

Select Committee on the Partial Defence of Provocation

Consultation on reform options

The Committee has received submissions proposing various options for reform of the law of provocation, as well as a number of submissions advocating abolition. The Committee is considering all options, including retention and abolition, and seeks your comment in relation to the various options proposed.

Abolish provocation

Repeal section 23 of the *Crimes Act 1900*.

Retain provocation without amendment

Retain section 23 of the *Crimes Act 1900* in its current form.

Retain provocation with amendments

Various reform options have been proposed. Broadly they fall into three categories:

1. *Conduct based*

These focus on restricting, limiting or excluding the types of conduct which can be relied upon as the basis for a defence of provocation. The rationale underpinning these reform proposals is that there are some types of conduct which the law should recognise as warranting the use of the provocation defence, but that the current law fails to adequately restrict or limit its use to those types of conduct.

2. *Test based*

These focus on amending the test applicable under section 23. The rationale underpinning test based reform proposals is that the current test is complex and confusing, and that it is (at least in part) responsible for concerning outcomes in particular matters. Unlike conduct based reform options, test based reform options do not attempt to circumscribe particular conduct as being sufficient to found the basis of a defence of provocation, but focus upon the nature of the test and the way it is able to be understood and applied.

3. *Combination of conduct and test based*

Comments are sought on these types of reform options generally, with comment also invited on specific options referred to below.

Conduct based reform options

A number of stakeholders have proposed variations of the following conduct based reform options:

Option 1: 'Positive restriction' model – violent criminal conduct/family violence

This model proposes to restrict the defence of provocation to matters where the provocative conduct seeking to be relied upon by the accused as the basis for the defence is violent criminal conduct. The model proposes that the violent criminal behaviour be an element of the provocation, and need not occur immediately prior to the incident resulting in the death of the deceased. The model proposes that the act resulting in death may be triggered by some other conduct including, for example, insults or verbal abuse, which could be considered in the context of prior criminal assaults upon the accused.

This option was put forward by some Committee members during the public hearings and was considered by a number of witnesses. See transcripts of evidence for Tuesday 28 August 2012, pp 13, 22, 28, 41-51, 52-55, 65-70, 78-83 and Wednesday 29 August 2012, pp 4-5, 21, 48, 61-63, 75-76.

A variation of this model (**Appendix A**) has been proposed which would further restrict the provocative conduct to ‘acts which constitute domestic or family violence’.

Comments are also sought on whether it would be appropriate to reverse the onus of proof, to require that the defendant establish, on the balance of probabilities, that they are not liable to conviction for murder based on the partial defence of provocation.

Option 2: ‘Exclusionary conduct’ model

This model would explicitly exclude a range of particular types of conduct which, on their own, could *not* form the basis of a defence of provocation. The types of conduct commonly suggested as those which should be expressly excluded as being able to form the basis of a provocation defence include anything said or done by the deceased to indicate a change in the nature of the relationship¹ and non-violent sexual (or homosexual) advances.

Several stakeholders, including NSW Women’s Legal Service, the NSW Domestic Violence Committee Coalition and Wirringa Baiya Aboriginal Women’s Legal Service, supported an exclusionary conduct model. More detail on this option is outlined in submissions from a number of stakeholders (including Submissions 37, 31 and 35.²) See also transcripts of evidence Tuesday 28 August 2012, pp 2-14.

Test based reform option

The Honourable James Wood AO QC has proposed specific reform of the test applicable under section 23.

Option 3: Wood model

This model would reword section 23 of the *Crimes Act 1900* to, among other things, remove the ordinary person test. This model requires that the jury consider all the characteristics of the accused and the circumstances in which the provocation occurred in determining whether the provocation, in all of the circumstances, was such as to warrant the liability or the culpability of the accused being reduced from murder to manslaughter.

The model also proposes to reverse the onus of proof to require the accused to establish provocation on the balance of probabilities. This option would, if adopted, align provocation to section 23A (substantial impairment by abnormality of the mind).

More detail on this option is outlined in Mr Wood’s draft proposal (**Appendix B**) and in his transcript of evidence Wednesday 29 August 2012, pp 2-9.

¹ This may include, for example, sexual jealousy upon the discovery of infidelity of the victim, confessions of infidelity by the victim, taunts by the victim about the accused’s sexual inadequacy and/or threats by the victim to leave a relationship with the accused, or actual separation.

² NSW Women’s Legal Service, the NSW Domestic Violence Committee Coalition and Wirringa Baiya Aboriginal Women’s Legal Service respectively.

Combination of conduct and test based reform options

Another option that has been proposed is that section 23 should be reformed in respect of the conduct which is capable of forming the basis of a provocation defence *and* in respect of the test applicable to those seeking to invoke the defence.

