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Divergent Directions in Reforming Legal Responses to Lethal Violence

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Abstract

Over the past three decades, debates about legal reforms to lethal violence have been evident across Australia and in other jurisdictions. While these debates have often arisen from shared concerns, the resulting reforms have taken different approaches to reformulating the defences to murder. This article considers the divergent approaches taken to reform and the process of law reform itself, documenting the significance of localised histories and high profile cases. It also questions whether reforms to the defences to murder have responded adequately to the varying contexts within which men and women kill. The analysis reveals the limitations of law reform inquiries that fail to take a comprehensive approach to considering the operation of the laws in this area. The article calls for ongoing critical analysis of homicide within and beyond the law.

Key Words: Homicide Law Reform, Defences to Murder, Provocation, Self Defence, Excessive Self Defence.

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Homicides are relatively infrequent events but attract disproportionate attention in public discourse and from the media. Criminal justice system responses to homicide are subject to a high level of critical scrutiny, which in turn may inflect public (mis)understandings of criminal law and process, and affect levels of confidence in the justice system. In recent decades the complexity and incoherence of homicide laws, including the defences to murder, has been noted in several jurisdictions, but what has more often prompted calls for law reform and sparked ongoing debates about the direction for reform have been high profile cases with outcomes that are seen as unjust, inequitable or contrary to public expectation. A common concern has been that some defences to murder are gender biased in substance or in practice in that they fail to adequately accommodate the circumstances of victims of domestic[3] and or sexual abuse (typically women) who kill, while too readily accommodating undeserving men such as those who rely on the partial defence of provocation having killed an intimate partner, or another man in so called homosexual advance killings.

Law reform inquiries and other forms of review have occurred internationally and in some Australian jurisdictions, and have often been followed by the implementation of statutory reforms to the defences to murder and/or the rules of evidence. Yet across similar legal systems, these reforms have taken divergent directions, failed to reduce complexities in the operation and structure of the law of homicide, and as such, continue to attract criticism (on England and Wales, see Quick and Wells, this issue). In this paper we document recent developments in the law of homicide in various Australian jurisdictions by examining the divergent directions that those law reforms have taken whilst also recognising the limitations of law reform with this area.

[3] The terms domestic violence, domestic abuse and family violence are used interchangeably throughout this paper; Australian states and territory differ in the terms used in relevant legislation.

Criminological and legal discourse commonly assumes a high level of moral consensus about murder, suggesting a greater clarity about the boundaries of murder and more coherence in the laws of homicide than are apparent on critical examination (Brown et al, 2011: 14). However, Naffine (2009: 219) argues that far from offering a clear case based on consensus, offences such as rape and murder demonstrate considerable 'moral uncertainty'. Moreover, as Norrie (2005: 59) notes there 'is an important gap between legal concepts used to judge deaths, and the moral quality of the killings … legal categories have to be teased and twisted to reflect the moral quality of killings in particular cases'. This 'lack of fit between criminal law doctrine' and the 'reality of criminal law practices' (Brown et al, 2011: 5), is an important focus for research. Recognition of this conceptual gap also highlights the need for a broader contextual understanding of homicide, of criminal laws and procedure and processes of law reform, since ongoing debates and controversies around legal responses to homicides are unlikely to be settled satisfactorily by reference to (mythical) moral certainties or legal principles that are at odds with empirical reality. Of course, laws are the product of historical, social and political contexts, and legal practices give effect to law in particular contexts. Bringing criminological frameworks to bear in reflecting on legal responses to homicide is a central focus of the current special issue.

This article begins that reflection by providing a critical evaluation of not only the ways in which Australian jurisdictions have sought to reform law's responses to lethal violence but also the impetus for these reforms, and importantly the limitations of these reforms in practice. In doing so, this article looks firstly at the influence of localised histories, high profile cases and the mandate of law reform inquiries, and secondly, at the specific directions of recent reforms targeted at the law of self defence, excessive self defence and provocation whilst also recognising the importance of evidentiary provisions and the structure of sentencing in any law reform exercise. The resulting

analysis highlights that whilst debates surrounding the laws of homicide have often been stimulated by shared concerns about the gendered operation of homicide laws, the reforms implemented have taken divergent approaches to solving the problems posed by the operation of the defences to murder.

Divergent Laws

There are notable differences in legal responses to homicides between the states and territories of Australia. One illustration of this is in terms of the presence or absence of partial defences to murder. In Tasmania, for example, since the abolition of provocation in 2003 there are no partial defences to homicide.[4] However, Queensland has retained the partial defences of provocation and diminished responsibility, and in 2010 introduced a new partial defence of killing for preservation in an abusive domestic relationship (s304B *Criminal Code*). In contrast to both these approaches, Victoria abolished provocation as a partial defence to murder in November 2005, whilst implementing a new offence of defensive homicide.[5] These divergent approaches taken to reforming the provocation defence are examined in more detail in the second half of this article.

Some attempts have been made to bring about greater consistency in criminal laws across Australian jurisdictions. The Model Criminal Code project initiated by the Standing Committee of Attorneys General in 1990, formed the basis of the Commonwealth Criminal Code and was intended to encourage greater uniformity across Australia. However, adoption of the model criminal code provisions has been uneven and subsequent reforms, such as the reintroduction of excessive self defence in some jurisdictions, have not conformed to the recommendations of the Model Criminal

[4] *Criminal Code Amendment: Abolition of Defence of Provocation) Act 2003*.
[5] Enacted through the *Crimes Act 1958* (sec. 9AD)

Code Officers Committee (MCCOC, 1998: 113). More recently, the Australian Law Reform Commission and New South Wales Law Reform Commission examined homicide laws as one focus of their joint reference on family violence. They recommended, inter alia, an investigation of 'strategies to improve the consistency of approaches to recognising the dynamics of family violence in homicide defences in state and territory criminal laws' (ALRC and NSWLRC, 2010: rec 14.4:654).

Localised Histories, Political Campaigns and High Profile Cases

Despite these attempts to create uniformity in the structure of homicide laws through exercises of reform, differences in the laws are evident across the Australian states and territories. Brown et al (2011: 37) note that divergences in laws between the states in part arise from greater 'parliamentary activism' and are also the product of particular political campaigns and localised histories. A focus on selected reforms in New South Wales (NSW) and Victoria illustrates the significance of localized histories alongside the influence of high profile cases.

