The 'Specific Triggering Incident' in Provocation: Is the Law Gender Biased?

★

STELLA TARRANT†

Traditional interpretation of the defence of provocation under the Western Australian Criminal Code is challenged by the author who argues, on the basis of the New South Wales case, R v Chhay, *that no specific triggering incident is required. In the alternative, the author claims that the requirement of a triggering event is in effect discriminatory towards women and may thus contravene section 22 of the Sex Discrimination Act 1984 (Cth) and be Constitutionally invalid.*

IN 1994 the Court of Criminal Appeal in New South Wales considered, in the context of a spouse killing, whether, in order to rely on provocation, a defendant needed to point to a specific 'triggering incident'[1] before she could invoke a past history of violence by the deceased. The court decided that she did not.

The provocation provisions in New South Wales are different from those in sections 245 and 281 of the Western Australian Criminal Code. This article considers whether the reasoning in *R v Chhay*,[2] the New South Wales case, could also be applied in Western Australia. It is then argued that, if it does not, the Western Australian provisions may be discriminatory on the basis of sex and, ultimately, that they may be Constitutionally flawed.

The article proceeds in the following way. First, the law of provocation in New South Wales and Western Australia is set out. With respect to New South Wales, the facts and decision in *Chhay* are explained; with respect to Western Australia, interpretations of sections 245 and 281 of the Code

† Lecturer, The University of Western Australia. I would like to thank Doug Hodgson and Neil Morgan for their very helpful comments on an earlier draft of this article.

1. By a 'specific triggering incident' I mean specific, clearly identified conduct by the victim immediately, or very shortly, before the retaliation by the accused.
2. (1994) 72 A Crim R 1.

are set out. Secondly, the case of *Chhay* is considered for its possible application in Western Australia. It is argued, as a matter of interpretation, that the reasoning in *Chhay* does (or should) apply in this state. The third section considers the possibility that this argument is wrong (ie, that the reasoning in *Chhay*, with respect to the 'specific triggering incident', cannot be adopted in Western Australia as a matter of interpretation). The consequences of this conclusion are considered. The argument is advanced that, assuming that a specific triggering incident *is* required in Western Australia, then the provocation provisions of the Code may be discriminatory within the meaning of the Sex Discrimination Act 1984 (Cth). This is an 'equality analysis' of the Code provisions and relies on the proposition that women and men respond differently to provocative violence. This part of the article considers (i) social science research on responses to spousal violence and (ii) the operation of section 22 of the Sex Discrimination Act. If the provocation provisions are found to be inconsistent with that Act, this has Constitutional implications.

PROVOCATION IN NEW SOUTH WALES AND WESTERN AUSTRALIA

1. New South Wales: R v Chhay

Mrs Chhay was convicted of the murder of her husband and appealed against conviction on the ground that provocation was not properly put to the jury. In a 13 year marriage, beginning in Cambodia and ending in Australia, Mrs Chhay had suffered severe and frequent abuse. This abuse involved beatings which would often increase in severity if her husband was drunk, or if he had lost a job or their business was not going well. It also involved deprivation of household money (which was spent on alcohol) and a refusal to get medical treatment for their children. The night before the killing there had been an argument between Mr and Mrs Chhay, apparently about their failing business, in which Mr Chhay threatened to seek a divorce and leave Mrs Chhay to fend for herself and their three children. Mrs Chhay alleged that at the time of the killing (in the early hours of the next morning) the deceased came at her with a knife and that she killed him in response. The Crown's case was that she killed him with the knife whilst he was asleep.

Section 23 of the Crimes Act 1900 (NSW) creates the defence of provocation in that state. The section expressly provides that failure to respond immediately will not preclude reliance on provocation. It states:

> 23. (2) An act ... causing death is an act done ... under provocation where:

> (a) the act ... is the result of a loss of self control ... induced by any conduct of the deceased ... and
> (b) that conduct of the deceased was such as could have induced an ordinary person ... to have ... lost control ...
> whether that conduct of the deceased occurred immediately before the act ... causing death or at any previous time.

In spite of what appears clear language[3] the question on appeal in *Chhay* was whether the abusive relationship, on its own, could constitute provocation or whether a specific triggering incident — the alleged knife attack by Mr Chhay— was required. The trial judge directed that the triggering incident was required but the Court of Criminal Appeal disagreed. The past abuse itself could be the provocation.

