Domestic Homicide and the Defence of Provocation: A Tasmanian Perspective on the Jealous Husband and the Battered Wife

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The law has long recognised that a cold-blooded killing should be distinguished from a killing that is provoked. The defence of provocation has been said to operate as the law's concession to 'human frailty'.[1] However, as the doctrine of provocation has its origins in regulating the behaviour of men, the law's concession has not been universal. It operates predominantly as a concession to male anger.[2] The doctrine of provocation was shaped by the views of a society dominated by male attitudes and conduct. In consequence, the requirements of the defence have traditionally reflected male standards of behaviour and male responses. The narrative of provocation recounts the familiar story of jealousy, betrayal and infidelity – the story of the jealous husband. It does not enable the accurate retelling of a different story, a story of fear, violence and oppression – the story of the battered wife.[3] Traditionally, the provocation defence has been of

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1 For detail concerning the history of the defence of provocation see: T Green, *Verdict According to Conscience* (1985); T Green, 'The Jury and the English law of Homicide, 1200 - 1600' (1976) 74 *Michigan Law Review* 413; J Horder, *Provocation and Responsibility* (1992); J Dressler, 'Rethinking Heat of Passion: A Defence in Search of a Rationale' (1982) 73 *Journal of Criminal Law and Criminology* 421; G Coss, '"God is a Righteous Judge, Strong and Patient: and God is Provoked Every Day". A Brief History of the Doctrine of Provocation in England' (1991) 13 *Sydney Law Review* 570; B Brown, 'The Demise of the Chance Medley and the Recognition of Provocation as a Defence to Murder in English Law' (1963) 7 *American Journal of Legal History* 310; R Singer, 'The Resurgence of Mens Rea: I - Provocation, Emotional Disturbance, and the Model Penal Code' (1986) 27 *Boston College Law Review* 243; J Kaye, 'The Early History of Murder and Manslaughter' (1967) 83 *Law Quarterly Review* 365, 594 and A Ashworth, 'The Doctrine of Provocation' [1976] *Cambridge Law Journal* 292.

2 In *Chhay* (1994) 72 A Crim R 1, 11 (Gleeson CJ) it was stated that 'the law's concession to human frailty was very much, in its practical application, a concession to male frailty'.

3 See A Reilly, 'Loss of Self-Control in Provocation' (1997) 21 *Criminal Law Journal* 321. Reilly observes at 331 that '[l]egal defences provide a platform for accused persons to tell the story of event surrounding their offensive conduct'. In a similar

limited assistance to women who kill their abusive partners. The experiences of battered women have not fitted easily within the masculinist model of the defence of provocation.

In recent years, there has been a willingness to expand the concept of provocation to give some recognition to the reality of the lives of battered women.[4] There is recognition that the situation which precipitates the killing by women of their abusive partners as potentially raising the defence of provocation.[5] The principal reforms have been the recognition of cumulative provocation, the modification of the requirement of suddenness and the recognition that fear is an emotion capable of causing a loss of self-control. This article will address the law of provocation as it operates in Tasmania and evaluate the

vein, Carol Smart remarks that 'legal process translates everyday experience into legal relevances ... It excludes a great deal that might be relevant to the parties, and it makes its judgments on the scripted or tailored account', C Smart, 'Law's Truth/Women's experience', in R Graycar (ed), *Dissenting Opinions: Feminist Explorations in Law and Society* (1990) 6. The legal process and the requirements of the criminal defences allow a 'story' to be told. It is the ability to mould your story into the legally accepted account that permits reliance on exculpatory defences.

4 In particular, the legislative developments in New South Wales *Crimes Act* (NSW) s 23 and Australian Capital Territory *Crimes Act* (ACT) s 13. There have also been developments at common law: Victoria and South Australia. See J Tolmie, 'Provocation or Self-Defence for Battered Women who Kill', in S. Yeo (ed) *Partial Excuses to Murder*, (1991) and S Tarrant, 'Something is Pushing them to the Side of their Own Lives: A Feminist Critique of Law and Laws' (1990) 20 *University of Western Australia Law Review* 573.

5 It is noted that the Court have been slower to accept it as raising the defence of self-defence, see R Bradfield, 'Is near Enough Good Enough? Why isn't Self-Defence Appropriate for the Battered Woman?' (1998) 5 *Psychiatry, Psychology and Law* 71 and J Tolmie, 'Provocation or Self-Defence' ibid. There is extensive Australian (as well as international) literature concerning the availability of self-defence to the battered women. The Australian critique includes: P Easteal, 'Battered Women who Kill: A Plea of Self-Defence', in Easteal and McKillop (eds), *Women and the Law* (1993); G Hubble, 'Feminism and the Battered Woman: The Limits of Self-Defence in the Context of Domestic Violence' (1997) 9 *Current Issues in Criminal Justice* 113; G Hubble, 'Self-Defence and Domestic Violence: a Reply to Bradfield' (1999) 6 *Psychiatry, Psychology and Law* 51; I Leader-Elliott, 'Battered But Not Beaten: Women Who Kill in Self Defence' (1993) 15 *Sydney Law Review* 403; S Tarrant, 'Provocation and Self-Defence: A Feminist Perspective' (1990) 15 *Legal Service Bulletin* 147; S Tarrant, 'Something is Pushing them to the Side of their Own Lives' ibid; J Tolmie, 'Provocation or Self-Defence' ibid; J Stubbs and J Tolmie, 'Feminisms, Self-Defence, and Battered Women: A Response to Hubble's "Straw Feminist"' (1998) 10 *Current Issues in Criminal Justice* 73 and J Stubbs and J Tolmie, 'Falling Short of the Challenge? A Comparative Assessment of the Australian Use of Expert Evidence on the Battered Woman Syndrome' (1999) 23 *Melbourne University Law Review* 709. However, the issues raised by a consideration of the defence of self-defence are beyond the scope of this article.

extent to which the reforms developed in other jurisdictions have been (or can be) adopted in Tasmania.

In addition, this article will examine the extent to which the current law of provocation in Tasmania serves to condone male violence against women by providing a partial excuse to murder when men kill their female partners following separation, infidelity or rejection. The paradigm case of provocation is adultery: 'we have all read the French novel where the husband comes home and finds the wife in bed with the lover, and that is often cited as a classic example of provocation'.[6] The images of the 'French novel' and the 'lover' convey the idea that a killing in these circumstances is a case of romantic passion gone astray. It connotes the image of the man who killed for love, a man who is worthy of our compassion and sympathy.[7] It is apparent that while women may have experienced difficulty accessing the defence, the defence of provocation in Tasmania (as elsewhere) has endorsed the story of the jealous husband.

A Case Study or Two

In this discussion, case studies will be used to illustrate the operation of the defence of provocation in the domestic context. The case studies have been chosen as they reflect the circumstances in which men typically kill their female intimate partners and women typically kill their male intimate partners and then seek to rely on the defence of provocation.[8] In most cases where women kill their partner, the killing follows a history of physical abuse by the male partner.[9] The

6 In *Bush* (1993) 69 A Crim R 416, 427 (Drummond J) referring to the trial judge's direction to the jury.

7 See I Leader-Elliott, 'Passion and Insurrection in the Law of Sexual Provocation', in Naffine and Owens (eds), *Sexing the Subject of Law* (1997) 162.

8 Howe observes that:

> [T]he circumstances in which men and women kill and then raise provocation are not only vastly different; they are incommensurable ... [case law] demonstrates that men kill women and other men because of sexual or other slights to their 'honour' ... In sharp contrast, women defendants almost always kill men in self-defence in the context of a long history of brutal violence and then raise both provocation and self-defence, male centred defences which need to be stretched and distorted to match the woman's experience

A Howe, 'Provoking Comment: The Question of Gender Bias in the Provocation Defence - A Victorian Case Study', in Grieves and Burns (eds), *Australian Women: Contemporary Feminist Thought* (1994) 129.

9 Wallace reported that in 70% of cases where women killed their husbands, there was evidence of prior physical abuse by the husband: A Wallace, *Homicide: The Social Reality* (1986) 97. Bacon and Lansdowne observed that 'in 14 of the 16 cases where women killed their husbands or boyfriends, the woman had been physically

motivation is predominantly self-preservation.[10] Women who use violence against their partner after a history of ongoing violence, often do so at a time other than the actual attack.[11] In contrast to the defensive circumstances surrounding the cases where women kill their male partners, men often kill their female partner 'as an attempt to exert power and control over them, to prevent them from leaving or as an expression of jealousy'.[12] Men kill their female partners when they challenge the man's authority, threaten to leave, actually leave, or form a new relationship (actual or suspected).[13]

The case of *Chhay*[14] provides an illustration of the situation where a woman kills her abusive partner. Chhay killed her husband with a

assaulted in the past by the husband she was subsequently accused of killing', W Bacon and R Lansdowne, 'Women who Kill Husbands: The Battered Wife on Trial', in O'Donnell and Craney (eds), *Family Violence in Australia* (1982) 71. See also Tarrant, 'Something is Pushing them to the Side of their Own Lives', above n 5, 587–589.

10 K Polk and D Ranson, 'The Role of Gender in Intimate Homicide' (1991) 24 *Australian and New Zealand Journal of Criminology* 15, 23.

11 See Tarrant, 'Something is Pushing them to the Side of their Own Lives' above n 5, 585–590. Tarrant observes that 'a central case for women is that they respond to an attack (or a series of attacks) at a time other than the time of an attack', S Tarrant, 'The "Specific Triggering Incident" in Provocation: Is the Law Gender Biased?' (1996) 26 *Western Australian Law Review* 190, 198.

