IMPERMISSIBLY IMPORTING THE COMMON LAW INTO CRIMINAL CODES: *POLLOCK V THE QUEEN*

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Abstract

In the recent case of *Pollock v The Queen*,[1] the High Court stated that: 'In interpreting the language of s 304 [of the *Criminal Code 1899* (Qld) which deals with the partial defence to murder of provocation] it is permissible to have regard to decisions expounding the concept of "sudden provocation" subsequent to the Code's enactment.'[2] This paper takes issue with the purported 'permissibility' of importing into a section originally drafted in 1897 and which reflected the law as expressed by Chief Justice Tindal in the 1833 case of *R v Hayward*,[3] the current common law test for provocation in Australia as per *Stingel v The Queen*[4] and *Masciantonio v The Queen*.[5] The basis for this attack on the High Court's jurisprudence on Code interpretation is both specific and general. Specifically, this paper argues that the High Court impermissibly imported the current common law test for provocation into s 304 in a strained manner by relying on a contrived reading of the phrase 'and before there is time for the person's passion to cool', whilst simultaneously ignoring the use of 'the person' not 'an ordinary person', in s 304. More generally, it is respectfully argued that the High Court has broken the golden rule of code interpretation of not looking outside

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1 [2010] HCA 35.

2 *Pollock v The Queen* [2010] HCA 35 [47] (French CJ, Hayne, Crennan, Kiefel and Bell JJ), citing *Boughey v The Queen* (1986) 161 CLR 10, 30 (Brennan J); *R v K* (2010) 84 ALJR 395, 422 (Gummow, Hayne, Kiefel, Crennan and Bell JJ).

3 (1833) 6 Car & P 157, 159.

4 (1990) 171 CLR 312.

5 (1995) 183 CLR 58.

of the code to the common law unless the meaning is either unclear or has a prior technical meaning.[6] The wider implication of such an approach is that the courts are infusing the common law into Criminal Codes despite the stated intention of codification being the replacement of 'all existing law and becomes the sole source of the law on the particular topic'.[7] The relevance of a case study such as *Pollock* lies in highlighting the dangers to the internal consistency of codes, in the absence of legislative reform, flowing from judicial attempts to interpret a single section of a code in line with modern sensibilities. Furthermore, the case study draws attention to the opposite positions taken by the judiciary of Queensland and Western Australia in reading the definition of provocation for assault into the respective sections dealing with provocation and murder in the two Griffith Codes. This goes to the heart of Code interpretation and is testimony to the strength of precedent and 'settled' law, with the Queensland Government ignoring the opportunity to specifically insert an objective test into s 304 when it amended the section in 2011.

I INTRODUCTION

In *Pollock v The Queen*,[8] the High Court stated that: 'In interpreting the language of s 304 [of the *Criminal Code 1899* (Qld) which deals with the partial defence to murder of provocation] it is permissible to have regard to decisions expounding the concept of "sudden provocation" subsequent to the Code's enactment.'[9] This paper takes issue with the purported 'permissibility' of importing into a section originally drafted in 1897 and which reflected the law as expressed by Chief Justice Tindal in the 1833 case of *R v Hayward*,[10] the current common law test for

6 *Bank of England v Vagliano Brothers* [1891] AC 107, 145 (Lord Herschell).

7 D.C. Pearce and R.S. Geddes, *Statutory Interpretation in Australia* 2006) [8.8].

8 [2010] HCA 35.

9 *Pollock v The Queen* [2010] HCA 35 [47] (French CJ, Hayne, Crennan, Kiefel and Bell JJ), citing *Boughey v The Queen* (1986) 161 CLR 10, 30 (Brennan J); *R v K* (2010) 84 ALJR 395, 422 (Gummow, Hayne, Kiefel, Crennan and Bell JJ).

10 (1833) 6 Car & P 157, 159.

provocation in Australia as per *Stingel v The Queen*[11] and *Masciantonio v The Queen*.[12] The core argument is that whilst it might be objected that the relevant common law should not be frozen in time as it existed prior to 1899 when the *Criminal Code 1899* (Qld) was enacted, to import later developments in the relevant common law in the face of the clear language of the particular code section breaches the golden rule of code interpretation and amounts to judicial legislation.

The obvious starting point for a discussion on code interpretation is to look to the section in dispute itself. Section 304 of the *Criminal Code 1899* (Qld) reads as follows:[13]

> 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.

The High Court commenced its analysis of s 304 by stating that '[j]udges of the Supreme Court of Queensland have for many years interpreted the provision by reference to the common law'.[14] The reason for the

[11] (1990) 171 CLR 312.

[12] (1995) 183 CLR 58.

[13] The Queensland Parliament has recently passed legislation to amend s 304, but these amendments do not actually alter the wording of the original section under discussion. Two of the proposed subsections to s 304 qualify the words 'sudden provocation'. Subsection (2) states that: 'Subsection (1) [the original section] does not apply if the sudden provocation is based on words alone, other than in circumstances of a most extreme and exceptional character.' Subsection (3) also restricts the reach of the partial defence of provocation for domestic relationships where the deceased sought to end or change the nature of the relationship. See *Criminal Code and Other Legislation Amendment Act 2011* (Qld).

[14] *Pollock v The Queen* [2010] HCA 35 [46] (French CJ, Hayne, Crennan, Kiefel and Bell JJ), citing *R v Herlihy* [1956] St R Qd 18; *R v Young* [1957] St R Qd 599; *R v Johnson* [1964] Qd R 1; *R v Callope* [1965] Qd R 456; *Buttigieg* (1993) 69 A Crim R 21; *R v Pangilinan* [2001] QCA 81; [2001] 1 Qd R 56. Academic writers also appear to have uncritically accepted this line of authority from judges of the Supreme Court of Queensland. See, for example, R.G. Kenny, *An Introduction to Criminal Law in Queensland and Western Australia* (LexisNexis Butterworths, 7th ed, 2008) 250, [12.52]. 'In Queensland, in the absence of a statutory definition of provocation for murder, reliance is placed upon the principles pertaining to provocation as they develop at common law.'

importation of the common law was said to lie in the absence of a definition of provocation in s 304. This is in contrast to the definition of provocation in s 268 of the *Criminal Code 1899* (Qld) which refers to an offence of which assault is an element for the purpose of s 269 which deals with the defence of provocation for an assault. The High Court relied on the *obiter dicta* in *Kaporonovski v The Queen*[15] as authority for the statement 's 304 does not express the conditions upon which provocation is given legal effect'[16] which in turn justified looking to the common law 'to determine the circumstances'[17] whereby murder is reduced to manslaughter under s 304.

This paper respectfully contends that this is not an accurate interpretation of s 304, which is supported by an examination of the context of the original drafting of s 304 by Sir Samuel Griffith and the law of provocation at the time s 304 came into effect in 1899. Of considerable significance is the fact that while both sections 268 and 269 of the *Criminal Code 1899* (Qld) refer to the 'ordinary person', s 304, which covers the more serious act of killing on provocation, eschews any reference to the ordinary person. This is scarcely surprising given murder was a capital offence.

The High Court continued its justification for importing the current common law of provocation into s 304 by stating that '[t]he use of the expression "sudden provocation" was intended to import well-established principles of the common law concerning the partial defence in the law of homicide'.[18] The High Court appended a footnote (15) to this statement which is reproduced in full below as it is central to the argument of this paper.

> Section 304 of the Code was taken directly from cl 312 of Sir Samuel Griffith's draft code. See Griffith, *Draft of a Code of Criminal Law*, (1897) at 123. The marginal note to cl 312 refers

15 [1973] HCA 35; (1973) 133 CLR 209, 219 (McTiernan ACJ and Menzies J). *Kaporonovki* was a 'glassing' case and was therefore concerned with provocation and assault (s 269) rather than provocation and murder (s 304). The High Court split 3 to 2 on whether the objective test in s 269 could be imported into s 304 with the majority saying the two sections could not be read together, thereby endorsing the Queensland rather than the Western Australian approach.