2. Western Australia: sections 245 and 281 of the Code

Sections 245 and 281 of the Criminal Code (WA) provide a defence of provocation in Western Australia in relation to killings. According to these sections a killing is 'provoked' if it is committed in response to a provocative incident which causes a sudden and temporary loss of control in such circumstances that an ordinary person would have been likely to lose control and kill. If a killing is found to have been provoked a conviction of murder is reduced to manslaughter.[4] Interpretation of the Code provisions

---

3. Indeed, it is somewhat surprising that the court considered the necessity for a specific triggering incident in so much detail. In light of the terms of s 23 the question was whether, in this instance, a specific triggering incident was required, but the Court nevertheless took the opportunity to address the gender issues inherent in the case in more detail. This throws up another matter. The fact that the question whether provocation should be put to the jury was addresssed as a substantial issue suggests that in jurisdictions where a specific triggering event is not required the focus of analysis in provocation will shift to the objective element of the defence. Was the retaliation within the range that the ordinary person might have expressed? This is akin to the reasonableness requirement inherent in self-defence which, as *Runjanjic* ((1991) 53 A Crim R 362) and *Lavallee* ((1990) 55 CCC (3d) 97) show, itself raises important gender-related issues. Thus, other difficulties for women are foreshadowed in the trial judge's reasons. It would seem that even in the face of an express statutory provision he could not accept that Mrs Chhay's response to the abuse she received over 13 years was within the range of possible responses that an ordinary person might have expressed.

4. S 245 of the Code provides: 'The term 'provocation' ... means and includes ... any wrongful act or insult of such a nature as to be likely, when done to an ordinary person ... to deprive him of the power of self control, and to induce him to assault the person by whom the act or insult is done or offered.'
S 281 of the Code provides: 'When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute wilful murder

by the courts has proceeded from a traditional common law model requiring an immediate response to provocative conduct. However, two modifications have been made by case law, both of which bear on the requirement of immediacy.

First, it is now settled law that, when considering the nature of the provocative incident on which the defence of provocation is based, a jury may consider the history of the relationship between the accused and the deceased.[5] Thus, in the case of *The Queen v R*[6] the jury was entitled to consider the words: 'I love you, we are all going to be one big happy family' in the context of a long history of astonishing abuse of the accused herself and recently acquired knowledge that the abuse had also been directed at her daughters. However, this development, allowing the provocative incident to be 'contextualised', does not alter the fundamental requirement that the accused's retaliation must follow immediately on the victim's provocative act.

The second ameliorating interpretation of the Code provisions relates to the so-called 'cooling off' period. Retaliation need not ensue hard on the provocative conduct in every case. So long as the accused responds before a 'cooling off' period has intervened a defendant may rely on provocation. This was affirmed by the High Court in *R v Parker*.[7] In that case the accused followed his wife and her lover after they had left his house on a bicycle; he killed the lover some 20 minutes later. It was held that the provocative conduct of the deceased, over a total of some two hours, 'heat[ed] the blood' and 'kept it boiling to the moment of the fact'.[8] There is thus some flexibility in the requirement of immediacy, insofar as an accused can rely on provocation where she or he remains out of control for some length of time (and it is likely that an ordinary person would have done so). However, the model underlying the defence continues to assume an immediate, extreme emotional reaction to the victim's conduct.[9] In other words, the principle in *Parker* contemplates that the 'passion', on the basis of which reliance on provocation is placed, has arisen immediately following the identified provocative conduct but that it may have been

---

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

5. In the context of spouse homicides discussed here: *The Queen v R* infra n 6. In another context, see *Mehemet Ali* (1957) 59 WALR 28.
6. (1981) 4 A Crim R 127.
7. (1962) 111 CLR 610.
8. Id, 663.
9. For a discussion of this distinction between the flexibility introduced by the concept of the 'cooling off' period and the primary model underlying the defence, see *Chhay* supra n 2, 11.

maintained for varying periods of time.[10] This model, even with its flexibility, does not account for a situation where the blood was not 'boiling' at the time of the provocative act but was 'kindled' at a later time.

Thus, interpretation of the Code provisions to date has not encompassed the proposition affirmed in *Chhay*. Although the idea of a 'cooling off' period is recognised in Western Australian law it would seem that the traditional concept of a triggering incident has not been challenged. A specific triggering incident would seem to be required if a history of abuse is to be relied on to contextualise the provocation.

DOES (OR SHOULD) THE REASONING IN CHHAY APPLY IN WESTERN AUSTRALIA?

The difference between the two models suggested in the previous section — one of immediate 'passion', the other of 'passion' at another time — is often gender based. Women are more likely than men to lose control at a time other than the provocative incident; men are more likely to lose control at the time of the incident. This difference,[11] and the possible significance of it, if it is accepted that only one of the response models is appropriate as the basis for provocation in law,[12] are considered in detail in the next part of the article. In this section, however, the idea that the reasoning in *Chhay* may properly be adopted in Western Australia as a matter of statutory interpretation of sections 245 and 281 of the Code is explored.