12 E McDonald, 'Provocation, Sexuality and the Actions of "Thoroughly Decent Men"' (1993) 9 *Women's Studies Journal* 126, 126–127. Polk and Ranson conclude that their study confirms the conclusions of the earlier study by Wallace that 'either separation (including its threat) or jealousy were the major precipitating factors, and thus the homicide can be viewed as an expression of the male's attempt to exert ... their power and control over their wives', K Polk and D Ranson, 'Homicide in Victoria', in Chappell, Grabosky and Strang (eds), *Australian Violence Contemporary Perspectives* (1991), 80–81 citing Wallace above n 9, 123.

13 Leader-Elliott, 'Passion and Insurrection', above n 7, 151.

14 (1994) 72 A Crim R 1. This is a decision of the New South Wales Court of Criminal Appeal. The appellant was successful in arguing that the trial judge had not directed the jury correctly in relation to provocation. I have chosen to rely on an example from another jurisdiction to illustrate the operation of the defence for two reasons. The first is the dearth of relevant case law in Tasmania. In my research, I have identified only 3 cases between 1979–1999 where a female offender has successfully relied on the defence of provocation in respect of the killing of her abusive partner, (*Gardner* (Unreported, Supreme Court of Tasmania, 25 June 1979); *Franke* (Unreported, Supreme Court of Tasmania, 22 August 1983); *Cornick* (Unreported, Court of Criminal Appeal, Tasmania, 28 July 1987, BC8700051). In view of the scarcity of female homicide offenders (including domestic homicide offenders) in Tasmania, it might be suggested that the operation of the defence of provocation in the domestic context is not an issue. This is to ignore the enormous impact that the deficiencies in the Tasmanian law will have in the event that a case occurs where a woman kills her violent partner. The second reason was to use a case where provocation had been successfully

meat cleaver. She had been forced to marry the deceased in Cambodia. He was cruel and abusive. He had previously refused to let one of their children obtain medical treatment with the consequence that it died. Following their move to Australia, the deceased continued to be violent towards Chhay. Chhay was obliged by tradition to continue to live with her husband. The deceased drank excessively. He went into business and it failed. This made him more violent and Chhay was very afraid of him. On 6 August, there was a lot of drinking and swearing, mainly about the failure of the business. The deceased swore at Chhay and hit the furniture. Chhay was very scared. The deceased eventually took a blanket and pillow and went to sleep in the lounge room. The deceased was killed in the early hours of the following morning, while he was asleep. This is the story of the 'battered wife'.

The case of *Hutton*[15] illustrates how the Tasmanian court tends to interpret the situation where a man kills his female partner following the discovery of infidelity as raising the defence of provocation. Shane Hutton killed his defacto wife and her new partner after he discovered them in a sexually compromising position. Hutton and the deceased ('B') had been living in a defacto relationship for about nine months. Apart from normal arguments, there had been no problems in the relationship. Hutton and B had agreed to marry once B's divorce was finalised. The deceased ('R') was a friend of B's and he visited Hutton and B's house on a number of occasions. Hutton got on 'really well' with R and had no suspicion that R and B might be romantically involved.

On the day of the killing, Hutton brought B breakfast in bed. He went shopping, visited B's mother, played with the children and then went shooting with R. On their return, B 'suddenly, unexpectedly and for no apparent reason came into the lounge room and told Hutton 'to pack his bags and to leave the house and not come back'.[16] Hutton packed his bags and left in a car jointly owned by himself and B. B threatened to call the police if he did not return the car. So later in the day, he returned to the house. Upon his return, Hutton found R and B lying on the floor cuddling. At that moment, B laughed at him 'in a sarcastic and scornful manner'. The appellant lost control of

relied upon in another jurisdiction, where is would not be likely to succeed in Tasmania.

15 [1986] Tas R 24.

16 [1986] Tas R 24, 25.

himself, picked up a rifle and shot them both. This is the story of the 'jealous husband'.[17]

This article will demonstrate that the battered woman has considerable difficulty relying on the defence of provocation in Tasmania, while the jealous husband's claim to the provocation defence is naturally accepted. Hutton's immediate response to the discovery of his former partner with another man conformed to the legally endorsed model of the provoked killer: the sudden and impulsive killing. In contrast, Chhay's conduct can be construed as a 'revenge' killing: the deliberate and premeditated killing. Chhay waited until her husband was asleep before she struck him. The law affords a degree of understanding to those who respond immediately but 'not if one does so after time for reflection upon that conduct and its significance'.[18]

The Law of Provocation

Provocation provides a partial defence in regard to an unpremeditated killing after the accused has lost self-control, if an ordinary person also would have lost control and acted as the accused did. It reduces murder to manslaughter. The law of provocation in Tasmania is governed by section 160 of the Criminal Code (Tas) 1924. This provision was based on the common law,[19] and its subsequent interpretation has reflected the common law. Section 160 provides (inter alia):

> (1) Culpable homicide which would otherwise be murder may be reduced to manslaughter if the person who causes death does so in the heat of passion caused by sudden provocation.

[17] It is interesting to observe the fragility of the male. In *Hutton* [1986] Tas R 24, the 'sarcastic and scornful' laughter directed at the wronged man was just so wounding. In *Stingel* (1990) 171 CLR 312, the discovery of his former girlfriend performing oral sex on another man and being told to 'Piss off you cunt' caused the accused to lose control. Even in *Askeland* (1983) 8 A Crim R 338, 342 the accused's confession records that wounded pride was his motivation for killing his wife. It was alleged that his wife said '"You just missed the fellow I had here, He's a jolly sight better lover than you". With that, I grabbed the weight and hit her and kept on hitting her'.

[18] J Jerrard, 'Conceptualising Domestic Violence in the Criminal Law' (1995) 14 *Social Alternatives* 23, 25.

[19] See *Kearnan* (Unreported, Supreme Court of Tasmania, 80/1968). In that case, Neasey J comments that 'section 160 is a very close copy of the Draft Code of 1897, s176 and the report of the Commissioners to which the Draft Code is appended, shows in relation to s176 that the only alteration of the common law the Commissioners thought they were introducing was to widen the scope of conduct which might constitute provocation as to include the spoken word', at 8.

> (2) Any wrongful act or insult as to be sufficient to deprive an ordinary person of the power of self-control, and which, in fact, deprives the offender of the power of self-control, is provocation, if the offender acts upon it on the sudden, and before there has been time for his passion to cool.
>
> (3) Whether the conditions required by subsection (2) were or were not present in the particular case is a question of fact, and the question whether any matter alleged is, or is not capable of constituting provocation is a question of law. ...

There are several essential requirements of the defence of provocation.[20] The first requirement is that the defendant must have been deprived of the power of self-control and killed while under the influence of provocation. This is a subjective test. The second is that an ordinary person in the position of the defendant could have lost control and acted as the defendant did.[21] This imports an objective test into the law of provocation. The third requirement is that there is conduct that can amount to provocation, namely a 'wrongful act or insult'.

Provocative Conduct

The 'wrongful act or insult' and cumulative provocation

Traditionally, the history of the relationship between the accused and the deceased provided background context. However, the history of the relationship was irrelevant as a matter of law to the consideration of the adequacy of the provocative conduct identified immediately preceding the killing.[22] The jury's consideration of adequate provocation must be focused solely on the alleged provocative incident immediately before the killing. In all Australian jurisdictions, the concept of 'cumulative' or 'last straw' provocation has now been recognised. The effect is that the history of the relationship between the

[20] It is noted that the specific rules relating to provocation differ between jurisdictions. However, these three essential requirements are common to all jurisdictions. In *Stingel* (1990) 171 CLR 312, 320 the Court said that it shared the perception 'that, in this particular field of criminal law, the common law, the Codes and other statutory provisions, and judicial decisions about them, have tended to interact and to reflect a degree of unity of underlying notions'.

[21] Note that in New South Wales and the Australian Capital Territory, the requirement is that the ordinary person could have 'so far lost control as to have formed the intent to kill, or to inflict grievous bodily harm upon, the deceased', *Crimes Act* (NSW) s 23(2)(b); *Crimes Act* (ACT) s 13.

[22] *Duffy* [1949] All ER 932. See discussion in S Yeo, *Unrestrained killings and the Law: A Comparative Analysis of the Laws of Provocation and Excessive Self-defence in India, England and Australia* (1998) 21.

accused and the deceased is relevant to an assessment of the gravity of the 'trigger' incident.[23] This means that while the final provocative conduct may appear trivial in isolation, its full weight can be understood by a consideration of the course of conduct between the accused and the deceased.[24]

Cumulative provocation has been accepted by the Tasmanian Court as being relevant to the assessment of whether the 'wrongful act or insult' relied on by the accused was sufficient to cause an ordinary person to lose self-control as required in s 160(2).[25] In relation to battered women who kill their abusive partners, the history of violence by the deceased provided the context in which the allegedly provocative incident can be understood and assessed. In *Gardner*,[26] the accused killed her husband while he was asleep. On the day of the killing, the deceased and the accused had had visitors. The deceased had been pressuring her for sexual intercourse and as soon as the visitors left, he insisted on having sexual intercourse. He 'dragged [her] down the passage by the hair and threw [her] on a bed, removed all [her] clothes, forcibly, and ... began to attempt to have sexual intercourse'. The deceased threatened the accused with violence if she resisted. He then fell asleep or passed out on top of her. The accused obtained a rifle and shot the deceased. It was accepted that the deceased's conduct towards the accused was heightened because 'it was only the latest in a series of similar actions over a period of years'.[27]

In *Cornick*,[28] the appellant killed her defacto husband. The deceased frequently abused alcohol and 'particularly at those times he would become argumentative' and violent. He had previously hit her, attempted to choke her and held a knife to her throat. On the day of the killing, the appellant picked up the deceased from a friend's

[23] See *Parker* (1963) 111 CLR 610, *Hall* (Unreported, Court of Criminal Appeal, Tasmania, 85/1968), *Hutton* [1986] Tas R 24.