16 *Pollock v The Queen* [2010] HCA 35 [46] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

17 Ibid.

18 Ibid. [47]

> to ss 58 and 172 of the *Criminal Code Bill* (Bill 2)[19] in *House of Commons Parliamentary Papers*, (1880), Vol 2 at 1. Section 172 of the Bill provided:
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> "Culpable homicide, which would otherwise be murder, may be reduced to manslaughter if the person who causes death does so in the heat of passion caused by sudden provocation.
>
> Any wrongful act or insult of such a nature as to be sufficient to deprive an ordinary person of the power of self-control may be provocation, if the offender acts upon it on the sudden and before there has been time for his passion to cool ..."
>
> Section 172 of the Bill was based on cl 176 of the draft code appended to: United Kingdom, *Report of the Royal Commission Appointed to Consider the Law relating to Indictable Offences*, (1879) [C 2345] ("Report of the Royal Commission") at 100-101. The Commissioners regarded s 176 as reflecting the common law save for the inclusion of insults as capable of amounting to provocation: Report of the Royal Commission at 22, 24-25. Sir Samuel Griffith considered cl 312 of his draft to embody the common law: Griffith, *Draft of a Code of Criminal Law*, (1897) at xii.

There are three significant observations to be made. First, the *Criminal Code Bill* (1880) did not pass into law. Second, Sir Samuel Griffith chose not to adopt the language of s 172 of the Bill in s 304, and in particular ignored the reference to the objective test of 'to deprive an

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[19] There are numerous references to 'Bill of 1880' in Sir Samuel Griffith's Draft Criminal Code 1897. The marginal note for s 276 Defence of Provocation, which covers an assault caused by provocation, states 'Compare Bill of 1880, s 58'. Importantly, s 276 makes specific reference to the 'ordinary person'. There is no such reference to the ordinary person in s 312 Killing on Provocation, and the marginal note simply reads 'Ib., ss 58, 172'. Significantly, s 312 specifically uses the words 'but for the provisions of this section' which prevents the importation of the 'ordinary person' test in s 276 into s 312, which in any event is understandable in the context of an assault in 276, compared to s 312 where failure of the partial defence of provocation means death. To reinforce the point, the marginal note to s 298, which deals with Killing of a Human Being Unlawful, reads 'Common Law'. If Sir Samuel Griffith had intended the developing common law to be imported into s 312 in the form of the 'reasonable man' test in *R v Welsh* (1869) 11 Cox CC 336, 338, it is contended he would have used the marginal note 'Common Law'. All the indicia support the view that s 312 stood alone in its subjective terms and the ordinary person test only referred to s 276.

ordinary person of the power of self-control'. Indeed, in his famous letter to the Queensland Attorney-General in 1897, Sir Samuel Griffith observed that the work of the English Commissioners, who prepared the Draft Code of Criminal Law upon which the 1880 Bill was based, 'did not, however, escape severe criticism, especially from Sir Alexander Cockburn, then Lord Chief Justice of England, who pointed out some serious defects in the Draft Code as prepared by the Commissioners'.[20] Third, Sir Samuel Griffith, in the same letter, referred to authority on the law of provocation in the following terms: 'The subject of provocation as reducing the guilt of homicide committed under its influence from murder to manslaughter is covered by authority.'[21] This paper contends that the authority referred to here is *R v Hayward*.[22]

It is also perhaps not widely known that the Queensland Government referred Griffith's draft Code of Criminal Law to a Royal Commission which was chaired by Sir Samuel Griffith himself. The Commissioners went through the draft Code section by section. An examination of the report[23] shows that s 304 (then s 312) was unchanged.[24] By contrast, there was considerable discussion and disagreement over the definition of provocation in s 268 (then s 275) and the defence of provocation for an assault in s 269 (then s 276).[25] The Attorney-General referred to this disagreement in his second reading speech of the Criminal Code Bill.[26] The point being made is that in all the deliberations of the Commissioners and during the Parliamentary Debates, there was no suggestion of an objective test in the form of an ordinary or reasonable person applying in s 304. At no stage during the nearly two year period between Sir Samuel Griffith's letter to the Queensland Attorney-General

20 Sir Samuel Griffith, Letter to the Queensland Attorney-General, 29 October 1897, iv, citing a letter from the Lord Chief Justice of England to the Attorney-General, 18 June 1879. The Lord Chief Justice's letter offers the opinion that 'the Bill ought not to pass without very many corrections and amendments … a great deal remains to be done to make the present code a complete and perfect exposition, or a definitive settlement of the criminal law'.

21 Ibid, xi.

22 (1833) 6 Car & P 157, 159.

23 *Report of the Royal Commission on A Code of Criminal Law* (1899) Queensland Government Printer, Brisbane.

24 Ibid, 90.

25 Ibid, 83-84.

26 Queensland, *Parliamentary Debates*, Legislative Assembly, 21 September 1899, 109 (Attorney-General).

dated 29 October 1897 to the Minister's second reading speech of 21 September 1899, did anyone think to ask the following question: 'If an objective test is required for provocation where assault is an element, why not also require an objective test for provocation where a killing is an element?'

The implication of the High Court's footnote 15 in *Pollock v The Queen*[27] above, is that Sir Samuel Griffith intended to import s 172 of the English Bill into s 304. With respect, there is no justification for such an implication, and it ignores the plain words of s 304 which contains only a subjective test of doing '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'. This is neither the language of the English Bill of 1880 nor the test of the 'reasonable man' applied by Keating J in 1869 in *R v Welsh*,[28] but the language of the 1833 case of *R v Hayward*,[29] which the High Court itself acknowledged.[30] It is of course quite appropriate to make use of extrinsic material in the interpretation of an Act,[31] but the dispute here concerns the proper identification of Sir Samuel Griffith's intention in utilising the extrinsic material.

The High Court does not appear to distinguish between the provisions of an Act and the provisions of a Code for the purposes of considering extrinsic material. In discussing the different judicial views on the meaning of provocation in s 304, Colin Howard stated 'that what Sir Samuel Griffith thought he was doing, as expressed in correspondence, is not relevant to the construction of what he has done'.[32] In *R v Johnson*,[33] a provocation case, Lucas AJ agreed with this view by observing 'it is

27 [2010] HCA 35.

28 (1869) 11 Cox CC 336, 338.

29 (1833) 6 Car & P 157, 159.

30 *Pollock v The Queen* [2010] HCA 35 [50] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

31 See for example s 14B(1) of the *Acts Interpretation Act 1954* (Qld) which allows consideration of extrinsic material capable of assisting in the interpretation of a provision (a) if the provision is ambiguous or obscure – to provide an interpretation of it; or (b) if the ordinary meaning of the provision leads to a result that is manifestly absurd or is unreasonable - to provide an interpretation that avoids such a result; or (c) in any other case – to confirm the interpretation conveyed by the ordinary meaning of the provision.

32 Colin Howard, 'Provocation and Homicide in Australia' (1960) 33 Australian Law Journal 355, 360.

33 [1964] St R Qd 1, 21.

clear that Sir Samuel's comments on his Draft Code cannot be used for the purpose of the construction of the Code as enacted'. For present purposes, as contended above, this paper attempts to rebut the High Court's arguments for calling in aid Sir Samuel Griffith's notes and correspondence, whilst respectfully agreeing with Howard and Lucas AJ that such extrinsic material is irrelevant to code interpretation.

The argument being made here is grounded in the rules of code interpretation, and it is respectfully contended that the High Court has broken the golden rule of code interpretation of not looking outside of the code to the common law unless the meaning is either unclear or has a prior technical meaning.[34] Fisse has highlighted the disparity between the theory that a code should be internally self-consistent and self-sufficient with the practice that 'inevitable ambiguities of language make this impossible'.[35] Fisse continues by making the significant point that codification tends 'to fix the content of the law as at one point in time'[36] and without regular amendments 'obliges the judiciary either to do increasing violence to its literal terms or else abandon progress'.[37] This paper argues that the former has occurred because the Queensland Legislature has left s 304 unaltered for 112 years (and then inexplicably failed to amend the original section).[38]

The 2011 amendments to s 304 leave the original section intact as s 304(1). The explanatory notes merely assume an objective test based on past judicial interpretation, rather than specifically incorporating

34 *Bank of England v Vagliano Brothers* [1891] AC 107, 145 (Lord Herschell). Colvin and McKechnie state that the interpretation of the word 'provocation' by the Queensland Court of Appeal in *R v Johnson* [1964] Qd R 1 is an example of 'technical' interpretation. See E. Colvin and J. McKechnie, *Criminal Law in Queensland and Western Australia* (LexisNexis Butterworths, 5th ed. 2008) 10. 'The common law meaning (which incorporates a version of the "ordinary person" test) was preferred on the basis that provocation had become a term of art at common law by the time that the Code was enacted.' (15.10, 338.)