In the context of homicide offences the assumption that immediacy is required in provocation in Western Australia comes from two phrases in section 281 of the Code. Provocation must be 'sudden' and there must be

---

10. This is consistent with the English law of provocation, some restatements of which have occurred in the context of spouse killings. Eg, in *Ahluwalia* (1993) 96 Cr App R 133, 139 where Kiranjit Ahluwalia killed Deepak Ahluwalia after a 10 year abusive marriage, the Court of Appeal held that the question whether the 'cooling off' period had resulted in the accused regaining control was a question of fact for the jury. However, the model on which the court based its decision was clearly one in which the cooling off period signified (for the purposes of assessing what the *ordinary person* might have done) an opportunity to regain control. The court said: '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" caused by the alleged provocation. 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.' This is the model of immediacy underlying *Parker*: see *Thornton* [1992] 1 All ER 306.
11. See 'Research on Responses to Spousal Violence' infra p 197.
12. See 'The Criminal Code and Section 22 of the Sex Discrimination Act 1984 (Cth)' infra p 199.

a response 'before there is time for ... passion to cool'. With respect to the requirement of suddenness, if 'sudden' provocation can be equated with a 'sudden and temporary loss of control' — the common law formulation — then the reasoning in *Chhay* could be applied in interpreting the Code. In *Chhay*, Gleeson CJ makes a distinction between the idea of a 'sudden and temporary loss of control' on the one hand and the time gap between the provocative conduct and the response on the other. The lapse of time is a different concept from that of suddenness. He writes:

> 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.[13]

Thus, following the Chief Justice's reasoning, the suddenness required in section 281 of the Code could be interpreted as referring to the process of losing control, not to the time between the provocative conduct and the subsequent loss of control. If control is lost quickly (whenever that process begins) it indicates the kind of emotion relevant for provocation as opposed to the kind which motivates a merely vengeful response.

The other phrase in section 281 on which the concept of immediacy is based —'before there is time for ... passion to cool' — is not discussed in *Chhay,* but general principle suggests that it does not necessarily preclude provocation where there is no specific triggering incident. The requirement of immediacy has a limiting function — to ensure that retaliation which results in a killing, and which is a calculated revenge, cannot be the basis for a provocation defence. Time is understood as an indicator of capacity for control.[14] But, as will be discussed in more detail,[15] time is *not* an indicator of capacity for control in some circumstances — at least where the time period is that between one incident of provocative violence and a subsequent emotional response. That gap in time is likely, in circumstances some women find themselves in, to be a *condition* for the expression of 'rage-out-of-control'.

An alternative interpretation of section 281 is that the time period implied in the requirement that retaliation must be before passion has cooled is a reference to one of two other periods of time. First, as with the requirement of suddenness, the time may be that between the onset of loss of control and the retaliatory act. An argument against this interpretation is that it results in the latter phrase adding nothing to the requirement of 'sudden' provocation. But it could be said that the second phrase performs a clarifying function and that the phrases should be read together. The

13. *Chhay* supra n 2, 10.
14. See discussions in *Ahluwalia* supra n 10, 138-139; *Chhay* supra n 2, 9.
15. See 'Research on Responses to Spousal Violence' infra p 197.

second time period to which the phrase in question ('before there is time for ... passion to cool') may refer is that between an event which precipitates a 'turning point' — a changed perception — and the subsequent loss of control resulting in retaliation. Again, as will be discussed, a 'turning point' for some women in abusive relationships occurs when an event changes her perception of the abuse (eg, when the violence becomes visible outside the relationship or she becomes aware of a child's victimisation). The suggestion here is that the time period implicit in the phrase 'before there is time for ... passion to cool' may be the period between such a 'turning point' and the retaliatory act. But if this were the case, the idea of a time lapse would, itself, need to be re-conceptualised since the process of responding to those kinds of events is significantly different from responding to physical abuse for those who have the capacity to do so. Although this interpretation of a time gap overcomes the argument that the two phrases in section 281 add nothing to each other, it is not the preferable interpretation because it is likely to add, in effect, an additional component to the defence of provocation. It may mean that a defendant would be required to identify a 'precipitating event' in addition to the provocation.

To sum up: 'sudden' provocation in section 281 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*. Equally, the phrase 'before there is time for ... passion to cool' could be a reference to the period of time between the onset of loss of control, or the 'precipitating event', and the killing — though the former is the preferable interpretation. It is possible, on this view, that sections 245 and 281 of the Code do allow reliance on provocation without the identification of a specific triggering incident.