New South Wales

In the early 1980s, the context in NSW was receptive to calls for law reform in the interests of battered women charged with homicide, although it seems it was not yet ready for a re-examination of self defence. Activists campaigning on behalf of Violet Roberts, and her son Bruce, [6] and Georgia Hill [7] each of whom had been convicted of the murder of their violent husband, made a strong case that existing laws including self defence and provocation were gender biased (Genovese 1998). At the time of these convictions, murder carried a mandatory life sentence in NSW. The new Labour

[6] *R v Violet Roberts, Bruce Roberts*, unreported Supreme Court of NSW, Newcastle, 15 March 1976.The significance of the *Roberts* case is discussed further in Morgan's (2012) article within this special issue.
[7] *Hill* (1981) 3 A Crim R 397.

government had established a women's policy unit and, in 1981 created a Task Force on Domestic Violence. These provided an avenue for feminists within the bureaucracy and the community to urge reform (Genovese, 1998), although the outcomes did not entirely meet activist demands.[8] The Task Force recommended, inter alia, abolishing the mandatory life sentence for murder, and that defences be amended 'to give full and proper recognition of the situation of the battered woman who kills her tormentor' and urged that a review of homicide laws be expedited (NSW Task Force on Domestic Violence, 1981:76-7). Subsequent reforms enacted by the NSW Government in 1982 introduced discretion in sentencing for murder and changes to the partial defence of provocation.[9] These changes were intended to make provocation more available to battered women by removing the requirement for sudden action following provocation and by recognising that what constituted provocation was not necessarily a final provocative act but may also arise from past incidents (Tolmie, 1990). Self defence, however, remained unchanged.

These reforms in NSW were influenced by high profile cases from other states, which also arose from contexts of domestic abuse, such as *Krope* in Victoria[10] and *R* in South Australia.[11] The NSW judiciary was also receptive to reform, at least to some extent. For instance, the removal of the mandatory penalty for murder had support from senior judges including the Chief Justice (Walker, 1982: 2484), and developments at common law indicate that courts were also beginning to respond to these same social concerns. One illustration of this is that the NSW Court of Criminal Appeal in *Hill* took into account 'virtually the entire relationship between the accused and the deceased in

[8] For instance the proposal by activists to abolish the objective test ('ordinary person') for provocation was not adopted by the Task Force (Genovese, 1998: 238-9).
[9] *Crimes (Homicide) Amendment Act 1982.*
[10] *Krope* (Unreported, Supreme Court of Victoria, 15/08/1978).
[11] *R v R* (1981) 28 SASR 321

determining that provocation was an issue' (Walker, 1982: 2486; Brown et al, 2011: 576-7). However, despite such reforms, critics argue that provocation has limited application to the various contexts within which battered women kill (Howe, 2004), especially women who act 'calmly and with deliberation' (Horder, 1992: 190), rather than with the loss of self control associated with provocation.

By 1997, however, a very different concern about provocation was beginning to emerge in the NSW context. In *Green,*[12] a NSW case argued before the High Court, the defendant had killed a male friend who had made a sexual advance towards him; the High Court found that provocation should have been left to the jury. That a non-violent sexual advance, commonly referred to as the 'homosexual panic' defence, could be seen as a legitimate basis for raising a partial defence of provocation resulted in heightened public concern and academic criticism of the provocation defence within NSW and more broadly (Howe, 1997, 1998; Golder, 2004; Tomsen and Crofts, 2012 this issue). *The Green* case arose at a time when there was already concern about the killing of gay men or of men assumed to be gay allegedly in response to non-violent sexual advances (Tomsen, 2002). However, provocation has been retained in NSW, despite continuing calls for its reform and/or abolition (see further Fitz-Gibbon, 2012a).

The 2012 conviction and sentencing of Chamanjot Singh[13] has stimulated renewed debate about provocation in NSW, this time focused on concerns that the partial defence was used to minimise domestic violence by the defendant. Singh successfully argued that he had been provoked to kill his wife because of suspicions that she had been unfaithful and that she intended to terminate the relationship, which may have resulted

[12] *Green v The Queen* (1997) 191 CLR 334,
[13] *R v Singh* [2012] NSWSC 637, hereinafter *Singh;* Singh was sentenced to imprisonment with a non-parole period of 6yrs and an additional term of 2 yrs.

in his deportation since he was in Australia on a spousal visa. Despite evidence presented at trial that he had been violent to his wife on previous occasions, limited attention was given to that fact at sentencing. Controversy over the case has resulted in the establishment in June 2012 of a parliamentary inquiry to consider the viability of provocation as a partial defence to murder in NSW.

Victoria

In Victoria during the 1980s, public, academic and political concern about provocation arose chiefly with respect to a number of controversial cases in which men who had killed their intimate partners successfully used provocation to avoid a conviction for murder. The 1987 killing of Vicki Cleary in Victoria by her former boyfriend, Peter Keough, who served less than four years gaol after being convicted of manslaughter on the grounds of provocation, was a very significant case in this respect. Following Keough's conviction, Vicki's brother Phil Cleary commenced a public campaign for the abolition of provocation as a partial defence to murder (see further Morgan, 2012, this issue). However, it was not until almost 20 years later, in 2005, that provocation was abolished in Victoria.

The 2004 conviction and sentencing of James Ramage[14] in the Victorian Supreme Court for the manslaughter of his estranged wife, Julie, on the basis of provocation prompted national outrage, and arguably had a substantial influence of the speed with which the Victorian government acted on the VLRC's (2004) previous recommendation to abolish provocation (Hemming, 2010; Kissane, 2009; McSherry, 2005; Ramsey, 2010). The successful use of the provocation defence gave legitimacy to Ramage's account that in the circumstances immediately prior to her death, his wife's new relationship and failure to consider returning to their marriage had caused him to lose self-control. The case was

[14] *R v Ramage* [2004] VSC 508, hereinafter *Ramage*.

described by one feminist scholar as a, 'spectacularly misogynist defence tale of a man provoked beyond endurance by a taunting, exiting, adulterous and menstruating woman' (Howe 2004: 74). As such, the Ramage case highlighted the gendered operation of the provocation defence and the role that it can play in defaming the character of the, often female, victim of homicide (Coss, 2005; Howe, 1999, 2004; Kissane, 2004, 2009; Maher et al, 2005; McSherry, 2005; Ramsey, 2010).

Throughout the 1980s and 1990s in Victoria, concerns were also building about the limited application of existing defences to the circumstances faced by battered women who had killed in response to domestic violence. Activists began a concerted campaign for law reform and for justice on behalf of Heather Osland, who was convicted for the murder of her violent husband in 1996.[15] Osland's defence team argued that she had suffered from battered women's syndrome and had killed her husband in self-defence after a period of prolonged abuse. However, Osland was convicted of murder, whilst her son, David, who struck the lethal blow, was acquitted on the grounds of self defence (Shiel 2005). The *Osland* case has since been cited as one of the catalysts for the 2005 implementation of the new offence of defensive homicide in Victoria (Flynn & Fitz-Gibbon, 2011).

