludes the defence where "the sudden provocation is based on anything done by the deceased" to end or change a relationship.

The focus of both s 304(1) and s 304(3) is upon the provocative act. Section 304(1) draws a clear connection between the provocative act and the loss of self-control. The provocative act must "cause" loss of self-control. Section 304(3) also draws a relationship between the conduct of the deceased and the loss of self-control; but the term used is "based on" certain conduct of the deceased.

In the High Court, Mr Peniamina successfully argued to the majority (Bell, Gageler and Gordon JJ) that ss 304(1) and (3) operated in this way:

1. The provocative act (here the cutting with the knife) which caused the loss of self-control must be identified.

2. Only if that act was done by the deceased to end or change the relationship does s 304(4) operate to limit the defence.

3. As "there was no evidentiary foundation for the suggestion that the conduct with the knife was (of itself) a thing done to end the relationship", s 304(3) had no operation.[61]

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61 *Peniamina v The Queen* (2020) 95 ALJR 85 at [28].

Keane and Edelman JJ, in dissent, construed s 304(3) more widely. In their Honours' view, the conduct of the deceased was wider than just the provocative act of cutting. If the jury concluded that the deceased had acted to end or change the relationship and that triggered the intention of the appellant to kill, then the defence was "based on" conduct of the deceased to end or change the relationship and the defence was limited.[62]

The circumstances identified by the Law Reform Commission are those arising when a person wishes to leave an abusive relationship. The possessive nature of the abuser may lead the abuser to kill the person attempting to leave the relationship. There seems no policy reason to link the exclusion of the defence to the specific provocative act as the majority in the High Court has found the subsection does. Section 304(3) could easily be amended to exclude the defence where the provocative act is done "in the course of" the deceased changing or ending the relationship.

Conclusions

Any step to abolish the partial defence of provocation, without at the same time abolishing the mandatory sentence of life imprisonment for murder, is a very serious step. It is also contrary to the conclusions reached in most of the studies on the topic. It is clear that serious injustice could be inflicted. That a person in a domestic relationship who is legitimately provoked into killing their domestic partner would face the same punishment as an offender who has intentionally plotted and murdered a third party, perhaps even for money, is intolerable.

Abolishing life as a sentence for murder has its own difficulties. The family of a murder victim may have a legitimate sense of grievance if the offender who killed their relative receives a lesser sentence than an offender who killed another person. These sentiments were publicly expressed when s 305 was amended to mandatorily extend the non-parole period for a person convicted of murdering a police officer.

One option is to maintain the mandatory sentence of life imprisonment but to allow judicial discretion in the setting of a non-parole period. This also though has its difficulties. Should a battered woman, finally provoked to kill her partner, be forever stigmatised by a murder conviction?

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62 At [106]-[107].

The public outrage in Mr Peniamina's case went primarily to three issues:

1. he started the violence by punching her;

2. the level of violence was obscene by any standards;

3. the attack was prolonged.

Section 268, which defines provocation as a defence to assault, specifically excludes as an act of provocation, any lawful act done by the person assaulted.[63] An act done in self-defence is a lawful act. It would not be difficult to amend s 304 to specifically prevent acts done in self-defence as amounting to provocative acts.

Amendments attempting to bring proportionality of the violence to the provocation have little merit. Proportionality is already ingrained in the test. The provocation must be such as would cause an ordinary person to form a murderous intent and carry it out. The introduction of some sort of proportionality test would achieve very little.

Consideration could be given to amendment so as to introduce an objective test to judge the period over which a person could reasonably be without self-control. This seems to be the primary public concern about Mr Peniamina's case. He evidently lost control. The jury were content to conclude on his largely unchallenged evidence[64] that he remained in that state right up to the time he crushed his wife with a cement bollard. Questions arise though as to whether there should be some statutory limitation. Should the partial defence apply where a reasonable person would not only have lost his/her temper and formed a murderous intent, but would have regained self-control before the act which killed was committed?

Section 304(3) has not been a success. Any subsection which seeks to remove a defence to murder is likely to be strictly construed. The difficulty confronted by the Crown in the High Court in *Peniamina* was with the sudden provocation being "based on" acts done for the specific purposes listed in s 304(3)(c)(i)-(iii). Perhaps the net could be widened to include acts done by a person in the course of ending or changing the relationship, although even that would probably not catch the circumstances of Mr Peniamina.

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63 Section 268(3).

64 Because the only other witness was deceased.

No doubt both courts and legislators will continue to struggle with the challenges arising from domestic violence.