Discussion paper
Audit on Defences to Homicide: Accident and Provocation
October 2007
Introduction

The Attorney-General and Minister for Justice and Minister Assisting the Premier in Western Queensland commissioned an audit of homicide trials to ascertain the nature and frequency of the reliance on the excuse of accident (section 23 of the Criminal Code) and the partial defence to murder of provocation (section 304 of the Criminal Code).

The audit was precipitated by three recent cases – Jonathan James Little, who was acquitted of murder in relation to the death of David Stevens; Ryan William Moody, who was acquitted of manslaughter in relation to the death of Nigel Lee; and Damien Karl Sebo, who was acquitted of murder, but convicted of manslaughter, in relation to the death of Taryn Hunt.

The audit was conducted by the Strategic Policy unit within the Department of Justice and Attorney-General and involved analysing a selection of murder and manslaughter trials which were finalised between July 2002 and March 2007.

In determining what defences or excuses were left to the jury to apply, the audit team reviewed trial transcripts obtained from the State Reporting Bureau (SRB) and appeal records, if applicable, obtained from the Court of Appeal registry.

This discussion paper provides a review of the law in relation to the excuse of accident and the partial defence of provocation. It includes a jurisdictional comparison and looks at law reform in other Australian jurisdictions and in New Zealand and the United Kingdom. The discussion paper also looks at the role of the jury and the nature of Queensland’s sentencing system. Finally, the discussion paper outlines the results of the audit, including a number of case studies involving particularly relevant factual circumstances.

The discussion paper does not reflect or represent the views of the government or the Attorney-General, nor does it propose a particular direction for future action. Rather, the purpose of the discussion paper is to provide information about the nature and frequency of the use of these defences, as well as some broader contextual information, in order to provide an opportunity for stakeholders to comment on the operation and use of these defences.

The nature and use of the accident excuse does not appear to have been the subject of any sustained challenge until recently. With the exception of an amendment made in 1997, the section has operated unchanged for the life of the Criminal Code. An almost identical provision (without the 1997 amendment) exists in the Western Australian Criminal Code.

By contrast, the partial defence of provocation has been the subject of a number of recent reviews, including by the Law Reform Commissions of Victoria, New South Wales, Western Australia, the United Kingdom and New Zealand. The defence has been abolished or reformed in a number of jurisdictions.
An examination of the operation of the law needs to extend beyond the words in the Criminal Code to how those words have been interpreted by the courts and to how juries are directed on the meaning of the law.

It is also worth considering that just because a jury acquits in a particular case does not mean the law is wrong.

Often there is a sharp divergence between the prosecution and defence versions of events. If the defence’s version of the facts is accepted by the jury, the accused may be entitled to be acquitted, even though that outcome might seem unreasonable on the prosecution’s case.

In other cases, a jury may act mercifully or sympathetically, even though the law may technically require a conviction. If a jury thinks the law will apply unfairly in a particular case, there is a greater possibility that they will acquit despite the law.

On the other hand, there is the argument that the jury is left with no choice but to acquit, because the law (including the way in which the law has been interpreted by courts) requires it, even though the outcome may appear unjust.

In considering the operation and use of these defences, the real question is whether the current law reflects the community’s expectations of criminal responsibility.

In relation to accident, is it appropriate to excuse a person from criminal responsibility for causing another person’s death in circumstances where the death was not a reasonably foreseeable outcome of their deliberate actions?

In support of the current test, there is the argument that manslaughter is a very serious charge and the consequences of being convicted of manslaughter may be significant. A person should not be convicted of manslaughter in circumstances where it was not reasonably foreseeable that death would result from his or her actions.

The opposing view is that manslaughter should apply to all cases in which death results from a willed act (such as an assault). Whether the death was foreseeable or not in the circumstances would be a matter for sentencing discretion, not criminal responsibility.

In relation to provocation, is it appropriate for anger and a loss of self-control to provide a partial defence to murder while other circumstances that may reduce an offender’s culpability do not?

Although a number of jurisdictions have enacted repeal or reform of the provocation defence, none of these jurisdictions apply mandatory life imprisonment for murder.

It has often been said that ‘hard cases make bad law’, meaning that caution should always be exercised in making changes to the law based on an apparently unacceptable outcome occurring in a particular case. An amendment to the law designed to remedy an injustice in one case, may result in serious injustice in other cases.
Making a submission

A series of questions is included at the end of this discussion paper to assist in formulating a response to the issues raised.

Submissions can be mailed to:

The Attorney-General and Minister for Justice and Minister Assisting the Premier in Western Queensland
GPO Box 149
BRISBANE QLD 4000

or emailed to: attorney@ministerial.qld.gov.au

The closing date for submissions is Monday 3 December 2007.
Part 1 – Overview

This part of the discussion paper summarises the three recent cases which precipitated the audit and provides information about the operation of Queensland’s criminal justice system in order to provide some context of the broader environment in which these cases were decided.

1.1 The cases of Sebo, Moody and Little

As the Attorney-General informed Parliament on 18 July 2007, Sebo’s case highlighted the long-established provocation defence in Queensland’s Criminal Code. Similarly, the two jury acquittals earlier this year relating to the deaths of two young men, David Stevens and Nigel Lee, highlighted the so-called ‘accident defence’ in the Criminal Code.

The following information is a summary of the evidence given in each trial. Of course, it is an unavoidable feature of a homicide trial that evidence can not be called from the alleged victim of the crime.

Damien Karl Sebo

Sebo was indicted for the murder of his 16-year-old ex-girlfriend, Taryn Hunt. Sebo was 12 years her senior.

Sebo and Taryn had been in a relationship for approximately 20 months. Four months into the relationship, Sebo moved in with Taryn, her mother and younger brother, and shared Taryn’s bedroom. Approximately one month prior to Taryn’s death, she ended the relationship with Sebo and formed a new relationship with a young man who was 21 years of age.

At the request of the mother (who needed assistance with rent), Sebo remained in the home but slept in the garage. On the mother’s evidence, Sebo was still very much a part of Taryn’s life, driving her to certain places and on a number of occasions the mother would awake in the morning to find Taryn asleep in Sebo’s bed.

The month prior to Taryn’s death was tumultuous with Taryn and Sebo arguing about the fact that Taryn was seeing other males. Sebo asserted he was still in love with Taryn and wanted their relationship to continue.

On the night in question, Sebo and Taryn went to the casino and met up with another friend. Taryn was drinking. From this point, there is only Sebo’s account of what occurred. On the drive home Sebo and Taryn began to argue. Sebo’s account is that Taryn admitted she had been sleeping with other men and taunted him as to how easy it was to cheat on him. Sebo pulled the car over to the side of the road and they continued to argue. On Sebo’s account, Taryn continued with her taunts and said she would continue to sleep with other men. At some point Sebo and Taryn got out of the car. Sebo picked up a wheel brace and threatened her with it. Taryn said that he would not use it. Sebo hit Taryn four times to the head, crushing her skull.

Sebo dialled emergency and drove Taryn to the hospital. He then drove off and disposed of the steering lock. He returned to the hospital and was spoken to by police.
At first he fabricated a story that he had told Taryn to get out of his car and had driven off. He returned about 30 minutes later to find her assaulted and lying under a bush. Sebo eventually confessed to her killing.

At his trial Sebo pleaded not guilty to murder but offered to plead guilty to manslaughter. The defence ran the case on the basis that murder had been established, but that Sebo was acting under provocation. The jury acquitted Sebo of murder and found him guilty of the manslaughter of Taryn.

Ryan William Moody
Moody was indicted on manslaughter for the death of Nigel Lee.

In the early hours of the morning the deceased and a number of his friends were waiting in a cab queue. The accused, his brother and two friends (one female) were in the process of getting into a cab which had pulled up at the back of the queue. Persons in the queue began to yell in objection perceiving that the accused’s group had jumped the queue.

The many witness called at the trial gave varying accounts of what then occurred but the position taken by both the prosecution and the defence was that the accused was seated in the front with his female friend in the back. The accused’s brother was standing at the rear passenger door when approached by the deceased and two other males. A fight then ensued between the deceased and the accused’s brother. The witnesses gave varying accounts as to who threw the first punch. The accused pushed into the group and a general melee ensued. Two males where fighting in the back of the cab, the accused’s brother was fighting between the cab and the footpath and the accused and deceased began to fight next to the cab.

It would seem that the fight between the accused and deceased moved onto the road. Both the accused and deceased were throwing punches. There was evidence that at some point the accused karate kicked the deceased. The accused then punched the deceased to the face, breaking the deceased’s nasal bridge and causing immediate unconsciousness. The deceased died soon after when blood from the nasal injury entered his lungs. The post mortem examination revealed that the deceased had a high blood alcohol level. The medical evidence was that the deceased’s state of intoxication may have contributed to his death as it may have made aspiration of the blood easier by impairing the reflexes which were part of the mechanism that was involved in coughing up blood. The intoxication may also have had some effect on the unconscious state of the deceased which hindered the body’s normal reflex action to cough the blood out.

It was accepted that the one punch to the deceased’s nose was the fatal blow. A reading of the trial transcript also reveals that self-defence was an equally important issue for the jury’s consideration. The jury returned a verdict of not guilty.

It is interesting to note that this was the second time that Moody was tried in relation to this charge. In his first trial, the jury were unable to reach a verdict and were discharged. That might suggest that determining criminal responsibility was not an easy matter for the jury in this case.
**Jonathon James Little**

Little was indicted on murder for the death of David Stevens.

Little was walking in the Fortitude Valley mall in the early hours of Sunday morning and arguing with his girlfriend on his mobile phone. The deceased approached Little and said something to him. At the trial there were varying accounts from witnesses but one independent witness gave evidence that Little and the deceased were pushing each other. Another witness gave evidence that the deceased confronted Little and was in his face, blocking his path.

Little then assaulted the deceased. Again, there were varying accounts but both the prosecution and the defence accepted that Little punched the deceased to the head causing the deceased to drop to the ground and then when the deceased was down, Little kicked him to the back of the neck.

The deceased died two to three days later from a subarachnoid haemorrhage as a consequence of a traumatic rupture of the left vertebral artery. The post mortem examination revealed that the deceased had a high blood alcohol concentration. The medical evidence at trial was that it is more likely that the fatal blow was the punch. The tearing of the artery was caused by an overstretching of the artery which only occurs when the victim is intoxicated and is less likely to occur when the head is on the ground with less opportunity to overstretch.

In relation to the charge of murder, the defence argued that the Crown had not made out the element of intent. In relation to manslaughter, the defence argued that the Crown could not disprove that the death occurred by accident. If the jury accepted that the blow which caused death was the punch, then an ordinary person in the defendant’s position could not reasonably have foreseen death as eventuating from a single punch as occurred in this case. On the medical evidence, the punch was inflicted with moderate force.

It is relevant to note that the jury were also directed on self-defence (on the basis of some evidence leading to the possibility of a physical exchange including the fact that Little had a tear to his ear), the partial defence of provocation (on the basis of the words spoken, the evidence of pushing, and the possible blow to the ear) and intoxication (on the basis that Little had consumed five beers that night).

The jury returned a verdict of not guilty for murder and manslaughter.

### 1.2 Homicide

**Queensland’s Criminal Code**

Section 302 of the Criminal Code provides the offence of murder. A person commits murder when they unlawfully kill another, intending to kill or cause grievous bodily harm. A person who unlawfully kills another under such circumstances as not to constitute murder is guilty of manslaughter (section 303 of the Criminal Code).

In Queensland, a person convicted of murder must be sentenced to life imprisonment or to an indefinite sentence under Part 10 of the *Penalties and Sentences Act 1992* (the PSA). There is no discretion for the sentencing judge to order any shorter sentence.
For manslaughter, a maximum sentence of life imprisonment applies.