While this discussion demonstrates the influence that key cases can have, recent developments in Queensland illustrate how cases that attract public concern may influence law reform in unanticipated or undesirable ways. As Edgely and Marchetti (2011: 149) note, with respect to the recent introduction of a new partial defence in Queensland, high profile cases that prompt an inquiry may not necessarily be 'the most

[15] Osland's case was heard in the High Court. While the appeal raised a number of issues including self defence and battered woman syndrome, the court focused mostly on the question of whether the verdicts reached for Osland and her son were inconsistent, but found that they were not. Her appeal was dismissed; *Osland v R [1999]* 197 CLR 316.

fortuitous progenitors of a solution', in this case to 'the legitimate defensive needs of women who kill violent abusive spouses'.[16]

Law Reform Inquiries

Recent homicide law reform inquiries have largely been stimulated by similar concerns and by cases illustrating the law's inadequate response to homicides perpetrated within the intimate context, but the inquiries have differed in their breadth and approach. Not all inquiries, for example, have adopted law reform methodologies that allow for a reconsideration of traditionally taken for granted legal categories (Des Rosiers, 2005; Morgan, 2012, this issue). They are of course shaped, although not necessarily confined, by their terms of reference and as such, some recent Australian law reform inquiries have had terms of reference limited to a narrow focus on selected partial defences, and/or that have specifically excluded relevant considerations such as the structure of sentencing for homicide offences or evidentiary provisions.

One illustration of this can be seen in the path leading to the introduction in Queensland of the new partial defence 'the Abusive Domestic Relationship Defence'. Edgely and Marchetti (2011) document how an inquiry by the Queensland Law Reform Commission (QLRC) confined to the excuse of *accident* and the defence of *provocation* (2008*)* raised broader concerns about the limitations of the defences available for people who killed in response to domestic violence, even though this was not strictly within their terms of reference. Whilst the QLRC did not review self defence, they did recommend that consideration should be given to the development of 'a *separate*

[16] An inquiry was instigated following public outcry about the findings in three separate cases in which men had been charged with murder. The first involved a man charged with murder but convicted of manslaughter after killing his ex girlfriend and two others involved men acquitted in separate cases of murder and manslaughter having killed other men following drunken altercations (Edgely and Marchetti, 2011: 149).

defence to murder for persons who have been the victims of a seriously abusive relationship who kill their abusers' (QLRC, 2008: Recommendation 21-4). In response to these recommendations, the Queensland government appointed academics Mackenzie and Colvin to prepare an independent report which was limited to the issue of a separate defence. The terms of reference for Mackenzie and Colvin's (2009: at 1.6) report also 'expressly excluded' the issue of introducing discretionary sentencing for murder, although the authors did raise concerns about the need for specific provisions for sentencing in cases arising from abusive relationships.

While considerations of reforms to homicide law face the inherent tension arising from the need to prevent 'unmeritorious claims', this concern seems to have been given particular emphasis by Mackenzie and Colvin (2009). The authors noted that opinion was divided among respondents to their discussion paper and that the legal community was not willing to accept a change to the law of self defence (Mackenzie and Colvin, 2009: at 3.32-3.33). However, the new partial defence of preservation in an abusive domestic relationship, which has since been introduced on their recommendation, also faces strong opposition from parts of the legal community[17] and academics (Edgely and Marchetti, 2011; Hopkins and Easteal, 2010), largely on the basis that those who meet the requirements for the defence should achieve a full acquittal, as in other jurisdictions, and not a conviction for manslaughter. To date, Queensland is the only Australian jurisdiction that has not reformulated the general law of self defence, and continues to have complex provisions with very stringent requirements. It is arguable that both the framing of the original QLRC inquiry to exclude self defence (Edgely and Marchetti, 2011: 151) and the exclusion of the consideration of the mandatory sentence for murder

[17] Prominent Queensland barrister Andrew Boe (2010: at 14) has stated: 'I, and most others consulted about this proposal disagreed quite vehemently with the terms of the amendment. We were collectively ignored, as were the raft of women's organizations that were also consulted.'

has frustrated attempts at more comprehensive reforms and may in part explain why Queensland is currently so out of step with other jurisdictions. The Queensland reforms are examined further by Douglas (2012) in this special issue.

By contrast, Victoria in 2004 and WA in 2007 each took a comprehensive approach to examining the needs for homicide law reform. For instance, the review conducted by the Law Reform Commission of WA (LRCWA) 'looked at the way homicide offences, defences and the sentencing provisions interlock' and recognised that '[t]he consequences of change in one area need to take account of effects in another to balance the varying circumstances in which offences and defences may arise and interact' (LRCWA: iv). Consistent with that approach, both commissions urged that the reforms they recommended needed to be adopted 'as a coherent package of reform' (LRCWA: iv; VLRC, 2004: xxiv). Similarly, the VLRC review in 2004 has since been praised as 'the most comprehensive and cogent critique of the doctrine' of provocation in Australia (Freiberg and Stewart, 2011: 104).

The Direction of Recent Reforms

Like the NSW homicide reforms in the 1980s, recent reforms to the laws of homicide nationally have largely been prompted by perceived failings in legal responses to victims of domestic violence. However, the focus of reforms has shifted, and recent developments in legal responses to lethal violence have been characterised by countervailing tendencies. For instance, as Fitz-Gibbon and Pickering (2012: 168) have identified in the area of self defence and excessive self defence, one common thread in law reforms dating back to the 1980s can be characterised as the intent to 'bring women into the discursive legal realm'. However, this desire has often been met with difficulties when attempted through law reform. As argued by Kaspiew (1995: 381):

> The challenge then, is to change the legal framework and reshape the narrative structure so that women's stories are both told and heard. Translating this into a law reform strategy raises complex questions. As the experience to date has shown, tinkering at the edge is not enough.

Reforms related to self defence and excessive self defence typically rely on juries being able to hear and understand women's stories, and in the latter case on judges exercising sentencing discretion with due regard to the full context of the lethal act.

At the same time as attempts are made to render self defence more open and flexible, the focus of modern reforms to provocation, which have emerged as an area of particular concern in the past fifteen years, has been on excluding categories of behaviour (and undeserving men who seek to rely on them), or removing provocation altogether as a means for minimising men's violence. Through this approach to reform, the abolition of provocation limits the role of the jury in homicide cases, a shift that recent research by Fitz-Gibbon and Pickering (2012: 173) found is lamented by some legal actors.

In this section, we focus on selected key reforms to consider how different Australian jurisdictions have sought to include women within the discursive realm of the law, but also how different approaches to homicide law reform have attempted to create a more accurate categorisation of the circumstances within which both men and women commit lethal violence.

