



# Provocation in domestic homicide sentencing



# Background

Provocation abolished as partial defence to murder Nov 2005.

Previously could reduce murder to manslaughter if:

- there was evidence of provocative conduct by the victim,
- the defendant lost self-control as a result of that provocation,
- the provocation was such that it was capable of causing an ordinary person to lose self control and form an intention to cause serious bodily harm or death, and
- the provocation must have actually deprived the defendant of self-control and the defendant must have acted while so deprived and before his or her passion had cooled.

*(Masciantonio v The Queen (1995) 183 CLR 58, 66)*

# Background

## **Victorian Law Reform Commission**

56 recommendations, including:

- Partial defence of provocation be abolished.
- Relevant circumstances of an offence, including provocation, be taken into account in sentencing.

Abolition motivated by concerns about its inequitable operation (particularly re intimate partner homicide).

# Background

May 2003–[Tasmania](#)–abolished

Nov 2005–[Victoria](#)–abolished

Oct 2006–Northern Territory–modified

Oct 2007–[New Zealand](#)–LC recommended [abolition](#)

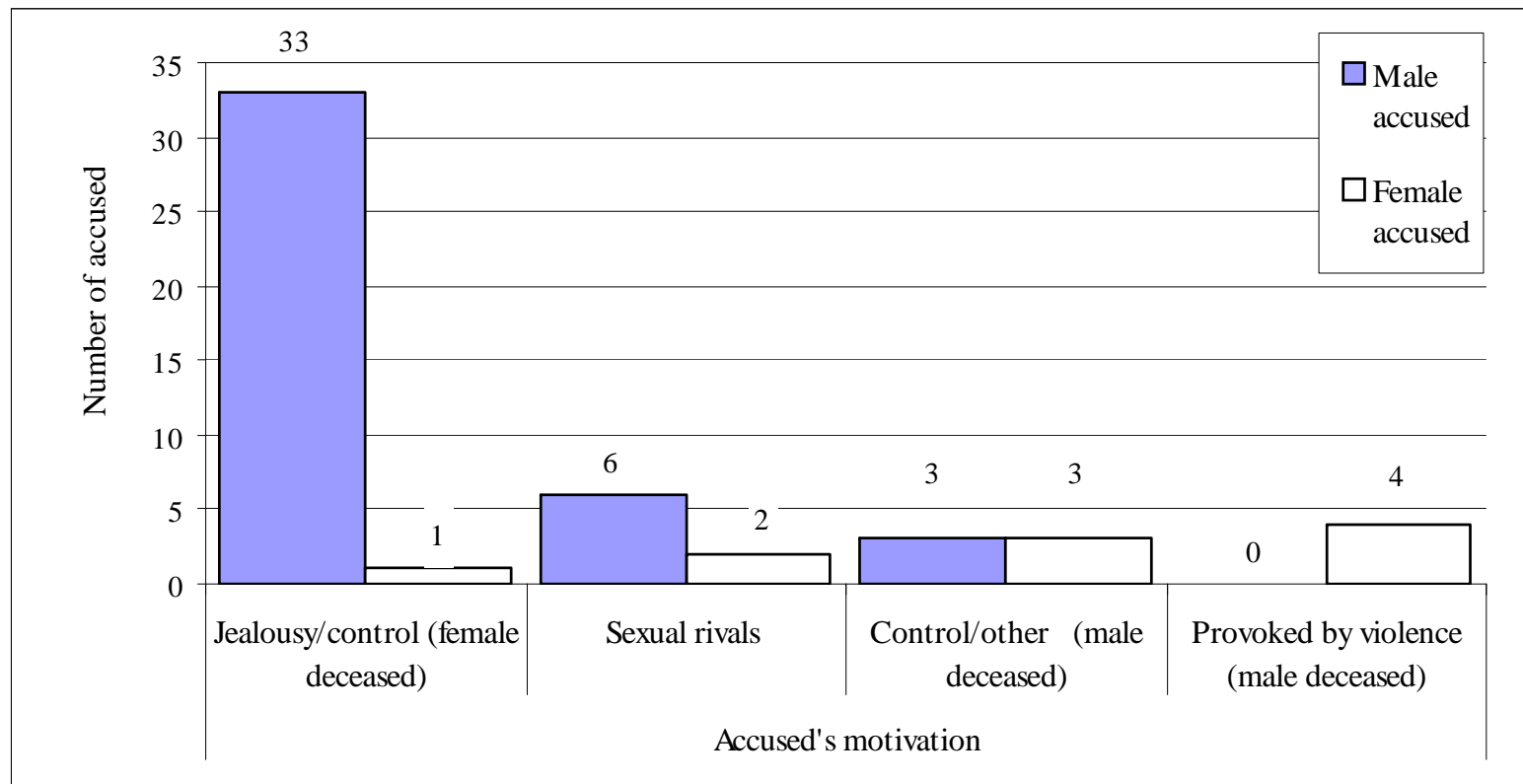
July 2008–United Kingdom–proposal to modify