The first issue in a charge of homicide (murder or manslaughter) is causation. Section 293 (definition of ‘killing’) provides that any person who causes the death of another, directly or indirectly, by any means whatever, is deemed to have killed the other person. Case law states that a person causes the death of another if his act or conduct is a substantial or significant cause of death, or substantially contributed to the death (eg see R v Sherrington [2001] QCA 105).

An unlawful killing is murder if the offender intends to cause the death of the person killed (or that of some other person), or if the offender intends to do the person killed (or some other person) grievous bodily harm. Section 302 sets out the other circumstances in which killing is murder.

Where a person is killed in circumstances not amounting to murder, then the offence is manslaughter – see section 303 (definition of ‘manslaughter’).

**The burden or onus of proof**

As in any criminal prosecution, the burden rests on the prosecution to prove the guilt of the defendant. Except in very limited circumstances, there is no burden on a defendant to establish his or her innocence\(^1\).

Every defendant is presumed to be innocent and can only be convicted if the prosecution establishes to the requisite standard that he or she is guilty. That standard of proof is proof beyond reasonable doubt’. Juries are told that if they are left with a reasonable doubt about guilt, then it is their duty to acquit. The burden of proof applies to each and every element of the offence (for example, the element of intent in a charge for murder), and extends to any matters of excuse raised on the evidence, for example, accident, self-defence and provocation.

The Criminal Code provides for a range of excuses, defences and partial defences to homicide to take into account the fact that people kill in a range of different situations and that their culpability may be affected by a variety of factors. Some of these defences are complete defences, that is, the accused person is entitled to be acquitted (for example, insanity, accident and self-defence). Other defences are partial defences, that is, they operate to reduce what would otherwise be murder to manslaughter (for example, provocation and diminished responsibility).

Thus, a person may be acquitted of murder because the jury is not satisfied that the accused caused the death, or is not satisfied that the death was not an ‘accident’.

The jury may not be convinced of the intent element required for murder, in which case, manslaughter is the appropriate verdict.

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\(^1\) For a murder prosecution, the burden of proof rests on the defendant to establish the defence of insanity and the partial defence of diminished responsibility. The standard of proof is on the balance of probabilities.
1.3 Sentencing for homicide

Murder
Section 305 of the Criminal Code provides that a person convicted of murder must be sentenced to life imprisonment or to an indefinite sentence under Part 10 of the PSA. There is no discretion for the sentencing judge to order any shorter sentence.

A person sentenced to mandatory life imprisonment is not able to apply for release on parole until after 15 years has been served. The court cannot order an earlier date for parole eligibility, but may set a later date.

If the person is being sentenced on more than one conviction for murder or has been previously convicted of murder, the sentencing judge must order that the offender not be released until the person has served a minimum of 20 or more specified years.

Therefore, in Queensland, a person convicted of murder will serve at least 15 years imprisonment before being eligible to apply for release on parole. It is also important to note that parole will not necessarily be granted at this time or at any later time. If released on parole, a life prisoner remains subject to parole for the rest of his or her life, and may be returned to prison to serve out the sentence if the parole is breached.

By way of contrast, some other Australian jurisdictions do not impose mandatory life imprisonment on offenders convicted of murder, leaving it to the sentencing judge to determine an appropriate sentence. For example, in Victoria where mandatory life imprisonment does not apply, the Victorian Sentencing Advisory Council reported on 15 August 2007 as to the sentencing trends for murder in that state and advised:

There were 152 people sentenced for the principal offence of murder in the higher courts between 2001-02 and 2005-06. This made up 1.5% of all cases sentenced in the higher courts. The report finds that the majority of the people sentenced over the five year period for the principal offence of murder received a period of imprisonment (91%). The lengths of imprisonment terms ranged from thirteen years with a non-parole period of ten years to life with no parole, while the most common sentence length was twenty years with a fifteen year non-parole period.²

Manslaughter
Section 310 of the Criminal Code provides that a person convicted of manslaughter is liable to imprisonment for life. With the exception of a sentence of mandatory life, this is the most severe penalty available under the Criminal Code.

The circumstances surrounding an offence of manslaughter vary greatly. For example, a person may be convicted of manslaughter following the acceptance of a partial defence to murder such as provocation or diminished responsibility. Alternatively, it might be accepted that there was no intent to kill or that the killing was as a result of criminal negligence. Queensland law therefore distinguishes between the intentional taking of a person’s life (called murder) which carries mandatory life imprisonment and other killings (called manslaughter) where a wider sentencing discretion applies.

The sentencing range for manslaughter is perhaps the widest of all offences, due to the wide range of possible factual circumstances. The Court of Appeal noted in *R v Whiting, Ex parte Attorney-General* [1995] 2 Qd R 199, that ‘manslaughter is, above all, an offence in which particular circumstances vary so much that it is difficult, and perhaps undesirable, to try to generalise in advance about the appropriate sentence to be imposed.’

Under Part 9A of the PSA, an offender is deemed to be a serious violent offender if convicted of an offence mentioned in the schedule (such as manslaughter) and sentenced to 10 years or more imprisonment. The PSA also enables a court to declare an offender to be convicted of a serious violent offence (SVO), if the offender is sentenced to between five and 10 years for a schedule offence (such as manslaughter) or to any term of imprisonment for an offence involving the use of serious violence or resulting in serious harm to another person (again, this would include manslaughter).

The effect of being convicted of an SVO is that the offender must serve 80% of the sentence or 15 years (whichever is the shorter period) before being eligible to apply for parole. Again, parole will not necessarily be granted at this time or at any later time. For example, Sebo, who was convicted of manslaughter, was declared to be convicted of an SVO, meaning that he is required to serve at least eight years of the 10 year sentence ordered by the trial judge.

**Long term prisoners**

As at 30 June 2007, the Queensland prisoner population was 5597, including 1083 people held on remand (that is, awaiting trial). 1095 prisoners (20% of the total prison population) were serving sentences of eight years or more, and of those, 415 or 48.7% were serving sentences for homicide.

As at 20 September 2007, there were 327 prisoners in custody serving life sentences. As at 30 June 2007, there were 78 prisoners out of the 327 serving life sentences who had reached their parole eligibility date but who had not yet been released.

In the last five years, five prisoners sentenced to life sentences have been returned to custody as a result of breaching their parole order or their resettlement conditions.

**1.4 The role of the jury**

In each of the three cases giving rise to the audit, a jury determined the criminal responsibility of the person charged.

The right to be tried by jury has been a foundation of our criminal justice system for many centuries. The jury is charged with the enormous responsibility of determining the guilt or innocence of a fellow citizen.

The jury’s job is to determine the facts of the case, based on the evidence given during the trial, and to apply the law as directed by the trial judge to those facts. Issues relating to the way in which juries are directed on the law are discussed later in this discussion paper.
Jurors are not volunteers, but are called to perform jury service. Juries comprise a
diverse cross-section on the community. They apply a collaborative approach to reach
a consensus decision through the delivery of a unanimous verdict.

Jury deliberations are confidential. The policy behind maintaining the confidentiality
of jury deliberations was discussed by the New South Wales Law Reform
Commission in Report 48 Criminal Procedure: The Jury in a Criminal Trial released
in 1986. The rationale for the policy includes:

• encouraging freedom of speech and candour in the jury room;
• protecting the jury from outside influences;
• enabling a jury to bring in unpopular verdicts without fear of community reaction;
• protecting the privacy of individual jurors; and
• protecting jurors from retaliation and harassment. 3

In introducing the Jury Act 1995 into Queensland Parliament on 14 September 1995,
the then Attorney-General, the Honourable Matt Foley MP explained the rationale for
the confidentiality rule in his second reading speech –

‘there is a reasonable fear that if jurors knew their views about issues were to be
exposed, social pressure would discourage unpopular verdicts, especially in small
communities. …the thought that something said by a juror in the course of
discussions could later be released in the media for debate would undoubtedly have a
seriously inhibiting effect on discussions. In fact, the whole deliberation process
would be undermined if a juror had to proceed with the onus of thinking half the time
about the evidence and the other half on how what is said may be treated by the
media’.

The jury system allows the community to participate in a most significant way in the
operation of the criminal justice system. As the High Court said in the case of Doney v
The Queen (1990) 65 ALJR 45 at 47 – ‘…the genius of the jury system is that it allows
for the ordinary experiences of ordinary people to be brought to bear in the
determination of factual matters’.

In Kingswill v The Queen (1985) 159 CLR 264 at 301-2, the High Court had this to
say about the importance of the jury to our criminal justice system –

‘Trial by jury also brings important practical benefits to the administration of criminal
justice. A system of criminal law cannot be attuned to the needs of the people whom
it exists to serve unless its administration, proceedings and judgments are
comprehensible by both the accused and the general public and have the appearance,
as well as the substance, of being impartial and just. In a legal system where the
question of criminal guilt is determined by a jury of ordinary citizens, the
participating lawyers are constrained to present the evidence and issues in a manner
that can be understood by laymen. The result is that the accused and the public can
follow and understand the proceedings. Equally important, the presence and function
of a jury in a criminal trial and the well-known tendency of jurors to identify and side
with a fellow-citizen who is, in their view, being denied a “fair go” tend to ensure
observance of the consideration and respect to which ordinary notions of fair play

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entitle an accused or a witness. Few lawyers with practical experience in criminal matters would deny the importance of the institution of the jury to the maintenance of the appearance, as well as the substance, of impartial justice in criminal cases (cf Knittel and Seiler: “The Merits of Trial by Jury”, Cambridge Law Journal, vol 30 (1972), 316 at pp 320–1).

The institution of trial by jury also serves the function of protecting both the administration of justice and the accused from the rash judgment and prejudices of the community itself. The nature of the jury as a body of ordinary citizens called from the community to try the particular case offers some assurance that the community as a whole will be more likely to accept a jury's verdict than it would be to accept the judgment of a judge or magistrate who might be, or be portrayed as being, over-responsive to authority or remote from the affairs and concerns of ordinary people. The random selection of a jury panel, the empanelment of a jury to try the particular case, the public anonymity of individual jurors, the ordinary confidentiality of the jury's deliberative processes, the jury's isolation (at least at the time of decision) from external influences and the insistence upon its function of determining the particular charge according to the evidence combine, for so long as they can be preserved or observed, to offer some assurance that the accused will not be judged by reference to sensational or self-righteous pre-trial publicity or the passions of the mob.'
Part 2 – Accident and provocation – The current law

This part explains the current law with respect to the excuse of accident and the partial defence of provocation, and discusses a recent review of the operation of the defence of provocation.

2.1 The accident excuse

Section 23
Section 23 of the Criminal Code provides the excuse from criminal responsibility commonly referred to as “accident”. The provision states:

23 Intention—motive

(1) Subject to the express provisions of this Code relating to negligent acts and omissions, a person is not criminally responsible for—

(a) an act or omission that occurs independently of the exercise of the person’s will; or

(b) an event that occurs by accident.

(1A) However, under subsection (1)(b), the person is not excused from criminal responsibility for death or grievous bodily harm that results to a victim because of a defect, weakness, or abnormality even though the offender does not intend or foresee or can not reasonably foresee the death or grievous bodily harm.

(2) Unless the intention to cause a particular result is expressly declared to be an element of the offence constituted, in whole or part, by an act or omission, the result intended to be caused by an act or omission is immaterial.

(3) Unless otherwise expressly declared, the motive by which a person is induced to do or omit to do an act, or to form an intention, is immaterial so far as regards criminal responsibility.

Section 23 is not actually a ‘defence’, it is framed in terms of an exemption from criminal responsibility, that is, if it is fairly raised on the evidence, the prosecution must exclude beyond reasonable doubt that the act was an unwilled act, or that it occurred by accident.