1. Self Defence

Since the early 1990s, advocacy and feminist academic analysis has focused on self defence, rather than provocation, as the preferred avenue for pursuing justice for

battered women on trial (Stubbs and Tolmie, 1999). This is for several reasons. Importantly, unlike partial defences, which reduce murder to manslaughter, a finding of self defence results in an acquittal. There is widespread agreement that self defence should be able to be applied to cases in which women kill an abusive intimate partner,[18] although traditionally cases in which victims of abuse kill in non-confrontational circumstances have faced obstacles in the application of self defence. This shift has been influenced by international and national developments at common law, including cases in which Battered Woman Syndrome had been accepted by courts, and in statutory reforms (Stubbs and Tolmie, 1999).

Historically, self defence required that the attack or threat that a person was defending themselves against was imminent. This constituted a significant obstacle to battered women who killed in non-confrontational situations, since they were unlikely to be able to defend themselves in a direct confrontation with their abuser. In 1987 the common law construction of self defence was simplified in *Zecevic* ((1987) 162 CLR 645), with imminence no longer being an expressed requirement, but in the Code States (NT, Queensland and WA) the defence remained complex and more restrictive (Guz and McMahon, 2011: 89).

All Australian states and territories now have statutory provisions. Although these differ in several respects,[19] all but Queensland have removed the requirement for imminence or a precipitating assault[20] thus addressing some of the formal obstacles to the use of self defence by battered women who killed in non-confrontational circumstances

[18] This does not mean that all cases in which a victim of domestic violence kills their abusive intimate partner necessarily constitute self defence.
[19] For a detailed analysis see Sheehy et al (2012, forthcoming), and Guz and McMahon (2011).
[20] Although see Guz and McMahon (2011: 91) who indicate that in a small number of cases in Queensland 'a more relaxed approach to imminence' had been evident.

(Bradfield, 1998; Edgely and Marchetti, 2011: 171-2; VLRC, 2002). However, imminence is likely to arise in assessing whether the accused person's belief that it was necessary to do what they did was reasonable (Guz and McMahon, 2011: 97). Thus, it remains important that 'self-defence is defined and understood in a way that takes adequate account of women's experiences of violence through reforms to evidence and clarification of the scope of the defence' (VLRC 2004: 68).

In Victoria, reforms to the law of self defence were introduced in November 2005 as part of a comprehensive package, which largely followed the recommendations of the VLRC (2004). The reforms included a statutory defence of self defence for murder and manslaughter, the abolition of provocation, the introduction of defensive homicide and legislative guidance on the admissibility of evidence of domestic abuse (ALRC and NSWLRC, 2010: at 14.20). The Victorian provisions expressly state that imminence is not a requirement for self defence, but this only applies to cases involving family violence. By contrast, a similar provision introduced through the WA reforms in 2008 is not limited to the context of domestic abuse, but applies generally (Guz and McMahon, 2011).

However, it should be noted that reforms to the law of self defence in Australian states were not always done with attention to the needs of battered women. For instance, in NSW it had been recognised for some time that self defence was being interpreted in a way that did not easily accommodate women's claims of self defence (NSWLRC, 1997; Sheehy et al 2012a, this issue). Yet, in 2001 when amendments were introduced which codified self defence, largely based on the Model Criminal Code, and a partial defence

of excessive self defence was re-introduced,[21] there was no reference at all to domestic violence.

2. Excessive Self Defence

Perspectives on the partial defence of excessive self defence differ substantially across Australia. In 1987 excessive self defence was abolished at common law by the High Court of Australia in *Zecevic* ((1987) 162 CLR 645). The MCCOC (1998: 113) also later recommended against its reintroduction on the grounds that it was 'vague'. However, contrary to these recommendations it has since been reintroduced in NSW, SA and WA. The VLRC (2004: 105) also recommended the re-introduction of excessive self defence, in part because they saw it as 'a better fit' than provocation for battered women who killed but who could not meet the requirements for a complete defence of self defence.[22] This recommendation was praised by Tolmie (2005: 41), who commented that the availability of excessive self defence 'might encourage battered defendants to go to trial, rather than to plea-bargain, because self-defence will no longer be an all-or-nothing proposition'. However, in response to the recommendations of the VLRC (2004), the Victorian government took a different approach to providing a so-called 'safety net' for battered women who killed.

In 2005, the Victorian government introduced a new *offence* of defensive homicide[23] which is an alternative verdict to murder. The offence applies to situations where a person acting in self defence believed that their action was necessary, but did not have a reasonable basis for that belief. It was seen to offer more options than the current 'all or

[21] The circumstances in which self defence would apply to the defence of property were also reformed and made more limited.
[22] Where successfully used, the Commission proposed that the partial defence would operate to reduce murder to manslaughter, and would be available to persons who killed in self-defence, while still recognising that their use of lethal violence was disproportionate to the threat posed (Neave, 2004).
[23] *Crimes Act 1958* (s. 9AD).

nothing' provisions for self-defence cases (Office of the Attorney General, 2005), and to have the advantage of making clear the basis of a jury's finding, thus aiding sentencing. The former Victorian Attorney-General Robert Hulls, explained defensive homicide in this way:

> where a killing occurs in the context of family violence, the legislation will affirm that she can argue self-defence even if the threat from which she was defending herself is not immediate, and even where her response involved greater force than the harm with which she was threatened. (Shiel, 2005: 3)

However, some critics of the new offence have raised concerns that the offence may undermine self defence claims by battered women and normalise the perception that a manslaughter verdict rather than a full acquittal is the appropriate outcome in such cases (Fitz-Gibbon, 2012b; Fitz-Gibbon and Pickering, 2012; Sheehy, 1995).

It is too soon to know, given the relative rarity of such cases, if defensive homicide has effectively opened up an avenue for women who otherwise would have faced a murder conviction. However, the outcomes of defensive homicide cases to date give cause for concern that men who have killed female intimate partners can successfully access the offence in unintended ways (Capper and Crooks, 2010; Department of Justice, 2010; Fitz-Gibbon, 2012b; Fitz-Gibbon and Pickering, 2012; Tyson et al, 2010; Tyson, 2011). In particular, the 2010 conviction and sentencing of Luke Middendorp[24] for the defensive homicide of his partner, Jade Bownds, has lead critics of the new offence to question whether rather than providing a half way house for battered women, this new offence will provide an avenue of excuse for jealous men, similar to that of the now abolished provocation defence (Fitz-Gibbon 2012b; Tyson et al, 2010).

[24] *R v Middendorp* [2010] VSC 202

This may demonstrate a failing to anticipate how 'law shapes the stories that are told by defendants' (Leader-Elliott, 1993: 440) and that defence lawyers would adapt their strategies and find avenues to reintroduce the kinds of problematic – typically victim blaming - narratives that the abolition of provocation was intended to exclude. However, it also presents a reminder of law's capacity to receive such narratives, since they resonate, still, with long held legal practices and cultural understandings within and beyond the legal system. It is these practices and cultural understandings that continue to offer significant obstacles to change.

