SHOULD THE PARTIAL DEFENCE OF PROVOCATION TO MURDER BE REFORMED? IF SO, WHY AND HOW? IF NOT, WHY NOT?
1. Introduction

On 18 July 1999, a man killed his girlfriend because he felt jealous of her relationship with another man in Saudi. During the trial, he successfully relied on the defence of provocation, and his charge was mitigated to manslaughter. Another similar case happened in 2009, a husband chopped his wife to death after he suspected her of having an affair. During the trial, he failed to rely on the defence of provocation, and was sentenced to life imprisonment.\(^1\)

The above Hong Kong cases present us with a series of questions: what is the defence of provocation? what are the core problems of the provocation defence? And in light of these problems, should we abolish the provocation defence? If not, what can be done to reform it? Also, should new foreign law be adopted, such as the “loss of control” defence in the UK? If so, which parts should be adopted and how?

This essay argues that the provocation defence should be reformed in Hong Kong, and should be retained with amendments responding to the core concerns regarding the applications of the partial defence. There are four parts to the essay. First, it will provide the current positions of the provocation defence. Second, it identifies the core problems of the provocation defence in Hong Kong. Third, it reviews and compares the legal reforms of the provocation defence in the UK, New Zealand and Australia. Fourth, it offers recommendations on how should the defence be reformed in Hong Kong, with reference to the experiences in other common law jurisdictions.

\(^1\) HKSAR v Liang Yaoqiang [2017] HKEC 189.
2. Background: Overview of provocation as a partial defence for murder

The common law defence of provocation has existed for over three hundred years, it is a partial defence to evade a mandatory life sentence by mitigating the charges of murder to voluntary manslaughter. Provocation is not a general defence applicable to all criminal offences, but is specifically available under the offence of murder. Provocation defence is regarded as unlawful killing without malice, because the law recognises certain situations where emotions take control over rationality.

In *HKSAR v Liang Yaoqiang*, Fok PJ offered explanation of the underlying rationale of the defence of provocation, para. 31: “the law deems that there may be circumstances in which an impulsive homicide act done by a person who has been provoked into losing his self-control,... the doctrine derives from ‘the law’s compassion to human infirmity’”

The doctrine of provocation is subject to legislation. In Hong Kong, under section 4 of the Homicide Ordinance, if there is evidence for the jury to find that the person charged was provoked into losing his self-control, the question of whether the provocation was sufficient to make a reasonable man act as he did shall be left to be determined by the jury.
The partial defence of provocation has evolved through case law over the years. The general rules and requirements of the provocation defence has been developed in *R v Duffy*,\(^{10}\) Lord Devlin defined provocation as “some acts or series of acts” which are done by “the dead man to the accused”, and “cause in any reasonable person and actually causes in the accused a sudden and temporary loss of self-control”. And at that moment, the accused is “not master of his mind”.

The provocation defence consist of two tests: a subjective and an objective tests. In *Ho Hoi Shing v HKSAR*,\(^{11}\) Chan PJ reaffirmed that the defence of provocation involves the determination of two issues: (1) “was the accused provoked to lose his self-control”, and (2) “was the provocation enough to make a reasonable man do as he did?” The first question was a question of fact, while the second issue is an objective question which requires the application of the standard of an ordinary person of the same age and sex as the accused.

3. **Problems with the provocation defence**

The defence of provocation has long been criticised for promoting the culture of victim-blaming, and has created a defence in relation to uncontrolled human emotions, especially in domestic homicide cases, with consequences involving sexual infidelity.\(^{12}\) It is argued that because of the problems identified in this essay, the defence of provocation should be reformed, and has demanded a legislative change.

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\(^{10}\) [1949] 1 QB 63.


The problems of provocation defence is rooted in the historical development of the law. The basis of the law of provocation is developed on the conception that woman is the property of man. In *Regina v Mawgridge*, the court held that sexual jealousy is the rage of men and adultery is the highest invasion of property. In the modern days, the provocation defence is still attacked by feminist that the law is in favour of the male accused, and has justified the murder of women by their partners. The problems of the provocation defence is therefore signified a social reflection on gender equality and feminist rights.