A SEX EQUALITY ANALYSIS OF THE PROVOCATION PROVISIONS

The discussion in the previous section explored the possibility that the reasoning in *Chhay* does apply in Western Australia. This section of the article explores some possible consequences of the opposite conclusion, namely that the reasoning in *Chhay* cannot be adopted in this State as a matter of statutory interpretation and that a specific triggering incident is required in order for a defendant to rely on provocation. The argument in this section is that, if this is so, then sections 245 and 281 together treat men and women differently and in a way which disadvantages women. It is then argued that this discrimination may offend federal anti-discrimination legislation and, consequently, that it may be constitutionally invalid.

This is a sex equality analysis of the provocation provisions and relies on the proposition that, as a matter of fact, women tend to respond to provocative violence in a different way than men. It is therefore necessary to look in more detail at the proposition mentioned earlier in the paper that women are likely to respond to provocation at a time *other* than the time of a physical attack. The first part of this analysis considers domestic violence research on responses to spousal violence. The second and third parts of the analysis discuss the possibility that, in light of this research, the provocation provisions of the Code (if they cannot incorporate the reasoning in *Chhay*) are inconsistent with the Sex Discrimination Act 1984 (Cth) and, in consequence of section 109 of the Commonwealth Constitution, are invalid.

1. Research on responses to spousal violence

It is now generally understood from domestic violence research that many women regularly, and as a matter of sensible practice, remain passive during an attack by their spouse.[16] This may be because of the difference between the woman and her assailant in size and strength. Alternatively, a woman may remain passive in order to reduce the severity of the attack or in the hope that it will reduce the future frequency of attacks. To quote from just one marital violence study:

> The majority of the women [109 women who suffered abuse from their male spouses] ... responded to a violent attack by remaining physically passive. Women learn that it is futile to attempt to match the physical strength of their husbands and try primarily to protect themselves during attacks. Two women summed up the experience of most women: 'Well, I didn't try to hit him back. It just got worse if I did.' ... 'I just tried to defend myself, got my arms up to save myself.... If you can just think to yourself, I'm going to get two or three and then he'll stop ... but he wouldn't stop if you cried out or protested.'[17]

Responses to domestic violence have been analogised to responses of victims of serious 'one-off' crimes, particularly 'prolonged contact' crimes.[18] Symonds, for example, on the basis of a psychiatric study of one-off crime victims, concluded that there is typically a three-phase response, whatever the nature of the crime, but that the duration and intensity of each phase may alter depending on the nature and quality of contact with

16. See eg RE Dobash & R Dobash *Violence Against Wives: A Case Against the Patriarchy* (London: Open Books, 1980); E Hilberman & K Munson 'Sixty Battered Women' (1977) 2 Victimology 460; JE Stets *Domestic Violence and Control* (New York: Springer-Verlag, 1988) 107-109; S Tarrant 'Something is Pushing Them to the Side of Their Own Lives: A Feminist Critique of Law and Laws' (1990) 20 UWAL Rev 573, 585-590.
17. Dobash & Dobash id, 108-109.
18. C Ewing *Battered Women Who Kill: Psychological Self-Defense as Legal Justification* (Massachusetts: Lexington Books, 1987) 71.

the criminal.[19] In phase one victims typically react with shock and disbelief; in phase two they realise the reality of the situation and are terrified. Phase three often involves 'circular bouts of apathy, anger, resignation, irritability, constipated rage, insomnia, startled reactions, and replay of the traumatic events through dreams, fantasies, and nightmares'. Significantly, phase three is unlikely to occur while the victim is in contact with the perpetrator.[20] Thus, violent explosions of emotion are likely when a recipient of violence is *not* in the company of the perpetrator of a 'prolonged contact' violent attack.

To draw this analogy between victims of one-off crimes and women receiving violence in relationships, and to say that many women remain passive during the course of an attack, is not a claim that no women ever fight back, nor that those who do not fight back are the only ones who are seriously victimised. Some women always fight back, and some do so occasionally. It is a claim, however, that a *central* case for women who are receiving abuse from their spouse is that they do not retaliate at the time when an attack is in progress. To put this positively, a central case for women is that they respond to an attack (or series of attacks) at a time other than the time of an attack.

The thing that triggers a response from a woman, where she has not responded before, differs from situation to situation. However, domestic violence research suggests likely circumstances. For example, Johnson and Ferraro observe that many women who have been abused experience, as was mentioned earlier,[21] a 'turning point' involving a changed perception of their situation and the abuse they are receiving, after which it is more likely that some kind of action is taken in response to that violence.[22] This turning point 'may stem from dramatic events or crises. It may additionally originate from progressive, gradual realisations by women'.[23] Johnson and Ferraro suggest three kinds of circumstances: first, there may be a marked escalation of the severity of the abuse during which the woman will presumably be even less likely to respond but which alters her perception of the danger she is in. Secondly, the turning point may result from the abuse becoming apparent to someone outside the relationship, again altering her perception of the abuse. The third possible turning point is a response to a significant change in the abusive relationship, for example, if the stage of 'contrition' (involving apology and promises not to repeat the