[24] See *R* (1981) 28 SASR 321, 326 (King CJ) where it was accepted that:

> [I]n determining whether the deceased's actions and words on the fatal night could amount to provocation in law, it is necessary to consider them against the background of family violence and sexual abuse ... The deceased's words and actions in the presence of the appellant on the fatal night might appear innocuous enough on the face of them. They must, however, be viewed against the background of brutality, sexual assault, intimidation and manipulation.

[25] *Hall* (Unreported, Court of Criminal Appeal, Tasmania, A85/1968), *Carroll* (1984) 11 A Crim R 268, *Hutton* [1986] Tas R 24.

[26] (Unreported, Supreme Court of Tasmania, 25 June 1979).

[27] Ibid 2 (Neasey J).

[28] (Unreported, Court of Criminal Appeal, Tasmania, 28 July 1987, BC8700051).

home. He had been drinking. After the appellant and deceased arrived home, the appellant began preparing the evening meal. There was an argument during which the deceased behaved in an argumentative and aggressive manner and assaulted their two sons. He pushed the appellant, although he did not hit her. The appellant obtained a knife and stabbed the deceased. It was accepted that 'in the light of the history of the relationship and the events on the [day of the killing] ... the provocation was very significant and substantial although not extreme'.[29]

Cumulative provocation has not only assisted women who seek to rely on the defence of provocation in the context of ongoing domestic abuse. It has also helped men claim that they have been provoked by their partner's rejection and/or infidelity. In *Hutton*, the Tasmanian Court of Criminal Appeal allowed the appellant's appeal on the ground that the defence of provocation should have been left to the jury. According to Cox J:

> In the circumstances of this case ..., there is evidence that the relationship was of such a kind that the accused might reasonably have expected fidelity from the deceased and evidence that suddenly finding his expectations dashed, he had insult added to that injury when her conduct was contemptuously thrown in his face. In my view the insult her scornful laugh constituted in that context was in law capable of being regarded as sufficient to deprive an ordinary person of the power of self-control.[30]

In the context of their relationship, the innocuous action of the deceased in laughing at the appellant was elevated in status to be an insult sufficient to deprive an ordinary person of the power of self-control and provoke him to commit an act similar to that committed by the appellant.

A triggering incident

The concept of cumulative provocation has enabled an expanded operation for the defence of provocation, in Tasmania (as in other Code jurisdictions).[31] However in Code jurisdictions, considerable legal difficulties remain for women who kill their abusive partners and then attempt to rely on the defence of provocation. These jurisdictions 'double dip'[32] in relation to the requirement of suddenness: in addi-

29 Ibid 13 (Cox J).

30 [1986] Tas R 24, 37 (Cox J).

31 *Criminal Code* (WA) s 281, *Criminal Code* (Qld) s 304.

32 D O'Connor and P Fairall, *Criminal Defences* (3rd ed, 1996) 201.

tion to the requirement that the accused act on the sudden,[33] there must be 'sudden provocation'.[34] The prerequisite of suddenness governs both the provocation and the retaliation: '"Suddenness" is a necessary element of both the insult and the reaction to it'.[35]

In Tasmania, cumulative provocation has only been accepted in the narrow sense that the history of the relationship is relevant to assess the gravity of the 'wrongful act or insult' identified as the provocative conduct.[36] Battered women who seek to rely on the defence of provocation must be able to point to a specific triggering incident (a 'wrongful act or insult') occurring immediately, or very shortly before the loss of self-control by the accused.[37] Similarly, it is not possible to rely on the defence of provocation 'in cases where there is nothing that can be described as sudden'.[38]

[33] See discussion below at page 20.

[34] Tasmania: '... if the person caused death does so in the heat of passion caused by *sudden* provocation', *Criminal Code* (Tas) s 160(1); Griffith Code: '...the act which caused death is in the heat of passion caused by *sudden* provocation', *Criminal Code* (WA) s 281, *Criminal Code* (Qld) s 304, (emphasis added).

[35] *Daniels* (1984) 7 CCC (3d) 542, 549 (Laycraft JA), cited with approval by the Tasmanian Court of Criminal Appeal in *Attorney-General's Reference No 1 of 1992* (1993) 1 Tas R 349, 360 (Cox J), 369 (Crawford J) and 382 (Zeeman J). The Canadian Criminal Code s 215 is identical to s 160 of the *Criminal Code* (Tas).

[36] In *Hutton* [1986] Tas R 24, 30 (Cox J) it was recognised that:

> [A]lthough past event may not be relied upon as constituting provocation the history of the relationship between the accused and the victim is capable of being material in determining the significance and gravity of the act or insult relied upon as constituting provocation.

See also *Hall* (Unreported, Court of Criminal Appeal, Tasmania, A85/1968) 8 where Crisp J stated that 'while past wrongs are no doubt properly enquired into and looked at to assist in evaluating the emotional tension that present affronts may lead to there is really nothing ...which would constitute provocation in law'. These authorities were cited with approval in *Attorney-General's Reference No 1 of 1992* (1993) 1 Tas R 349. This is the position in Canada: see *Daniels* (1984) 7 CCC (3d) 542, 554.

[37] This definition is based on the definition provided by Tarrant. Tarrant defined a 'specific triggering incident' as 'specific, clearly identified conduct by the victim immediately, or very shortly, before the *retaliation by the accused*', Tarrant, 'The "Specific Triggering Incident" in Provocation', above n 11 at 190 (emphasis added). I would define 'specific triggering incident' in the context of 'sudden provocation' to mean 'specific, clearly identified conduct by the victim immediately, or very shortly, before the *loss of self-control by the accused*'.

[38] I Grant *et al*, *The Law of Homicide* (1994), 6–24. See also T Quigley, 'Battered Women and The Defence of Provocation' (1991) 55 *Saskatchewan Law Review* 223, 248 who observes that:

> [A] woman who kills her abuser in the face of some relatively minor incident which pales in comparison with earlier abuse of greater magnitude may run the risk of losing

In cases where women kill their abusive partners immediately following a violent attack, the requirement of 'sudden provocation' is satisfied. In *Franke*, the accused killed her husband with a claw hammer. The deceased had begun to 'carry out a cruel and aberrant sexual attack [on the accused] ... which involved the use of the handle of the claw hammer'.[39] The accused managed to obtain the claw hammer and immediately struck her husband. It was accepted that the accused had 'lost the power of self-control and caused her husband's death in the heat of sudden provocation'.[40] Similarly, in *Gardner*, it was considered that the accused was 'acting under the immediate stress of extreme provocation'[41] when she killed her husband after he passed out on top of her.

However, if Chhay had killed her husband and been tried in Tasmania, it would have been difficult to satisfy this additional requirement of suddenness given the period of time that had elapsed since the last identifiable provocative act of the deceased, who had fallen asleep. It is likely that the provocation would not have been available as there had not been a specific trigger incident that could have satisfied the requirement of 'sudden provocation'. In contrast, men who kill their partners after the discovery of infidelity (such as Hutton) have no such difficulty satisfying the requirement of 'sudden provocation', ie that the loss of self-control was proximate to the 'wrongful act or insult'.

In contrast to the position at common law[42] and in Code jurisdictions, the law in New South Wales and the Australian Capital Territory has been extended by statute.[43] In the New South Wales decision of *Chhay*, the Crown's case (and the one accepted by the jury) was that she had killed the deceased while he was asleep. This was held not to be a legal impediment to the availability of the defence of provocation. As stated by Gleeson CJ, 'a loss of self-control can develop even after a lengthy period of abuse, and without the necessity for a specific triggering incident'.[44] There was no legal requirement that the

the defence. This may be so particularly where she kills the abuser at a somewhat later time when he is not actively engaged in abuse, and indeed may even be asleep.

39 (Unreported, Supreme Court of Tasmania, 22 August 1983) 2 (Neasey J).

40 Ibid.

41 (Unreported, Supreme Court of Tasmania, 25 June 1979) 1 (Neasey J).

42 See *Osland* (1998) 159 ALR 170.

43 *Crimes Act* (NSW) s 23, *Crimes Act* (ACT) s 13. It is noted that the amendments in New South Wales were introduced in 1982 following the *Report of the New South Wales Task Force on Domestic Homicide*.

44 (1994) 72 A Crim R 1, 13.

defendant point to any specific event as the basis of provocation, and the defendant may rely on a history of violence to provide the content of the provocative conduct.

There have been attempts to argue that the requirement of 'sudden provocation' is not a substantial obstacle to a liberal interpretation of the provocation provisions in the Criminal Codes. The most thorough attempt to argue for an expansive interpretation of the requirement of 'sudden provocation' is Tarrant's consideration of sections 245 and 281 of the Western Australian *Criminal Code*.[45] In her article, Tarrant contends that section 281 can be interpreted so as to remove the need to isolate a specific trigger incident. This position is advanced by arguing that the requirement of 'sudden provocation' in section 281 can be equated with the common law formulation of 'a sudden and temporary loss of self-control'.