While section 23 applies to all persons charged with any criminal offences against the statute law of Queensland, this discussion paper is only concerned with the operation of section 23 in homicide trials.

The Queensland Court of Appeal in R v Van Den Bemd [1995] 1 Qd R 401 reviewed the leading authorities and explained section 23(1) as providing two distinct rules. Under section 23(1)(a), a person is not criminally responsible for an act unless it is ‘his own act, and an act which results from the exercise of his will’. Examples of an unwilled act include an act done in a state of sleep or automatism. In relation to this first rule, the word ‘act’ refers to ‘some physical action apart from its consequences’, such as the firing of a rifle rather than the wounding that follows, or the wielding of a stick rather than the killing of the child whom it strikes. By contrast the rule in section 23(1)(b) (an event which occurs by accident) exculpates an accused from liability for the accidental outcome of his willed acts. The word event’ in this rule means ‘the consequences of an act’.

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An event occurs by accident within the meaning of section 23(1)(b) if it was a consequence which was not in fact intended or foreseen by the accused and would not reasonably have been foreseen by an ordinary person – see Kaporonovski v R (1973) 133 CLR 209. Where the event in question is a death, the test has also been stated in these terms – ‘the test of criminal responsibility under section 23 is not whether the death is an ‘immediate and direct’ consequence of a willed act of the accused, but whether death was such an unlikely consequence of that act an ordinary person could not reasonably have foreseen it.’ It has also been expressed as ‘an ordinary person in the position of the accused would have foreseen the event as a possible outcome’. See R v Van Den Bemd [1995] 1 Qd R 401 and Murray v R (2002) 211 CLR 193.

In other words, death may result from a willed act (such as a punch), and still be an unintended and unforeseeable consequence.

In Stevens v R (2005) 222 ALR 40, Callinan J also pointed out that the word ‘reasonably’ qualifies the concept of foreseeability. Regard must be had to all of the surrounding circumstances, and whether in light of those circumstances, ‘an ordinary person acting and thinking reasonably, and with time to do so, would not have foreseen the death or any real possibility of it’. He went on to say that ‘the fact that the occurrence of an event as a consequence of an act or series of acts might seem in hindsight to have been a real possibility, does not mean that that accused must always be taken as having foreseen it, or that an ordinary person in the same circumstances would reasonably have foreseen it’ (at paragraph 156).

Section 23 is also subject to the express provisions of the Criminal Code relating to negligent acts or omissions. That means that section 23 does not provide an exemption from criminal responsibility in cases where criminal negligence applies. For example, a person in charge of a loaded firearm who kills someone without any intent to kill, cannot use accident to excuse manslaughter in circumstances where the person failed to use reasonable care and to take reasonable precautions to avoid danger to the life or health of others.

The case of Van Den Bemd and the 1997 amendment

In 1997, following the decision of the Queensland Court of Appeal in R v Van Den Bemd [1995] 1 Qd R 401, section 23 was amended by the insertion of new subsection (1A).

Van den Bemd was charged with manslaughter following the death of a man in a fight in a bar. According to witnesses, the accused struck the deceased on the face one or two times. The medical and other expert evidence suggested that death was a result of a blow to the left side of the neck. The deceased may have had some predisposition to a subarachnoid haemorrhage (the cause of death) either because of some natural infirmity or because he had consumed alcohol. The trial judge directed the jury to the effect that it was not a defence that the victim may have been more susceptible than usual to a subarachnoid haemorrhage. Further, the trial judge directed the jury that ‘if you punch someone and that person dies and there is nothing else to suggest that anything but the punch caused the injury from which the victim dies, you are deemed
to have killed him. The fact that it might have been only a moderate punch does not matter’. He went to direct the jury that ‘you take your victim as you find him’.

Despite the case of *Kaporonovski v R*, which provided that an accused is not criminally responsible for a consequence which was not in fact intended or foreseen by the accused and would not reasonably have been foreseen by an ordinary person, it appears that this direction did reflect the case law at that time, that is, that the accident ‘defence’ would not be available to a charge of manslaughter in circumstances where a person died because of a direct application of force without any other factor intervening. This was based on the authority of the decision of *R v Martyr* [1962] Qd R 398, the facts of which were similar to those occurring in Van Den Bemd’s case.

Van Den Bemd successfully appealed to the Court of Appeal against his conviction, effectively challenging the correctness of the earlier decision of *Martyr*.

The Queensland Court of Appeal noted that the trial judge had declined to direct the jury on the effect of section 23 of the Criminal Code, and that refusal was in accordance with the decision in *Martyr*. The trial judge had held that section 23 had no application where the blow struck by the accused was a willed act and the death a direct result of it. As a result, the jury were not asked to consider whether or not the prosecution had proved that the death of the deceased was a foreseeable consequence of the blow.

The Court of Appeal considered a number of other authorities, noting that they were not easy to reconcile with each other, and that the authorities on the second rule of section 23 were ‘in some disarray’ (at page 400). The court then referred to the decision of the High Court in *Kaporonovski*, which is referred to in more detail above. The court concluded that *Martyr* was no longer good authority and that the test of criminal responsibility under section 23 is not whether the death is an immediate and direct consequence of a willed act of the accused, but whether death was such an unlikely consequence of that act an ordinary person could not reasonably have foreseen it.

An application by the Crown for special leave to appeal to the High Court was refused in *R v Van Den Bemd* (1994) 179 CLR 137. The majority of the High Court refused the Crown’s application for special leave to appeal, holding that the words of section 23 were inherently susceptible of bearing the meaning placed on them by the Court of Appeal in Queensland, and that the interpretation derived support from the decision in *Kaporonovski*.

It is of interest to note that the minority High Court judges in *Van Den Bemd* said that it has never been the case under the Criminal Code that a death which is caused by the deliberate infliction of a fatal blow is ‘accidental’ merely because the death was not foreseen or intended and was not reasonably foreseeable by the accused or a bystander. At page 384 of the judgment Brennan J said – ‘If, as a matter of fact, the trauma inflicted by an accused does cause the death of a victim and nothing has intervened between the trauma and the death, there is no factor that warrants the treating of the death as accidental’. McHugh J said at 397 – ‘If a person intentionally
punches another person and kills him or her, it would not be in accordance with ordinary speech to describe the death as an accident even if the death would not have occurred but for some weakness in the physical condition of the deceased.’

According to the second reading speech, the purpose of the 1997 amendment was to overrule the decision of the High Court so that where a person causes death or grievous bodily harm to another person then the offender must ‘take the victim as he finds him’, if the victim is later shown to have had some defect, weakness, or abnormality, such as an ‘egg shell’ skull.

It appears that because of this amendment, there is a difference in how a jury is asked to approach the question of foreseeability, depending on whether there is a pre-existing defect. Where there is no pre-existing defect, the death must be foreseeable, but where there is a pre-existing defect, it does not matter that the death was not foreseeable.

The difficulty in this approach is perhaps best demonstrated by the way in which juries are directed on the effect of subsection (1A). The model direction included in the Supreme and District Court Bench Book\(^4\) in relation to section 23(1A) provides:

‘(Concealed) defect, weakness, or abnormality

The present case is, however, complicated by the medical evidence we have heard at this trial. Dr Tong, who examined Smith's body after death, said he found that what, in his opinion, had caused death was the rupturing or bursting of an aneurism, which is like a bubble on a blood vessel in the brain. He told us here that it was likely that the aneurism burst when Smith's head struck the kerb. He also said that Brown, or anyone else, could not have known that Smith had such an aneurism or bubble in his brain. Indeed, even the victim Smith himself would not have known that he suffered from such a condition.

That might well lead you to think that no reasonable person would have foreseen the possibility that Smith would die as a result of being punched in the way he was.

However, I am bound to tell you that in law this may not matter in this instance. That is so because under our law a person is not excused of manslaughter if the death of the victim is the result of a defect, weakness or abnormality from which the victim suffered. If, therefore, you are satisfied beyond reasonable doubt that the aneurism of which Dr Tong told you was a “defect, weakness or abnormality” from which Smith suffered, and also that Smith's death resulted because of it, then it is open to you as the jury to find Brown guilty of unlawfully killing Smith, even though no reasonable person would or could have foreseen his death as a possible result of the punch delivered by Brown. In that event, you may return against Brown a verdict of manslaughter.’

Recent application of section 23

It is the application of section 23 to the crimes of murder and manslaughter that has caused recent controversy after the defence was raised in the cases of Little and Moody.

The question that arises from these cases is whether it is appropriate to excuse a person from criminal responsibility for causing another person’s death in circumstances where the death was not a reasonably foreseeable outcome of their deliberate actions (in these cases, an assault).

The minority High Court judges in *Van Den Bemd* seem to have supported a stricter liability for manslaughter following an assault.

On one hand, there is an argument that manslaughter should apply to all cases in which death results from a willed act (such as an assault). Whether the death was foreseeable or not in the circumstances would be a matter for sentencing discretion, not criminal responsibility.

The opposing view is that manslaughter is a very serious charge and the consequences of being convicted of manslaughter may be significant. A person should not be convicted of manslaughter in circumstances where it was not reasonably foreseeable that death would result from his or her actions. Imposing too strict a liability may make juries even more reluctant to convict for manslaughter.

2.2 The partial defence of provocation

*Section 304*

The partial defence of provocation to murder has had recent publicity following the acquittal of Damien Sebo of the charge of murder relating to the death of Taryn Hunt. Sebo was convicted of manslaughter and sentenced to 10 years imprisonment.

Pursuant to section 304 of the Criminal Code, the defence of provocation, when accepted by a jury, reduces murder to manslaughter. The provision states:

304 Killing on provocation

When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation, and before there is time for the person’s passion to cool, the person is guilty of manslaughter only.

In a case where the evidence gives rise to a question of provocation, the onus lies on the prosecution to disprove provocation beyond a reasonable doubt. There are a number of elements to the defence:

- the killing occurred in the heat of passion;
- caused by sudden provocation; and
- before there is time for passion to cool.

Provocation consists of conduct which causes a loss of self-control on the part of the defendant and which could be capable of causing an ordinary person to lose self-control and to act in the way which the defendant did. The defendant must actually have been deprived of self-control and have killed the other person while so deprived.
As there is no definition of provocation in relation to murder (there is in relation to the separate defence of provocation for assault\(^5\)), the common law is relied upon for interpretation of section 304. The High Court in *Stingel* (1990) 171 CLR 312 stated that a subjective and an objective test apply. The accused’s personal characteristics are considered to determine the level of seriousness of the provocation. This can include all the complexities that make up that individual, such as age, sex, cultural and racial background and family history. But then the question is whether an ‘ordinary man’ sharing only the same age as the accused would have killed in response to that level of provocation.

**Review of the defence of provocation**

A number of recent reviews have considered the partial defence of provocation. These include the Victorian Law Reform Commission’s (the VLRC) Report *Defences to Homicide: Final Report*, published in October 2004 (the VLRC Report) and the New South Wales Law Reform Commission’s (the NSWLRC) Report *Partial Defences to Murder: Provocation and Infanticide*, Report 83, published in October 1997. In Queensland, the Taskforce on Women and the Criminal Code in its Report published in February 2000, examined the defence of provocation, particularly as it related to domestic homicides.

Given the recency of the VLRC report, this discussion paper has relied on the detailed research and analysis contained in Chapter 2 of that report in the following discussion.

The VLRC notes that ‘the common law defence of provocation developed at a time when the death penalty was mandatory for those convicted of murder. The existence of provocation as a partial justification or excuse is therefore inextricably linked with the desire to mitigate against the harshness of a mandatory sentence.’\(^6\) Unlike other Australian jurisdictions, in Queensland, murder continues to carry mandatory life imprisonment.

