

# Domestic Killings and Reframing the Provocation Defence

Heather Douglas  
h.douglas@law.uq.edu.au

# Common Law Developments

---

- The trigger
  - May be hard to ID... *Chhay, R*
- The underpinning emotion
  - Anger (honour) versus fear (danger)
  - But fear = self defence?
- A sudden loss of control
  - Extending time...for all (Morgan)
- The ordinary person
  - 'Battered woman syndrome'...mediated by an expert
  - Social framework evidence (Stubbs / Tolmie)

# Statutory reform?

WA 2008	Provocation abolished	<ul style="list-style-type: none"> <li>• Presumptive life for murder.</li> </ul>
NT 2006 ACT 2004	New formulation introduced	<ul style="list-style-type: none"> <li>• Generally excludes non-violent sexual advance</li> <li>• Murder in NT = Life</li> </ul>
NSWLRC 1997	Not yet introduced	<p>Recommendations:</p> <ul style="list-style-type: none"> <li>• Despite murder having sentence range, did not rec. abolition.</li> <li>• Reformulation- broader discretion to jury</li> </ul>
Working party 1998	Not yet introduced	<ul style="list-style-type: none"> <li>• Exclude non-violent homosexual advances</li> </ul>
2001	Introduced excessive self defence	
SA		<p>CL provocation Mandatory life for murder</p>

- 2007 *Sebo* case (10 yrs)
- Review in shadow of mandatory life...
- Recommended stat reform:
  - \* Save for extreme and exceptional circs
  - Trigger not words alone....
  - Trigger not choice about relationship
  - \* Reverse onus
  - \* Separate defence for battered persons
  - \* Retention of complete defence to assault

# Tasmania

---

- 1995 abolition of mandatory life
- 2003 abolition of provocation

*...people who rely on provocation intend to kill. An intention to kill is murder. Why should the fact that the killing occurred when the defendant was acting out of control make a difference? All the ingredients exist for the crime of murder.*

Mrs Jackson MP

- *Tyne* [2005] TASSC (CCA)

# Victoria

---

- VLRC 2004 recommended abolition of provocation:  
‘[w]hile extreme anger may partly explain a person’s actions, in the Commission’s view it does not mean such behaviour should be partly excused.’ xxi
- 2005
  - \* Abolished provocation
  - \* Introduced offence of defensive homicide s9AD
  - \* Family violence evidence s9AH

The VLRC recommended the introduction of a defence of excessive self defence on the basis that it would:

*...have a number of potential benefits for people who kill in response to family violence...[the defence] may encourage more women to plead not guilty to murder as self-defence will no longer be an all or nothing defence. xxix*

<p><i>R v Smith</i> [2008] VSC 87</p>	<p>Plea of guilty to defensive homicide</p>	<p>Drinking alcohol, deceased male victim acted in aggressive manner. Defendant and victim fought, victim stabbed to death.</p>	<p>7 years npp 5 yrs 6 mths</p>
<p><i>R v Edwards</i> [2008] VSC 297</p>	<p>Plea of guilty to defensive homicide</p>	<p>Defendant killed new male partner of previous female defacto (bashed with bottle and chair leg). Victim said something a 'bit smart'.</p>	<p>10 years npp 8 years</p>
<p><i>R v Giammona</i> [2008] VSC 376</p>	<p>Plea of guilty to defensive homicide</p>	<p>Victim called the def a 'dog'. Def. claimed fight in prison cell with victim. Victim stabbed in the back.</p>	<p>8 years npp 6 years</p>
<p><i>DPP v Pennisi</i> [2008] VSC 498</p>	<p>Charged murder. Convicted at trial manslaughter</p>	<p>Defendant killed partner by strangling. 'A fight.' Def. claimed 'accident' (no intent).</p>	<p>10 years npp 7 years</p>

# *DPP v Pennisi* [2008] VSC 498

---

*Her death was an accident only in the sense that you did not intend it, and were surprised by it. ..You were, as you told the police, angry. I am satisfied... that it was your anger ...which explains why you went beyond defence...*

*So Ms. Bishop was killed in her own bed, in her own home, in circumstances of violence, by a person to whom she ought to have been able to look for support. This is a factor which aggravates your criminality.*

Harper J

---

*...extending self defence to cover certain pre-emptive responses and restore excessive self defence.*

*R v Gould [2007] VSC 420 at [21]  
Coghlan J*

*‘our own version of honour killings...’  
Harriet Hartman, Minister for Equalities*