35 Brent Fisse, *Criminal Law* (The Law Book Company Limited, 1990) 4.

36 Ibid, 5.

37 Ibid, citing inter alia *Kusu* [1981] Qd R 136 (limited relevance of evidence of intoxication to deny mental element of offence under s 28 *Criminal Code* (Qld); cf *O'Connor* (1980) 146 CLR 64); *Stuart v The Queen* (1974) 134 CLR 426 (objective test of liability for complicity in relation to probable consequences of enterprises; cf *Johns v The Queen* (1980) 143 CLR 108).

38 *Criminal Code and Other Legislation Amendment Act 2011* (Qld). See above n 13.

an objective test. Thus, the elements of the defence are unchanged in s 304(1) as Griffith's original language is retained, and therefore the amendments have no impact on this paper's argument.

Having implied that Sir Samuel Griffith intended to import s 172 of the English Bill into s 304, it was but a short further step for the High Court to invoke the objective test contained in s 172 as applying to s 304, such that the conduct of the deceased had 'the capacity to provoke an ordinary person'[39] although this requirement is not 'stated in terms'.[40] Once the objective test is invoked, judicial consideration of changes to that test over time are justified on the grounds that 'it is permissible to have regard to decisions expounding the concept of "sudden provocation" subsequent to the Code's enactment'.[41] Such a chain of reasoning allowed the High Court to examine the Queensland Court of Appeal's 'sevenfold test' based on the provisions of s 304, which test in turn was derived as a result of the line of authority flowing from judges of the Supreme Court of Queensland importing the common law into s 304 commencing in 1956 onwards.[42]

By contrast with judicial importation of the common law, the need for the imprimatur of the legislature applies *a fortiori* to a Criminal Code. As Kirby J tellingly pointed out: 'Codification puts a brake on the modern technique of looking beyond the statutory language … The purpose of codification would be undermined if lawyers, in the guise of construction, reintroduced all of the common law authority which the NT Code was intended to replace.'[43]

II BACKGROUND TO SECTION 304

Provocation can be traced back to the 17th century, when the criminal law distinguished between a killing where there was proof of malice aforethought and an unpremeditated killing on the spur of the moment following a provocative act.[44] The distinction was significant at a time

39 *Pollock v The Queen* [2010] HCA 35 [47] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

40 Ibid.

41 Ibid, citing *Boughey v The Queen* (1986) 161 CLR 10, 30 (Brennan J); *R v K* (2010) 84 ALJR 395, 422 (Gummow, Hayne, Kiefel, Crennan and Bell JJ).

42 *R v Herlihy* [1956] St R Qd 18.

43 *Director of Public Prosecutions (NT) v WJI* [2004] HCA 47 [71].

44 See Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (Thomson Reuters, 3rd ed, 2010) 293.

when capital punishment was the penalty for murder and could only be avoided if the defendant lacked malice aforethought.[45] 'Manslaughter was only available where the killing had occurred "suddenly" and in "hot blood" in response to an act of provocation by the deceased.'[46]

In *Masciantonio v The Queen*, McHugh J summarised the central concept of the law of provocation as suddenness negativing premeditation.

> The central idea of the law of provocation has always been that of a sudden and temporary loss of control that results from the provocative conduct of the deceased. When that loss of control results in an intention to kill or cause grievous bodily harm to the provoker and the intention is accompanied by action that causes the death of that person, the law has been prepared to forego the ultimate penalty for the taking of a human life that is done with the requisite intent. But the doctrine of provocation was never intended as a general licence to kill or wreak havoc. The concept of suddenness negatived any question of premeditation.[47]

The High Court recognised that at the time Sir Samuel Griffith was writing his draft criminal code for Queensland, '[t]he sixth edition of *Russell on Crimes and Misdemeanours* … stated the law of provocation in terms that were drawn from East'.[48] East had explained the term 'sudden provocation' to mean the absence of premeditation.[49] Self evidently, the longer the period between the alleged provocative act and the response, the more likely it was to be a deliberate and malicious act.[50] The High Court further observed that s 304 reflected 'the way provocation was explained to the jury [by Chief Justice Tindal] in *R v Hayward*'.[51]

This paper contends that when Sir Samuel Griffith drafted s 304 he was intending that a jury would be directed in similar terms to those used by Chief Justice Tindal in *R v Hayward* as to 'whether there had been

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45 Ibid, 295, citing *Royley's* case (1612) Cro Jac 296; *Nugget* (1666) 18 Car 2; *R v Mawgridge* (1707) 84 ER 1107.

46 Ibid, 294.

47 (1995) 183 CLR 58, 80.

48 *Pollock v The Queen* [2010] HCA 35 [50] (French CJ, Hayne, Crennan, Kiefel and Bell JJ), citing Russell, *A Treatise on Crimes and Misdemeanours*, 6th ed (1896), vol 3, 54.

49 East, *Pleas of the Crown*, (1803), vol 1, 241.

50 Ibid, 252-253.

51 *Pollock v The Queen* [2010] HCA 35 [50] (French CJ, Hayne, Crennan, Kiefel and Bell JJ), citing *R v Hayward* (1833) 6 Car & P 157, 159.

time for the blood to cool, and for reason to resume its seat, before the mortal wound was given'.[52] The absence in s 304 of any reference to the provocation being sufficient to 'deprive an ordinary person of the power of self-control' as used in the English Bill of 1880, is, it is argued, evidence that a purely subjective test was intended. Section 304 is clearly drafted not to reflect an objective test, but the law of murder and manslaughter in the 19th century. When Sir Samuel Griffith drafted s 304, the section referred to both wilful murder,[53] by which was meant 'intentional killing',[54] and murder by which was meant 'killing, which though unintentional, is done under such circumstances [such as intending to do the person killed some bodily injury of such as nature as to be likely to cause death] as to warrant the infliction'[55] of the death penalty.[56] Hence, under s 304, absent premeditation and present passion, then manslaughter is the result.

As a matter of logic, it follows that if s 304 was clear in its terms, there was no need for Sir Samuel Griffith to include a definition of provocation in s 304. As mentioned earlier, the High Court relied on the *obiter dicta* in *Kaporonovski v The Queen*[57] as authority for the statement 's 304 does not express the conditions upon which provocation is given legal effect'[58] which in turn justified looking to the common law 'to determine the circumstances'[59] whereby murder is reduced to manslaughter under s 304. This paper argues that, with due respect to McTiernan ACJ and Menzies J, contrary to their opinion in *Kaporonovski v The Queen*,[60] s 304 is perfectly clear as to the conditions and circumstances under which the partial defence to murder of provocation was to operate. These conditions had been perfectly clear to judges from the *Trial of*

52 *R v Hayward* (1833) 6 Car & P 157, 159.

53 Wilful murder was removed from s 304 by the *Criminal Code and Offenders Probation and Parole Act Amendment Act* 1971 (Qld).

54 Sir Samuel Griffith, above n 20, xii.

55 Ibid.

56 The original s 313 Punishment of Murder in the Draft Criminal Code 1897 read as follows: 'Any person who commits the crime of wilful murder or murder is liable to the punishment of death.

57 [1973] HCA 35; (1973) 133 CLR 209, 219 (McTiernan ACJ and Menzies J).

58 *Pollock v The Queen* [2010] HCA 35 [46] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

59 Ibid.

60 [1973] HCA 35; (1973) 133 CLR 209, 219 (McTiernan ACJ and Menzies J).

Lord Morley[61] in 1666, and, therefore, it was impermissible to look outside s 304 to the development of the common law and the objective test. Furthermore, it was contrary to the rules of code interpretation as Sir Samuel Griffith had decided not to include an objective test in s 304.

Reference has been made earlier to the 1956 case of *R v Herlihy*[62] which marks the starting point of the importation of an objective test into s 304. In *Herlihy*, the Queensland Court of Criminal Appeal examined the relationship between s 268 and s 304. Mack J, having noted that for the purposes of s 304 either provocation is undefined or s 268 applies, gave the following colourful assessment.