19. M Symonds 'Victims Responses to Terror' in F Wright, C Bahn & RW Rieber (eds) *Forensic Psychology and Psychiatry* (New York: NY Academy of Sciences, 1980) 129.
20. Id, 129-130.
21. See 'Does (or Should) The Reasoning in *Chhay* Apply in WA?' supra p 194.
22. J Johnson & K Ferraro 'The Victimized Self: The Case of Battered Women' in J Kotarba & A Fontana (eds) *The Existential Self in Society* (Chicago: UCP, 1984) 118, 120.
23. Ibid.

violence) grows shorter or disappears.[24] Another possible triggering circumstance for the turning point is the acquisition of knowledge that not only she, but also her children or other loved dependants are, or have been, the subject of the man's abuse.[25]

2. The Criminal Code and Section 22 of the Sex Discrimination Act 1984 (Cth)

If sections 245 and 281 of the Code require a specific triggering incident immediately or very shortly before the accused's retaliation then, as discussed, spousal violence research shows that those provisions overlook a substantial proportion of women.[26] And if that is the case then those provisions discriminate indirectly on the basis of sex. They systematically disadvantage women because it is women who are likely to be the ones who are less powerful in on-going heterosexual relationships involving violence. This section explores the possibility that this systematic disadvantage amounts to discrimination under section 22 of the Sex Discrimination Act 1984, and, if it does, whether the provisions may be invalid by virtue of section 109 of the Commonwealth Constitution. The analysis is not intended to be exhaustive but merely to suggest an expansive view of this area of law and to propose directions for further research.

(i) Section 22 of the Sex Discrimination Act (Cth)

Section 22 of the Sex Discrimination Act 1984 (Cth) ('SDA') provides: 'It is unlawful for a person who ... provides services ... to discriminate ... on the ground of ... sex....'

One form of discrimination, defined in section 5 of the SDA, is perpetrated where a standard is imposed on a group of people which is neutral on its face but which has a disproportionate, disadvantageous impact on members of a particular sub-group. This is referred to as 'indirect discrimination'. There are four elements in this kind of discrimination. There must be:

---

24. Id, 121-124.

25. See eg the foundational Australian cases in this area: *The Queen v R* supra n 6; *Falconer* (1990) 65 ALJR 20; *Kina* (unreported) Qld Ct Crim App 29 Nov 1993 no 221 (retaliation after being threatened that her niece would be sexually abused). Cf Ewing supra n 18, 36. Studies showing that between 51-54% of abused women who did not kill and 71% of abused women who did kill reported physical or sexual abuse of their children.

26. See the discussion above concerning domestic violence research. For an analysis of the social context of spouse homicides in Australia, the prevalence of spousal violence as a background to them and 'delayed' responses: see Tarrant supra n 16.

- a *requirement or condition*;
- which is *not reasonable having regard to the circumstances*;
- and with which a *substantially higher proportion* of another sub-group (in this instance men);
- can *comply*.

Discrimination of this kind is unlawful if it occurs in an area of public life regulated by the SDA.[27]

Subject to two issues discussed below, it is arguable that the four elements are satisfied where a criminal defence is structured so as to prevent reliance on it by a disproportionate number of women. For the purposes of the argument the rule that a person must respond to provocative conduct almost immediately could be said to be a 'requirement or condition' of reliance on provocation. A 'requirement or condition' within the meaning of anti-discrimination legislation has been interpreted broadly.[28] In *Australian Iron and Steel Pty Ltd v Banovic*,[29] McHugh J endorsed a passage from the English case of *Clarke v Eley (IMI) Kynoch Ltd*:

> It is not right to give these words [requirement or condition] a narrow construction. The purpose of the legislature in introducing the concept of indirect discrimination into the [English Sex Discrimination] Act ... was to seek to eliminate those practices which had a disproportionate impact on women or ethnic minorities and were not justifiable for other reasons.[30]

Construed in the light of its legislative purpose (viz, to eliminate systematic disadvantage as well as specific and conscious discrimination against women) it is likely that a rule insisting on a particular practical and emotional response pattern would come within the meaning of a 'requirement or condition' in the SDA. Moreover, as discussed, domestic violence research indicates that a substantially higher proportion of men than women are able to 'comply' with that requirement.[31] Women regularly