According to the VLRC, the development of provocation as a defence can be traced back to 16\(^{th}\) and 17\(^{th}\) century England when brawls and fights arising from ‘breaches of honour’ were common. Anger was considered a reasonable and rational response if ‘honour’ had been affronted. Reflecting social order in England at the time, early cases of provocation were restricted to physical conduct such as an assault on the offender or witnessing a man in the act of adultery with the offender’s wife. In the 19\(^{th}\) century, the defence of provocation moved from being based on the idea of anger as a justified response in some situations, to being based on the idea of anger as a loss of self-control. Further, the concept of an objective standard of self-control by way of the ‘reasonable man’ was also introduced.\(^7\)

The modern day justification for having a partial defence of provocation is that it recognises human frailties by acknowledging that the accused could not properly

\(^5\) Section 268, Criminal Code.


\(^7\) Ibid, pages 21 to 23.
control his or her behaviour in the circumstances, and an ordinary person might react similarly.\textsuperscript{8}

\textbf{The use of the provocation defence by female defendants}

Women as well as men rely on the defence of provocation. During the last 25 years women have increasingly made use of provocation as a defence to murder where there is a background of domestic violence. What was originally a male oriented defence based on sudden action in direct response to provocative conduct has been extended, through successful court cases, to also encompass killing that does not immediately follow the provocation and is to be seen in the context of the victim’s long term violent behaviour towards the accused. Removing provocation removes this defence from all types of accused who may wish to raise it – women as well as men.

The VLRC identified the following criticisms of the provocation defence:

(a) provocation and a loss of self-control is an inappropriate basis for a partial defence – people should be able to control their impulses, even when angry and such a loss of self-control does not provide a sufficient reason, moral or legal, to distinguish such people from cold-blooded killers;

(b) provocation promotes a culture of blaming the victim – and sends a message that some victims’ lives are less valuable than others;

(c) provocation is gender biased – all the homicide studies examining gender show that men and women kill in different situations. Women tend to kill on provocation following physical violence. Men tend to kill on provocation following provocative conduct such as verbal taunting, infidelity or other sexual behaviour, including unwelcome but non-violent homosexual advances. Given the historical context of the defence’s origins, it is clear that the law developed to fit and excuse certain types of violent conduct more likely to be engaged in by men than women. In \textit{R v Chhay} (1994) 72 A Crim R, Gleeson CJ commented on the ‘considerable dissatisfaction’ which had developed regarding the law and seemed to agree with the ‘common criticism…that the law’s concession to human frailty was very much, in its practical application, a concession to male frailty’;

(d) provocation privileges a loss of self-control as a basis for a defence – why should anger and a loss of self-control provide a partial defence to murder while other circumstances that may reduce an offender’s culpability, for example killing a person out of compassion, do not;

(e) the test for provocation is conceptually confused, complex and difficult for juries to understand and apply. The current test, which requires the jury to distinguish between the ordinary person for the purposes of determining the gravity of the provocation and the ordinary person for the purposes of determining powers of self-control, is confusing and difficult for juries to understand and apply.\textsuperscript{9}

\textsuperscript{8} Ibid, page 23.

\textsuperscript{9} Ibid, pages 26 to 35.
The VLRC identified a number of arguments in support of retaining a provocation defence, including:

(a) there is a great stigma attached to being convicted of murder and a person who kills in response to provocation is less morally culpable than another person who intentionally kills, therefore the difference in moral culpability cannot be adequately reflected in sentencing alone;

(b) the jury is in the best position to apply community standards to criminal conduct and therefore the jury, not a judge, should decide questions of culpability;

(c) abolishing the defence of provocation could result in more acquittals of those accused of murder, because the ‘half-way house’ result of manslaughter on the basis of provocation is removed. If the jury is made aware that provocative conduct was involved and may have lead the accused to lose control then the jury may decide to acquit rather than see the accused convicted of murder;

(d) particular concern was expressed about the impact of removing provocation for women who kill violent partners and who are unable to successfully argue self-defence; and

(e) in jurisdictions where a discretionary sentence applies to murder, there may be increased community dissatisfaction with sentencing if judges are seen to be reducing sentences for murder by taking provocation into account.\textsuperscript{10}

\textit{Provocation and mandatory life imprisonment}

In Queensland, where mandatory life imprisonment applies to murder, these arguments assume greater significance. If the defence of provocation is abolished, and a person is found guilty of murder, then a sentence of mandatory life imprisonment follows. There is no discretion for a sentencing judge to take into account the circumstances of the case and reduce the period of imprisonment where he or she considers it appropriate and just to do so. This issue only arises in Queensland, and the arguments in favour of abolition of the defence identified by the VLRC must be seen in that context.

Without the partial defence of provocation, which effectively downgrades murder to manslaughter, a person who kills suddenly following provocative conduct will be sentenced the same way as a person who premeditates murder or a person who commits murder in the commission of an offence such as robbery of a bank. An effect of the partial defence of provocation may be that jurors can take into account evidence of provocation where they otherwise might be reluctant to convict for murder for which a life sentence must be imposed.

\textsuperscript{10} Ibid, pages 36 to 41.
Part 3 – Inter-jurisdictional comparison

This part sets out the law that applies in other jurisdictions, and describes the recent reform, or suggestions for reform, of the provocation defence in some jurisdictions.

3.1 Accident

The common law jurisdictions

Victoria, New South Wales and South Australia

The common law applies in Victoria, New South Wales and South Australia. One of the main differences between the Queensland Criminal Code and the common law is that the Criminal Code does not have a concept of ‘mens rea’. Some Criminal Code offences (such as murder) require an intention to cause a specific result, others do not. Where no specific intent is required, section 23 still requires the prosecution to negative an unwilled act or an accidental event, if either is raised on the evidence. As there is no equivalent of section 23 at common law, a comparison between the Criminal Code and common law jurisdictions is difficult.

In the case of Wilson v R (1992) 107 ALR 257, the High Court reviewed previous authorities to categorise manslaughter at common law. The majority concluded that murder requires ‘malice aforethought’ (i.e. an intention to cause death or grievous bodily harm, or the other factors included in the Criminal Code definition of murder) whereas manslaughter was every other ‘punishable homicide’. Manslaughter is divided into voluntary manslaughter (i.e. where the elements of murder are present, but the culpability of the offender’s conduct is reduced by reason of provocation or substantial impairment of the mind) and involuntary manslaughter. There are two categories of involuntary manslaughter: manslaughter by an unlawful and dangerous act carrying with it an appreciable risk of injury; and manslaughter by criminal negligence.

Wilson’s case was a case of manslaughter by an unlawful and dangerous act. The deceased died from brain damage after being punched in the face by Wilson and falling to the ground. The majority of the High Court held that ‘an appreciable risk of serious injury is required in the case of manslaughter by an unlawful and dangerous act’. Such a direction ‘gives adequate recognition to the seriousness of manslaughter and to respect for human life, while preserving a clear distinction from murder.’

While it is difficult to make the comparison, arguably a jury would be making a similar assessment in applying section 23(1)(b) to a fatal punch (was the outcome reasonably foreseeable by an ordinary person?) as they would in applying the test for manslaughter by an unlawful and dangerous act (was the act dangerous, and did it carry with it an appreciable risk of serious injury?). Despite the acknowledged differences between the Criminal Code and the common law, the High Court does endeavour to ensure a consistent application of criminal law principles across Australian jurisdictions.

It should be noted that in Wilson’s case, the minority judges preferred a different test for manslaughter by an unlawful and dangerous act, saying ‘the prosecution does not need to prove that the accused intended to commit a dangerous act; it merely has to
prove that he committed an unlawful act and it is sufficient that, viewed objectively, it is a dangerous act.’

The minority went on to say that ‘one principle which stands higher than all others in the criminal law is the sanctity of human life’ and to quote the following statement – ‘A man is guilty of involuntary manslaughter when he intends an unlawful act and one likely to do harm to the person and death results which was neither foreseen nor intended. It is the accident of death resulting which makes him guilty of manslaughter as opposed to some lesser offence such as assault …’ (at page 277).

United Kingdom
In the United Kingdom, the House of Lords case of DPP v Newberry [1977] AC 500 is authority for the proposition that an accused person is guilty of manslaughter if he or she intentionally does an act that is unlawful and dangerous and the act inadvertently causes death; that it is unnecessary to prove that the accused knew that the act was unlawful or dangerous; and that the test is an objective test, namely whether all sober and reasonable people would recognise that the act was dangerous in the sense of carrying with it the risk of some harm, not whether the accused recognised its danger.

The code jurisdictions

Australian Capital Territory (ACT) and the commonwealth
The ACT and the commonwealth apply the Model Criminal Code’s general principles of criminal responsibility. Given that Model Criminal Code offences are divided into ‘physical’ elements and ‘fault’ elements, it is difficult to make a comparison with the Queensland Criminal Code, which does not take this approach. However, the Model Criminal Code does contemplate an accident defence for strict and absolute liability offences (absolute liability applies to the element of causing death for the offence of manslaughter under the Commonwealth Criminal Code). See for example section 10.1 of the Commonwealth Criminal Code:

10.1 Intervening conduct or event
A person is not criminally responsible for an offence that has a physical element to which absolute liability or strict liability applies if:
(a) the physical element is brought about by another person over whom the person has no control or by a non-human act or event over which the person has no control; and
(b) the person could not reasonably be expected to guard against the bringing about of that physical element.

Western Australia
The Western Australian Criminal Code contains a provision in the same terms as section 23, except without subsection (1A) (the Van Den Bemd amendment).

The Northern Territory
The Northern Territory had indicated its intention to follow the Model Criminal Code provisions, but at present section 31 of the Northern Territory Code provides:
31 Unwilled act etc. and accident

(1) A person is excused from criminal responsibility for an act, omission or event unless it was intended or foreseen by him as a possible consequence of his conduct.

(2) A person who does not intend a particular act, omission or event, but foresees it as a possible consequence of his conduct, and that particular act, omission or event occurs, is excused from criminal responsibility for it if, in all the circumstances, including the chance of it occurring and its nature, an ordinary person similarly circumstanced and having such foresight would have proceeded with that conduct.

(3) This section does not apply to a crime defined by section 155. [Section 155 relates to failure to provide rescue or help etc].

Tasmania

Section 13 of the Tasmanian Criminal Code provides:

13 Intention and motive

(1) No person shall be criminally responsible for an act, unless it is voluntary and intentional; nor, except as hereinafter expressly provided, for an event which occurs by chance.

(2) Except as otherwise expressly provided, no person shall be criminally responsible for an omission, unless it is intentional.

(3) Any person who with intent to commit an offence does any act or makes any omission which brings about an unforeseen result which, if he had intended it, would have constituted his act or omission some other offence, shall, except as otherwise provided, incur the same criminal responsibility as if he had effected his original purpose.

(4) Except where it is otherwise expressly provided, the motive by which a person is induced to do any act or make any omission is immaterial.

3.2 Provocation

Victoria

The Victorian Crimes (Homicide) Act 2005 amended the Crimes Act 1958 following the VLRC Report on defences to homicide. The amendments included:

- abolition of provocation as a partial defence to murder; and
- creation of a new offence of defensive homicide which is an alternative to murder.

If a person is on trial for murder, and the prosecution does not satisfy the jury beyond reasonable doubt that the accused person did not have a relevant belief, the jury may return a verdict of guilty to defensive homicide (20 years maximum imprisonment). The relevant belief is that the conduct (which led to the killing) was necessary to defend the accused or another person from death or serious injury.