> On the literal construction interpreting s 304 by reading s 268 into the section is like searching for the continuation of a road that has already disappeared in the wilderness, and to interpret s 304 without the assistance of s 268 is not dissimilar to seeking a road that does not exist.
>
> It is in such circumstances as these I think that one should turn to the common law in its then stage of development, or as it was thought to be then to find if words or expressions there used had acquired a technical meaning.[63]

This paper disputes the accuracy of the above passage, contending that s 304 is quite clear in its terms and, contra to Mack J's view, provocation is defined in s 304 in the well understood language of the nineteenth century version of the partial defence. Therefore, there is no need to look either to s 268, which deals with the separate offence of assault, or to the common law outside of s 304 under the guise of a prior technical meaning.[64] As regards the latter, Mack J, with respect, applies an inconsistent argument. On the one hand, his Honour invokes a prior technical meaning for provocation, whilst on the other (as will be discussed) endorses the importation into s 304 of later developments in the common law.

The vagaries of judicial interpretation in relation to murder and provocation in the Griffith Codes can be here illustrated by contrasting the approach taken in Western Australia, where s 245 of the *Criminal*

61 *Trial of Lord Morley* (1666) 6 St Tr 770.

62 [1956] St R Qd 18.

63 *R v Herlihy* [1956] St R Qd 18, 60-61, citing *Bank of England v Vagliano Brothers* [1891] AC 107; *R v Scarth* [1945] St R Qd 38.

64 *Bank of England v Vagliano Brothers* [1891] AC 107, 145 (Lord Herschell).

Code (WA) is written in similar terms to s 268 of the *Criminal Code* (Qld), and contains a definition of provocation with reference to an offence of which assault is an element. Just one year after *Herlihy* was decided, in *Mehemet Ali v The Queen*,[65] the Court of Appeal in Western Australia reached the opposite conclusion by accepting that s 245 provided the definition of provocation for the purposes of the now repealed s 281 (the equivalent of s 304).

Mack J continued by dealing with the argument that the common law could never apply to s 304 because on the authority of Viscount Simon in *Holmes v Director of Public Prosecutions*[66] provocation can never have the effect of reducing murder to manslaughter if the slayer intended to kill.[67] The key passage of Viscount Simon's judgment stated that 'where the provocation inspires an actual intention to kill … the doctrine that provocation may reduce murder to manslaughter seldom applies' (the one very special exception was the actual finding of a spouse in the act of adultery).[68] Mack J met this argument in a manner highly germane to the thrust of this paper.

> However, there was a constant stream of authority up to the time that our Code was enacted which showed that a distinction was drawn between an intent formed in cold blood and a 'hot blood' intent … [t]he phrase 'malice aforethought is negatived' is based on human frailty[69] … [t]he theory appears to be that the loss of

[65] (1957) 59 WALR 28. *Mehemet Ali* was reaffirmed in a string of cases such as *Sreckovic* [1973] WAR 85; *Censori* [1983] WAR 89; *Roche* [1988] WAR 278; and *Williams* (1996) 15 WAR 559. It was not until 2003 that the correctness of reading s 245 into s 281 was doubted in *Hart* (2003) 27 WAR 441. In any event, it became academic as provocation as a partial defence to murder was abolished in 2008 following the passage of *The Criminal Law Amendment (Homicide) Act 2008* (WA).

[66] [1946] AC 588, 598.

[67] *R v Herlihy* [1956] St R Qd 18, 61. Section 304 contains the phrase 'unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder', which implies the person had the necessary intention (malice aforethought) to kill to constitute murder. Under the 'hot blood' defence malice aforethought is negated because the loss of self-control in the heat of passion rules out premeditation.

[68] *Holmes v Director of Public Prosecutions* [1946] AC 588, 598.

[69] Citing East's *Pleas of the Crown* (1803), volume 1, chapter 5, section 23(a), page 238, where it is stated that 'the party may rather be considered as having acted under a temporary suspension of reason, than from any deliberate malicious motive'.

> the power of self-control … prevents the formation of a reasoned and real intent to kill.[70]

Mack J was particularly concerned with Viscount Simon's use of the words 'actual intention' in the passage quoted above, which his Honour interpreted as meaning 'an intention formed in circumstances falling short of a legal defence of provocation'.[71] In this way, Mack J was able to get out from under 'such an extremely limited operation on the doctrine'[72] calling in aid two Privy Council cases which respectively dealt with the Criminal Code of the Gold Coast[73] and the Ceylon Penal Code.[74] In the latter case, Mack J seized on Lord Goddard's use of the words 'an illustration'[75] when his Lordship was discussing a man finding his wife in the act of adultery, to widen the sole exception given in *Holmes v Director of Public Prosecutions*[76] considered above.[77] Such a chain of reasoning allowed Mack J to conclude 'that the language used in s 304 is merely a short form statement of the common law doctrine of provocation'.[78]

For the purposes of this paper, the significance of Mack J's judgment in *Herlihy* is that it was necessary for his Honour to invoke the human frailty argument that underpins the 'hot blood' defence of provocation in order to widen the partial defence to encompass intentional killings outside of catching a person in the act of adultery.[79] Even so, Mack J

70 *R v Herlihy* [1956] St R Qd 18, 61-62.

71 *R v Herlihy* [1956] St R Qd 18, 62. Mack J gave as an example a person who accompanied his act with the words 'I will kill you'.

72 *R v Herlihy* [1956] St R Qd 18, 62.

73 *Kwaku Mensah v The King* [1946] AC 83. The Criminal Code of the Gold Coast (now Nigeria) was at the time based on Griffith's Queensland Criminal Code.

74 *Attorney-General for Ceylon v Perera* [1953] AC 200. The Ceylon Penal Code (now Sri Lanka) is based on Macaulay's Indian Penal Code.

75 *Attorney-General for Ceylon v Perera* [1953] AC 200, 205.

76 [1946] AC 588, 598 (Viscount Simon).

77 *R v Herlihy* [1956] St R Qd 18, 64.

78 *R v Herlihy* [1956] St R Qd 18, 64. Mack J cited three examples in support of his opinion: *The Encyclopaedia of the Laws of England* (1898) volume X, page 298; East's *Pleas of the Crown* (1803), volume 1, chapter 5, section 19 (11), page 232; Sir James Stephen, *A History of the Law of England* (1883), volume 3, page 81.

79 In *R v Johnson* [1964] St R Qd 1, 19, Lucas AJ pointed out that the Privy Council in *Lee Chun-Chuen v The Queen* [1962] 3 WLR 1461, 1464 had interpreted the dictum of Viscount Simon in *Holmes v Director of Public*

recognised that the 'hot blood' defence under sudden provocation still had to satisfy other conditions such as the gravity of the wrongful act, the proportionate use of force, and the loss of the power of self-control.[80] There is scant reference to an objective test in the judgment other than to endorse the test of 'might an ordinary reasonable man be so provoked to do what this man did?' citing *R v Sabra Isa*[81] as authority in following the development of the common law.[82]

Thus, all the nineteenth century authorities, such as East and Stephen, are called upon in support of basing the partial defence of provocation on the loss of self-control preventing the formation of the intent to kill for murder (malice aforethought), whilst at the same time allowing the development of the common law to be imported into s 304. Once the conclusion is reached by Mack J that 's 304 reproduces the common law',[83] there is simply no discussion of whether the language of s 304 is consistent with later developments in the common law. This paper contends that it is upon such weak foundations of analysis that the Supreme Court of Queensland has continued to uphold an objective test in s 304 since 1956 when the Court of Criminal Appeal decided *Herlihy*.

Further support for this contention can be found in *R v Johnson*[84] and the article by Howard.[85] Stanley J sat on the Court of Criminal Appeal in both *Herlihy* and *Johnson* and dissented in both cases, holding that s 304 was not a restatement of the common law. Stanley J disagreed with the majority in *Johnson* stating that 's 304 does not contain an elliptical expression of the whole doctrine of provocation'.[86] Stanley J argued that it was an error to 'read in the whole doctrine of common law provocation as distinct from the common law definition of provocation',[87] with the crucial question being 'What is provocation? Not – What factors deprive a provoked person of the right to rely on it?'[88]

Prosecutions [1946] AC 588, 598 in the same way as Mack J in *R v Herlihy*.