27. These are: work, education, goods, services and facilities, accommodation, land, clubs and administration of Commonwealth laws and programs: SDA s 3.
28. *Australian Iron and Steel v Banovic* infra n 29, 185; *Waters v Public Transport Corp* (1991) 173 CLR 349.
29. (1989) 168 CLR 165, 196.
30. [1983] ICR 165, 171.
31. See 'Research on Responses to Spousal Violence' supra p 197. The 'substantially higher proportion' question would be calculated by comparing the number of women who could comply as a proportion of all relevant women and the number of men who could comply as a proportion of all relevant men: *Banovic* supra n 29, 170-171, 177-178, 185-187. The 'base-groups' of relevant men and women must be determined in each case. In the case considered in this article the relevant groups would be the women and men who relied on provocation in their defence or who sought to rely on the defence but were precluded from doing so because there was no specific triggering incident. A base-group composed, for example, only of those who in fact relied on provocation in their defence would be inappropriate because it would not 'ascertain whether sex is significance to compliance': see *Banovic* supra n 29, 178.

respond at a time other than the physical attack. The ability to comply with a requirement or condition is to be assessed on a practical, not a theoretical, level[32] and so the fact that some women may be able to respond immediately would not be fatal to the argument. And, presumably, the argument that such disproportionate impact on one sex is unreasonable would be sustainable in light of the fact that Parliament would be free to enact more gender-neutral legislation.

Thus, although the relationship between the criminal laws and the requirements of anti-discrimination legislation have not been fully considered by the courts, it may be that the provocation provisions of the Criminal Code are, at least prima facie, indirectly discriminatory. There are, however, two more questions which arise in relation to the proposition that the provisions offend against the SDA. First, does the indirect discrimination come within one of the areas of public activity regulated by the SDA? (Of the areas covered by the Act[33] it would seem that the 'provision of services' is most relevant. Is the administration of justice with respect to criminal defences a 'service' within the meaning of the SDA?) The second question is whether a law, as opposed to discretionary conduct on the part of a person, can be the source of discrimination under the SDA. Unlike race discrimination,[34] sex discriminatory laws are not, themselves, expressly prohibited by the SDA. However, there is an argument that discriminatory conduct required by a law may render the law invalid.

(a) 'Services'

Is the provision to citizens by the state of a criminal justice system, including the administration of a criminal defence, a 'service' within the meaning of section 22 of the SDA? An immediate response may be in the negative, but it is informative to analyse the question in more detail. Questions arise concerning the generality of such a function and the fact that it is exercised by the judiciary.

It has been held that 'services' need not be confined to specific functions and that they may be very general in nature. For example, it has been held that the provision by a municipal council to its ratepayers of an entitlement to attend council meetings is a service,[35] as is the exercise of functions of the Registrar of Births, Deaths and Marriages.[36] Thus, the

32. *Price v Civil Service Commission* [1978] ICR 27.
33. See supra n 27.
34. Racially discriminatory laws are expressly prohibited by s 10 of the Racial Discrimination Act 1975 (Cth).
35. *Byham v Preston CC* (1991) EOC 92-377.
36. *L v Registrar of Births, Deaths and Marriages* (1985) EOC 92-142. Provision of services to prisoners by the Director-General of Corrections has also been held to be a service:

generality of the function of a state in administering a rule of criminal law should not itself preclude that function from being a 'service' under the SDA. However, in *Hoddy v Department of Corrective Services*[37] it was said: 'The provision of services probably requires that there be some actual or contemplated transactional dealing involving the persons utilising the services'.[38] This suggests an actual interaction of some kind with state officers who impart information or benefits. This requirement, too, has been widely construed. For instance, in *Henderson v Victoria*[39] it was held that the making of an application for leave to have a child in prison, and the rejection of that application, was a transaction or dealing. Thus, with respect to the question of the existence of a relevant interaction it may be said that an attempt by an accused to rely on provocation in her submissions to a trial court, and a judge's refusal to put the defence to the jury for want of a specific triggering event, may be such a transaction or dealing.

To date duties of the judiciary have not been included within the term 'services'. Section 4 of the SDA provides: '"Services" includes: ... services of the kind provided by a government'. It is unclear whether 'government' is a general term referring to the functions of governance by the state or a more specific reference to the executive or administrative arm of government, separate from the judiciary within our constitutional system. Thus far, authority has dealt with actions of government agencies performing administrative services in the latter sense,[40] but there is no express restriction to this sphere mandated by the terms of section 4 itself. The section may be designed to ensure the inclusion of government sevices rather than the exclusion of some kinds of government or state services.

However, it may be argued that the scope of the term 'services' must be interpreted in light of the constitutional principle of judicial independence. Where there is doubt it must be assumed that, in order to maintain such independence, the legislature did not intend to include the judiciary in a mandate affecting their functions. This argument, invoking judicial independence, can be responded to in two ways. First, it confronts the overarching legislative purpose of the SDA — the elimination of discrimination against disadvantaged groups. Such an interpretation would amount to a significant limitation on that purpose, suggesting that it was

---

see *Jolly v Director-General of Corrections* (1985) EOC 92-124; *Hoddy v Corrective Services Dept* infra n 37.