On the basis of the above, and in the context of Hong Kong, three core problems have been identified: (1) The Provocation defence was reduced to an excuse in domestic violence cases; (2) It has fallen short in recognising cumulative provocation of the female accused in domestic homicide cases; and (3) The objective test of a reasonable person has created gender bias and is uncertain and difficult for the jury in applying the standard.

3.1 *Problem 1:*

The Provocation defence was reduced to an excuse in domestic violence cases

Among other applications of the provocation defence, the most common ground of provocation is sexual infidelity.

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13 (1707) Keil. 119.
In Hong Kong, killings triggered by alleged sexual infidelity are nothing rare. From one killing his girlfriend because he had heard that she was going to meet with another man, to one randomly chopping his girlfriend over 50 times after he found that she may be having an affair with a man he knew. Those frenzied killing are not usually triggered by the motive of taking away the life of the victim, but rather, to express the strong emotions towards provocative acts and words, such as being extremely angry at the victims’ sexual infidelity.

Killing provoked by alleged sexual infidelity should be a serious concern in Hong Kong, especially because of the dramatically increased cross-border marriage after the 1997 Handover. In HKSAR v Ng Tung Mo, a domestic homicide case of cross-border marriage, para. 9, the court pointed out that: “The domestic considerations make the case particularly difficult … but the accused must be dealt with in a manner that discourages others from solving martial disputes with a hammer, or some other heavy instrument.” Many social and domestic conflicts have been emerged after the spouse are settled in Hong Kong. Many of the provoked killings in domestic homicide cases are from cross-border marriage, while the husband was allegedly taunted by their wife as to their sexual prowess and financial disadvantage.

3.2 Problem 2:

Provocation defence has fallen short of recognising cumulative provocation of the female accused in domestic homicide cases

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17 HKSAR v Tam Ho Nam [2017] HKEC 2034.
20 Susanne Choi, “In cross-border marriage conflicts in Hong Kong, money is the heart of the matter” (02 April, 2018) SCMP. Available at: https://www.scmp.com/comment/insight-opinion/article/2139934/cross-border-marriage-conflicts-hong-kong-money-heart-matter (visited 12/1/2019).
Even though in *R v Humphreys*\(^{21}\) and *R v Ahluwalia (Kiranjit)*,\(^{22}\) the court held that “Battered Wife Syndrome” is a valid grounds of the provocation defence, it has been criticised on ground that it has failed to recognise the pattern of “slow burn” response by the female accused in the UK.\(^{23}\)

The same concern can be seen in Hong Kong. The city is a conservative society embracing traditional mandarin culture. The relationships of husband/wife would be in ideological power relations, which was symbolised by the husbands providing financial support of the family while the wives deal with internal family matters (男主外女主内). It is not unimaginable that many wives are suffering domestic violence, both mental and physical, in silence.\(^{24}\)

Thus, the partial defence of provocation in domestic homicide cases has created two serious problems which amount to injustice and unfairness to the female accused/wife: (1) the unequal power (physical and usually financial) between the husband and wife would render a weaker bargaining power of the wife. For her, the only option is to bear the domestic violence with silence and the fear of serious violence. But because of the “sudden” requirements of the provocation defence that encouraged the juries to ignore the cumulative effects of domestic violence and the provocative effect of the killing as the “final straw”,\(^{25}\) the wife cannot rely with any confidence on that defence;\(^{26}\) (2) However, since the provocation defence recognises sudden provocative conducts, the husband/male partner may rely on the defence in most of the

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\(^{21}\) [1995] 4 All ER 1008.

\(^{22}\) See n 17 above.


\(^{24}\) According to the Hong Kong Social Welfare Department, 80% of the victims in 2213 reported domestic violence cases are female. Available at: [https://www.swd.gov.hk/vs/english/stat.html](https://www.swd.gov.hk/vs/english/stat.html) (visited 5/1/2019).


\(^{26}\) See n 11 above.
domestic homicide cases, especially in cases involving sexual infidelity. The immediate provocation happens when the husband finds out that his wife is cheating on him or thinks that she is deceiving him.