80 *R v Herlihy* [1956] St R Qd 18, 61.

81 [1952] St R Qd 269.

82 *R v Herlihy* [1956] St R Qd 18, 61.

83 Ibid. 65.

84 [1964] St R Qd 1.

85 Howard, above n 32.

86 *R v Johnson* [1964] St R Qd 1, 15-16. Cf Philp ACJ, 3.

87 *R v Johnson* [1964] St R Qd 1, 15.

88 Ibid.

Stanley J relied upon the well known passage in *Brennan v The King* that the language of a code 'should be construed according to its natural meaning and without any presumption that it was intended to do no more than restate the existing law',[89] in finding that 'the inquiry is at most whether the accused acted in the heat of passion on sudden provocation which in fact caused him to lose his self control'.[90] Of considerable import, in the context of the argument being made here, is Stanley J's following statement that '[t]he fact that the provocation would not have caused loss of self-control in an ordinary man would be irrelevant'.[91] This paper respectfully agrees with Stanley J's conclusion which is in accordance with the proper principles of code interpretation.

Howard,[92] who was writing in 1960 before *Johnson* was decided, focused on the disagreement in the Court of Criminal Appeal on the interpretation of s 304 in the three cases of *R v Sabri Isa*[93] in 1952, *R v Herlihy*[94] in 1956 and *R v Young*[95] in 1957. Essentially, Howard agreed with those judges in the minority in the above trio of cases who considered ss 304 and 268 should be read together to produce the law of provocation, as was the case in Western Australia from 1957 following the decision in *Mehemet Ali v The Queen*.[96] Howard respectfully agreed with Stanley J in *Sabri Isa* that s 304 is 'clear and unambiguous'[97] pointing out the gaps left in s 304 including the reasonable man test 'are exactly filled by s 268'.[98]

Howard's other main point concerned the doctrine of precedent. Howard pointed out that in *Herlihy* and *Young* the majority favoured the common law by one judge agreeing with the other without further comment. In any event, Howard argued in all three cases the judicial views expressed were *obiter* because the appeals were dismissed irrespective of which view prevailed.[99] Thus, Howard 'submitted that the choice between

89 (1936) 55 CLR 253, 263 (Dixon and Evatt JJ).
90 *R v Johnson* [1964] St R Qd 1, 15.
91 Ibid.
92 Howard, above n 32.
93 [1952] St R Qld 269.
94 [1956] St R Qld 18.
95 [1957] St R Qld 599.
96 (1957) 59 WALR 28.
97 Howard, above n 32, 359 citing Stanley J in *R v Sabra Isa* St R Qld 269, 289.
98 Howard, above n 32, 359,
99 Ibid.360.

s 268 and the common law is still open'.[100] The door was closed in 1964 in *R v Johnson*[101] with Philp ACJ and Lucas AJ both holding that the Court of Criminal Appeal should regard itself as being bound by *R v Herlihy*. Nevertheless, Howard has usefully highlighted the link between the divergence in judicial views on s 304 and the application of *stare decisis*.

III DEVELOPMENTS IN THE COMMON LAW OF PROVOCATION

In the Introduction above, reference was made to the High Court's statement: 'In interpreting the language of s 304 it is permissible to have regard to decisions expounding the concept of "sudden provocation" subsequent to the Code's enactment.'[102] The first authority listed is Brennan J in *Boughey v The Queen*,[103] where the High Court was interpreting s 157(1) of the *Criminal Code 1924* (Tas) which deals with murder.

> [W]hen the Code employs words and phrases that are conventionally used to express a general common law principle, it is permissible to interpret the statutory language in the light of decisions expounding the common law.[104]

Brennan J cited Windeyer J in *Mamote-Kulang v The Queen*[105] as authority for the above statement. In the context of the argument being made in this paper, Windeyer J's remarks are worthy of close inspection, especially as they refer to the *Criminal Code 1899* (Qld).

> [W]hen the Code employs words and phrases that had before its enactment been part of the language of the criminal law, and had been long used to embody and express ideas deeply rooted in its history, we should read those words in the Code in their established meanings, unless of course they be displaced by the context.[106]

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100 Ibid

101 [1964] St R Qd 1.

102 *Pollock v The Queen* [2010] HCA 35 [47] (French CJ, Hayne, Crennan, Kiefel and Bell JJ), citing *Boughey v The Queen* (1986) 161 CLR 10, 30 (Brennan J); *R v K* (2010) 84 ALJR 395, 422 (Gummow, Hayne, Kiefel, Crennan and Bell JJ).

103 *Boughey v The Queen* (1986) 161 CLR 10, 30 (Brennan J).

104 Ibid.citing as authority *Mamote-Kulang v The Queen* (1964) 111 CLR 62, 76 (Windeyer J).

105 *Mamote-Kulang v The Queen* (1964) 111 CLR 62, 76 (Windeyer J).

106 Ibid.

Applying Windeyer J's above statement to s 304, it is contended they support the argument in this paper at two levels. First, the employment of words that embody 'ideas deeply rooted' in the history of the law of provocation should be read in the Code 'in their established meanings'. This clearly supports the interpretation from the *Trial of Lord Morley*[107] in 1666 onwards that the crucial jury question is whether death was caused 'in the heat of passion' sufficient to oust premeditation. Second, there is nothing in s 304 to displace such a reading based on the historically established meaning of provocation. There are no words in s 304 that change the context such as a reference to 'an ordinary person' or the 'reasonable man'.

In *Pollock v The Queen*,[108] the High Court referred to the well known case of *Parker v The Queen*[109] which detailed the history of provocation and noted that 'the doctrine was being worked out at a time when duelling was commonplace'.[110] Dixon CJ was writing in 1963 and in the context of a killing that occurred some 20 minutes after the initial provocation when the appellant chased after his wife and her lover, such that his Honour was of the view 'a provocation [was] still in actual operation when Parker [the appellant] came upon Dan Kelly [the deceased] with his wife'.[111] Dixon CJ's focus on the 'slow boil' aspect of Parker's killing of Kelly was made necessary by the words of the then s 23(2)(c) *Crimes Act 1900* (NSW) which required that 'the act causing death was done suddenly, in the heat of passion caused by such provocation'.

For present purposes, of more significance are the words of the then s 23(2)(b) of the *Crimes Act 1900* (NSW): 'That it was reasonably calculated to deprive an ordinary person of the power of self-control, and did in fact deprive the accused of such power.' Thus, an objective test had been unequivocally inserted into s 23(2)(b) by the New South

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107 *Trial of Lord Morley* (1666) 6 St Tr 770.

108 *Pollock v The Queen* [2010] HCA 35 [48] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

109 (1963) 111 CLR 610.

110 *Parker v The Queen* (1963) 111 CLR 610, 625-628 (Dixon CJ); 650-652 (Windeyer J).

111 *Parker v The Queen* (1963) 111 CLR 610, 628. Ian Leader-Elliott has suggested that prior to the nineteenth century it was necessary for the defendant to literally catch the adulterers in the act. Ian Leader-Elliott, 'Passion and Insurrection in the Law of Sexual Provocation' in Rosemary Owens and Ngaire Naffine (eds), *Sexing the Subject of Law* (Lawbook, 1997) 153.

Wales legislature. No such test has ever been inserted into s 304 of the *Criminal Code 1899* (Qld) by the Queensland legislature.

The High Court acknowledged that s 304 pre-dated the emergence of an objective test when it stated that a 'threshold objective test was not part of the law at the time Tindal CJ formulated his classic direction in *Hayward*'.[112] Instead, the High Court pointed to developments in the law of provocation that had occurred both before and after Sir Samuel Griffith penned the words of s 304. The High Court noted thirty-six years after *Hayward*, 'the "reasonable man" had made his appearance'[113] pointing to Keating J's directions in *R v Welsh*, which 'required the jury to consider whether the provocation was such that a reasonable man might be induced in the anger of the moment to commit the act'.[114] The High Court concluded on this point by observing that following *R v Lesbini*[115] in 1914 'the "reasonable man" test was accepted as being an essential requirement for the operation of the partial defence'.[116]

With the greatest respect to the judges of the High Court, tracing the development of the common law of provocation in this way is simply irrelevant. The key to understanding the manner of the change of emphasis in the operation of the defence of provocation is evident in the High Court's reference to Viscount Simon LC's judgment in *Mancini v Director of Public Prosecutions*[117] in 1942, where the Lord Chancellor discussed whether a sufficient interval had passed whereby a reasonable man's passion would have cooled.