3. The Partial Defence of Provocation

As noted above, provocation has also attracted renewed attention in the past two decades, arising largely from concerns that men have successfully relied upon provocation in inappropriate circumstances, such as to minimise or excuse their violence against an intimate partner, or in same sex killings where the victim was alleged to have made a homosexual advance which was argued constituted provocation.[25] In response to the latter concern, both the ACT in 2004[26] and the Northern Territory (NT) in 2006[27] enacted provisions to exclude non-violent sexual advances from forming the basis of a partial defence of provocation (Riley, 2008; Roth, 2007). This approach was considered in NSW but received a mixed reception; it was rejected by the NSWLRC in 1997, but endorsed by a NSW working party on homosexual killings in 1998. This change has not been adopted in NSW (Roth, 2007: 7.2).

[25] The aforementioned cases of *Ramage* and *Green* are examples of this.
[26] *Crimes Act* 1990 s 13(3)
[27] *Criminal Code* s 158(5)

Provocation has been abolished as a partial defence to murder in Tasmania, Victoria, WA and New Zealand (NZ). The apparent motivations for the abolition of provocation have been similar in these jurisdictions. Provocation was abolished in NZ in August 2009, following a finding by the Law Commission (2007: 11) that the partial defence was 'bias[ed] in favour of the interests of heterosexual men' and had been used problematically in the defence of men who have killed women and homosexual men. Gender bias was also one of the reasons given for the MCCOC recommendation to abolish provocation (1998: 99ff).

It is not clear what lead to Tasmania, in 2003, becoming the first Australian jurisdiction to abolish provocation,[28] although the Director of Public Prosecutions is said to have supported the change (Jackson, 2003). The Tasmanian Minister for Justice, Judy Jackson (2003: 60) gave three reasons justifying the bill to abolish provocation. She stated that '[t]he main argument ... stems from the fact that people who rely on provocation intend to kill. An intention to kill is murder' (Jackson, 2003: 59*)*. The second argument was that provocation could be adequately dealt with in sentencing, and the third was that it was gender biased and did not fit the circumstances of battered women:

> The defence of provocation is gender biased and unjust…The defence was not designed for women and it is argued that it is not an appropriate defence for those who fall into the "battered women syndrome". While Australian courts and law have not been sensitive to this issue, it is better to abolish the defence than to try to make a fictitious attempt to distort its operation to accommodate the gender behavioural differences. (Jackson, 2003: 59-60)

[28] *Criminal Code Amendment: Abolition of Defence of Provocation) Act 2003*.

However, the abolition of provocation in Tasmania and NZ occurred in contexts where no other partial defences to homicide exist, and without the implementation of other reforms intended to make self defence more readily available to battered women. As such, fears have been raised that in the absence of other reforms, the abolition of provocation in those jurisdictions may make things more difficult for battered women (Bradfield, 2003; see also Sheehy et al, 2012b).

4. Abusive Domestic Relationship Defence

To date, Queensland is the only jurisdiction to have introduced a specific defence that applies only in the context of abusive relationships (Douglas, 2012, this issue). The Mackenzie and Colvin (2009) report in Queensland canvassed the option of introducing excessive self defence but opted instead for the new 'Abusive Domestic Relationship Defence' which reduces murder to manslaughter. This partial defence differs from excessive self defence in two key ways: it is limited to abusive relationships and it has an objective requirement, that is, 'there would have to be reasonable grounds for the belief that defence of the victim requires the death of the abuser' (Mackenzie and Colvin, 2009: at 3.50). This latter requirement was said to have been implemented 'to safeguard against the misuse of the defence by unmeritorious defendants' (Mackenzie and Colvin, 2009: at 3.49) but has attracted strong criticism.

Despite the apparent intent to provide a safety net for victims of abuse, Edgely and Marchetti (2011: 125) conclude that the new defence 'puts victims of abuse who kill in a more difficult tactical position than if it had not been enacted' and 'creates a serious risk that women will be unjustly convicted of manslaughter' (130). They also lament that it puts responding to an abusive domestic relationship on the same footing as provocation and diminished responsibility (Edgely and Marchetti, 2011), partial defences that have attracted substantial criticism in both their general application and

the way in which they have been applied to domestic abuse cases (Burton, 2001; Horder, 1992; Tarrant, 1990; Tolmie, 1990; Yeo, 1993). Such concerns emphasise the need for close monitoring and review of the operation of this new provision.

Evidential provisions

Evidential provisions play a substantial role in shaping the accounts that are given of homicides but are not always given due emphasis in law reform initiatives. For instance, while the legal requirements for self defence are now reasonably open and should be able to accommodate the circumstances of a battered woman who kills to preserve herself or others, the outcome of a case may well rely on relevant evidence being introduced to assist in determining whether a defendant's use of violence was reasonable and necessary. Expert evidence on domestic violence has been admitted in such cases across Australia, but where it is narrowly focused, as in some interpretations of Battered Woman Syndrome, it may risk undermining self defence claims by suggesting that the defendant's behaviour was not reasonable. There is common agreement that broader evidence on battering and its effects, is desirable and useful to juries in these cases (Stubbs & Tolmie, 1999).

The VLRC (2004) found that additional measures were needed to ensure that the range of evidence relevant to understanding the nature and impact of abuse, and its admissibility was clarified. The Commission (2004: xxxiv-xxxv) recommended, inter alia, the introduction of a provision to:

> clarify that expert evidence is admissible about the general nature and dynamics of abuse and social factors that impact on people in violent relationships. This evidence could be given by people with expertise on family violence and would

> assist jurors to better understand what it is like to live in a situation of ongoing abuse, and what may be reasonable for a person living in this situation.

Alongside Victoria, Queensland has also introduced legislative provisions to provide guidance on the admission and relevance of evidence of family violence, including expert evidence (ALRC and NSWLRC, 2010: at 14.31), but other Australian jurisdictions are yet to do so.

The Significance of Sentencing

The current structures for the sentencing of homicide offences are significant considerations in debates surrounding homicide law reform. A failure to examine sentencing issues, or the expressed exclusion of sentencing in some law reform inquiries, forecloses a fuller consideration of law reform options. It also seems to presuppose a level of public unwillingness to recognise and respond to differing levels of culpability in homicide.