3.3 Problem 3:
The objective test of a reasonable person has created gender bias and is uncertain and difficult for the jury in applying the standard. In Attorney General for Jersey v Holley, a domestic homicide case, Lord Nicholls of Birkenhead cited the much-quoted explanation of the “reasonable man” test given by Lord Diplock in R v Camplin. His Lordship cast doubt on the practice of varying the standards of self-control according to gender: “The powers of self-control possessed by ordinary people vary according to their age and, more doubtfully, their sex.” His reasoning is that both men and women have the capacity for self-control, and both can control their emotions according to the particular circumstances; in such cases, why judge their capacity for self-restraint based on their gender?

It is true that there are psychological differences among men and women, but gender stereotyping will inevitably serve to underpin and reinforce gender inequality. The capacity of self-control is largely affected by personal attributes, while one’s gender can only reflect their capacity of self-restraint to a limited extent.

Also, the reasonable person test is criticised as “complex and difficult for juries to understand.” On one hand, the jury has to consider the particular personal characteristics; on the other hand, it expects the accused to act appropriately.
within the standard of an ordinary reasonable person. In *R v McGregor*, the court questioned the reasonable man test: “*[a person having] the power of self-control of an ordinary person, but otherwise having the characteristics of the offender was well-nigh impossible*”\(^{32}\)

4. **Legal reform of the Provocation defence in other common law jurisdictions**

Despite the deep roots the defence of provocation has laid down in the common law, it has been abolished in certain common law jurisdictions.

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<tr>
<th>Common Law Jurisdictions</th>
<th>Abolition/Still Available</th>
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<td>New Zealand</td>
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<td>Australia</td>
<td>(a) Abolished in <em>Victoria</em> and <em>Tasmania</em>; (b) Still Available in <em>New South Wales</em>, <em>Queensland</em>, <em>South Australia</em> and <em>Western Australia</em>.</td>
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Table1. The abolition and retention of the provocation defence in other common law jurisdictions (as of 2018)

4.1 *The United Kingdom*

\(^{32}\) [1962] NZLR 1069
The UK Law Reform Commission recommended, *inter alia*, that the legislative reform should eliminate the “loss of self-control” in provocation defence as it privileged men’s reactions to provocation; and that the defence should only be available to a person of ordinary self-restraint. There should only be the standard of an ordinary person without references to the accused’s personal capacity of self-control. ³³

In 2009, the defence of provocation was abolished and was replaced by the defence of “*Loss of control*” under the Coroners and Justice Act 2009 (C&JA 2009). It provided that (1) sexual infidelity should not be the ground of provocation, and (2) the common law requirement of a “sudden” loss of self-control is extinguished.

The C&JA 2009 introduced “qualifying trigger” into the provocation defence, which is “an extremely grave character” that caused the defendant to feel “justifiably and seriously wronged”. The new element also included the defendant’s fear of serious violence from the victim, either against the defendant or another person, which aims to protect victims who has suffered long term domestic abuse and was subsequently provoked to kill.

### 4.2 New Zealand

The New Zealand Law Reform Commission recommended, *inter alia*, the abolition of the provocation defence on the grounds that it is “irretrievably flawed”, and that the accused who are unable to demonstrate an ordinary facility for self-control are excluded from the scope of the defence. ³⁴

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In 2009, the defence of provocation was also abolished under the Crimes (Provocation Repeal) Amendment Act 2009. As a result, there are no partial defences to murder in New Zealand since then.

4.3 Australia (New South Wales)

The NSW Law Reform Commission recommended, *inter alia*, that the provocation defence would only be available in “gross provocation”, that words or conduct which caused the defendant to have a justifiable sense of being seriously wronged.

In 2014, under the amendment of Crime Acts, section 23 of the Crime Acts has restricted the application of the provocation defence to “extreme provocation”.

Acts that constitute extreme provocation should be a serious indictable offences that caused the accused to lose self-control.

4.4 Australia (Queensland)

The Queensland Law Reform Commission recommended, *inter alia*, that the legislative change of the provocation defence should respond to “battered persons”. The commission also commented that the amendments have reduced the scope of the applications of the provocation defence out of sexual jealousy and possessiveness.