> 'Cooling time', which in the early development of the doctrine operated presumptively to exclude provocation (and in this way to keep the doctrine within bounds), had come to be a factor bearing on the determination of the threshold objective 'reasonable man' test.[118]

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[112] *Pollock v The Queen* [2010] HCA 35 [58] (French CJ, Hayne, Crennan, Kiefel and Bell JJ), citing *R v Hayward* (1833) 6 Car & P, 157, 159.

[113] *Pollock v The Queen* [2010] HCA 35 [58] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

[114] Ibid, citing *R v Welsh* (1869) 11 Cox CC 336, 338 (Keating J).

[115] [1914] 3 KB 1116, 1120.

[116] *Pollock v The Queen* [2010] HCA 35 [58] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

[117] [1942] AC 1, 9.

[118] *Pollock v The Queen* [2010] HCA 35 [59] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

Thus, the High Court is able to replace the subjective test of whether 'there is time for the person's passion to cool' (the actual words of s 304) with an objective test of whether 'there is time for the "reasonable" person's passion to cool'. This paper contends such a judicial insertion of an objective test is impermissible for code interpretation.

The thinness of the High Court's justification, it is respectfully contended, is amply demonstrated in the following passage.

> The words of s 304 that require that the act causing death is done 'in the heat of passion caused by sudden provocation, and before there is time for the person's passion to cool' are the expression of a composite concept incorporating that the provocation is such as could cause an ordinary person to lose self-control and to act in a manner which encompasses the accused's actions. It is the last-mentioned objective requirement that keeps provocation within bounds. The concluding words beginning 'and before' are not the statement of a discrete element of the partial defence.[119]

There is no dispute that the above extract from s 304 expresses a composite concept. What is challenged is the strained and artificial interpretation of the phrase 'and before there is time for the person's passion to cool' to connote an objective test, whilst simultaneously ignoring the use of 'the person' not 'an ordinary person'. As argued in this paper, such a reading is not the law that Sir Samuel Griffith wrote into s 304, and no amount of calling in aid subsequent developments of the common law of provocation can make it so. Section 304 reflects a subjective test, and the law contained therein clearly states that if an interval passed, then it was malice aforethought or revenge and not passion. Whether the interval was sufficiently short or long to constitute manslaughter or murder respectively, was a matter for the good sense of the jury based on the circumstances of the case.

Section 304 does not contain an objective test and, with respect, references by the High Court to 'a composite concept' that incorporates the ordinary person standard is misleading and misrepresents the law of the nineteenth century that s 304 expresses. Indeed, Dixon CJ's focus on the subjective 'slow boil' aspect of Parker's killing of Kelly in *Parker v The Queen*[120] provides further support for the contention that s 304 does not contain an objective test in the absence of any direct reference to an ordinary or reasonable person in s 304 itself. The concluding words of s 304 refer to 'the person's passion' not to 'an ordinary person' which

[119] Ibid. [65]
[120] (1963) 111 CLR 610, 628.

this paper contends is unequivocal and determinative. The concluding phrase of s 304, 'and before there is time for the person's passion to cool', does place a boundary around the partial defence of provocation, but not an objective one involving an ordinary person's response to the gravity of the provocation. The actual boundary provided in s 304 is a combination of conditions including the heat of passion, sudden provocation, the passage of time, the gravity of the wrongful act, the proportionate use of force, and the loss of the power of self-control.

IV THE QUEENSLAND COURT OF APPEAL'S SEVENFOLD TEST

The Queensland Court of Appeal had set out seven propositions (the sevenfold test) for provocation under s 304, stating that if the Crown could prove any one of them beyond reasonable doubt then provocation would be excluded. The sevenfold test was as follows:[121]

1. the potentially provocative conduct of the deceased did not occur; or
2. an ordinary person in the circumstances could not have lost control and acted like the appellant acted with intent to cause death or grievous bodily harm; or
3. the appellant did not lose self-control; or
4. the loss of self-control was not caused by the provocative conduct; or
5. the loss of self-control was not sudden (for example, the killing was premeditated); or
6. the appellant did not kill while his self-control was lost; or
7. when the appellant killed there had been time for his loss of self-control to abate.

The High Court considered that such model directions, which were included in the Queensland Supreme and District Court Bench Book, may be of assistance to trial judges in explaining the concept of provocation and the ways by which the Crown may eliminate the partial defence when appropriately adapted to the case, but not so as to distract the jury's attention from the central task of the judge in identifying the appropriate directions of law on the real issues in the case.[122] Effectively,

[121] *Pollock v The Queen* [2010] HCA 35 [3] (French CJ, Hayne, Crennan, Kiefel and Bell JJ), citing *R v Pollock* [2008] QCA 205 [7] (McMurdo P).

[122] *Pollock v The Queen* [2010] HCA 35 [67] (French CJ, Hayne, Crennan,

the High Court held that using the sevenfold test as a template in this case led to the jury being misdirected.

The High Court focused its attention on the fifth and seventh propositions. The High Court had difficulty with the fifth proposition on the grounds that 'it was susceptible of being understood as requiring that the loss of self-control immediately follow the provocation',[123] going on to cite *Parker v The Queen*[124] as authority for the statement that provocation is not necessarily 'excluded in the event there is any interval between the provocative conduct and the accused's emotional response to it'.[125] Essentially, in this case, the High Court was concerned that in response to the jury's question on the meaning of 'sudden', meanings given included 'unpremeditated' and 'immediate'. The High Court, it would appear, was troubled that '[i]t was left to the jury to decide what "sudden" meant when applied to the appellant's loss of self-control'.[126]

With respect, it is not immediately apparent why leaving the meaning of the term 'sudden' to the good sense of the jury should have so concerned the High Court, notwithstanding the fact that the jury sought clarification on the meaning of 'sudden' in the context of s 304.[127] The trial judge drew on the *Oxford English Dictionary* but concluded that sudden is 'an ordinary, English word that means what you understand it to mean as ordinary members of the community'.[128] The High Court appears to be critical of both the trial judge and the fifth proposition (the loss of self-control was not sudden, giving the example that the killing was premeditated) when the Court stated '[t]he fifth proposition was

Kiefel and Bell JJ), citing *Alford v Magee* (1952) 85 CLR 437, 466 (Dixon, Williams, Webb, Fullagar and Kitto JJ).

123 *Pollock v The Queen* [2010] HCA 35 [53] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

124 *Parker v The Queen* (1964) 111 CLR 665, 679.

125 *Pollock v The Queen* [2010] HCA 35 [54] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

126 Ibid [53]

127 Contrast the purported need for further explanation of the word 'sudden' in s 304, with Connolly J's observations on the word 'intends' for murder in s 302(1): '[I]t is not only unnecessary but undesirable, in charging a jury, to set about explaining an ordinary and well understood word in the English language. It is a truism that it is the Code itself which speaks and that it is, with respect, wrong in principle to gloss it.' *R v Willmot (No 2)* [1985] 2 Qd R 413, 418.

128 *Pollock v The Queen* [2010] HCA 35 [40] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

misleading in the absence of further explanation'[129] which is a reference to 'the care with which it was necessary to direct the jury as to the respondent's "slow boil" submission'.[130] However, it is here contended that the trial judge's direction was consistent with the basis upon which Sir Samuel Griffith drafted s 304 in leaving a decision on whether the elements of the partial defence had been satisfied to the common sense of the jury.

Moving on to the seventh proposition, the cause for concern expressed by the High Court becomes even more obscure, muddied as it is by the injection of the objective test into s 304. At one point, the High Court appeared to be approving the following statement in *Masciantonio v The Queen* 'that the question of whether an accused had regained self-control was not answered by reference to the ordinary person'[131] but rather by 'the conduct of the accused and to the common experience of human affairs'.[132] Again, this paper contends that, with respect, if the High Court had been content to leave the matter there then such an interpretation would have been consistent with Sir Samuel Griffith's original drafting because s 304 contains a subjective not an objective test.