Manslaughter is still retained as an alternative to murder. A manslaughter verdict would be returned where the jury believed that the killing was not intentional. A defensive homicide verdict would be returned where the jury believed the killing was intentional but there was no belief that it was needed to be done in self-defence or defence of another, although that was raised. Presumably where that is not raised, it is not something for the jury to consider and the verdict would be either murder or manslaughter.
For the purposes of murder and defensive homicide and where domestic violence is alleged, it is stated that a person may have reasonable grounds for believing their conduct is necessary for self-defence or another’s defence, even if the harmful actions the person is reacting to are not immediately harmful and even if the person’s conduct involves excessive force.

In relation to provocation the VLRC remarked:

‘From a common sense perspective, most people would find it easier to understand how someone might, in an emotional state, hit another person because they did something to upset them, rather than how an ordinary person, even faced with the gravest provocation, might intentionally kill.

Historically, an angry response to a provocation might have been excusable, but in the 21st century, the Victorian community has a right to expect people will control their behaviour, even when angry or emotionally upset – particularly when the consequences are as serious as homicide. The continued recognition of provocation as a separate partial excuse for murder, in our view, is therefore both unnecessary and inappropriate. To the degree the circumstances of the killing may decrease a person’s level of moral culpability, this can be adequately taken into account, as it is for all other offences, in sentencing.’

In relation to excessive self defence (which became defensive homicide in the Victorian amendments) the VLRC remarked:

‘In the Commission’s view, people who kill another person, genuinely believing their life is in danger, but who are unable to demonstrate the objective reasonableness of their actions, are deserving of a partial defence. In this case, the person intends to do something which is lawful, and is therefore in a very different position to someone who intends to kill unlawfully and intentionally due to provocation or a mental condition. This person’s lower level of culpability, we believe, should be recognised in the crime for which he or she is convicted’.

Unlike Queensland, murder does not carry mandatory life imprisonment in Victoria, rather life imprisonment is the maximum penalty. Accordingly, in sentencing for murder, a Victorian judge can take into account provocative acts that may have lead up to a killing, whereas a Queensland judge cannot. In the VLRC’s view this was a reason for the abolition of provocation as a defence. Human frailties could be determined by the judge in sentencing, not the jury in deciding guilt. This difference means that if Queensland simply abolished provocation there would be no ability to assess the circumstances of a case where ‘provocative behaviour’ was offered to the accused.

**Tasmania**

In 2003 Tasmania abolished the defence of provocation by the **Criminal Code Amendment (Abolition of Defence of Provocation) Act 2003.** In her second reading speech, the Minister for Justice and Industrial Relations stated (20 March 2003):

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11 Ibid, Executive Summary, page xxi

12 Ibid, Executive Summary, page xxii
‘The main argument for abolishing the defence stems from the fact that 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.

Another reason to abolish the defence is that provocation is and can be adequately considered as a factor during sentencing. Now that the death penalty and mandatory life imprisonment have been removed, provocation remains as an anachronism.

The third reason supporting abolition is that the defence of provocation is gender biased and unjust. The suddenness element of the defence is more reflective of male patterns of aggressive behaviour. The defence was not designed for women and it is argued that it is not an appropriate defence for those who fall into the ‘battered women syndrome’. While Australian courts and laws have not been insensitive to this issue, it is better to abolish the defence than to try to make a fictitious attempt to distort its operation to accommodate the gender-behavioural differences.

Finally, the defence of provocation can be subject to abuse. The defence test has become increasingly subjective and it becomes difficult to separate out cases where the defendant was not actually provoked but merely lost his or her temper and decided to kill. The fact remains that a person who is convicted of manslaughter because of a successful provocation defence intended to murder someone. It is therefore conceptually odd for a defence of provocation to apply to reduce that to manslaughter.’

It is to be noted that one of the reasons given for abolishing the defence in Tasmania was the fact that provocation could be considered as a factor in sentencing. As mandatory life applies to murder in Queensland, a sentencing judge cannot take provocation into account.

**New South Wales**

Section 23 of the *Crimes Act 1900* contains the defence of provocation and provides, in part:

**23 Trial for murder—provocation**

(1) Where, on the trial of a person for murder, it appears that the act or omission causing death was an act done or omitted under provocation and, but for this subsection and the provocation, the jury would have found the accused guilty of murder, the jury shall acquit the accused of murder and find the accused guilty of manslaughter.

(2) For the purposes of subsection (1), an act or omission causing death is an act done or omitted under provocation where:

(a) the act or omission is the result of a loss of self-control on the part of the accused that was induced by any conduct of the deceased (including grossly insulting words or gestures) towards or affecting the accused, and

(b) that conduct of the deceased was such as could have induced an ordinary person in the position of the accused to have so far lost self-control as to have formed an intent to kill, or to inflict grievous bodily harm upon, the deceased, whether that conduct of the deceased occurred immediately before the act or omission causing death or at any previous time.
The NSWLRC reviewed the partial defences of infanticide, provocation and diminished responsibility and developed proposals for reform and clarification of the defences. The NSWLRC published Report 83 - Partial Defences to Murder: Provocation and Infanticide in 1997. The NSWLRC recommended that the defence be retained but the ordinary person test reformulated to make it clearer and simpler for juries to understand. No other changes were recommended.

The change recommended has not been acted upon by the New South Wales Government.

South Australia
In South Australia the defence of provocation is available at common law.

Australian Capital Territory (ACT)
Section 13 of the Crimes Act 1900 contains the defence of provocation to murder. In 2004, under the Sexuality Discrimination Legislation Amendment Act 2004 the ACT Government enacted an amendment to exclude the defence of provocation in the case of a non-violent, sexual advance. This is contained in subsection (3) below. Section 13 now provides, in part:

13 Trial for murder—provocation
   (1) If, on a trial for murder—
       (a) it appears that the act or omission causing death occurred under provocation; and
       (b) apart from this subsection and the provocation, the jury would have found the accused guilty of murder;
       the jury shall acquit the accused of murder and find him or her guilty of manslaughter.
   (2) For subsection (1), an act or omission causing death shall be taken to have occurred under provocation if—
       (a) the act or omission was the result of the accused’s loss of self-control induced by any conduct of the deceased (including grossly insulting words or gestures) towards or affecting the accused; and
       (b) the conduct of the deceased was such as could have induced an ordinary person in the position of the accused to have so far lost self-control—
           (i). as to have formed an intent to kill the deceased; or
           (ii). as to be recklessly indifferent to the probability of causing the deceased's death;
       whether that conduct of the deceased occurred immediately before the act or omission causing death or at any previous time.
   (3) However, conduct of the deceased consisting of a non-violent sexual advance (or advances) towards the accused —
       (a) is taken not to be sufficient, by itself, to be conduct to which subsection (2) (b) applies; but
       (b) may be taken into account together with other conduct of the deceased in deciding whether there has been an act or omission to which subsection (2) applies.
The Northern Territory
Section 158 of the Northern Territory’s Criminal Code contains the defence of provocation. In 2006, the Northern Territory Government enacted an amendment to exclude the defence of provocation in the case of a non-violent, sexual advance. \(^\text{13}\) This is contained in subsection (5) below. Section 158 now provides, in part:

### 158 Trial for murder – partial defence of provocation

1. A person (the "defendant") who would, apart from this section, be guilty of murder must not be convicted of murder if the defence of provocation applies.
2. The defence of provocation applies if:
   a. the conduct causing death was the result of the defendant's loss of self-control induced by conduct of the deceased towards or affecting the defendant; and
   b. the conduct of the deceased was such as could have induced an ordinary person to have so far lost self-control as to have formed an intent to kill or cause serious harm to the deceased.
3. Grossly insulting words or gestures towards or affecting the defendant can be conduct of a kind that induces the defendant's loss of self-control.
4. A defence of provocation may arise regardless of whether the conduct of the deceased occurred immediately before the conduct causing death or at an earlier time.
5. However, conduct of the deceased consisting of a non-violent sexual advance or advances towards the defendant:
   a. is not, by itself, a sufficient basis for a defence of provocation; but
   b. may be taken into account together with other conduct of the deceased in deciding whether the defence has been established.

Western Australia
Section 281 of Western Australia’s Criminal Code contains the defence of provocation, which mirrors the Queensland provision on provocation:

### 281 Killing on provocation

When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute wilful murder 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.

In 2006, the Western Australian Law Reform Commission (WALRC) published an Issues Paper on the law of homicide that considers reform to provocation and self-defence generally and particularly in relation to battered women who kill. The WALRC has not yet published its report. Some of the questions the WALRC asks in its issues paper \(^\text{14}\) are:

- Should provocation be abolished as a partial defence to wilful murder and murder?
- If the objective ‘ordinary person’ test for provocation is to be retained, what characteristics should be taken into account in assessing an ordinary person’s response to provocation? Should the person’s age, sex, religion or ethnic

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\(^{13}\) Criminal Code Reform Amendment (No.2) Act 2006

background be taken into account? Should the defence be reformulated and a purely subjective test be introduced?

- Should the defences of provocation and self-defence be amended to enable battered women to rely upon them in relation to homicide of a partner? Alternatively, should a separate defence be established for women who kill in response to serious and prolonged domestic violence or abuse? If so, should such a defence extend to others in abusive relationships?

**United Kingdom**

Provocation developed through the common law as a defence to murder in the United Kingdom. In 1957 the defence was placed in the *Homicide Act 1957* as follows:

Where on a charge of murder there is evidence on which the jury can find that the person charged was provoked (whether by things done or by things said or by both together) to lose his self-control, the question whether the provocation was enough to make a reasonable man do as he did shall be left to be determined by the jury; and in determining that question, the jury shall take into account everything both done and said according to the effect which, in their opinion, it would have on a reasonable man.

In 2004 the United Kingdom Law Commission (UKLC) reviewed the defence of provocation and recommended that it be reformulated.\(^{15}\) The UKLC proposed amending the defence to require the defendant to have acted in response to “gross provocation”. With respect to battered women, the UKLC proposed removing the “loss of self-control” requirement. The UKLC also recommended incorporating excessive self-defence into the defence.

The UKLC also described the current law on the defence as having major problems and the “law of murder in England and Wales is a mess”. As a result, the UKLC was asked to also review the law of murder.

The UKLC reported on that review in 2006. The UKLC recommended restructuring murder (attracting mandatory life) and manslaughter (attracting a maximum of life) into a three-tiered structure of first degree murder (mandatory life), second degree murder (maximum life with minimum terms) and manslaughter (maximum life). It was envisaged that the provocation defence would reduce first degree murder to second degree murder.\(^{16}\)

No legislative amendments have as yet followed from these recommendations.

**New Zealand**

In 2001, the New Zealand Law Commission (NZLC) published a report on criminal defences and ‘battered defendants’, *Some Criminal Defences with Particular Reference to Battered Defendants*, Report 73. The NZLC recommended:

- abolishing the defence of provocation;
- not introducing excessive self-defence;


not introducing a separate defence for battered women who kill; and
clarifying the law of self-defence.

In 2004, the NZLC was asked to consider further issues arising from its 2001 recommendations, including\(^{17}\):

- Will the repeal of partial defences unduly disadvantage persons with mental illness or disability, battered defendants, and any other minority groups who may be particularly reliant on such defences?
- Undertake gender analysis of the current operation of partial defences, and in light of this, consider the gender implications of the recommendation for partial defence repeal.
- Is there a risk of unduly harsh sentences under section 102 of the Sentencing Act as currently drafted (and should the section therefore be amended) if partial defences are repealed?
- Is the stigma of a murder conviction appropriate for persons who have acted by reason of adverse circumstances for which society may feel some sympathy?
- Should there be a separate defence for battered defendants, in addition to or instead of current defences?

The NZLC has not reported on these further issues as yet.