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35 Laws of New Zealand, Public Act 2009 No 64.
36 See n 35 above.
In 2010, under the Criminal Code and Other Legislation Bill 2010, section 304 of the Criminal Code 1899 was amended to the effect that (1) words alone would not constitute provocation, (2) the provocation defence will not apply in a domestic relationship, when one party killed the other party because of the belief that the relationship will end or the nature of the relationship will be changed, and (3) the burden of proof will be on the defence, to prove that the person charged is liable for manslaughter only. However, the requirement of “sudden” was retained under the reform.

Also, a new partial defence of “Killing for preservation in an abusive domestic relationship” was introduced in section 304B of the Criminal Code 1899, which aims to protect the victim in long-term abusive domestic relationship who believes that the killing is necessary for the person’s preservation from death.

4.5 *Summaries of legal reform in other common jurisdictions*

The table below is a brief summaries of major legal reform of the provocation defence in other common law jurisdictions.

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<thead>
<tr>
<th>Common Law Jurisdictions</th>
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<th>“Battered women” cases</th>
<th>Qualified Triggering</th>
<th>Objective test</th>
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<th>“Sudden” reactions</th>
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<td>The UK</td>
<td>Disregarded as grounds of provocation</td>
<td>Recognised “Fear of Serious Violence” as grounds of provocation</td>
<td>Qualifying trigger: (1) An extremely grave character (2) Feel justifiably</td>
<td>Retained</td>
<td>On the prosecution (beyond reasonable doubt)</td>
<td>Need not be sudden</td>
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39 Laws of Queensland.
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<td>Australia (New South Wales)</td>
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<td>“Extreme Provocation” included long term abuse</td>
<td>Words and conducts that constitute “Extreme Provocation”</td>
<td>Retained</td>
<td>On the prosecution (beyond reasonable doubt)</td>
<td>Need not be sudden</td>
</tr>
<tr>
<td>Australia (Queensland)</td>
<td>Disregarded as grounds of provocation</td>
<td>Recognised killing for preservation in an abusive domestic relationship</td>
<td>Should be of exceptional character; Words alone would not constitute provocation</td>
<td>Retained</td>
<td>On the defence</td>
<td>Retained</td>
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Table 2. Summaries of legal reforms in other common law jurisdictions (as of 2018)

5. **Recommendations: How to reform Provocation in the context of Hong Kong criminal law?**

With references to the legal reform of other common law jurisdictions, there are five recommendations: (1) Retaining the defence and do not abolishing “provocation” entirely; (2) Removing “sexual infidelity” as a ground of provocation; (3) Recognising “cumulative fear of serious violence” as grounds of provocation and removing the requirement of “sudden” loss of self-control; (4) Excluding gender as a determining factors of self-control and retaining the current two-limbs objective test; (5) Define the qualifying trigger of the provocation as “extreme provocation” and shift the onus of proof to the prosecution.
5.1 **Recommendation 1:**

Retaining the defence and not abolishing “provocation” entirely

To begin with, it should be stressed that despite of the problems of the provocation defence, it should be retained with amendments responding to the concerned faults of the partial defence. This is proposed on the grounds that the provocation defence is intended to allow for the courts to show compassion towards human infirmity and certain circumstances that significantly impair the mental state of the accused.\(^{40}\)

It must be emphasised that even though the defence of provocation has been abolished and replaced by the new defence of “loss of self-control” in the UK, the new law has retained certain features of the defence of provocation, such as the actual loss of self-control; And in New South Wales, the defence is still available but has been restricted to “extreme provocation”, including long-term (domestic) abuse.

Also, it is contended that Hong Kong should not follow the approach in New Zealand and should retain the defence, on the ground that there is mandatory sentence for murder in Hong Kong. In New Zealand, there is presumptive sentence for murder under the Sentencing Act 2002.\(^{41}\) Courts can exercise its distortion to discretionary sentence and refuse to impose a life imprisonment on the defendant when it is manifestly unjust. But in Hong Kong, there is mandatory sentence of life imprisonment for murder, it is an unwise development abolishing the provocation defence because provoked killing should not be the worst categories of murder.\(^{42}\)

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\(^{40}\) *HKSAR v Lam Chor Yuk* [2011] HKEC 286, para. 31.