However, the High Court immediately appeared to qualify the above extract in stating that 'the duration of the loss of self-control is of lesser significance than the capacity of the provocation to induce in the ordinary person the requisite intention'.[133] This led to the High Court concluding that the ordinary person test 'does not require the jury to hypothesise the time that an ordinary person might have taken to regain composure'. With respect, the fallacy of attempting to import an objective test into the words of s 304 is here exposed, with the logical impossibility of reconciling the objective person test with a 'ticking clock' as exemplified by the use of words 'sudden provocation, and before there is time for the person's passion to cool' in s 304.

Boiled down, the High Court's difficulty with the propositions five and seven is that they invite the jury to find that if there is any substantial interval between the provocative conduct and the killing the link

[129] Ibid. [54]
[130] Ibid.[55]
[131] *Pollock v The Queen* [2010] HCA 35 [60] (French CJ, Hayne, Crennan, Kiefel and Bell JJ). citing *Masciantonio v The Queen* (1995) 183 CLR 58, 69 (Brennan, Deane, Dawson and Gaudron JJ).
[132] Ibid.
[133] Ibid.[61]

is broken, whereas irrespective of the passage of time the loss of control could still be 'sudden' which is Dixon CJ's point in *Parker*. Nevertheless, the jury can still be told that as a matter of inference it is open for them to find that the longer the period of time between the provocation and the killing, the more likely the link is to be broken and that the killing was actually premeditated or revenge. This brings one back to common sense, which the courts have also found to be the touchstone for causation.[134]

Yet, the problem goes deeper than propositions five and seven. The problem lies with the seven part test devised by the Queensland Court of Appeal, which in turn is based on the flawed importation of the common law and the objective test into s 304 by the Supreme Court of Queensland from 1956 onwards. The seven part test is itself longer than the entire s 304, and 'had been incorporated into the model directions on provocation contained in the Queensland Supreme and District Court Benchbook'.[135]

The leading case on provocation is *Stingel v R*.[136] The central issue in *Stingel* was the interpretation of the test in the now repealed s 160(2) *Criminal Code 1924* (Tas) that required the wrongful act or insult to be 'of such a nature as to be sufficient to deprive an ordinary person of the power of self-control', which involved an objective threshold test. Unlike s 304 of the *Criminal Code 1899* (Qld), s 160(2) above specifically imported an objective test. The High Court held that such an objective test could not be answered without an objective assessment of the gravity in the circumstances of the particular case of the wrongful act or insult.

> [T]he fact that the particular accused lacks the power of self-control of an ordinary person by reason of some attribute or characteristic which must be taken into account in identifying the content or gravity of the particular wrongful act or insult will not affect the reference point of the objective test, namely, the power of self-control of a hypothetical 'ordinary person'.[137]

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134 *Campbell v The Queen* [1981] WAR 286, 290 (Burt CJ).

135 *Pollock v The Queen* [2010] HCA 35 [4] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

136 (1990) 171 CLR 312.

137 *Stingel v R* (1990) 171 CLR 312, 332. The only qualification made by the High Court was to allow on grounds of fairness and common sense that 'at least in some circumstances, the age of the accused should be attributed to the ordinary person of the objective test' (329). While the High Court

Professor Yeo has pointed out why jurors find the distinction between the subjective and objective components of the test so difficult.

> [The test] bears no conceivable relationship with the underlying rationales of the defence of provocation … The defence has been variously regarded as premised upon the contributory fault of the victim and, alternatively, upon the fact that the accused was not fully in control of his or her behaviour when the homicide was committed. Neither of these premises requires the distinction to be made between the characteristics of the accused affecting the gravity of the provocation from those concerned with the power of self-control.[138]

Reverting back to the seven part test of the Queensland Court of Appeal, allowing that the two step process in *Stingel* is contained in proposition 2 as per s 87.2 of the Queensland Supreme and District Court Bench Book, then in addition the jury still has six other propositions to consider, any one of which will exclude provocation. On closer examination, however, these propositions either duplicate each other or state the obvious. Thus, propositions 1, 3, 4 and 6 effectively tell the jury they can eliminate provocation if they do not believe either the alleged provocative conduct occurred or that the accused lost self-control (a later substitution for 'in the heat of passion') when the victim was killed. This, one would have thought, was obvious to any jury. Putting aside the test in *Stingel* in proposition 2, this leaves the temporal issues in propositions 5 and 7 discussed above. Once the seven part test is stripped down to its bare essentials, it becomes clear that the sticking point is the relationship between proposition 2, which for simplicity will be labeled the objective test, and propositions 5 and 7.

It may be objected that the seven propositions do not duplicate each other, and, rather, add gloss bearing in mind the High Court did not suggest duplication was a problem. Similarly, it can be fairly said that directions that are obvious are not necessarily unimportant, given that the seven part test was a direct response to the difficulties juries experienced coming to grips with the test for provocation. However, the real point is that setting out the seven points in this way obscures the essential jury question of the nexus between the two limb test in

referred to an objective assessment of the gravity of the provocation, the assessment of the content and extent of the provocative conduct from the viewpoint of the defendant is generally understood to be the subjective element of the defence. See above, Bronitt and McSherry, n 44, 297.

138 Stanley Yeo, *Unrestrained Killings and the Law* (Oxford University Press, Delhi,1998), 61.

Stingel and the meaning of 'sudden' provocation. Arguably, this will become more apparent following the 2011 amendments to s 304, which *inter alia* place the burden of proof on the defendant on the balance of probabilities under sub-section 304(7). Thus, propositions 1, 3, 4 and 6 represent the baseline which must be crossed before the defence of provocation has any realistic chance of succeeding. As the High Court itself noted, the judicial task is 'to identify the real issues in the case and to relate issues of law to those issues'.[139]

The difficulties with the *Stingel* test are magnified when the open ended subjective gravity of the provocation and the objective reasonableness of the response, are also set into the context of the twin temporal requirements of s 304 of 'sudden provocation, and before there is time for the person's passion to cool'. This is the reason the importation of the objective test into the original s 304 simply does not work, totally apart from being impermissible. For example, the Queensland Supreme and District Court Bench Book states that: 'The expression "before there is time for the person's passion to cool" is concerned with whether the defendant's loss of self-control (the "heat of passion") in fact continued at the relevant time, not whether the ordinary person would have had sufficient opportunity to recover self-control in the same circumstances.'[140] Thus, the potential for the confusion of the jury is plainly obvious where, within the twin limbs of *Stingel*, there is a further distinction between the defendant's subjective 'heat of passion' continuing as opposed to the ordinary person's objective time for recovery of self-control.

If the objective part of the *Stingel* test is removed, then s 304 works as it was intended to operate by Sir Samuel Griffith. The boundaries of provocation revert back to the common sense of the jury in deciding whether the nature of the provocation was sufficiently serious by the standards of the day (a narrower role for gravity than under *Stingel*) and whether the temporal requirements of suddenness and heat of passion rule out premeditation. A return to the original subjective test in the context of the current wording of s 304, it is contended, is not only plainly more intelligible to the jury (as it was to juries in the nineteenth

[139] *Pollock v The Queen* [2010] HCA 35 [67] (French CJ, Hayne, Crennan, Kiefel and Bell JJ), citing *Alford v Magee* (1952) 85 CLR 437, 466 (Dixon, Williams, Webb, Fullafar and Kitto JJ).

[140] Department of Justice and Attorney-General, *Supreme and District Court Benchbook* (Queensland: The Department 2008) s 87.2, footnote 5, citing *Pollock v The Queen* [2010] HCA 35 [57] – [66].

century), but also avoids the ordinary person in the law of provocation developing 'a split personality'.[141]

The best known attack on the objective test was made by Murphy J in *Moffa v The Queen*[142] where his Honour argued that the objective test should be abandoned as it had no place in a rational criminal jurisprudence.