Judicial discretion in sentencing for murder is not universally available in Australia; Queensland, NT and South Australia retain a mandatory life sentence for murder, whilst WA has a presumption in favour of a life sentence. Even in jurisdictions that do not have mandatory or presumptive life imprisonment for murder, sentencing provisions carry great significance in cases of lethal violence. The starting point for sentencing in a case of murder is typically markedly different from that of manslaughter.[29] As such, the probable sentence arising from a conviction is likely to profoundly shape decisions at multiple stages of the criminal process – from charge, to plea and the exercise of prosecutorial discretion, to strategies employed by prosecution and defence counsel. A

[29] For example within NSW, the standard non-parole period applied to murder is 20 years, however, in contrast the offence of manslaughter does not attract a standard non parole period allowing judges to apply a discretionary sentence without the constraints of a presumptive minimum.

failure by governments or law reform commissions to recognise how offences, defences and sentencing 'interlock' (LRCWA, 2007: iv) leaves the outcomes of any law reform exercise particularly open to unintended consequences.

It has been explicitly stated in several jurisdictions that the move away from mandatory life sentences for murder removes one of the last rationales for the provocation defence. As such, research has often linked the abolition of provocation with the removal of the mandatory life sentence for murder and the implementation of a discretionary model of sentencing (Douglas, 2010; Forell, 2006; Hemming, 2010; Yule, 2007). As Leader-Elliot (2007: 183) commented,

> it is unlikely that the current trend to recommend abolition of the qualified defence of provocation would have had the same momentum and the same success, if the penalty for murder was mandatory.

This is illustrated in the recent reforms implemented in WA, where alongside the abolition of provocation, the government abolished the mandatory life sentence for murder and replaced it with a presumptive life sentence, an approach that has since been praised as 'the correct path' to reform by advocates of the abolition of provocation (Hemming, 2010: 1).

Beyond the mandatory life sentence for murder, concerns have also emerged about how the issues that were commonly raised at trial in matters relying on provocation might be dealt with in sentencing. Once again these concerns differ depending on whether the focus is on the intent to recognise the valid claims of the victim of battering or on forestalling claims that are undeserved. In some jurisdictions such as Tasmania, there seems to have been too ready an assumption that sentencing would adequately protect

the interests of battered women who kill subsequent to the abolition of provocation, (Roth, 2007: at 8.3), This is notwithstanding the likelihood that a conviction for murder in the absence of a partial defence that might reduce murder to manslaughter is likely to result in a prison sentence that is much longer than that for manslaughter.[30] In recognition of this problem, the VLRC (2004) recommended that in sentencing an offender who had been the victim of violence by the deceased, the full range of sentencing options should be considered.

The VLRC (2004) also recognised the possibility that undesirable features traditionally associated with provocation (such as victim blaming or homophobia) could re-emerge at the sentencing stage in a manner that was less open to challenge and scrutiny than at the trial. At the time that provocation was abolished Stewart and Freiberg (2008: 284) noted that:

> 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 laws not be transferred from the substantive criminal law into the law of sentencing…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.

[30] The LRCWA (2007: 221) previously predicted that moving the consideration of provocation to sentencing would likely have disparate effects on the lengths of murder sentences imposed. They commented that – '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…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' (LRCWA, 2007: 221).

For this reason, they emphasised that in relocating provocation to sentencing 'many of the old assumptions will need to be discarded and a new normative framework must be developed' (Stewart and Freiberg, 2008: 284). If this does not occur, Bradfield (2003: 324) has previously warned that 'the sentencing process will merely reiterate the legitimacy of men's violence in response to sexual jealousy and possessiveness'.

As such, since the abolition of provocation in Victoria, Felicity Stewart and Arie Freiberg have been involved in the development of a culpability based framework for sentencing provocation cases post-abolition (Freiberg and Stewart, 2008, 2009, 2011). Stewart and Freiberg (2009: at 1.1.10) suggest that provocation should only be considered at sentencing where 'serious provocation should be found to have given the offender a justifiable sense of having been wronged' and where the degree of provocation is proportionate to the severity of the offender's response. Importantly, they clarify that this evaluation should be made by a sentencing judge with consideration of society's common understandings and expectations of human behaviour and personal autonomy.

As yet the effect of relocating provocation to sentencing in Tasmania, Victoria and WA is largely unknown or at best inconclusive from initial evaluations of relevant law reform packages. Initial research has suggested that provocation is yet to emerge in Victorian case law as a significant factor in sentencing for murder (Stewart and Freiberg, 2009) and that there has been a displacement of cases from manslaughter by reason to provocation – not to murder – but to other categories of manslaughter (Fitz-Gibbon and Pickering, 2012).

Law Reform: Contradictions, Contingency and Limitations

Of course outcomes cannot simply be read from the intent or the objects of the reforms (Davies, 2003). It is naïve to believe that law reform per se is likely to be sufficient to bring about desired change, or that there are effective *legal* solutions to the problems at hand. It is also unwise to ignore the possibility that law reform may bring about unintended consequences. Recent evaluations of the effects of the 2005 Victorian homicide law reforms provide an illustration of this (Fitz-Gibbon and Pickering, 2012). As such, a question that inevitably emerges concerns the transformative potential of the law, particularly where issues of gender are concerned. Past research has recognised the limitations of law reform in this regard, highlighting that success is not assured, and that reforms seeking an avenue through which women's experiences of violence can be better heard and represented within the discursive framework of the law may fail, fall short of their objectives or produce unanticipated outcomes (Armstrong, 2004; Graycar and Morgan, 2005; Hunter, 2006; Nourse, 2000; Wells, 2004).

The ALRC and NSWLRC (2010: at 14.99) also recognised that 'a focus on the doctrinal content of defences is insufficient to ensure that the experiences of family violence victims who kill are accommodated in practice'. They recommended a raft of other measures, intended to bring about cultural chance within the legal system, such as professional legal and judicial education, and a family violence benchbook. The importance of recognising that law reform in itself does not necessarily achieve complete change is noted by Graycar and Morgan (2005: 395), who argue that 'changes to law can only ever constitute a small part of any profound social change'. Similarly, and in discussing the relocation of provocation to sentencing, Freiberg and Stewart (2011: 120) note that:

> As has been the experience with the long history of the reform of the law relating to sexual assault offences, changing professional and lay behaviour and

> attitudes is not easy. Stereotypes die hard. Reform is not just about changing the words on a page.

The contradictions of feminist engagement with law reform have long been recognised (Smart, 1989). Concerns about feminist engagement with the state, for instance that feminist activism around violence against women has empowered the state but not women (Bumiller, 2008; Martin, 1998; Snider, 2003) offer significant challenges and reason for reflection on the too ready resort to criminal justice intervention as a feminist strategy. However, in matters of domestic homicide, questions about whether or not to engage with the justice system do not arise in the same way – traditionally the battered woman who kills an abusive partner has been most likely to be subjected to the full force of the criminal justice system. Thus it is 'not possible to simply reject or accept' the process of law reform; there is the need to work internally and externally to law 'retaining a skepticism and critique of law' (Davies, 2003: 170).