\(^{41}\) Laws of New Zealand.

The abolition of the provocation type of defence would result in the risk of wrong labelling. The provocation defence is rooted in the “fair labelling” principle. Even though acts of killing may show no evidential differences, application of moral standards and levels of culpability should allow the courts to mitigate the liability of the provoked accused from murder to manslaughter.

Apart from the above, it is argued that self-defence may not be applicable in “battered women” cases because there is no imminent threat imposed on the accused. As a result, the inadequacy of self-defence would render the female accused unable to raise similar defences. The provocation defence should not be abolished.

The retention of provocation should not be seen as opening the gateway to tolerating irresponsible serious crimes, but as a compassionate allowance for an act of frustration that may be performed by the most rational person in the society. However, it should be emphasised that the argument against abolition of the provocation defence is not absolute, especially in the future development of the law of murder, mandatory life imprisonment for murder may be abolished. That may be a turning point of the abolition of the entire provocation defence.

5.2 Recommendation 2: Removing “sexual infidelity” as a ground for provocation

It is suggested that in order to deliver a positive message to the public that no one owns or possesses another person, especially their partners and

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46 See n 2 above, p 173.
spouses, sexual infidelity should no longer be a ground of provocative killing.

In a more recent application of the new law on “loss of self-control” in the UK, sexual infidelity has no place in the defence of provocation. In *R v Clinton*, the judge’s decision on loss of self-control reaffirmed that sexual infidelity is to be ignored as a qualifying trigger for the loss of self-control of the accused. It is suggested that the reform of the defence of provocation in Hong Kong should follow this approach. The defence should not be reduced to proffering an excuse for the accused to kill a morally unfaithful partner, and uncontrolled emotions tied to an idea of ownership or possession of a partner can no longer justify reduction of liability for a killing to manslaughter.

5.3 **Recommendation 3:**

Recognising “cumulative fear of serious violence” as grounds for provocation, and abolish the requirement of “sudden” loss of control as a requirement for provocation

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48 See n 4 above, p.122.
In *R v Duffy*, the court refused to recognise cumulated provocation of domestic violence as a ground of the partial defence because it failed to meet with the requirement of “sudden” loss of self-control.

It is suggested that the reform of the provocation defence in Hong Kong should not follow the above decision and should recognise sustained fear of serious violence as grounds for provocation by removing the requirement of “sudden” loss of self-control, on the grounds that the cumulative effects of domestic violence can result in great desperation for the wife with “slow-burn” responses, and that should be recognised by law as provocative acts.

One of the counter arguments to the provocation defence is the “cooling period”. But when the power relations between the parties are unequal, and the violence inflicted is so sustained, this counter argument surely loses credibility. Hong Kong is a relatively conservative society embracing traditional mandarin cultural values, so people tend to be ashamed to disclose such internal family matters as disputes between a husband and wife, however bitter or violent they may have become (家醜不出外傳). Provocation through sustained violence or fear of violence in Hong Kong needs to be viewed in that cultural context, and the law of Hong Kong needs to protect those spouses who have suffered domestic violence in silence over a long period of time, often with no extended family support.

The current requirement of “sudden” loss of control in a defence of provocation should be removed because there offers no opportunity for the luxury of a ‘cooling period’ in many cases, as advised by the court in *R v Clinton*, the “husband's conduct over the years” and the “impact of what he said when he was killed” should surely be considered as a whole.51

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50 See n 11 above.
5.4 **Recommendation 4:**

Excluding gender as a determining factors of self-control and retaining the current two-limbs objective test

The problem of determining a person’s capacity of self-restraint and emotions-control by reference to gender is left unclear under section 54(1)(c) of the C&JA 2009.\(^\text{52}\)

In light of the problems of gender bias, it is suggested that the reform of the provocation defence in Hong Kong should be distinguished from the UK legislation. It should go further to remove the consideration of gender from how a reasonable person should have behaved, and restrict the criteria for evaluating a provocation defence to factors such as “history, background, features and attributes of the defendant relevant to the provocation”.\(^\text{53}\) Such an approach can offer a solution to highly contentious gender arguments.