As a result of this parallel being drawn, Tarrant argues that the reasoning of *Chhay* [46] in relation to the common law requirement of 'a sudden and temporary loss of self-control' can be applied in interpreting the Code. Tarrant cites Gleeson CJ's view in *Chhay* that:

> As a matter of common law ... it is essential that at the time of the killing there was a sudden and temporary loss of self-control caused by the alleged provocation but, at the same time, it denies that the killing need follow immediately upon the provocative act or conduct of the deceased.[47]

Thus, it is possible (the argument goes) to interpret section 281 as 'referring to the process of losing control, not to the time between the provocative conduct and the subsequent loss of self-control'.[48] In

[45] Tarrant, 'The "Specific Triggering Incident" in Provocation' above n 11, 192-196. See also E Colvin *et al*, *Criminal Law in Queensland and Western Australia* (2nd ed, 1998) who assert that 'sudden provocation' is a 'requirement that the incident of provocation should have been sudden in the sense of being without forewarning'. Interpreted in this way it is [17.19]:

> [M]erely a gloss on the basic objective test that the provocation should have been likely or sufficient to cause an ordinary person to lose self-control: where there is forewarning of the provocation, there will usually be no grounds for the ordinary person to lose self-control. In contrast, a requirement for suddenness of response significantly tightens the requirement that the response occur before there is time for the passion to cool.

[46] (1994) 72 A Crim 1.

[47] Ibid 10.

[48] Tarrant, 'The "Specific Triggering Incident" in Provocation' above n 11, 195. It must be noted that an interpretation of the common law that holds that a specific trigger incident is not required must be questionable in view of the High Court decision in *Osland* (1998) 159 ALR 170. See in particular Kirby J at 218 who considered that:

summary, Tarrant's argument is that 'sudden provocation ... may be understood to be a reference to the kind of emotional and mental experience of the accused, as Gleeson CJ concluded in relation to the common law in *Chhay*'.[49] Interpreted in this way, there is no need for a specific trigger.

However attractive the conclusion may be that the restrictive wording of the Code can be equated with the common law or even the liberal legislative position in New South Wales,[50] Tarrant's argument is flawed. The flaw stems from Tarrant's initial assumption that 'sudden provocation' in section 281 can be equated with the common law formulation of a 'sudden and temporary loss of self-control'. This assumption enables the argument to be advanced that 'sudden provocation' refers to the process of losing control and to the time between the loss of self-control and the retaliation.[51] As will be seen below, this is not an accurate assessment of the role of the phrase 'sudden provocation'.

In advancing her interpretation of section 281, Tarrant observed that 'the traditional concept of a triggering incident has not been challenged'[52] in Western Australia. However, the need to identify a triggering incident has been directly considered and affirmed by the Tasmanian Court of Criminal Appeal in *Attorney-General's Reference No 1 of 1992*.[53] The respondent was charged with murder in respect of killing the deceased in March 1992 and at his trial was convicted of manslaughter on the grounds of provocation. There was evidence

> [E]vidence of a long-term abusive relationship, even if accepted, did not afford a person in the position of the appellant a blank cheque to plan and execute the homicide of her abuser, protected by the law of provocation, with only a passing nod at the immediate circumstances said to have driven her to the grave step of participating in the termination of a human life.

49 S Tarrant ibid 196. It is noted that Tarrant also discusses the phrase 'before there is time for ... passion to cool'. She argues that one possible interpretation of this requirement is 'as with the requirement of suddenness, the time may be that between the onset of loss of self-control and the retaliatory act', at 195. This interpretation is the correct interpretation of 'before there is time for ... passion to cool', as far as Tarrant asserts that it refers to the time frame between the loss of self-control and the killing. However, it is not the correct interpretation of sudden provocation. Nor is it strictly the time frame envisaged by the common law requirement of 'sudden and temporary loss of self-control'.

50 Note that the Victorian Court of Criminal Appeal rejected an argument that the common law could be interpreted in the same way as the liberal New South Wales provision, *Osland* [1998] 2 VR 636.

51 See n 50 above.

52 Tarrant, 'The "Specific Triggering Incident" in Provocation' above n 11, 194.

53 (1993) 1 Tas R 349. It is noted that special leave to appeal was refused by the High Court.

that the respondent had been persistently sexually abused by the deceased from the time the respondent was in grade 5 of primary school in about 1983 until February 1992. However, the last incident of sexual abuse occurred several days before the killing.

On the day of the homicide, the respondent and a friend agreed that they would go the deceased's house with a view to robbery. On the way to the deceased's house, the deceased picked up the respondent and his friend. In the car the deceased touched the respondent on his thigh. Whilst at the premises, the respondent's friend struck the deceased with a heavy object and he fell to the floor. The respondent then obtained a rock from outside and then struck the deceased several times on the head with the rock, as well as with a shovel.

There was psychiatric evidence that the respondent suffered 'sexual abuse accommodation syndrome'. A feature of the syndrome was 'an inability to do anything to prevent further victimisation by his molester, or to denounce him, and feelings of utter helplessness'.[54] Expert evidence was given that the respondent's 'rage that would have been there for years would have been released at that moment when [the respondent] suddenly had power over the person who had been abusing him'.[55]

At trial, the judge ruled that:

> [I]t would be open to the jury to find that because of the respondent's mental and emotional condition the deceased's earlier wrongful acts did not deprive him of the power of self-control until his companion struck the deceased and he thereupon acted on a sudden and before there was time for his passion to cool.[56]

The trial judge ruled that:

> [I]f the accused was not deprived of the power of self-control until a long time after the doing of the wrongful act, the defence of provocation was still available provided the 'accused thereupon acted on the sudden and before there'd been time for his passion to cool'.[57]

In effect, His Honour ruled that there was no need to identify a specific triggering incident that was near in time to the loss of self-control and the killing, and the respondent was entitled to rely on the cumulative course of abuse as the sufficient wrongful act.

[54] Ibid 352 (Crawford J).

[55] Ibid (Crawford J quoting the psychiatrist).

[56] Ibid 352–353 (Crawford J).

[57] Ibid 372 (Zeeman J).

In consequence of the trial judge's ruling, the Attorney-General referred a question of law concerning provocation to the Court of Criminal Appeal. On appeal, the issue was whether the trial judge had erred in his ruling, and, in particular, whether there was 'in addition to a requirement that the offender act upon it on the sudden, a requirement that the loss of the power of self-control by the offender follow suddenly upon the wrongful act or insult relied upon?'[58] The Court of Appeal unanimously held that the answer was 'yes': the loss of the power of self-control by the offender had to follow suddenly upon the wrongful act or insult.

The specification of 'sudden provocation' was not merely a semantic difference between the Code and the common law as it currently exists. It imports an additional legal requirement into the doctrine of provocation. The requirement of 'sudden provocation' was interpreted to mean that the 'wrongful act or insult ... [must make] an unexpected impact in that it takes the understanding by surprise'.[59] Accordingly, Zeeman J considered:

> Where there is a significant interval of time between the provocative conduct and the loss of self-control that loss of self-control is not the result of conduct which has taken the understanding by surprise. It may be the result of provocative conduct but that conduct will not have the quality of being 'sudden'. The use of the word 'sudden' in s 160(1) has the effect of requiring that the loss of the power of self-control occurs immediately or very soon after the unlawful act or conduct.[60]

Clearly, a specific triggering incident needs to be identified in Tasmania (and presumably in other Code jurisdictions) in order to rely on the defence of provocation. It is not possible for provocative conduct that occurred in the past to endow the 'wrongful act or insult' with the necessary quality of suddenness.[61]

58 Ibid 350.

59 Ibid 383. Note Quigley's comment, above n 38, 249, that this is

> precisely the opposite situation from that faced by a battered woman. She knows all too well what has happened in the past. Moreover, she has the apprehension and uncertainty of not knowing what is coming next, especially in an atmosphere of increasing violence.

60 (1993) 1 Tas R 349, 383.

61 Note also Canadian authority to the same effect: *Daniels* (1983) 7 CCC (3d) 542. Laycraft JA said at 554:

> [T]he requirement for suddenness of insult and reaction does not preclude a consideration of past events. The incident which finally triggers the reaction must be sudden and the reaction must be sudden but the incident itself may well be coloured and given meaning only be a consideration of events which preceded it. Indeed, one could imagine a case in which a given gesture, in itself innocuous,

The need to identify a specific triggering incident means that 'the primary model for the defence has not changed'[62] in Code jurisdictions, despite the expansion of the defence of provocation resulting from the recognition of the concept of cumulative provocation. 'A provocative incident must induce an immediate response'[63] in terms of an immediate loss of self-control. Also, as Tarrant observes, the requirement of a specific triggering incident creates a 'model of immediacy [that]... directly contradicts the response patterns of women who are repeatedly beaten'.[64] Consequently, the requirement for 'sudden provocation' poses a substantial obstacle for battered women who kill in circumstances that do not conform to the traditional masculine response pattern.

The Subjective Requirement: Loss of Self-Control

The subjective test is whether the accused lost self-control in response to the provocative conduct and killed while under the influence of the provocation. The subjective test is said to operate to ensure that '[the killing] was not a revenge killing, but rather a sudden and uncontrolled reaction to perceived injustice'.[65]

Suddenness

The traditional legal position was that the killing needed to be an immediate and spontaneous response to the provocation offered by the victim.[66] In *Gardner*, it was noted that the accused 'disengaged

> could not be perceived as insulting unless the jury was aware of previous events. They disclose the nature, depth and quality of the insult.

Laycraft JA distinguished the case from the previous case of *Tripodi* [1955] 4 DLR 445 as in the earlier case 'there was no evidence of a final taunt or insult to act suddenly on the accused's mind. Here there was a final taunt for the jury to consider', at 549.

62 Tarrant, 'Something is Pushing them to the Side of their Own Lives' above n 11, 592.

63 Ibid.

64 Ibid, 593.

65 *Acott* [1997] 1 All ER 706, 711 (Lord Steyn) citing *Ashworth* [1976] 31 at 317. However as Chan observes 'the notion of revenge reveals little about the dynamics of a violent interpersonal relationship', W Chan, 'Legal Equalities and Domestic Homicides' (1997) 25 *International Journal of the Sociology of Law* 203, 209.