37. (1992) EOC 92-397.
38. Id, 78.
39. (1984) EOC 92-105.
40. Eg *Byham v Preston CC* supra n 35; *L v Registrar of Births, Deaths and Marriages* supra n 36; *Jolly v Director-General of Corrections* supra n 36; *Hoddy v Corrective Services Dept* supra n 37; *Henderson v Victoria* ibid.

not what the Commonwealth parliament intended.[41] The second response arises if the argument based on judicial independence as a principle of statutory interpretation is accepted, or if that principle is asserted as a more profound limitation on legislative power (viz, a constitutional limitation on the Commonwealth parliament's power to encroach on the exercise of judicial power).[42] On this version of the judicial independence argument, important judicial functions could not come within the meaning of 'services' in the SDA even if the Commonwealth parliament had intended that they should. However, this argument is self-defeating. The response may be that, rather than being the justification for *avoiding* an obligation to ensure sex equality, the argument, itself, *within its own terms*, insists on such an obligation. By a different route the idea of judicial independence has the same effect as the inclusion of judicial functions within the scope of 'services' in the Act. The principle of judicial independence is founded on the need for equal treatment of all people under the law and before the courts.[43] Equality is at the heart of the judicial process. The insistence on independence is to ensure equal treatment in law.

To restate the proposition, the argument that the principle of judicial independence precludes the inclusion of conduct of the judiciary within the meaning of 'services' in the SDA, in turn leads to the conclusion that that principle (judicial independence) itself requires equality (including sex equality) under the law. If a state criminal law required a court to act in a discriminatory way it would encroach seriously on judicial independence. At this point, of course, the argument is a constitutional one rather than one merely of statutory interpretation.

(b) Discretionary conduct versus conduct authorised by a law[44]

There is no provision in the SDA expressly prohibiting sex

41. See *Gerhardy v Brown* infra n 47, 146 (opinion that judicial actions, including the imposition of penalties could offend against the Racial Discrimination Act 1975 (Cth)).
42. *Leeth v Cth* (1992) 174 CLR 455, 475-478, 486, 501-503 (in 3 different formulations, 4 judges held that Commonwealth legislative power is limited in that it cannot be exercised so as to encroach on the essential components of judicial process). Cf *Polyukhovich v Cth* (1991) 172 CLR 501, 703; *Kable v NSW* (unreported) High Ct 12 Sept 1996.
43. See *Leeth v Cth* ibid (4 judges held that equality before the law is an essential component of judicial process). Cf *Polyukhovich v Cth* ibid.
44. Since writing, the Full Court of the SA Supreme Court has delivered its judgment in *Pearce v SA Health Commission* (unreported) SA Sup Ct 10 Sept 1996 no 55801. It was held by a unanimous court that s 13(3) of the Reproductive Technology Act 1988 (SA) is inconsistent with s 22 of the SDA because it discriminates on the ground of marital status. A declaration was made that s 13(3) is invalid to the extent of the inconsistency by virtue of s 109 of the Commonwealth Constitution. S 13(3) made it unlawful to

discriminatory laws.[45] This is different from the case of racially discriminatory laws, which are expressly prohibited by section 10 of the Racial Discrimination Act 1975 (Cth) ('RDA'). The SDA deals most obviously with discriminatory *conduct*. However, there is an argument that discriminatory conduct required by a discriminatory law may render the law suspect.

It is generally the discretionary conduct of public officials or private actors which is the subject of anti-discrimination legislation. However, in some cases, as is argued for in this part of the article with respect to provocation, discrimination may be inherent in the statute rather than in the discretion of the actor. In the case under discussion a public officer (the judge) with duties under the statute is obliged to act in a discriminatory manner. The question whether a discriminatory law, or discrimination in the 'obligatory' acts of an official pursuant to the law, comes within the prohibition on sex discrimination in section 22 of the SDA has not been judicially considered. However, the same question has been considered in the context of the RDA.

Section 9 of the RDA is equivalent to section 22 (with section 5) of the SDA in that it directs its prohibition at discriminatory conduct. Section 9 makes it unlawful for a person 'to do any act involving a distinction, exclusion, restriction or preference based on race ... which has the purpose or effect of nullifying ... the recognition ... on an equal footing, of any human right'.[46] In *Gerhardy v Brown*[47] the High Court considered a South Australian Aboriginal land rights Act. It was assumed that the Act was discriminatory on the basis of race, but the question for consideration was whether it came within the terms of section 9 of the RDA. This is analogous to the question posed in this section: whether sections 245 and 281 of the

---

provide IVF services to single people. In a 6 page judgment the court analysed the question in terms of the constitutional principle of 'direct inconsistency' between a Commonwealth and a state law. The issue discussed in the text in this section, and which was raised by the High Court in *Gerhardy v Brown* infra n 47 (ie, whether federal laws prohibiting discriminatory *conduct* — as opposed to discriminatory *laws* — could be said to be inconsistent with discriminatory state *laws*), was not mentioned. It is unclear why the issue was not raised, although the SA court's analysis (which in effect takes Brennan and Deane JJ's line in *Gerhardy v Brown*, to be discussed) is clearly the preferable analysis.