Aug 2008–[Western Australia](#)–abolished

Oct 2008–Queensland–LRC recommended modification

# Intimate partner homicide

## Sexual Intimacy Homicides—Motivation of Male and Female Accused



Source: VLRC *Defences to Homicide Options Paper*.

# Infidelity, control or separation

- Prior to the abolition of the partial defence it was alleged in a number of cases that an offender who killed his / her partner had been provoked by conduct by the victim such as:
  - Ending the relationship.
  - Commencing a new relationship.
  - Unfaithfulness.
  - Sexual taunts.
- In most of these cases the jury convicted the offender of murder despite provocation being raised.
- However some resulted in a conviction for the lesser offence of provocation manslaughter with a lower maximum penalty and sentencing range.

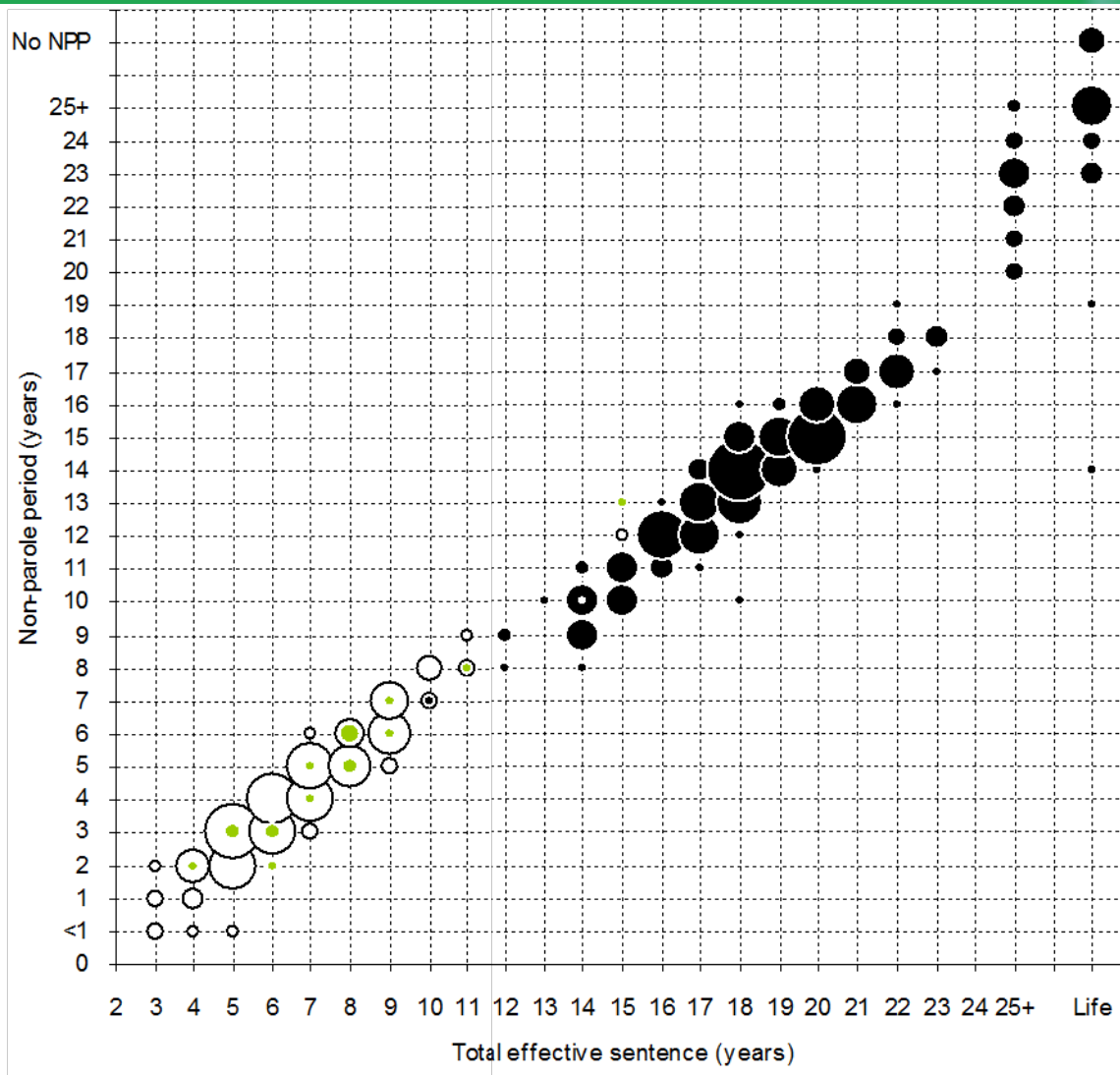
# Infidelity, control or separation

- VLRC: one of the purposes behind abolition of provocation would:
  - be undermined if men who kill their sexual partners were to receive significantly reduced murder sentences on the sole ground they were “provoked” to kill because they suspected their partner was unfaithful or was threatening to leave the relationship.
- Phil Cleary:
  - With provocation gone, is it the end of women being blamed for men’s violence? There is nothing in the legislation to say a woman’s infidelity, alleged or otherwise, won’t be dissected in a murder trial. Certainly, it will not be excluded when a judge calculates a sentence.

# Infidelity, control or separation

- Trial judges had a legal obligation to leave provocation to the jury in such cases.
- *R v Ramage*: “I of course must apply the current law whatever view I may hold as to the desirability of change to it.” (Osborn J)
- Sentences for provocation manslaughter in such cases at the high end of the range.

# Infidelity and separation

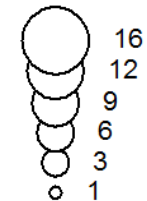


## Number of people

Provocation manslaughter  
(n=17)



Other manslaughter  
(n=141)



Murder (n=246)



# Infidelity and separation

- Leaving a relationship and other forms of exercising the right to autonomy by the victim has also been raised as provocation in sentencing hearings for non-fatal offences against the person such as assault or causing injury.