The problem of gender bias has also been identified by the NWS Law Reform Commission as having the effect of excusing male violence toward woman.\(^\text{54}\) It is argued that genuine gender equality should not put either male or female into the position of “dominant” or “submissive”, but to recognise that among many factors that affects human behaviors, gender can only reflect their capacity of self-restraint to a limited extent. Further, gender bias can be found in both male and female, for example, a jury may think that men have less self-restraint, and therefore easily lose their self-control, and killed their partners; Or conversely, a jury may think that women is more

\(^{52}\) Jonathan Herring, *Criminal law: text, cases and materials* (UK: oxford University Press, 2018), p 175; also see s. 54(1)(c) of the C&JA 2009: “a person of D’s sex and age, with a normal degree of tolerance and self-restraint and in the circumstances of D, might have reacted in the same or in a similar way to D.”

\(^{53}\) See n 2 above.

\(^{54}\) See n 35 above, p 33.
likely to tolerate and restrain herself and therefore she would fail in her plea of provocation. In either case, it is unfair to the accused.

On the other hand, even though the two-limbs objective test is complex and difficult to understand, it is proposed that it should be retained, on the grounds that the test attempts to balance between the subjective circumstances and personal characteristics of the defendant and community expectations. Retaining only the subjective test or objective test would produce unfair results.\textsuperscript{55}

Therefore, it is proposed that reform of the provocation defence in Hong Kong should go beyond the feminist perspective, and to exclude gender as the consideration of the reasonable person’s test, and that the two-limbs objective test should be retained.

\textbf{5.5 Recommendation 5:}

Define the qualifying trigger of the provocation as “extreme provocation” and shift the onus of proof to the prosecution

\textsuperscript{55}Ibid.
It is proposed that the provocation defence in Hong Kong should follow the approach in the UK that there should be qualifying trigger of the provocation, and should also follow the approach in NSW to define “extreme provocation”. It is suggested that the qualifying trigger of the defence should be of four characteristics, that it should be words or actions (or both) done to the accused which, (1) it is an “extreme provocation” with an grave character, (2) it has justifiably caused the accused a sense of being seriously wronged, (3) the act of the accused is in response to conduct of the deceased towards or affecting the accused, and (4) it would not be an excuse for the accused to use violence or taking an revenge. Also, it is proposed that the burden of proof should be shifted to the prosecution that the act causing death was not in response to extreme provocation, when there are sufficient evidence on the defence case that the issues of provocation must be left to the jury.

The above suggestions aims to limit the scope of the application of the provocation defence by restricting it into the nature of “extreme provocation”. This approach is responding to the criticism that provocation defence is too lenient about uncontrolled human emotions. In Dawes and others,\textsuperscript{56} the court held that it is correct for not leaving the loss of control defence to the jury as there was insufficient evidence that he had lost his control. The Dawes case demonstrated two important practice that should be followed by Hong Kong: (1) the qualifying trigger of the provocation must be of an extremely grave character, a minor taunt or irritation would not amount to provocation; and (2) when there is no sufficient evidence of the provocation defence, the court need not necessarily left it to the jury.

6. Conclusion

\textsuperscript{56} [2013] WLR(D) 130.
In light of the problems of the defence of provocation, legislative change is surely required in Hong Kong in the near future. This essay recommended that (1) the provocation defence should be retained; (2) “sexual infidelity” should be removed as a ground of provocation; (3) “cumulative fear of serious violence” should be recognised as grounds of provocation and the requirement of “sudden” loss of self-control should be removed; (4) gender should be removed as a determining factors of self-control and the current two-limbs objective test should be retained; and (5) the qualifying trigger of the provocation should be of “extreme provocation” nature and the onus of proof should be shifted to the prosecution.

Reform of the defence of provocation has implications beyond mere amendments to the existing legislation. It signifies a social move towards the eliminations of gender bias, protections and compensations to long term domestic violence victims, and to encourage a more responsible and self-restrained civilised society.