45. ALRC *Equality Before the Law: Women's Equality* 69 Pt II (Sydney: ALRC, 1994) 61. The ALRC has recommended enactment of a federal Sex Equality Act providing a general, federal right to gender equality in law equivalent to the general right to racial equality in s 10 of the RDA. The Sex Equality Act would provide that 'any law, policy, program, practice or decision which is inconsistent with equality in law on the ground of gender [is] inoperative to the extent of the inconsistency.'

46. This is the 'direct discrimination' provision in the RDA. 'Indirect discrimination' was inserted into the RDA by s 9(1A) in 1990, after *Gerhardy v Brown* infra n 47 was decided.

47. (1985) 159 CLR 70.

Code come within the terms of section 22 of the SDA. It was clear in *Gerhardy v Brown* that an inherently racially discriminatory state statute came within the provisions of section 10 of the RDA (which prohibits discriminatory laws). However, four of the judges considered also whether such a statute would offend against section 9 of the RDA. Gibbs CJ and Mason J held that section 9 does not apply in circumstances in which the actor, having statutory authority to act in a particular way, acts in accordance with the authority.[48] On the other hand, Brennan and Deane JJ held that acts done pursuant to a discriminatory law, as well as discretionary acts, come within the scope of section 9. Brennan J said: 'A State law cannot validly authorise the doing of an act if the doing of that act is prohibited by section 9 of the Racial Discrimination Act'.[49] Deane J said:

> Among the acts which section 9 of the Commonwealth Act ... makes it unlawful for any person to do is an act involving a distinction ... based on race ... which has the effect of nullifying or impairing the recognition ... on an equal footing, of any human right or fundamental freedom. In conflict with that prima facie operation of section 9 of the Commonwealth Act, section 19 of the State Act operates, as has been seen, to incorporate such a distinction ... into the general law of South Australia. *In other words, section 19 of the State Act establishes as the legal justification for action, including action by courts (eg, imposition of a penalty, issue of a writ of ejectment or grant of an injunction) and other law enforcement agencies (eg, preventing a proscribed entry or removing an entrant), a distinction ... which section 9 of the Commonwealth Act ... expressly states will render any act of a person unlawful.*[50]

If, then, Brennan and Deane JJ's line of reasoning were to be followed, rather than that of Gibbs CJ and Mason J, it might be that conduct done pursuant to a sex discriminatory law would be the subject of the statutory prohibition contained in section 22 of the SDA.

In conclusion, the operation of state laws is not generally considered in the light of the anti-discrimination requirements of other legislation. However, if a sex equality analysis is undertaken it is possible that the four elements of indirect discrimination in section 5 of the SDA may be satisfied by the provocation provisions in Western Australia. More difficult questions are whether judicial activity comes within the meaning of 'services' in section 22 of the SDA and whether conduct made mandatory by legislation (as opposed to discretionary conduct) comes within the scope of the SDA.

---

48. Id, 81-82, 93-94.
49. Id, 121.
50. Id, 146 (emphasis added).

(ii) Section 109 of the Commonwealth Constitution

Section 109 of the Commonwealth Constitution provides that, where a state law is inconsistent with a Commonwealth law, the state law is invalid to the extent of the inconsistency. If the provocation provisions of the Code offend against section 22 of the SDA because they discriminate against women then they would be invalid, as a consequence of the operation of this section.

CONCLUSION

Sections 245 and 281 of the Criminal Code have been understood, traditionally, to require a specific triggering incident. Athough there is flexibility in this requirement, both in that 'passion' can be maintained to some extent and insofar as the specific triggering incident can be 'contextualised' to take account of past conduct of the deceased, a model which is based on the requirement of immediacy works against the normal experience of women in many circumstances. *R v Chhay* and section 23 of the Crimes Act 1900 (NSW) establish that, in New South Wales, no such triggering incident is necessary in order to rely on provocation and that a history of past abuse itself can constitute the provocation.

I have suggested that sections 245 and 281 of the Code can be interpreted so that in Western Australia no specific triggering incident is required. Alternatively, if the provisions are interpreted in such a way as to require an immediate response then certain consequences follow, including, possibly, violation of section 22 of the SDA and, consequently, constitutional invalidity.