\(^{17}\) [http://www.lawcom.govt.nz/ProjectTermsOfReference.aspx](http://www.lawcom.govt.nz/ProjectTermsOfReference.aspx)
Part 4 – The audit

This part of the discussion paper summarises the results of the audit.

4.1 Audit methodology

The audit analysed a selection of trials for the offences of murder and manslaughter which were finalised between July 2002 and March 2007. These trials were selected on the basis of the availability of sufficient material to review the case. While the trials of Moody and Sebo did not fall within this timeframe, they were included in the audit because their outcomes contributed to the decision to conduct the audit.

The audit did not consider matters which were resolved by a plea of guilty, unless there had also been a trial. In other words, the review focused only on cases where a jury was required to determine the guilt or otherwise of the accused person.

Therefore, the audit did not consider those cases where an accused was indicted for murder, but entered a plea to manslaughter which was accepted by the prosecution, so that no jury trial occurred. However, where a trial occurred, even when an accused person entered a plea to a lesser charge, it was still considered as a trial for the purposes of the review. For example, the accused was indicted for murder, but entered a plea to manslaughter which was not accepted by the prosecution. The accused was then tried for murder, acquitted of murder by the jury, and was ultimately sentenced on the manslaughter plea.

The audit team reviewed trial transcripts obtained from the State Reporting Bureau and appeal records, if applicable, obtained from the Court of Appeal registry.

4.2 Homicide trials

During the relevant period, 131 people came before the courts on charges of murder. Of these, 101 defendants were tried by a jury (77%), and 30 defendants (23%) pleaded guilty to murder. The audit team analysed 80 of those 101 trials (79%).

During the relevant period, 116 people came before the courts on charges of manslaughter. Of these, 32 defendants were tried by a jury (28%), and 84 defendants (72%) pleaded guilty to manslaughter. The audit team analysed 20 of those 32 trials (63%).

4.3 Limitations of the audit

Because jury deliberations are confidential, the audit team could base its conclusions only on the directions given by the trial judge as to what defences or excuses applied to a particular case. In most cases, more than one excuse or defence was raised in the case. In those cases, the audit can not conclude what excuses or defences were successful. For example, a person charged with murder may be acquitted because of accident, self-defence or extraordinary emergency (complete defences). A person
charged with murder may be convicted of manslaughter because of provocation, diminished responsibility (partial defences), or because the accused lacked the requisite intent for murder. In the absence of a “special verdict” (where the trial judge asks the jury to record the basis of the verdict), it is not possible to conclude whether a conviction for manslaughter is attributable to provocation, diminished responsibility or a lack of intent. In only one of the cases reviewed by the audit team, was a special verdict delivered.

In addition, trial judges are required to direct the jury on any defence or excuse that is viable on the evidence, even if the defence or excuse is not specifically raised by or on behalf of the accused person. Where there is a dispute between the defence and the prosecution as to the facts of the case, a number of possibly inconsistent defences may be left to the jury. Thus the defence may contest a murder charge on the basis that the accused was acting under provocation, whereas the trial judge may direct the jury that they must also consider whether the accused had the requisite intent. A verdict of manslaughter, instead of murder, could be attributed to either or both of those matters being accepted by the jury.

As a result, there are limitations to the findings of the audit:
(a) the findings do not reveal what the jury regarded as the significant issues in the trial, though the evidence submitted at the trial and summing up of the trial judge is available through court transcripts;
(b) in most cases more than one defence/excuse was raised and as a result the audit cannot conclude with certainty whether a particular defence was successful; and
(c) a low number of manslaughter trials was able to be reviewed.

4.4 Audit findings

General comments
The audit team reviewed 80 murder trials and 20 manslaughter trials occurring between July 2002 and March 2007.

Apart from the cases of Little, Moody and Sebo, which have received significant publicity, this discussion paper does not refer to any defendant by name, nor does it refer to the names of the deceased persons. Instead, cases are identified by number – murder defendants are described as MU1, MU2 and so on, and manslaughter defendants as MA1, MA2 and so on.

The audit found that in most cases in which a particular defence or excuse was raised, it was raised in conjunction with another excuse or defence. The audit also found that a defence or excuse could be raised in circumstances where it appears that it was not the major issue at the trial, for example where the major issue at the trial was the identity of the killer.

While the audit team could make an assumption that a particular issue was or was not the major issue in the trial, it is important to acknowledge that these are assumptions
only, and the audit team could draw no conclusions as to what issues the jury regarded as being important. This is because jury deliberations are confidential.

For example, in one murder case, MU29, the prosecution case was that the accused was responsible for inflicting a number of serious injuries on the victim, intending to kill her or cause her grievous bodily harm. The defence case was that while the accused admitted to an assault on the victim, he did not commit an assault of the nature that caused the fatal injuries, and that someone else had later committed the fatal assault. As there was evidence that both the accused and the victim had been drinking, the jury were directed on intoxication. The jury convicted the accused of manslaughter, which suggests that they rejected both the prosecution and defence version of events, and instead were not satisfied beyond reasonable doubt that the accused in inflicting the fatal injuries intended to kill or do grievous bodily harm, having regard to his level of intoxication.

Defences
The audit team identified a number of ‘defences’ used in the trials reviewed:

- unwilled act (section 23(1)(a));
- accident (section 23(1)(b));
- mistake of fact (section 24 – a person who does or omits to do an act under an honest and reasonable, but mistaken, belief in the existence of any state of things is not criminally responsible for the act of the omission to any greater extent than if the real state of things had been such that the accused person believed to exist);
- extraordinary emergency (section 25 – subject to the express provisions of the Criminal Code relating to acts done upon compulsion or provocation or in self-defence, a person is not criminally responsible for an act or omission done or made under such circumstances of sudden or extraordinary emergency that an ordinary person possessing ordinary power of self-control could not reasonably be expected to act otherwise);
- insanity (section 27 – a person is not criminally responsible for an act or omission if at the time of doing the act or making the omission the person is in such a state of mental disease or natural mental infirmity as to deprive the person of capacity to understand what the person is doing, or of capacity to control the person’s actions, or of capacity to know that the person ought not to do the act or make the omission);
- intoxication (section 28(3) – when an intention to cause a specific result is an element of an offence (such as murder), intoxication, whether complete or partial, and whether intentional or unintentional, may be regarded for the purpose of ascertaining whether such an intention in fact existed);
- compulsion (section 31 – a person is not criminally responsible for an act or omission, if the person does or omits to do the act under a number of circumstances including: (i) when the act is reasonably necessary in order to resist actual and unlawful violence threatened to the person, or to another person in the person’s presence; or (ii) when the person does or omits to do the act in order to save himself or herself or another person, or his or her property or the property of another person, from serious harm or detriment threatened to be inflicted by some person in a position to carry out the threat; and the person doing the act or making
the omission reasonably believes he or she or the other person is unable otherwise to escape the carrying out of the threat; and doing the act or making the omission is reasonably proportionate to the harm or detriment threatened. However, this protection does not extend to an act or omission which would constitute the crime of murder, or to an offence of which grievous bodily harm to the person of another, or an intention to cause such harm, is an element.

- self-defence and aiding in self-defence (sections 271, 272, and 273);
- defence of a dwelling (section 267);
- provocation (section 304); and
- diminished responsibility (section 304A – a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder, is at the time of doing the act or making the omission which causes death in such a state of abnormality of mind (whether arising from a condition of arrested or retarded development of mind or inherent causes or induced by disease or injury) as substantially to impair the person’s capacity to understand what the person is doing, or the person’s capacity to control the person’s actions, or the person’s capacity to know that the person ought not to do the act or make the omission, the person is guilty of manslaughter only).

In most cases, by raising any of the above defences, the accused acknowledges that he or she caused the death of the victim, but that he or she is excused or partially excused from criminal responsibility with respect to causing the death. However there were some cases, as in the example above, when a specific “defence” was left to the jury in conjunction with a denial by the accused of causing the death or a suggestion that someone else was the killer.

Trials in which no defence was raised

Before looking at the cases in which accident and provocation were raised, it is significant to note the number of cases in which no specific defence or excuse was left to the jury to consider.

Of the 80 murder trials reviewed, there were 25 trials in which none of the above defences were raised. Where no specified defence was raised, the audit found that the accused defended the murder charge on the following bases:

- that someone else was the killer;
- the accused though involved, was not a party to the killing;
- issues as to the cause of death; or
- that confessions made by the accused were not reliable.

Five of these defendants were acquitted of murder. In four of these cases, it appears the major issue in the trial was the identity of the killer. In the fifth case, the prosecution case was that the accused had procured the actual killer to commit the murder. In that last case, the accused was convicted of being an accessory after the fact.
Of the 20 manslaughter trials reviewed, there were four trials in which none of the
defences were raised. Three of these defendants were acquitted of manslaughter. One
case involved criminal negligence; in the second, the trial judge directed the jury to
acquit because there was no evidence that the actions of the accused were a
substantial cause of death and in the third case, the issue at trial was the cause of
death.

Use of section 23 in murder trials
The audit found that of the 80 trials reviewed, section 23 was raised in 18 trials. These
cases involved either or both of the two limbs of section 23. In 14 of these cases, other
defences/excuses were also in issue. Thus in only four of these cases, was section 23
the only excuse/defence left to be considered by the jury.

The audit found that where section 23 was raised, either alone or in conjunction with
other defences, six defendants were acquitted of murder. One of those acquitted of
murder was convicted of manslaughter, which suggests that in that case, section 23,
though raised, was not the significant issue in the case (because section 23, if
successful, leads to an acquittal).

Table 1 sets out the outcomes of the four cases where the jury were directed on
section 23 as the only excuse/defence in issue:

Table 1 – The use of section 23 only in murder trials

<table>
<thead>
<tr>
<th>Defendant</th>
<th>Defences</th>
<th>Comment</th>
<th>Outcome</th>
</tr>
</thead>
<tbody>
<tr>
<td>MU12</td>
<td>Unwilled act and accident</td>
<td>Although the jury were directed on both limbs of section 23, the accused was acquitted of murder but convicted of manslaughter. It appears that the real issue at the trial was the liability of the accused as party to the offence under section 8 of the criminal code (offences committed in the prosecution of a common purpose). If successful, accident would have resulted in an acquittal.</td>
<td>Acquitted of murder but convicted of manslaughter</td>
</tr>
<tr>
<td>MU40</td>
<td>Accident</td>
<td>The defence also raised issues as to other possible causes of death.</td>
<td>Convicted</td>
</tr>
<tr>
<td>MU41</td>
<td>Unwilled act</td>
<td>The major issue at the trial appeared to be the identity of the killer.</td>
<td>Convicted</td>
</tr>
<tr>
<td>MU98</td>
<td>Accident</td>
<td>The major issue at trial appeared to be the identity of the killer.</td>
<td>Acquitted</td>
</tr>
</tbody>
</table>

It appeared to the audit team that the accident excuse (section 23(1)(b)) was not the
conclusive issue in relation to any of these trials. However, it is not possible to say
that with any certainty due to the confidentiality of jury deliberations.
In the remaining 14 cases (see Table 2), four accused were acquitted, but as a number of other defences were raised, the audit team could draw no firm conclusions as to the success or otherwise of the accident defence.