Given the recognised need for continual monitoring and evaluation of the law post-reform this special issue of the *Australian and New Zealand Journal of Criminology* provides a detailed examination of some of the current issues that arise in the law's response to lethal violence, together with some empirical findings, that reinforce the need for ongoing critical analysis of homicide within and beyond the law.

References

Armstrong SM (2004) Is Feminist Law Reform Flawed? Abstentionists and Sceptics. *Australian Feminist Law Journal* 20: 43–63.

Australian Law Reform Commission and New South Wales Law Reform Commission (2010) *Family Violence – A National Legal Response*. ALRC Report 114, Australia: Australian Law Reform Commission.

Boe A (2010) Domestic Violence in the Courts: re-victimising or protecting the victims?. In: *National Access to Justice and Pro Bono Conference*, Brisbane, 27-28 August 2010, pp.1-5.

Bradfield R (1998) Is near enough good enough? Why isn't self defence appropriate for battered women? *Psychiatry, Psychology and Law* 5(1): 71-85.

Bradfield R (2003) Contemporary Comment: The Demise of Provocation in Tasmania. *Criminal Law Journal* 27: 322–4.

Brown D et al (2011) *Criminal Laws: Materials and Commentary on Criminal Law and Process of New South Wales.* (5th ed.) Leichhardt: Federation Press.

Bumiller K (2008) *In an Abusive State: How Neoliberalism Appropriated Feminist Movement against Sexual Violence*. Durham, NC: Duke University Press.

Burton M (2001) Intimate Homicide and the Provocation Defence: Endangering Women? R v Smith. *Feminist Legal Studies* 9: 247–58.

Capper S and Crooks M (2010) New Homicide Laws Have Proved Indefensible. *The Sunday Age,* 23 May, 21.

Coss G (2005) Provocation's Victorian Nadir: The Obscenity of Ramage. *Criminal Law Journal* 29: 133–8.

Davies M (2003) Legal Theory and Law Reform. *Alternative Law Journal* 28(4): 168-173.

Department of Justice (2010) *Defensive Homicide: Review of the Offence of Defensive Homicide: Discussion Paper*. Victoria: Department of Justice.

Des Rosiers, N (2005) Leadership and Ideas: Law Reform in a Federation. In: Opeskin B and Weisbrot D (eds), *The Promise of Law Reform* Leichhardt: Federation Press.

Douglas H (2010) The Defence of Provocation. *The Law Report* ABC Report, 2 November.

Douglas H (2012) A consideration of the merits of specialised homicide offences and defences for battered women. *Australian and New Zealand Journal of Criminology* 45(3).

Edgely M and Marchetti E (2011) Women who kill their abusers: How Queensland's new abusive domestic relationships defence continues to ignore reality. *Flinders Law Review* 13: 125 -176.

Fitz-Gibbon K (2012a) Provocation in New South Wales: An Argument for Abolition. *Australian and New Zealand Journal of Criminology* 45(2).

Fitz-Gibbon K (2012b) Defensive Homicide Law akin to Getting Away with Murder, *The Weekend Australian*, 3 March.

Fitz-Gibbon K and Pickering S (2012) Homicide law reform in Victoria, Australia: From provocation to defensive homicide *British Journal of Criminology* 52(1): 159-180.

Flynn A and Fitz-Gibbon K (2011) Bargaining with Defensive Homicide: Examining Victoria's Secret Plea Bargaining System Post Law Reform. *Melbourne University Law Review* 35(3).

Forell C (2006) Gender Equality, Social Values and Provocation Law in the United States, Canada and Australia. *Journal of Gender, Social Policy and the Law* 14(1): 27–71.

Freiberg A and Stewart F (2011) Beyond the Partial Excuse: Australasian Approaches to Provocation as a Sentencing Factor. In: Roberts J (ed) *Aggravation and Mitigation at Sentencing: A Socio-legal Analysis*. Cambridge: Cambridge University Press.

Genovese A (1998) *The Battered Body: A Feminist Legal History*. PhD Thesis, University of Technology, Sydney, Australia.

Golder B (2004) The Homosexual Advance Defence and the Law/Body Nexus: Towards a Poetics of Law Reform. *Murdoch University Electronic Journal of Law* 11(1): 1-67.

Graycar R and Morgan J (2005) Law Reform: What's in It for Women?. *Windsor Yearbook of Access to Justice* 23(2): 393–419.

Guz A and McMahon M (2011) Is imminence still necessary? Current approaches to imminence in the laws governing self defence in Australia. *Flinders Law Review* 13: 79-124.

Hemming A (2010) Provocation: A Totally Flawed Defence That Has No Place in Australian Criminal Law Irrespective of Sentencing Regime. *University of Western Sydney Law Review* 14: 1–44.

Hopkins A and Easteal P (2010) Walking in Her Shoes: Battered Women Who Kill in Victoria, Western Australia and Queensland. *Alternative Law Journal* 35(3): 132-137.

Horder J (1992) *Provocation and Responsibility*. Oxford: Clarendon Press.

Howe A (1997) More Folk Provoke their own Demise (Homophobic Violence and Sex Excuses – Rejoining the Provocation Law Debate, Courtesy of the Homosexual Advance Defence. *Sydney Law Review* 19(3): 336-365.

Howe A (1998) Case Notes: Green v The Queen – The Provocation Defence: Finally Provoking its own Demise. *Melbourne University Law Review* 22: 466-490.

Howe A (1999) Reforming Provocation (More or Less). *The Australian Feminist Law Journal* 12: 127–35

Howe A (2004) Provocation in Crisis: Law's Passion at the Crossroads? New Directions for Feminist Strategists. *Australian Feminist Law Journal* 21: 53–75.

Hunter R (2006) Narratives of Domestic Violence. *Sydney Law Review* 28: 733–76.

Jackson J (2003) *Tasmania Parliamentary Debate*. House of Assembly, 20 March: 59–60.

Kaspiew, R. (1995), 'Rape Lore: Legal Narrative and Sexual Violence', *Melbourne University Law Review,* 20: 350–82.

Kissane K (2004) Honour Killing in the Suburbs. *The Age,* 6 November, 4.

Kissane K (2009) Julie and Jamie Ramage Had the Perfect Life: Plenty of Money, a Big House in Balwyn, a Couple of Kids. He Drove a Jaguar, She Rode Horses. Then Julie Left James … and Jamie Killed Julie. *The Age*, 24 April, 39.

Law Commission (2007) *The Partial Defence of Provocation*. Report 98, New Zealand: Law Commission.

Law Reform Commission of Western Australia (2007) *Review of the Law of Homicide, Final Report*. Project 97, Perth, Australia: Law Reform Commission of Western Australia.

Leader-Elliot I (2007) The Australian Law of Murder. In Horder J (ed.) *Homicide Law in Comparative Perspective*. Oxford: Hart Publishing.