66 In *Hayward* (1833) 6 Car and P 157, 159 Tindal CJ instructed the jury that:

> [T]he remaining and principal question for ... [the jury's] consideration would be, whether the mortal wound was given by the prisoner while smarting under a provocation so recent and so strong, that the prisoner might not be considered at the moment the master of his own understanding; in which case, the law in compassion to human frailty, would hold the offence to amount to manslaughter only: or whether there had been time for the blood to cool, and for reason to

[herself] ... and *immediately* loaded a .22 rifle and shot him dead'.[67] This requirement was embodied in the common law requirement that the accused acted while under the influence of 'a sudden and temporary loss of self-control'. At common law, the concept of 'suddenness' as required by the 'sudden and temporary loss of self-control' has been broadened. There is now no need for the killing to occur immediately after the provocative conduct and the primary issue is whether the accused had lost control at the time of the killing.[68]

The legislative embodiment of the sudden retaliation is found in the Code requirement in s 160(2) that the accused acted 'on the sudden and before there has been time for his passion to cool'.[69] In *Attorney-General's Reference No 1 of 1992*, it was accepted that the expanded interpretation of the common law requirement of the 'sudden and temporary loss of self-control' was equally as applicable to s 160(2) of the Code. As Cox J commented:

> The doctrine has always contemplated that while the loss of control must be suddenly induced, it need not manifest itself in the immediate performance of the fatal act. So long as that is performed while the offender remains deprived of the power of self-control by the provocative conduct which induced it, the extenuation will be available and the act will, in addition, be said to have been done on the sudden.[70]

In Code jurisdictions, as a matter of law, there may be a time delay between the loss of self-control and the fatal response. However, 'the longer the delay and the stronger the evidence of deliberation on the part of the defendant, the more likely it will be that the prosecution will negative provocation'.[71]

> resume its seat, before the mortal wound was given; in which cases the crime would amount to wilful murder.
>
> It was stated that:
>
> > [T]he jury must recollect that the weapon ... was not at hand when the quarrel took place, but was sought for by the prisoner from a distant place ... the exercise of contrivance and design denoted rather the presence of judgment and reason, than of violent and ungovernable passions.

67 (Unreported, Supreme Court of Tasmania, 25 June 1979) 2 (Neasey J), (emphasis added).

68 See *Parker* (1963) 111 CLR 610, (1963) 111 CLR 665.

69 In *Attorney-General's Reference No 1 of 1992* (1993) 1 Tas R 349, 380 (Zeeman J) it was accepted that 'the expression "sudden and temporary loss of self-control" ...encapsulates much of what is provided for by the Code, s 160(2)'.

70 Ibid 358.

71 *Ahluwalia* [1992] 4 All ER 889, 896 cited with approval in ibid, 358 (Cox J). Similarly, Zeeman J considered that the statement in *Ahluwalia* applied to s 160(2).

At common law, the concept of suddenness has been further modified by the recognition that there are two typical responses to provocation: 'an immediate loss of self-control and a slow burn reaction culminating eventually in a loss of self-control'.[72] In recognition of research and case law that demonstrates that 'battered women tend not to react with instant violence to taunts or violence as men tend to do' and that women 'typically respond by suffering a 'slow burn' of fear, despair and anger which eventually erupts into the killing of their batterer, usually when he is asleep, drunk or otherwise indisposed',[73] the courts have endorsed the concept of the 'slow-burn' loss of self-control.[74] This was endorsed by the Court of Criminal Appeal in *Attorney-General Reference No 1 of 1992*.[75]

The enlarged time frame now encapsulated by the requirement of the sudden response and the associated judicial recognition of 'slow-burn' appear to significantly broaden the operation of the defence of provocation for battered women who kill their abusive partners in Tasmania. The existence of a delay between the provocative act and the killing does not negative the defence of provocation, provided there is evidence of 'slow-burn' loss of self-control in the sense of 'a state of emotional turmoil which was suddenly induced by the deceased's provocative conduct'.[76] In order for Chhay to satisfy the requirements of the law of provocation in Tasmania, it would be necessary to argue that she lost self-control at the time of the deceased's last identifiable provocative act and that she remained out of control until the time she killed the deceased.

However, despite the expansion of the concept of 'sudden and temporary loss of self-control' and the recognition of 'slow-burn', the accused still needs to have responded 'suddenly' to the provocation in

72 Yeo, *Unrestrained killings and the Law*, above n 22, 51.

73 D Nicolson and R Sanghvi, 'Battered Women and Provocation: The implications of R v Ahluwalia' [1993] *Criminal Law* Review 728, 730.

74 *Ahluwalia* [1992] 4 All ER 889. Counsel submitted that women who have been subjected to a history of domestic violence may react with 'a "slow-burn" reaction rather than by an immediate loss of self-control'. Lord Taylor CJ stated at 896:

> we accept that the subjective element in the defence of provocation would not as a matter of law be negatived simply because of the delayed reaction in such cases, provided that there was at the time of the killing a 'sudden and temporary loss of self-control'

See *Osland* [1998] 2 VR 636, 645–649; *Osland* (1998) 159 ALR 170, 183–185 (Gaudron and Gummow JJ) and 218 (Kirby J). See also comments in *Chhay* (1994) 72 A Crim R 1, 9–13 (Gleeson CJ).

75 (1993) 1 Tas R 349, 358–359 (Cox J), 373–374 and 380 (Zeeman J).

76 Ibid 358 (Cox J).

the sense that the formation of the intention to kill was spontaneous and was caused by a sudden loss of self-control in the accused in response to the provocative act and that the accused acted before composure was regained.[77] The archetypal standard of the abrupt and explosive reaction to provocative conduct remains unaffected. The loss of self-control still must manifest in an explosive loss of self-control culminating in the fatal act. At the time of the killing, the brooding emotion must erupt (like a volcano). The loss of self-control must ultimately meet the male standard of suddenness. As such 'since the battered woman's final action is often devoid of frenzy and passion, women fail to meet the standard required of the reactive response'.[78]

The man who kills his partner immediately following the discovery of infidelity fits the conception of loss of self-control most readily endorsed by the law of provocation, that is the 'sudden eruption of violence'.[79] In cases of sudden discovery of 'infidelity', such as in *Hutton*,[80] the requirement of sudden retaliation is satisfied. In *Hutton*,[81] the accused lost self-control upon discovery of his defacto and another cuddling and hearing the 'scornful laugh'. He immediately picked up a rifle and shot them both. There is a close temporal link between the insult, the loss of self-control and the fatal response. This case reveals the sympathy shown to the reactions of those who fly into a rage and act impulsively and without reflection. The absence of premeditation in these cases enables the law to maintain its abhorrence of the 'revenge' killing.

Despite the assertion that male offenders typically kill 'with instantaneous outbursts,'[82] there is evidence that in some cases where men kill women and successfully rely on the defence of provocation in Tasmania, the element of 'suddenness' is absent. There is not any red-hot anger exploding after the sudden discovery of adultery.

77 *Parker* (1963) 111 CLR 610, (1963) 111 CLR 665. See also *Ahluwalia* [1992] 4 All ER 889, 895. In contrast, in New South Wales and the Australian Capital Territory the requirement of suddenness has been expressly removed, *Crimes Act* (NSW) s 23(2), 3(b), *Crimes Act* (ACT) s 13(2), (3). In Code jurisdictions, the accused's sudden response is further dictated by the need for 'sudden provocation' as discussed above.

78 S Edwards, *Sex and Gender in the Legal Process* (1996) 395.

79 *Chhay* (1994) 72 A Crim R 1, 13 (Gleeson J).

80 [1986] Tas R 24.

81 Ibid.

82 See S Yeo, 'Sex, Ethnicity, Power of Self-Control and Provocation Revisited' (1996) 18 *Sydney Law Review* 304, 314.

Sometimes there is just the confirmation of what has already been strongly suspected, or hurt and brooding emotions following rejection. 'Suddenness' is lacking in circumstances where men armed themselves in advance, and/or engineer a confrontation with their former (or current) female partner and then kill. The defence of provocation ought to be excluded in cases where the accused deliberately places himself in a situation that is likely to be provocative.[83] However, there is an apparent acceptance that the circumstances of the killing conform to the concept of a provoked killing.

In *R v Lyden*, the accused 'suspected that the conduct of the Hospital [where his defacto wife was resident] was likely to lead to improper relations between female and male patients there and kept a watch on the Hospital'.[84] The accused spied on his defacto wife[85] through a telescope. He saw her going to a remote corner of the grounds with another man. He drove his car to the spot and climbed over the fence to see his defacto wife and the man about to have sexual intercourse. He fired a revolver, hitting her twice and the man three times. His defacto wife died and the man was seriously wounded. The accused's suspected that his defacto wife was having an affair. He watched her, then armed himself with a rifle and climbed the fence to find confirmation of his suspicions. Despite the fact that the evidence suggests that the accused already had planned to kill his wife should his suspicions be confirmed, the accused was entitled to rely on the defence of provocation.

In reality, the gender-specific response to provocation may not so much differentiate male domestic killers from female domestic killers, as the culturally and legally endorsed model of such domestic killings. The male offender can shape his experience to mirror the legally endorsed narrative that a man will suddenly lose self-control following a partner's unfaithfulness.[86] As Wells observes:

[83] Leader-Elliott asserts that 'enraged men who engineer a confrontation, lose all self-control and kill their wives, lovers, or rivals after separation, are likely candidates for the ranks of those who are, morally speaking, murderers', I Leader-Elliott, 'Sex, Race and Provocation: In Defence of Stingel' (1996) 20 *Criminal Law Journal* 72, 85. Morgan adds to this by asserting that 'surely an accused does not only 'engineer a confrontation' if his wife has already left him?', J Morgan, 'Provocation Law and Facts: Dead Women Tell no Tales, Tales are told about them' (1997) 21 *Melbourne University Law Review* 237, 253.