> The objective test is not suitable even for a superficially homogeneous society, and the more heterogeneous our society becomes, the more inappropriate the test is. Behaviour is influenced by age, sex, ethnic origin, climatic and other living conditions, biorhythms, education, occupation and, above all, individual differences. It is impossible to construct a model of a reasonable or ordinary South Australian for the purpose of assessing emotional flashpoint, loss of self-control and capacity to kill under particular circumstances.[143]

To be clear, this paper is not a defence of the subjective test. The argument being put is that s 304 contains only a subjective test and that it is for the Queensland Parliament to amend s 304 to incorporate an objective test. In this regard, it is unfortunate that the very recent amendments to s 304 have left the original s 304, now s 304(1), untouched.[144] Fisse makes the point in discussing the need for codes to be regularly revised 'that in this matter the Australian code States have been neglectful, for none of the three codes has been properly revised since inception'.[145]

The reader may respond by asking the pertinent question of why does all this matter if the courts have found a way to achieve a more desirable outcome by inserting an objective test into s 304. The answer is to be found in the notion of a 'wilderness of single instances'.[146]

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[141] Model Criminal Code Officers Committee (MCCOC), *Fatal Offences Against the Person*, Discussion Paper (1998) 79.

[142] (1977) 138 CLR 601, 626.

[143] *Moffa v The Queen* (1977) 138 CLR 601, 625 (Murphy J).

[144] *Criminal Code and Other Legislation Amendment Act 2011* (Qld). See above n 13.

[145] Fisse, see above n 35, 5-6.

[146] Lord Alfred Tennyson, 'Aylmer's Field', *The Poetical Works of Alfred Tennyson, Poet Laureate* (Strahan, 1869) 341. It will be recalled that in Tennyson's poem, Leolin went and toiled: 'Mastering the lawless science of our law, That codeless myriad of precedent, That wilderness of single instances.'

V LEGITIMATE AND SPURIOUS JUDICIAL INTERPRETATION

As Spigelman CJ writing extra judicially has recently reminded the Australian legal fraternity, John Austin, the founder of the school of positivist jurisprudence, propounded a clear distinction between legitimate and spurious judicial interpretation.[147] This distinction was later developed by Roscoe Pound in America.[148] Pound contrasted legitimate interpretation which he defined as purely judicial in character 'so long as the ordinary means of interpretation, namely the literal meaning of the language used in the context are resorted to' with spurious interpretation whose object 'is to make, unmake, or remake, and not merely to discover' which Pound categorised as 'essentially a legislative, not a judicial process'.[149] One of Pound's concerns with spurious interpretation was that it reintroduced the personal element into the administration of justice whereas the whole aim of the law was to be rid of such a personal element.[150] Such a notion harks back to Jeremy Bentham's well known dislike of the common law and Bentham's support for codification.

For Bentham, codification was a 'plan of the complete body of laws supposing it to be constructed *ab origine*'[151] thereby restraining the 'licentiousness of interpretation'[152] by the judiciary, which in turn resulted 'from the want of amplitude or discrimination in the views of the legislator'.[153] Indeed, in Bentham's mind the legislator 'would need no interpreter [but] would be himself his own and sole interpreter'.[154]

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147 The Hon J.J. Spigelman, Chief Justice of NSW, 'The Garran Oration: Public Law and the Executive', Institute of Public Administration Australia, National Conference, Adelaide, 22 October 2010, 32, citing John Austin, *Lectures on Jurisprudence Vol 2* (4th ed, 1879) John Murray, London, 1029-1030.

148 Roscoe Pound, 'Spurious interpretation' (1907) 7 *Columbia Law Review* 379, 380-382.

149 Ibid. Pound has a glorious metaphor to describe spurious interpretation as putting 'a meaning into the text as a juggler puts coins, or what not, into a dummy's hair, to be pulled forth presently with an air of discovery'.

150 Ibid, 384-385.

151 Jeremy Bentham, *Of Laws in General* (H.L.A. Hart, ed, Athlone Press, 1970) 232.

152 Ibid.

153 Ibid, 239.

154 Ibid, 232-233.

However, Bentham was also alert to the need to make allowance for the alterations to the code without inconvenience, noting that 'no system of laws will ever, it is probable, be altogether perfect'.[155] The strength of a code based 'upon a regular and measured plan'[156] was that alterations 'would give less disturbance to it'.[157]

Some forty-two years after Pound wrote his article, another eminent American legal scholar, Lon Fuller, penned these memorable words which are apposite for the argument being made in this paper.

> [I]f our courts had stood steadfast on the language of the statute the result would undoubtedly have been a legislative revision of it. Such a revision would have drawn on the assistance of natural philosophers and psychologists, and the resulting regulation of the matter would have had an understandable and rational basis, instead of verbalisms and metaphysical distinctions that have emerged from the judicial and professorial treatment.[158]

The enactment and operation of Criminal Codes in Australia for over a century has inevitably required the High Court to consider on numerous occasions the appropriate principles to be applied to code interpretation. Pearce and Geddes have suggested that the main issue that has required the attention of the courts is the extent to which regard may be had to the common law or previous statutes in interpreting a criminal code.[159] This in turn raises the question to what extent is the retention of historical language, such as is to be found in s 304, a deliberate policy decision by the legislature to engage in 'power-sharing' with the judiciary, notwithstanding a code is supposed to be a comprehensive enactment?

Two observations are pertinent in this regard. First, it would appear that the Queensland legislature has been content for the Queensland judiciary to provide a solvent to the thorny issue of provocation in the latter half of the twentieth century. The provision of judicial solvents has been criticised by two members of the High Court.

> Judges have no authority to invent legal doctrine that distorts or does not extend legal rules and principles … It is a serious constitutional mistake to think that the common law courts have

[155] Ibid, 236.
[156] Ibid.
[157] Ibid.
[158] Lon L. Fuller, 'The Case of the Speluncean Explorers' (1949) 62 (4) *Harvard Law Review* 616-645, 637.
[159] Pearce and Geddes, above n 7, [8.8].

> authority to 'provide a solvent' for every social, political or economic problem.[160]

The second observation is that it is disappointing that instead of amending the original s 304 to specifically include an objective test and remove the words 'sudden' and 'before there is time for the person's passion to cool', it has been left intact as s 304(1) and merely qualified by the new subsections (2) and (3) which respectively cover restricting the reach of the partial defence where the provocation was words alone and in cases involving domestic relationships.[161]

VI CONCLUSION

The central issue in *Pollock v The Queen*[162] was the Queensland Court of Appeal's seven part test for provocation under s 304. This paper contends that the seven part test and the High Court's criticism of the test, particularly propositions five and seven, are based on a false foundational premise that an objective test underpins s 304. This paper argues that the whole line of Supreme Court of Queensland authority, commencing in 1956, that imports the common law and more latterly the *Stingel* and *Masciantonio* two part test for provocation into s 304, rests on an impermissible or erroneous interpretation. The basis for this contention of impermissibility is to be found in the well understood meaning of s 304 as per *R v Hayward*,[163] which adopts a solely subjective test and rests on the good common sense of the jury in the circumstances of the case.

The wider significance of this case study of *Pollock* is that it highlights the vagaries of judicial interpretation of Criminal Codes, and the consequent need for the legislature to both draft clear sections that minimise the need to look outside the Code and to regularly update the Code. Dixon CJ's well known criticism in *Vallance*[164] of s 13(1) of the *Criminal Code* (Tas), which was derived from s 23 of the *Criminal Code* (Qld), is pertinent here in 'that it is only by specific solutions of particular difficulties raised by the precise facts of given cases that the operation of such provisions as s 13 can be worked out judicially'.[165] It

[160] *Breen v Williams* (1996) 186 CLR 71, 115 (Gaudron and McHugh JJ).
[161] *Criminal Code and Other Legislation Amendment Act 2011* (Qld). See above n 13.
[162] [2010] HCA 35.
[163] (1833) 6 Car & P 157, 159.
[164] (1961) 108 CLR 56.
[165] *Vallance v The Queen* (1961) 108 CLR 56, 61.

was apparent in the 1950's that the judiciary in Queensland was divided over the appropriate approach to the treatment of provocation in the *Criminal Code* (Qld) and the relationship between sections 268, 269 and 304. This division was reinforced when Queensland and Western Australia took different interpretative paths. The question was 'settled' by precedent in both jurisdictions. This paper has utilised *Pollock* as a vehicle to highlight how inconsistencies in Codes arise and are perpetuated, with the consequent need for legislative vigilance.