Mackenzie G and Colvin E (2009) *Homicide in Abusive Relationships: A Report on Defences*. Prepared for the Attorney-General and Minister for Industrial Relations, Queensland.

McSherry B (2005) It's a Man's World: Claims of Provocation and Automatism in "Intimate" Homicides. *Melbourne University Law Review* 29: 905–28.

Maher J, Segrave M, Pickering S and McCulloch J (2005) Honouring White Masculinity: Culture, Terror, Provocation and the Law. *Australian Feminist Law Journal* 23: 147–70.

Martin DL (1998) Retribution Revisited: A Reconsideration of Feminist Criminal Law Reform Strategies. *Osgood Hall Law Journal* 36(1): 151–88.

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

Morgan J (2012) Homicide Law Reform and Gender: Configuring Violence, *Australian and New Zealand Journal of Criminology*, 45(3).

Naffine N (2009) *Moral uncertainties of rape and murder: Problems of the core of criminal law theory*. In: McSherry B, Norrie A and Bronitt S (eds) *Regulating*

Deviance: The Redirection of Criminalisation and the Futures of Criminal Law. Oxford: Hart Publishing.

Neave, M. (2004), *Defences to Homicide Final Report Launch*, Victorian Law Reform Commission, Australia, 18 November 2004, accessed 28 September 2009 at http://www.lawreform.vic.gov.au/wps/wcm/connect/Law+Reform/Home/Newsroom/Speeches/LAWREFORM+-+Defences+to+Homicide+Final+Report+Launch+speech

New South Wales Law Reform Commission (1997) *Partial Defences to Murder: Provocation and Infanticide*. Report 83, Sydney: New South Wales Law Reform Commission.

New South Wales Task Force on Domestic Violence (1981) Report *of the New South Wales Task Force on Domestic Violence to the Honourable N K Wran QC, MP, Premier of New South Wales*. Sydney: Government Printer.

Norrie A (2005) *Law and the beautiful soul.* London: Glasshouse Press.

Nourse V (2000) Symposium on Unfinished Feminist Business: The "Normal" Successes and Failures of Feminism and the Criminal Law. *Chicago-Kent Law Review* 75: 951–78.

Office of the Attorney-General (2005) Hulls Announces Major Reform to Homicide Laws. Media Release, 4 October 2005.

Queensland Law Reform Commission (2008) *A Review of the Excuse of Accident and the Defence of Provocation: Report no. 64*. Brisbane: Queensland Law Reform Commission.

Quick, O and Wells C (2012) Partial reform of partial defences: developments in England and Wales *Australian and New Zealand Journal of Criminology*, 45(3).

Ramsey CB (2010) Criminal Law: Provoking Change – Comparative Insights on Feminist Homicide Law Reform. *Journal of Criminal Law and Criminology* 100(1): 33–109.

Riley M (2008) Provocation: Getting Away with Murder? *Queensland Law Student Review* 1(1): 55–74.

Roth L (2007) *Provocation and Self-defence in Intimate Partner and Homophobic Homicides*. Briefing Paper No 3/07, Sydney: New South Wales Parliamentary Library.

Sheehy, E (1995) *What Would a Women's Law of Self-Defence Look Like?* Ottawa: Status of Women Canada.

Sheehy E, Stubbs J and Tolmie J (2012a) Battered women charged with homicide in Australia, Canada and New Zealand: How do they fare? *Australian and New Zealand Journal of Criminology*, 45(3).

Sheehy E, Stubbs J and Tolmie J (2012b, forthcoming) Defences to Homicide for Battered Women: A Comparative Analysis of Laws in Australia, Canada and New Zealand. *Sydney Law Review*: 00.

Shiel F (2005) End Draws Near for Defence of Provocation. *The Age*, 5 October, p.3.

Smart C (1989) *Feminism and the Power of Law*. London: Routledge.

Snider L (2003) Constituting the Punishable Woman. Atavistic Man Incarcerates Postmodern Woman *The British Journal of Criminology*, 43(2): 354-378.

Stewart F and Freiberg A (2008) Provocation in Sentencing: A Culpability-Based Framework. *Current Issues in Criminal Justice* 19(3): 283–308.

Stewart, F. & Freiberg, A. (2009), *Provocation in Sentencing*, 2nd edn, Sentencing Advisory Council, Melbourne.

Stubbs J and Tolmie J (1999) Falling short of the challenge? A comparative assessment of the Australian use of expert evidence on the battered woman syndrome. *Melbourne University Law Review* 23: 709-748.

Tarrant S (1990) Provocation and Self-Defence: A Feminist Perspective. *Legal Service Bulletin* 15(4): 147–50.

Tolmie J (1990) Provocation or Self-Defence for Battered Women who Kill?. In Yeo SMH (ed.) *Partial Excuses to Murder*. Sydney: The Federation Press.

Tolmie J (2005) Is the Partial Defence an Endangered Defence? Recent Proposals to Abolish Provocation. *New Zealand Law Review* 25: 25–52.

Tomsen S (2002) Hatred, Murder and Male Honour: Anti-homosexual Homicides in NSW, 1980-2000, Research and Public Policy Series, No.43, Canberra, Australian Institute of Criminology.

Tomsen S and Crofts, T (2012) Social and cultural meanings of legal responses to homicide among men: masculine honour, sexual advances and accidents *Australian and New Zealand Journal of Criminology*, 45(3).

Tyson D, Capper S and Kirkwood D (2010) Review of the offence of defensive homicide, *Domestic Violence Resource Centre*, Victoria, 13 September 2010, Available at http://www.dvrcv.org.au/defensive-homicide-submission/

Tyson D (2011) Victoria's New Homicide Law: Provocative Reforms or More Women "Asking for It"? *Current Issues in Criminal Justice* 23(2): 203–33.

Victorian Law Reform Commission (2002) *Defences to Homicide: Occasional Paper*. Melbourne, Australia: Victorian Law Reform Commission.

Victorian Law Reform Commission (2004) *Final Report on Defences to Homicide*. Melbourne, Australia: Victorian Law Reform Commission.

Walker F (1982) (NSW Attorney General) Second Reading Speech, Crimes (Homicide) Amendment Bill, Hansard, Legislative Assembly NSW Parliament 11 March 1982.

Wells C (2004) The Impact of Feminist Thinking on Criminal Law and Justice: Contradiction, Complexity, Conviction and Connection. *Criminal Law Review* July: 503–15.

Yeo S (1993) Resolving Gender Bias in Criminal Defences. *Monash University Law Review* 19(1): 104–16.

Yule J (2007) Current Issues with Regards to the Defences of Provocation and Self-Defence in the Criminal Law Context. In *Proceedings Australasian Law Teachers Association.* Perth, Australia.