[84] [1962] Tas SR 1, 2.

[85] The court refers to the accused's defacto wife as his 'concubine'.

[86] Reilly, above n 3, 335. Reilly states:

> [I]f it is true that we construct our social reality, then the law must take care in the way it directs the telling of narratives of excuse. While the defence of

> Provoked anger is understood in law to involve the desire for retaliatory suffering by the victim inflicted by the wronged person. Retaliatory suffering negates a threat to the self-worth of the wronged person. Common causes of male violence are prompted by possessiveness and/or jealousy.
>
> Judges, juries and textbook writes reflect this in giving latitude to men who find their wives with other man, with pre-planning and lack of suddenness ignored. The mitigation of provocation ultimately reinforces these aspects of male self-esteem which themselves lead to the violence.[87]

The male pattern of domestic homicide does not necessarily correspond with the accepted 'male model' of loss of self-control. Yet, our historical and social understanding of the doctrine of provocation informs the acceptance of the appropriateness of the provocation defence in these circumstances. In contrast, there is an absence of any comparable historical or social understanding of female provoked offenders.[88]

Fear/anger

The primary emotion associated with a loss of self-control is anger. However, it is the recognition that fear is also capable of causing a loss of self-control[89] that has expanded the subjective test and has enabled provocation to have a wider applicability to battered women. In the vast majority of cases, the provocative conduct relied upon by battered women consists (at least in part) of physical violence, so it recognises the reality of these women's lives to speak of the response in terms of fear as well as anger. For example in *Cornick*, the view was expressed that 'your stabbing of the deceased resulted directly from your fear and anger engendered by his selfish and violent conduct'. In

> provocation is based on the concept of a loss of self-control it allows the telling of stories of homicidal violence in response to unfaithfulness in sexual relationships, and homicidal violence in response to non-violent homosexual advances. ... If a legal rule espouses a norm that the ordinary man can lose self-control when his wife is unfaithful, men can weave this apparent reality into narratives of excuse.

87 C Wells, 'Battered Woman Syndrome and Defences to Homicide: Where Now?' (1994) 14 *Legal Studies* 266, 272.

88 See Leader-Elliott, 'Battered But Not Beaten' above n 5. Leader-Elliott observes at 405 that 'there are no comparable histories of the development of doctrines allowing an exculpatory effect to domestic violence or the oppression suffered by women who kill men'.

89 The Australian position is in contrast to the position in the United Kingdom where fear is not a sufficient emotion. In *Acott* [1997] 1 All ER 706, Lord Steyn said at 712-713 that 'a loss of self-control caused by fear, panic, sheer bad temper or circumstances (eg a slow down of traffic due to snow) would not be enough'.

Gardner,[90] it was accepted that at the time that the accused shot her violent husband she was 'in an intensely overwrought state of fear and humiliation and resentment'.[91]

While Yeo suggests that a recognition of fear as an emotion giving rise to a loss of self-control 'may explain why an accused appeared calm and deliberate during and after the killing',[92] I would assert that the primary model of the defence remains unchanged. A person's actions during a loss of self-control induced by fear, despair or panic must still reflect the actions of a person acting in anger (at least at common law and in Code jurisdictions). The need for a 'sudden and temporary loss of self-control' at the time of the killing remains unaltered and as such the doctrine of provocation still supports the model of explosive anger rather than the pattern of ongoing fear and desperation.

The danger in recognising fear as an emotion capable of founding the defence of provocation, is that women (and the courts) may rely on provocation rather than give consideration to the potential application of the defence of self-defence.[93] Fear is an emotion more closely associated with notions of self-defence, rather than provocation. The circumstances in which women kill their abusive partners suggests that the killing was predominantly motivated by a genuine fear for safety (self-defence) rather than a loss of self-control (provocation). The tendency automatically to classify women who kill after prolonged domestic abuse as provoked killers has meant that the fact that these women were predominantly acting in self-preservation has been obscured. The courts can claim to be doing something to improve the situation of battered women who kill, while in fact ignoring the issues associated with a reconsideration of the defence of self-defence.

90 (Unreported, Supreme Court of Tasmania, 25 June, 1979).

91 Ibid 2 (Neasey J).

92 Yeo, *Unrestrained killings and the Law*, above n 22, 50.

93 Tolmie, 'Provocation or Self-Defence' above n 5, 67; Tarrant, 'Something is Pushing them to the Side of their Own Lives' above n 4, 596, and Bradfield, above n 5.

The Objective Standard: The Ordinary Person Test[94]

It is not sufficient that the accused loses self-control in response to the provocation; there is a further requirement that an ordinary person in the position of the accused could also have lost self-control and acted as the accused did.[95] The objective standard enables an assessment of the moral status of the accused: it operates to enable a determination of whether the accused met the socially accepted standard of manslaughter. The objective standard fulfils an essential evaluative role: it provides an objective measure of the gravity of the provocation.[96]

In *Stingel*, the High Court made it clear that the ordinary person test is a two-pronged test.[97]The ordinary person test requires the jury to distinguish those characteristics of the accused that would affect the gravity of the provocation to him or her from those characteristics

94 For detailed discussion of the objective test, refer to Yeo, *Unrestrained killings and the Law*, above n 22; S Yeo, 'Recent Australian Pronouncements on the Ordinary Person Test in Provocation and Automatism' (1991) 33 *Criminal Law Quarterly* 280; Yeo, 'Power of Self-Control in Provocation and Automatism' (1992) 14 *Sydney Law Journal* 3; Yeo, 'Sex, Ethnicity, Power of Self-Control and Provocation Revisited' above n 82; and Leader-Elliott, 'Sex, Race and Provocation: In Defence of Stingel' above n 83.

95 Note that in New South Wales the requirement is that the ordinary person could have lost self-control so far as 'to have formed the intent to kill, or inflict grievous bodily harm upon the deceased', *Crimes Act* (NSW) s 23(2)(b). In the Australian Capital Territory, the requirement is that 'the conduct of the deceased was such that it could have induced an ordinary person in the position of the accused to so far lose self-control (i) as to have formed the intent to kill the deceased; or (ii) as to be recklessly indifferent to the probability of causing the deceased's death', *Crimes Act* (ACT) s 13(2)(b).

96 The objective test 'allows the jury to determine those provoked killers who should be regarded as murderers in terms of blameworthiness and those who are less culpable', New South Wales Law Reform Commission, *Partial Defences to Murder: Provocation and Infanticide Report* (1997), 42. See also Leader-Elliott, 'Sex, Race and Provocation: In Defence of Stingel' above n 83, 83–85.

97 (1990) 171 CLR 312, 327 that:

> [W]hile personal characteristics or attributes of the particular accused may be taken into account for the purpose of understanding the implications and assessing the gravity of the wrongful act of insult, the ultimate question posed by the threshold objective test ... relates to the possible effect of the wrongful act or insult, so understood and assessed, upon the powers of self-control of a truly hypothetical 'ordinary person'. Subject to a qualification in relation to age ... the extent of the power of self-control is unaffected by the personal characteristics or attributes of the particular accused.

This was affirmed by the majority of the High Court in *Masciantonio* (1995) 183 CLR 58, 66–67 in relation to the common law and in *Green* (1997) 148 ALR 659, 661 (Brennan CJ), 673 (Toohey J) and at 710–711 (Kirby J) in relation to the New South Wales provisions.

that would affect his or her power of self-control under the provocation in question. In terms of assessing the gravity of the provocation any relevant characteristics of the accused may be taken into account. In relation to the gravity of the provocation, the High Court stated that 'the content and extent of the provocative conduct must be assessed from the viewpoint of the particular accused'.[98] In contrast, the power of self-control to be expected of the ordinary person was unaffected by the personal characteristics of the accused, subject to a qualification in relation to age.[99] So, in assessing the power of self-control to be expected of the ordinary person the only relevant characteristic of the accused was age (in the sense of youth).

In addition, a further component of the ordinary person test is the nature of the ordinary person's response after losing self-control.[100] In *Stingel*, the High Court considered that the provocative conduct 'must have been capable of provoking an ordinary person not merely to some retaliation, but to retaliation "to the degree and method of continuance of violence which produces the death"'.[101] Some doubt has been cast on the status of this requirement by the later High Court decision in *Masciantonio*.[102] According to the High Court:

> Whether an ordinary person could form an intention to kill or do grievous bodily harm is of greater significance than the question whether an ordinary person could adopt the means adopted by the accused to carry out the intention.[103]

It appears that the response of the accused is still a relevant factor to the operation of the ordinary person test at common law and in Code

[98] *Stingel* (1990) 171 CLR 312, 326. The High Court stated that:

> [N]one of the attributes or characteristics of a particular accused will be necessarily irrelevant to an assessment of the content and extent of the provocation involved in the relevant conduct. . . . any one or more of the accused's age, sex, race, physical features, personal attributes, personal relationships and past history may be relevant.

This was affirmed in *Masciantonio* (1995) 183 CLR 58.

[99] *Stingel* (1990) 171 CLR 312, 329-332.

[100] See Yeo, *Unrestrained killings and the Law*, above n 22 and Yeo, 'Sex, Ethnicity, Power of Self-Control and Provocation Revisited' above n 82.

[101] *Stingel* (1990) 171 CLR 312, 325 citing *Holmes* [1946] AC 588, 597.

[102] In *Masciantonio* (1995) 183 CLR 58, 67 the majority commented that 'in considering whether an ordinary person could have reacted in the way in which the accused did, it is the formation of the intent to kill or do grievous bodily harm which is the important consideration rather than the precise form of physical reaction'.