**Table 2: The use of accident in conjunction with other defences in murder trials**

<table>
<thead>
<tr>
<th>Defendant</th>
<th>Defences</th>
<th>Comment</th>
<th>Outcome</th>
</tr>
</thead>
<tbody>
<tr>
<td>MU9</td>
<td>Unwilled act, accident, self-defence, provocation, intoxication and mistake of fact</td>
<td>The main issue at the trial appears to have been self-defence.</td>
<td>Acquitted</td>
</tr>
<tr>
<td>MU31</td>
<td>Accident, self-defence and provocation</td>
<td>The trial judge remarked that all defences raised were ‘barely arguable’.</td>
<td>Convicted</td>
</tr>
<tr>
<td>MU36</td>
<td>Accident, provocation and intoxication</td>
<td>The main issue at the trial was that the defendant claimed his co-offender had inflicted the fatal injuries on the victim in the absence of accused.</td>
<td>Convicted</td>
</tr>
<tr>
<td>MU50</td>
<td>Unwilled act, accident, and self-defence</td>
<td>The accused claimed to be acting in self-defence, that the knife was produced by the victim who was stabbed by accident during a struggle.</td>
<td>Acquitted</td>
</tr>
<tr>
<td>MU57</td>
<td>Accident and provocation</td>
<td>The defence case was that the accused had no intent to kill or do grievous bodily harm, offered to plead to manslaughter.</td>
<td>Convicted</td>
</tr>
<tr>
<td>MU58</td>
<td>Accident, self-defence, provocation and intoxication</td>
<td>This is Little’s case.</td>
<td>Acquitted</td>
</tr>
<tr>
<td>MU66</td>
<td>Unwilled act, accident, self-defence and provocation</td>
<td>The accused claimed the victim had the knife.</td>
<td>Convicted</td>
</tr>
<tr>
<td>MU70</td>
<td>Unwilled act, accident, self-defence and provocation</td>
<td>The accused claimed to be acting in self-defence, that a hammer was produced by the victim who was hit with it during a struggle.</td>
<td>Convicted</td>
</tr>
<tr>
<td>MU77</td>
<td>Accident and intoxication</td>
<td>The accused claimed that the victim lost her footing and fell.</td>
<td>Convicted</td>
</tr>
<tr>
<td>MU79</td>
<td>Accident, self-defence, provocation and intoxication</td>
<td>Victim found stabbed, following an assault by the accused. There were no witnesses to the stabbing.</td>
<td>Convicted</td>
</tr>
<tr>
<td>MU81</td>
<td>Unwilled act, accident, and intoxication</td>
<td>The main issue at trial appears to have been intoxication going to the ability to form intent.</td>
<td>Convicted</td>
</tr>
<tr>
<td>MU94</td>
<td>Accident, extraordinary emergency, mistake of fact</td>
<td>The defence case was that the victim had a gun, the accused believed the victim was</td>
<td>Acquitted</td>
</tr>
</tbody>
</table>
attempting suicide and attempted to take the gun, which discharged.

<table>
<thead>
<tr>
<th>MU99</th>
<th>Accident, provocation and intoxication</th>
<th>The main issue at the trial was that the defendant claimed his co-offender had inflicted the fatal injuries on the victim in the absence of accused.</th>
<th>Convicted</th>
</tr>
</thead>
<tbody>
<tr>
<td>MU100</td>
<td>Accident, self-defence, provocation and intoxication.</td>
<td>The main issue at the trial appears to have been self-defence.</td>
<td>Convicted</td>
</tr>
</tbody>
</table>

It can be noted that the same combination of defences may result in an acquittal in one case, but a conviction in another. The success or otherwise of a particular defence or combination of defences depends on the jury’s views of the facts of the case.

This point is exemplified by a closer examination of the other three cases, apart from Little, in which the defendant was acquitted after raising accident.

In MU9, it was alleged that the deceased had made wrongful insults and assaulted the accused, and the accused then inflicted the fatal wounds while being held in a head-lock by the deceased. Mistake of fact arose in relation to a belief by the accused that a number of people were involved in the assault on him. It appears that if all those facts were accepted by the jury, self-defence was the more significant defence.

In MU50, the victim died from a single stab wound. The defence case was that the victim, not the accused, produced the knife. The accused struggled with the victim in self-defence and the victim was stabbed once during that struggle. It appears that if those facts were accepted by the jury, it was open to the jury to acquit the accused.

In MU94, the victim was shot. The defence case was that victim had the gun, the accused believed that the victim was attempting suicide and attempted to take the gun from the victim, which discharged. Again, it appears that if those facts were accepted by the jury, it was open to the jury to acquit the accused.

In the four cases in which accident was raised and the accused was acquitted, it appears that the only case in which the foreseeability of death assumed such significance was the case of Little. The audit could conclude that accident, (section 23(1)(b)), appeared rarely to be the crucial consideration in murder trials.

**Use of section 23 in manslaughter trials**

The audit found that section 23 arose more often in manslaughter trials. This may be because in a case of murder, the prosecution is seeking to prove that the accused acted deliberately and with intent to kill or do grievous bodily harm, and the evidence going to prove that intent will by implication rule out both limbs of section 23.
The audit found that of the 20 trials reviewed, section 23 was raised in 14 trials. In only four of these cases was section 23 the only defence left for the jury’s consideration. On these four occasions, two defendants were acquitted.

Table 3 sets out the outcomes of the four cases where the jury were directed on section 23 as the only excuse/defence in issue:

**Table 3 – The use of section 23 only in manslaughter trials**

<table>
<thead>
<tr>
<th>Defendant</th>
<th>Defences</th>
<th>Comment</th>
<th>Outcome</th>
</tr>
</thead>
<tbody>
<tr>
<td>MA4</td>
<td>Accident</td>
<td>Although accident was raised, the trial judge directed a not guilty verdict on the basis that the prosecution had not established that the accused was a party to the offence under sections 7 and 8 of the criminal code;</td>
<td>Acquittal by direction of the trial judge</td>
</tr>
<tr>
<td>MA16</td>
<td>Unwilled act</td>
<td>The major issue at the trial appeared to be the identity of the killer.</td>
<td>Convicted</td>
</tr>
<tr>
<td>MA29</td>
<td>Accident</td>
<td>The major issue at the trial appeared to be who caused the fatal injury.</td>
<td>Acquitted</td>
</tr>
<tr>
<td>MA30</td>
<td>Accident</td>
<td>As well as accident, another issue raised at the trial was whether the intervention of a third party had caused the death.</td>
<td>Convicted</td>
</tr>
</tbody>
</table>

In the two cases where the accused was acquitted, it did not appear that accident (section 23(1)(b)) was the deciding factor.

In the remaining 10 cases (see Table 4) in which accident was an issue, eight defendants were acquitted, but as a number of other defences were raised, the audit team could draw no firm conclusions as to the success or otherwise of the accident defence. In each case, another defence (e.g. self-defence) or another issue (e.g. whether it could be proved that the defendant caused the death) could explain the acquittal.

**Table 4: The use of accident in conjunction with other defences in manslaughter trials**

<table>
<thead>
<tr>
<th>Defendant</th>
<th>Defences raised</th>
<th>Comment</th>
<th>Outcome</th>
</tr>
</thead>
<tbody>
<tr>
<td>MA7</td>
<td>Unwilled act, accident, self-defence, defence of a dwelling</td>
<td>The deceased was an intruder, who was confronted by the accused and a struggle ensued. During the struggle the accused held the deceased in a headlock resulting in his death.</td>
<td>Acquitted</td>
</tr>
<tr>
<td>MA11</td>
<td>Accident, aiding in self-defence</td>
<td>The deceased was involved in a scuffle during which he was punched by someone other than the accused. In a later scuffle, he was punched once by the accused and fell and struck his</td>
<td>Acquitted, the jury could not reach a verdict on an</td>
</tr>
<tr>
<td>Case no.</td>
<td>Court Decision</td>
<td>Accident, Self-Defence, and Compulsion</td>
<td>Summary</td>
</tr>
<tr>
<td>---------</td>
<td>----------------</td>
<td>----------------------------------------</td>
<td>---------</td>
</tr>
<tr>
<td>MA12</td>
<td>Acquitted</td>
<td>Accident, self-defence, and mistake of fact</td>
<td>The accused struck the deceased once to the head, mistake of fact was raised in relation to the threat posed by the deceased in the self-defence claim. The foreseeability of death appeared to be an issue in the trial.</td>
</tr>
<tr>
<td>MA14</td>
<td>Convicted</td>
<td>Accident, self-defence and mistake of fact</td>
<td>The accused punched the deceased in the course of a confrontation, the deceased fell back and hit his head. Accused claimed to be acting in defence of his brother.</td>
</tr>
<tr>
<td>MA20</td>
<td>Convicted</td>
<td>Accident and self-defence</td>
<td>There was an argument and pushing and shoving between accused and deceased, the accused pushed the victim over, who hit the back of his head. The accident issue was as to whether it was foreseeable that the push would result in death.</td>
</tr>
<tr>
<td>MA21</td>
<td>Acquitted</td>
<td>Accident, self-defence, and compulsion</td>
<td>This is Moody’s case.</td>
</tr>
<tr>
<td>MA22</td>
<td>Acquitted</td>
<td>Accident, self-defence, and compulsion</td>
<td>In the course of an argument, the deceased attacked the accused with a chain, the accused struck the deceased with a knife which severed an artery. The accident issue was as to the foreseeability that the strike to the arm would cause death.</td>
</tr>
<tr>
<td>MA25</td>
<td>Acquitted</td>
<td>Accident and self-defence</td>
<td>A verbal altercation became physical, with medical evidence as to a possible pre-existing aneurism which might have been triggered by the verbal confrontation, not an assault. The main issue appeared to be causation, with the accident issue on the basis that death was not foreseeable.</td>
</tr>
<tr>
<td>MA27</td>
<td>Acquitted</td>
<td>Accident, self-defence and provocation</td>
<td>The deceased and the accused punched each other, the deceased died of brain stem injury. The trial judge directed a not guilty verdict with the agreement of the prosecution.</td>
</tr>
</tbody>
</table>
MA32 | Accident and self-defence | One punch after the deceased threatened the accused, the deceased fell over and injured the back of his head. Accident was based on the foreseeability of death from one punch. The trial also raised issues in relation to causation. | Acquitted |

It can be seen that the foreseeability test in the second limb of section 23 arose in a number of manslaughter trials. In each case, it was also raised in conjunction with other defences. As with the murder trials reviewed, the same or similar combination of defences may result in an acquittal in one case, but a conviction in another. The success or otherwise of a particular defence or combination of defences depends on the jury’s views of the facts of the case.

This point is exemplified by a closer examination of the cases in which the foreseeability of death appeared to be a significant issue in the trial.

In MA11, the deceased was involved in a scuffle in which he was punched by someone other than the accused. The deceased was then involved in another scuffle during which he was punched once by the accused. He fell to the ground and lost consciousness, but was conscious again when taken to hospital by ambulance. The deceased declined medical treatment and discharged himself against medical advice. He was readmitted to hospital six days later and later died. The cause of death was a closed head injury which caused bleeding and swelling to the brain. The accused was acquitted of manslaughter.

In MA12, the accused struck the deceased once to the head. Although self-defence was also an issue in the trial it appears that the foreseeability of death from the blow was a significant issue. The cause of death was said to be a subarachnoid haemorrhage due to trauma to the head. The accused was acquitted.

In MA14, the accused punched the deceased in the course of a confrontation, the deceased fell back and hit his head, fracturing his skull. The deceased died in hospital some 20 hours later. The accused claimed to be acting in defence of his brother. The accused was convicted.

In MA20, there was an argument between the accused and the deceased. Some pushing and shoving occurred between them until the accused gave one big push, which caused the deceased to fall over and hit the back of his head. The injury caused a subdural haemorrhage and death. It was also alleged that the accused had kicked the deceased in the head as he lay on the floor. Accident was raised on the basis that it was not foreseeable that the push would result in death. The accused was convicted.

In MA22, the accused and the deceased argued, and the deceased hit the accused with a chain, and threatened to hit him again. The accused struck the deceased with a knife to his arm. An artery was severed and the deceased bled to death.
The jury were directed on accident as to whether it was reasonably foreseeable that the strike to the arm would cause death. The accused was acquitted.