- Often arises where the offender's personal circumstances such as race or culture are said to have made the victim's conduct provocative to the offender.

# Purpose

VLRC concerned about the approach that would be taken to provocation in sentencing but left question open.

## Purpose of our paper

- Develop approach to provocation to try and ensure that the problems associated with the partial defence did not re-emerge in sentencing.
- Should be applicable to fatal and non-fatal offences against the person.

# Sentencing factors

Section 5(2) of the Victorian *Sentencing Act 1991* sets out the factors that a court must have regard to in sentencing an offender, including:

- the maximum penalty prescribed for the offence; and
- current sentencing practices; and
- the nature and gravity of the offence; and
- the **offender's culpability and degree of responsibility** for the offence; and
- the presence of any aggravating or mitigating factor concerning the offender or of any other relevant circumstances.

# Culpability

At sentencing: provocation relevant to culpability.

When should provocation warrant a reduction in an offender's culpability for a responsive offence?

Theories of culpability:

- Character theory.
- Objective capacity theory.
- Reasons-based approach.

# Reasons-based approach

VLRC: in assessing culpability focus on the reasons for the offence, including the:

1. Gravity of the provocation.
2. Offender's emotional response (anger, fear, jealousy, resentment).
3. Reasons for and justifiability of the offender's response.

Recognises human emotions are complex: eg woman who kills violent husband may be motivated by anger and resentment as well as desperation and fear.

Therefore, focus not on responsive emotions, but the reasons for those emotions.

# Reasons-based approach

Offender's culpability is reduced only when the reasons for being frightened, angry or resentful are good reasons, though fear, anger or resentment in some cases may have led to excessive or inappropriate behaviour.

Return to the original rationale for provocation: focussed on *wrongfulness* of victim's actions and justifiability of the offender's aggrievement, rather than on whether the offender lost self-control as a result of something done by the victim.