[103] Ibid 70.

jurisdictions, albeit not as significant a factor as the formation of the necessary intent.[104]

Despite assertions that the objective test rests on the fundamental principle of equality before the law,[105] the objective standard in the defence of provocation has been the subject of considerable controversy.[106] The appearance of gender-neutrality masks the reality that the ordinary person is the ordinary man, and, more specifically the ordinary, heterosexual, 'white, middle-classed male'.[107] According to Edwards:

> What judges and juries consider constitutes justifications for provocation ... whilst being hailed as an objective legal standard making claims of neutrality and universality, is instead a masculinist construct encapsulated within a legal form.[108]

[104] See Yeo, *Unrestrained killings and the Law*, above n 22, 109–111 and Yeo, 'Sex, Ethnicity, Power of Self-Control and Provocation Revisited', above n 82.

[105] In *Stingel* (1990) 171 CLR 312, 324 reliance was placed on the words of Wilson J in the Supreme Court of Canada decision in *Hill* [1986] 1 SCR 313 that:

> [T]he objective standard ... may be said to exist in order to ensure that in the evaluation of the provocation defence there is no fluctuating standard of self-control against which accuseds are measured. The governing principles are those of equality and individual responsibility, so that all persons are held to the same standard notwithstanding their distinctive personality traits and varying capacities to achieve the standard.

This was cited by Kirby J in *Green* (1997) 148 ALR 659, 719.

[106] See for example, the New South Wales Law Reform Commission who consider that the ordinary person test has been the most controversial element of the defence of provocation, New South Wales Law Reform Commission, above n 96, 33.

[107] P Easteal and C Currie, 'Battered Women on Trial - Revictimisation by the Courts?' (1998) 3 *Sister-in-Law* 56, 62. In Canada a similar comment was made that 'under the guise of a neutral standard, the ordinary person is constructed in the image of white, heterosexual, able-bodied males who belong to the dominant cultural group in Canada', Grant *et al*, above n 38, 6-11. See also J Greene, 'A Provocation Defence for Battered Women Who Kill' (1989) 12 *Adelaide Law Review* 145, 158–161; J Bridgeman and J Millns, *Feminist Perspectives on Law*, (1998) chapter 11; Edwards, above n 78, chapter 9, S Lees, "Naggers, Whores, and Libbers: Provoking Men to Kill", in Radford and Russell (eds), *Femicide: The Politics of Woman Killing* (1992) 271; L Taylor, 'Provoked Reason in Men and Women: Heat-of-Passion manslaughter and Imperfect Self-Defense' (1986) 33 *UCLA Law Review* 1679, 1688, 1690 and 1692; W Chan, 'A Feminist Critique of Self-Defence and Provocation in Battered Women's Cases in England and Wales' (1994) 6 *Women & Criminal Justice* 39, 52–54; H Allen, 'One Law for all Reasonable Persons?' (1987) 16 *International Journal of Sociology of Law* 419; Yeo, *Unrestrained killings and the Law* above n 22; S Yeo, 'The Role of Gender in Provocation' (1997) 26 *Anglo-American Law Review* 431. See generally feminist literature in relation to the gender-neutrality and objectivity of the law.

[108] S Edwards ibid 366.

The accepted narrative of the circumstances in which it is ordinary to lose self-control and respond with fatal violence is predicated on the circumstances in which it is ordinary for men to respond in this way: 'the ordinary man provides the vehicle for invocations of the ambiguous virtues of outraged masculinity'.[109]

The factual context in which a number of the reported Tasmanian provocation cases arise is the killing of a female partner or her new lover by the rejected husband.[110] In *Hutton*,[111] the deceased's scornful laugh, in the context of the deceased's rejection of the appellant and his discovery of her with another man, was considered to be sufficiently provocative that it could cause an ordinary person to lose self-control and do what the appellant did. The evocative power of the legally endorsed narrative of fatal violence as a concomitant of infidelity elevates the realisation that you have been rejected in favour of another into sufficient basis for the plea of provocation. Even Underwood J, who held that Boyd's conduct 'was not conduct capable of provoking the ordinary man to act in the way in which the appellant acted', considered that it 'might have provoked the ordinary man to commit some act of violence to her person'.[112] While it is refreshing that Underwood J recognised that the ordinary person could not be so provoked as to shoot to kill following a 'scornful' laugh, it is concerning that his Honour felt that the ordinary person could respond with some level of violence.[113]

The legal narrative of the provocation defence has focussed on the outrage of men following the discovery of infidelity, such as in *Hutton*. However, in some cases, the relationship is over and the 'intimate relationship' only exists in the male offender's mind. How can a man's use of violence against his partner following her decision to end the relationship be partially excused? Provocation has been successfully relied upon where the parties have separated based on the accused's inability to accept that the relationship has ended or jealousy following the discovery that his former partner now has a new

[109] Leader-Elliott, 'Passion and Insurrection', above n 7, 163.

[110] See *Lyden* [1962] Tas SR 1; *Carroll* (1984) 11 A Crim R 268. Sexual provocation was also the basis of the leading case of *Stingel* (1990) 171 CLR 312.

[111] [1986] Tas R 24.

[112] Ibid 42.

[113] Similar comments are made by Howe, in the context of comments made that some level of violence may be expected in response to non-violent homosexual advance but not fatal violence, A Howe, '*Green v The Queen* The Provocation Defence: Finally Provoking its own Demise?' (1998) 22 *Melbourne University Law Review* 466, 484–485.

partner. How does the concept of unfaithfulness have any relevance in the context of a relationship that is over?[114]

In *McGhee*,[115] the appellant was convicted of attempted murder of his former defacto wife. Ultimately, it was held that the defence of provocation was not available in cases of attempted murder (and consequently in this case), but the construction of the narrative of provocation by the Tasmanian Court of Criminal Appeal is instructive. The appellant's defacto wife told him that she was having or wished to have a lesbian relationship with another woman. Two days later, his defacto wife moved out of the house she shared with the appellant. He was distressed by the breakdown of the relationship and spoke to his defacto wife on the telephone a number of times. Ten days after she had moved out, he went to her house with a view to reconciliation. On arrival at the victim's home, he witnessed a kiss or the aftermath of a kiss between his former defacto wife and her new partner. Over a period of several hours, the appellant left the premises and returned ultimately with a loaded gun. The appellant unsuccessfully tried to convince his former defacto wife to renew their relationship. He then grabbed the rifle and pointed it at her, intending to kill her. However, she managed to escape.

In assessing the potential application of the defence of provocation to the charge of attempted murder, Zeeman J expressed the view that 'there was sufficient evidence of provocation which required that the issue to have been left to the jury'.[116] His Honour recounted the circumstances of the killing in the following way:

> Even though the appellant had for some days been aware of the lesbian relationship, ... there was evidence upon the basis of which the jury could have found that the appellant came upon them in circumstances where they were kissing one another and thereby *openly flaunting* their sexual relationship. It would be a reasonable inference that the appellant might well have found that grossly insulting, ...[his former defacto wife] having only recently left him so that she might enter into that relationship and thereby terminating the long relationship which she had had with the appellant.[117]

[114] See V Nourse, 'Passion's Progress: Modern Law Reform and the Provocation Defence' (1997) 106 *Yale Law Journal* 1331.

[115] (1995) 183 CLR 82; (Unreported, Tasmanian Court of Criminal Appeal, 17 March 1994, A18/1994)

[116] Ibid, Court of Criminal Appeal, Tas, 20.

[117] Ibid.

The view expressed by Zeeman J was clearly that the conduct of the victim in kissing her new partner was an 'insult' for the purposes of s 160(2) of the Code.

The construction of events relied on by Zeeman J mould the killing into the narrative of infidelity, as the focus is on the victim's infidelity and the 'kiss'. Yet, there are two crucial flaws in this approach. The first was that the relationship was over, and had been over for a period of some days. The appellant knew that his relationship was over. The appellant knew that his former partner had formed a new relationship with a woman. It is only possible to argue that the provocation defence potentially applies to anger following unfaithfulness in the context of a relationship that has ended, if the reality is substituted with the male's 'fantasy' relationship. He still conceives his former partner as his possession.[118] The availability of the defence of provocation in these circumstances suggests that, for the purposes of the provocation defence, the legally endorsed position in respect of the status of a relationship is that 'it ain't over, until HE says it is'.[119]

The second flaw was that there was a lack of evidence that the appellant had lost self-control following the kiss. Even after the discovery of the kiss, some period of time had elapsed before the appellant returned with the gun. He then sought to persuade the victim to resume her relationship with him. It was then that he attempted to shoot her. The actual trigger for loss of self-control that precipitated the attempted murder was the refusal of the victim to resume the relationship with the appellant. And 'no matter what "the past experi-

[118] As Detmold observes:

> In patriarchy ... there is an illusory (private) metaphysics at work giving men the authority to deal with their women without regard to the relational question of whether they really are their women any longer. If a man loves a woman in his mind, that is, as it were, where the action is. So, in his mind she is still his woman no matter what is going on in the real world.

M Detmold, 'Provocation to Murder: Sovereignty and Multiculture' (1997) 19 *Sydney Law Review* 5, 25.

[119] It appears that the constitution of perspective for the defence of provocation is as masculinist as the concept of consent in rape. See L Jamieson, 'The Social Construction of Consent Revisited', in Atkins and Merchant (eds), *Sexualising the Social: Power and the Organisation of Sexuality* (1996). Jamieson observes at 62 that:

> [I]f a woman believes what is occurring is rape and the man does not, then in the law it is, indeed, not rape. Having ruled that no crime has occurred, the law does not have to answer the question "what is it then, if it is not rape?" or "if it is not rape, is it consensual sex?".