In MA25, a verbal altercation between the accused and the deceased became physical. The accused punched the deceased to the head four to seven times. There was conflicting evidence in this case as to the cause of death. One doctor gave evidence that death was caused by a blow to the head which caused a subdural haemorrhage. Another doctor gave evidence that it was possible that the deceased had a pre-existing defect, an aneurism. The doctor gave evidence that it was possible that the verbal altercation could have resulted in a rise in blood pressure sufficient to burst the aneurism. As a result of that evidence, causation (that is, whether the blows caused the haemorrhage) was a significant issue at the trial. In the event the jury were satisfied as to causation, they were directed on the issue of foreseeability, given evidence of the relative weakness of the blows. The accused was acquitted.

In MA32, the accused punched the deceased once, claiming that the deceased had threatened to hit him first. The deceased fell over and suffered an injury to the back of his head. The deceased died some hours later. Accident was raised on the basis that it was not reasonably foreseeable that one punch, which was not particularly forceful, would cause death. The defence also raised issues in relation to causation, saying that other later falls and manhandling by others may have caused the fatal injury. The accused was acquitted.

Use of provocation in murder trials

Of the 80 murder trials reviewed, provocation was raised as a defence 25 times. Eight of the defendants were found not guilty of murder. Of these, four defendants were found guilty of manslaughter by the jury, and one pleaded guilty to manslaughter. As provocation operates to reduce murder to manslaughter, those who were completely acquitted (i.e. not convicted of manslaughter) must have been acquitted due to the acceptance of other defences.

In only two of the 25 cases in which provocation was raised, was it the only defence left to the jury. Only one of these accused was acquitted (Sebo). The accused in the other case (MU26) was convicted of murder.

Table 5 sets out the circumstances of the eight cases in which provocation was raised and the accused was acquitted of murder.

Table 5 – Acquittals in trials where provocation was raised

<table>
<thead>
<tr>
<th>Defendant</th>
<th>Defences</th>
<th>Comment</th>
<th>Outcome</th>
</tr>
</thead>
<tbody>
<tr>
<td>MU9</td>
<td>Unwilled act, accident, self-defence, provocation, intoxication and mistake of fact</td>
<td>The main issue at the trial appears to have been self-defence, which would explain the acquittal.</td>
<td>Acquitted.</td>
</tr>
</tbody>
</table>
In relation to the above cases, with the exception of Sebo, as a number of other defences were raised, the audit team could draw no firm conclusions as to whether the manslaughter verdict was due to the provocation defence. Diminished responsibility also leads to a manslaughter verdict, and intoxication can lead to a manslaughter verdict if the degree of intoxication is sufficient to mean that the accused could not form the intent required for murder (see MU65 for example).

In two cases, MU74 and MU87, although the jury were not asked to deliver a special verdict in convicting for manslaughter instead of murder, the trial judge commented during sentencing on why he or she thought a manslaughter verdict was returned by the jury.

In MU74, the accused was the son of the deceased. The accused was drunk and became involved in a verbal altercation with his father, who was sober.
During the argument, the accused claimed the deceased had sexually assaulted his young daughter. The deceased made no response to the allegation, which prompted the accused to question his daughter, interpreting her response as confirmation that sexual abuse by the deceased had occurred. The accused yelled and accused the deceased, and in the face of his continuing silence picked up a knife and stabbed him in the heart. It appears that intoxication, relevant to the accused’s ability to form the required intent, was a significant issue in the trial. However, the trial judge sentenced the accused on the basis that he at least intended to cause grievous bodily harm (that is, he did have the requisite intent for murder) but the jury must have accepted there was provocation. The trial judge viewed the provocation as ‘minimal’.

In MU87, the accused was the husband of the deceased. The accused and the deceased argued. The accused claimed he knew his wife had been having an affair and was lying to him about it. During the argument, the deceased announced she was going to leave the accused and that she would take custody of the children and the house. The accused assaulted the deceased, bashing her head against the tiles. He then strangled her with a dog leash. There was medical evidence given at the trial that the accused suffered dysthymia and a general anxiety disorder. There was also evidence (relevant to the provocation defence) that he suffered a personality disorder involving dependant, avoidant and obsessional behaviour. The trial judge sentenced the accused for manslaughter on the basis of provocation, rejecting the suggestion that he was suffering diminished responsibility at the time.

Provocation is not available as a defence to a manslaughter charge.
Part 5 – Other developments

This part of the discussion paper examines some other recent developments that may be considered relevant in considering the appropriateness of the law’s current response to offences of violence, and whether or not any law reform is necessary.

5.1 Jury directions

As we noted earlier in the discussion paper, the role of the jury is to determine the facts of the case, based on the evidence given during the trial, and to apply the law as directed by the trial judge to those facts. For example, in a trial for manslaughter in which accident is an issue, the jury will be directed firstly on the words of section 23(1)(b), and then in terms of the meaning of those words according to current case law.

The task of directing the jury is further complicated by the requirement that the trial judge direct the jury on any excuse or defence that is raised on the evidence, even if it is not a defence argued by or on behalf of the accused. Because manslaughter is always available as an alternative verdict to murder, any circumstance that may reduce murder to manslaughter must be brought to the jury’s attention, even if it is inconsistent with the defence case, or the case has been run as ‘murder or nothing’.

The justification for this requirement was explained in the High Court case of Stevens v R (2005) 222 ALR 40, at paragraph 68, where Kirby J said – ‘The trial judge retains a duty to instruct a jury concerning any defence (even one not raised or pressed by a party and or indeed disclaimed by the parties) that fairly arises on the evidence and therefore needs to be considered by the jury in reaching their verdict’. Kirby J went on to say that juries are not required to accept, in its entirety either the prosecution or defence cases, and are entitled to form their own opinions on the facts.

In a paper presented to the Australian Institute of Judicial Administration Appeal Judges Conference in September 2006, the Chair of the NSWLRC, the Hon James Wood AO QC said:

‘there is a considerable degree of concern, and frustration, expressed by trial judges in relation to the difficulty which they experience in summing up a case to a jury, by reason of the ever-increasing number and complexity of the directions, warnings and comments that are required, the existence of which multiply the potential forappable error. Secondly, there is concern that, no matter how well-crafted a summing up may be, there is still a risk that it will not be understood and correctly applied by the jury.’

Justice Wood also commented on the nature of directions given to juries, saying:

‘A question arises as to whether it should continue to be regarded as either appropriate or necessary for judges, in an adversary system, to direct the jury on the possible availability of defences or verdicts for lesser offences, where they have not been raised by counsel.

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While the authority for doing so continues to be *Pemble v The Queen*, [(1971) 124 CLR 107] it seems that very often trial judges will be anxious to include such directions, particularly in relation to the various circumstances and partial defences that might give rise to a manslaughter verdict in the case of an accused charged with murder, on the most tenuous of bases, in order to appeal-proof the summing up. In some cases, these directions are given, and indeed the authorities suggest that they need to be given, even though the parties expressly object to that occurring."

The NSWLRC has a current reference on juries, which includes a reference on ‘the increasing number and complexity of the directions, warnings and comments required to be given by a judge to a jury’.

The Queensland Attorney-General has recently written to key stakeholders seeking their views about whether any issues exist in Queensland relating to directions to juries in criminal trials with a view to considering whether Queensland should participate in the NSWLRC and whether the Queensland Law Reform Commission should undertake work in this area.

### 5.2 Alternative verdicts

It is possible for the prosecution to charge a lesser offence in the alternative to a more serious charge, leaving the jury with the option of convicting on either charge. For example, a person may be charged with attempted murder, with a charge of assault laid as an alternative. A verdict of assault would be open if the jury was not satisfied to the requisite degree that the offender was trying to kill the victim.

For some offences, the Criminal Code provides what are known as ‘statutory alternatives’, that is, an alternative verdict that is available to the jury, even if it is not specifically charged by the prosecution. For example, section 576 provides that where a person is charged with murder, the jury may return a verdict of manslaughter. Thus, a manslaughter verdict is always available on a charge of murder. For any other verdict to be open on a charge of murder or manslaughter, the prosecution must specifically charge another offence in the alternative.

On a charge of murder or manslaughter, the prosecution can charge a number of other offences in the alternative, for example, grievous bodily harm, wounding or assault. There are however tactical reasons why the prosecution chooses not to charge alternative verdicts, for example, because it may encourage the jury to return a ‘compromise’ verdict.

### 5.3 ‘One punch can kill’

An issue that arises in the consideration of all three catalyst cases is the nature and consequences of violence in Queensland society. The cases of Little and Moody involved young men and alcohol, which were features noted in other cases considered in the audit.

Taking steps to reduce youth violence does not necessarily require law reform. For example, in October 2006, the Queensland Government established the Youth
Violence Taskforce to examine ways to reduce incidents of violent behaviour among young Queenslanders.

The taskforce has invited individuals and community groups to submit comments and suggestions for discussion, particularly around the aims of the taskforce, that is to:

- examine incidents and any trends of violence among young people in Queensland and Australia;
- recommend evidence based violence prevention programs; and
- examine the factors that lead a young person towards violence such as anger management, domestic and family influences, education, community influences such as role models and alcohol and drugs.

It may also be the case that the publicity given to these cases means that in future it will be harder for a jury to accept that death is not a foreseeable outcome from an assault. The Queensland Homicide Victims Support Group has recently campaigned in the community that ‘One punch can kill’\textsuperscript{19}.

\textsuperscript{19} See http://www.qhvsg.org.au/whats_on_at.php
Part 6 – Concluding comments and discussion questions

This discussion paper has aimed to provide information about the nature and frequency of the use of provocation and accident, as well as some broader contextual information, in order to provide an opportunity for stakeholders to comment on the operation and use of these defences.

The nature and use of the accident excuse does not appear to have been the subject of any sustained challenge until recently. By contrast, the partial defence of provocation has been the subject of a number of recent reviews resulting in abolition or reform in some jurisdictions.

An examination of these issues should extend beyond the provisions in the Criminal Code to how juries are required to undertake the task of determining criminal responsibility and to the environment in which a jury’s decision is made.

As we noted in the introduction, it has often been said that ‘hard cases make bad law’, meaning that caution should always be exercised in making changes to the law based on an apparently unacceptable outcome occurring in a particular case. An amendment to the law designed to remedy an injustice in one case, may result in serious injustice in other cases.

The following discussion questions are not intended to limit any comments or feedback, but to assist in formulating a response to the issues raised by this discussion paper.

Discussion questions

1. Does the current law as expressed in section 23(1)(b) (accident) reflect community expectations in relation to criminal responsibility?
2. Is the excuse provided by section 23(1)(b) appropriate in a case when death results?
3. Is there an inconsistency in the application of section 23 because of the operation of subsection (1A) (the Van Den Bemd amendment)?
4. Does the current law on provocation reflect community expectations in relation to criminal responsibility?
5. Is the defence of provocation appropriate for a case when death results?
6. In what circumstances, if any, should provocation provide a partial excuse for murder?
7. Does it make a difference to your views that mandatory life imprisonment applies to murder in Queensland?
8. Directions to the jury are based on court decisions and are intended to instruct the jury on the relevant law. Justice Wood has commented on jury directions by saying:

‘there is a considerable degree of concern, and frustration, expressed by trial judges in relation to the difficulty which they experience in summing up a case to a jury, by reason of the ever-increasing number and complexity of the directions, warnings and comments that are required, the existence of which multiply the potential for appealable error. Secondly, there is concern that, no matter how well-crafted a summing up may be, there is still a risk that it will not be understood and correctly applied by the jury.’

What is your view?