# Issues

1. Offender's reaction to the provocation:
  - a. Loss of self control.
  - b. Justifiable sense of being wronged.
2. Degree of provocation: did it justify the offender's sense of aggrievement:
  - a. Nature—was the victim exercising equality rights.
  - b. Duration.
3. Proportionality between provocation and offence.
4. Causation.

# Summary of approach

Whether, and to what extent, an offender's culpability will be reduced by provocation will depend on:

1. The degree of provocation, ie whether, in all of the circumstances of the case, the provocation caused the offender to have a justifiable sense of being wronged, considering the:
  - a. Nature and context of the provocation, including whether it consisted of the victim exercising his or her equality rights.
  - b. Duration of the provocation.



# Summary of approach

2. The degree to which the offender's response was disproportionate to the provocation—the greater the disproportionality the lower the reduction in the offender's culpability. For the most serious examples of offences against the person, only serious provocation is likely to warrant a reduction in the offender's culpability.
3. Whether the provocation was an operative cause of the offence, and remained an operative cause throughout the duration of the offence.

# 1. Offender's reaction

⇒ Loss of self-control?

⇒ UK Law Commission—reformulation of partial defence:

- Recommended against including 'loss of self-control' in the test for provocation.
- Focused on the nature and gravity of the provocation and its impact on the offender.
- First degree murder should be reduced to second degree murder if the defendant acted in response to gross provocation:
- 'Words and / or conduct which caused the defendant to have a justifiable sense of being seriously wronged'.

# Justifiable sense of being wronged

An offender's culpability for an offence against the person may be reduced if the offender acted in response to provocation consisting of words and / or conduct that gave the offender a **justifiable sense of being wronged**.

What words or conduct can justify the offender's grievance?

# 2. Degree of provocation

## Duration

- Long course of conduct may be more 'provocative' than isolated incident.
- Whole chain of events relevant to assessing the adequacy of the provocation.

## Nature

- Number of categories of provocation were problematic (eg 'sexual jealousy' provocation) ⇒ abolition.
- Public policy & need for normative behavioural change
- 'Ordinary person' vs equality framework.

# Equality test: options

## **(i) Inclusive test:**

Limit to conduct that undermines the accused's equality rights (eg, racist taunts, violence against women).

## **(ii) Exclusive test:**

Exclude conduct that arose due to the deceased exercising their equality rights (eg ending relationship, forming new relationship, working) on the basis that the deceased had a right to personal autonomy.

## **(iii) Modification of ordinary person test:**

The 'ordinary person' could be defined as having knowledge of equality rights and behaving consistently with these rights.

# Equality test: sentencing

Conduct that arose through the deceased exercising equality rights should not reduce an offender's culpability.

Eg leaving an intimate relationship, forming friendships or intimate relationships, working, obtaining an education.

# Personal characteristics

Offender's personal characteristics previously held to be relevant in assessing both substantive and sentencing provocation.

Personal characteristics vs equality rights?

# Personal characteristics

Any consideration of whether the offender's sense of being wronged was 'justifiable' must be consistent with equality principles.

Unlikely an offender's culpability will ever be reduced because s/he claims to have been provoked by the victim's enjoyment of equality rights, regardless of whether the offender can point to personal characteristics that caused him or her to find such behaviour provocative.

# 3. Proportionality

Not a separate component of partial defence.

Has been applied in sentencing for non-fatal offences.

## **In sentencing:**

- Offences against person vary from minor assault to murder.
- Mitigation of sentence varies on a continuum from significant to non-existent.

Whether a reduction is justified, and the extent of such a reduction, should vary with the degree of provocation by the victim and the degree to which the offender's response was disproportionate to that provocation.