Both are constructed from the male perspective. So, with the defence of provocation the existence of a relationship between the parties is constructed in accordance with the male's understanding of the state of the relationship.

ences of the ages" teaches us, it should no longer be in any sense ordinary for men to be partially forgiven when they kill their wives who are leaving them'.[120]

In contrast, the traditional narratives of provocation have not recognised women's lethal actions as morally appropriate for provocation, let alone self-defence. Even the recognition of infidelity as the basis for female defendants to rely on provocation has been a relatively recent concession to 'female frailty'.[121] However, in view of the factual circumstances in which women kill, it is a rather hollow concession to equality. The operation of the ordinary person test in regard to women who kill their violent partners has meant that

> [t]he reasonable man (woman) test is not judged on the same footing as it is for men, with the result that women who kill are not regarded as defending their honour, being motivated by an affront to their pride, justifiably morally outraged, or even less defending themselves.[122]

If a female defendant is to successfully rely on the defence of provocation, she has to endure more severe provocation than what male defendants are expected to endure before her decision to respond with lethal force is understood as an ordinary response.[123]

Conclusion

The purpose of this article was to highlight the potential (and actual) difficulties that exist in regard to the application of the Tasmanian defence of provocation in the domestic context with a view to encouraging interest in the reform of our provocation defence. In contrast to the level of attention that has been afforded to the defence of provocation in other Australian jurisdictions,[124] there has been silence in

[120] Morgan above n 83, 274.

[121] In *Holmes* [1946] 2 All ER 124, it was accepted that wives who killed husbands or their husbands' lovers could rely on the defence of provocation. It should be noted that this was not a case where a wife killed her husband in these circumstances. Rather, it conformed to the standard case of the jealous male killing his wife following the discovery of adultery.

[122] Edwards, above n 78, 398.

[123] Howe 'Provoking Comment', above n 8, 231–232. Howe observes that (234)

> in the case of the male killer, the provocation is readily apparent to masculinist judges; whereas in the case of the woman who kills a man with a long and continuing history of violence, judges struggle to perceive provocation, let alone the necessity of self-defence.

[124] For example, in New South Wales, the law was amended in 1982 to accommodate the experiences of women who kill following a history of domestic violence, see comments in *Chhay* (1994) 72 A Crim R 1, 12–13 (Gleeson CJ). There have been recommendations for reform in NSW: New South Wales Law Reform

Tasmania. The defence of provocation as contained in s 160 of the *Criminal Code* (Tas) is a dinosaur, which in its current form is incapable on adequately providing justice for women who kill their violent partners. In addition, it continues to condone violence by men against women in the domestic setting by partially excusing violence that results from infidelity and rejection.

The Tasmanian law of provocation fails to recognise and accommodate the experiences of those for whom danger presents itself in the form of the known monster rather than the paradigm of the menacing stranger.[125] The danger that is presented to a person who lives in a situation of ongoing violence, degradation and humiliation is not on all-fours with the man of honour 'strutting his stuff'. The difficulty that victims of intimate violence currently face in utlising the defence of provocation is that their reality does not easily fit into the legally endorsed account of what it is to be provoked. Even with the recent developments (the modification of the requirement of the 'sudden and temporary loss of self-control', the recognition of cumulative provocation and the acknowledgment that fear is an emotion capable of satisfying the subjective test), the law of provocation remains premised on the experiences of men. This is exacerbated by the need to identify a 'wrongful act or insult' that has the necessary characteristics of 'sudden provocation'.

Commission, *Provocation, Diminished Responsibility and Infanticide Discussion Paper 3*, 1993 and New South Wales Law Reform Commission, above n 96. In Victoria, see Law Reform Commissioner of Victoria, *Provocation and Diminished Responsibility as Defences to Murder*, 1982 and Law Reform Commission of Victoria, *Homicide Report 40*, 1991. In Western Australia, see D Malcolm, *Report of Chief Justice's Task Force on Gender Bias*, (1994). In South Australia, see Criminal Law and Penal Methods Reform Committee of South Australia, *The Substantive Criminal Law 4th Report*, (1977). In Queensland, see Taskforce on Women and the Criminal Code, *Taskforce on Women and the Criminal Code Discussion Paper* (1999); Taskforce on Women and the Criminal Code, *Report of the Taskforce on Women and the Criminal Code*, (2000); Z Rathus, *Rougher Than Usual Handling: Women and the Criminal Justice System* (2nd ed) (1994). At the Commonwealth level, the Model Criminal Code Officers Committee recommends the abolition of the defence of provocation, Model Criminal Code Officers Committee, *Fatal Offences Against the Person Discussion Paper*, (1998). There has also been extensive academic commentary, both feminist and otherwise.

125 As Chamallas asserts:

> at a minimum, we need a model that envisions the injury of domestic violence as extending over a substantial period to time and that takes account of the fact that the aggressor is not a stranger but an intimate partner of the victim, in whom she has resided trust in her person, her property, and her relationships.

M Chamallas, 'Hostile Domestic Environments: Commentary on Jane Maslow Cohen's Regimes of Private Tyranny:' (1996) 57 *The University of Pittsburgh Law Review* 809, 810.

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

> under the cover of an alleged compassion for human infirmity, simply reinforces the conditions in which men are perceived and perceive themselves as natural aggressors, and in particular *women's* natural aggressors.[126]

In *Hutton*, Cox J commented that 'the common law did presume that the discovery of adultery was such a provocation as might in human frailty rob an ordinary man of his power of self-control'.[127] His Honour considered that

> under s 160 there is no automatic reduction of the crime of murder to manslaughter by virtue of the accused finding his wife committing adultery but it could be scarcely be argued that such circumstances would not as a matter of law require a judge to put the issue of provocation to the jury.[128]

Yet reliance by men on the defence of provocation is not restricted solely to 'discovery of adultery' cases. It has been extended to cases where men 'claim that infidelity, desertion or sexual humiliation drove the offender to kill'.[129]

The Tasmanian defence of provocation is clearly in need of an overhaul. The defence of provocation operates as a 'deeply sexed excuse'.[130] This criticism is universally applicable to the defence of provocation given its masculinist origins. However, the defence of

[126] Horder, above n 1, 192.

[127] [1986] Tas R 24, 37.

[128] Ibid 34.

[129] Leader-Elliott, 'Passion and Insurrection', above n 7, 151. It has also been extended to cases where a man kills another man following an alleged non-violent homosexual advance, see A Howe, 'More Folk Provoke Their Own Demise (Homophobic Violence and Sexed excuses - Rejoining the Provocation Law Debate, Courtesy of the Homosexual Advance Defence' (1997) 19 *Sydney Law Review* 336, Howe, '*Green v The Queen*', above n 113 and A Howe, 'Reforming Provocation (More or Less)' (1999) 12 *The Australian Feminist Law Journal* 127.

[130] Howe, 'More Folk Provoke Their Own Demise', ibid 337.

provocation in Tasmania is even more troubling than the defence of provocation at common law or as it exists in those common law jurisdictions governed by statute. The Tasmanian provocation defence does not even reflect the current common law but the common law as it existed in the nineteenth century. It codifies the version of the common law that proceeded on the basis of 'an imperfect understanding of the impact which provocative conduct may have on the human mind'.[131] The double requirement of 'suddenness' contained in s 160(1) and s 160(2) means that any judicial attempts to expand the defence to account for the experiences of battered women are likely to be severely curtailed.

It is urged that the Tasmanian legislature recognise the deficiencies of the current law and take appropriate steps to initiate legislative reform. In 1982, the New South Wales government recognised that the restrictive view of the loss of self-control encapsulated in the defence of provocation failed to accommodate the experiences of women who kill following a history of violence[132]and amended the law.[133] In 2000, the legislature in Tasmania, faced with a defence of provocation even more restrictive than the pre-1982 New South Wales provision, has done nothing. It is suggested that the Tasmanian government take urgent steps to remedy the anachronistic defence of provocation. In this regard, we could yet overtake the reforms in New South Wales (currently the most progressive in Australia), if a remodelled approach to provocation in Tasmania adequately dealt with the operation of the provocation defence in the case of the jealous husband.[134]

[131] *Attorney-General's Reference No 1 of 1992* (1993) 1 Tas R 349, 383 (Zeeman J).

[132] The Attorney-General's introductory statement recognised that

> the current law of provocation is based on a theory of human behaviour which assumes that all people respond to provocation suddenly ... This is not true. It is certainly not true for women, and it is also not true for men ... The rule requiring sudden action upon provocation caters for those whose personality is explosive or whose conduct has not been inhibited by years of training in submissive behaviour.

Cited in *Chhay* (1994) 72 A Crim R 1,12–13 (Gleeson CJ).

[133] In New South Wales, the legislation specifically provides that 'there is no rule of law that provocation is negatived if the act of omission causing death was not an act done or omitted suddenly', *Crimes Act* (NSW) s 23(2)(b), and it does not matter whether 'the [provocative] conduct of the deceased occurred immediately before the act of omission causing death or at any previous time', *Crimes Act* (NSW) s 23(1).

[134] Although the defence of provocation has been relied on by battered women, it is my view that ultimately the fundamental masculinism of the provocation defence is inescapable. It is my preference that the defence of provocation be abolished. In this regard, I am in agreement with Horder, above n 1; Howe, 'Reforming

Provocation (More or Less)', above n 129; Howe, '*Green v The Queen*', above n 113; Howe, 'More Folk Provoke Their Own Demise', above n 129; Howe 'Provoking Comment', above n 8; Morgan, above n 83; G Coss, 'Revisiting Lethal Violence by Men' (1998) 22 *Criminal Law Journal* 5; and the Model Criminal Code Officers Committee, above n 124. However, I have not chosen this article as the place to advance the argument for the abolition of provocation. The purpose of this article was not to dictate the precise form that the reforms should take, but to urge that we begin the process towards reform.