# 4. Causation

*R v Taueki* (NZ):

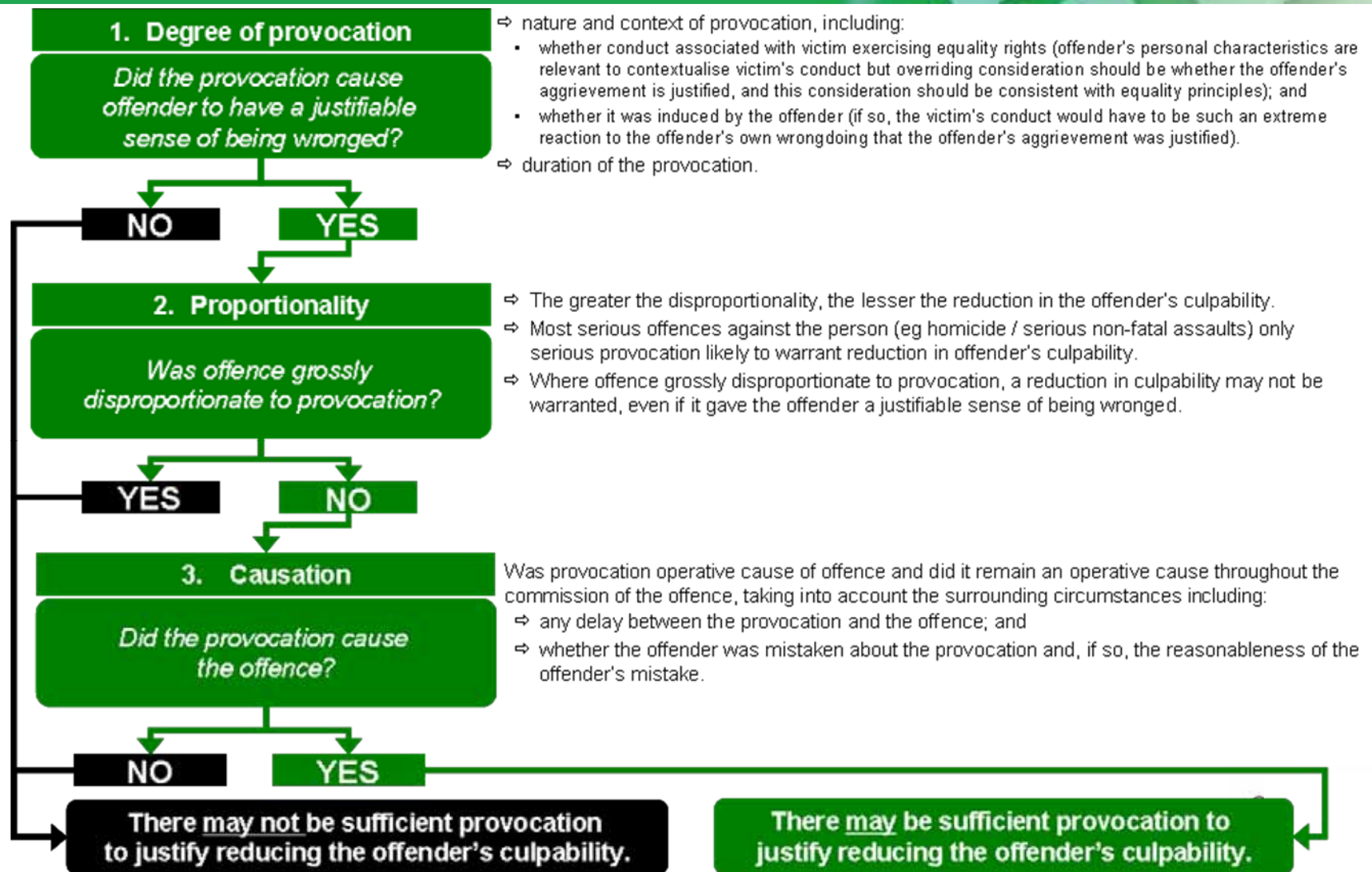
For provocation to reduce the seriousness of a grievous bodily harm offence, ‘the sentencing Judge will need to be satisfied that there was serious provocation **which was an operative cause of the violence** inflicted by the offender, and which remained an operative cause throughout the commission of the offence’.

# Causation: Delay

- Substantive provocation: delay relevant to loss of self-control.
- In sentencing: period of time between provocation and response relevant to the assessment of culpability.
- Cumulative provocation: culpability of an offender may be reduced, even significantly, by the provocation despite a delay between the last provocation and the offence.
- The justifiability of, or reasons for, the offender's reaction to the provocation are likely to be highly significant in assessing the relevance of delay in a particular case.

# Summary

Whether provocation reduces culpability, and extent of reduction, depends on:



# Contact us

## Sentencing Advisory Council



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