Option 4: 'Gross provocation' model

The 'gross provocation' model is based on an early model developed by the Law Commission for England and Wales. It proposes that the defence be reformulated to restrict its application to circumstances in which the defendant acted in response to 'gross provocation' which caused the defendant to have 'a justifiable sense of being seriously wronged' or to 'fear serious violence towards the defendant or another', or a combination of both. The proposal alters the test to require that a person of the same age and 'ordinary temperament' might have reacted in the same or similar way to the gross provocation.

The proposal also contains a number of exclusions (i.e. express identification of circumstances in which it will not be possible for the defence to make a provocation plea), which include (a) words alone, (b) things done or said that constitute infidelity and (c) a non-violent sexual advance.

This option is proposed by Dr Arlie Loughnan and Associate Professor Thomas Crofts in their submission (Submission 29) and in their transcript of evidence Wednesday 29 August 2012, pp 75-82.

A variation of this model (**Appendix C**) has been proposed which, except in the most extreme and exceptional circumstances, would exclude the application of the partial defence to circumstances where, in the context of domestic relationship, one person kills another, and the provocation is based on anything done by the deceased or anything the defendant believes the deceased has done to end the relationship or to change the nature of the relationship. This model has also been proposed with a reversal of the onus of proof, to require that the defendant establish, on the balance of probabilities, that they are not liable to conviction for murder based on the partial defence of provocation.

Reversal of the onus of proof

Under the current law in NSW, the defendant does not have to prove provocation. If there is evidence that there may have been provocation, the Crown bears the onus of proving beyond reasonable doubt that a defendant was *not* provoked.

A number of the options proposed include consideration of whether a reversal of the onus of proof is appropriate. This would require that the defendant to establish, on the balance of probabilities, that they are not liable to conviction for murder based on the partial defence of provocation.

Comment is sought on whether a reversal of the onus of proof would be appropriate in respect of any of the models.

23 Trial for murder—provocation

- (1) Where, on the trial of a person for murder, it appears that the act or omission causing death was an act done or omitted under provocation and, but for this subsection and the provocation, the jury would have found the accused guilty of murder, the jury shall acquit the accused of murder and find the accused guilty of manslaughter.
- (2) For the purposes of subsection (1), an act or omission causing death is an act done or omitted under provocation only where the conduct of the deceased:
 - (a) was an act or omission that constitutes violent criminal acts or acts which constitute domestic or family violence; and
 - (b) was such as could have induced an ordinary person in the position of the accused to have formed an intent to kill, or to inflict grievous bodily harm upon, the deceased,whether that conduct of the deceased occurred immediately before the act or omission causing death or at any previous time.
- (3) For the purpose of determining whether an act or omission causing death was an act done or omitted under provocation as provided by subsection (2), there is no rule of law that provocation is negated if:
 - (a) there was not a reasonable proportion between the act or omission causing death and the conduct of the deceased that induced the act or omission,
 - (b) the act or omission causing death was not an act done or omitted suddenly, or
 - (c) the act or omission causing death was an act done or omitted with any intent to take life or inflict grievous bodily harm.
- (4) Where, on the trial of a person for murder, there is any evidence that the act causing death was an act done or omitted under provocation as provided by subsection (2), the onus is on the prosecution to prove beyond reasonable doubt that the act or omission causing death was not an act done or omitted under provocation.
- (5) This section does not exclude or limit any defence to a charge of murder.

23 Trial for murder—provocation

- (1) Where, on the trial of a person for murder, it appears that the act or omission causing death was an act done or omitted under provocation and, but for this subsection and the provocation, the jury would have found the accused guilty of murder, the jury shall acquit the accused of murder and find the accused guilty of manslaughter.
- (2) For the purposes of subsection (1), an act or omission causing death is an act done or omitted under provocation where:
 - (a) the act or omission is the result of a loss of self-control on the part of the accused that was induced by any conduct of the deceased (including grossly insulting words or gestures) towards or affecting the accused, and
 - (b) that conduct of the deceased was such **that taking into account all of the characteristics of the accused and the circumstances in which the provocation occurred, including the history of the relationship between the accused and the deceased and the manner in which the provocation came to the attention of the accused, was such as to warrant his or her liability being reduced to manslaughter.**

whether that conduct of the deceased occurred immediately before the act or omission causing death or at any previous time.

- (3) For the purpose of determining whether an act or omission causing death was an act done or omitted under provocation as provided by subsection (2), there is no rule of law that provocation is negated if:
 - (a) there was not a reasonable proportion between the act or omission causing death and the conduct of the deceased that induced the act or omission,
 - (b) the act or omission causing death was not an act done or omitted suddenly, or
 - (c) the act or omission causing death was an act done or omitted with any intent to take life or inflict grievous bodily harm.
- (4) **Where a person is intoxicated at the time of the act or omission causing death, and the intoxication is self-induced, loss of self-control caused by that intoxication or resulting from a mistaken belief occasioned by that intoxication is to be disregarded.**

“Self-induced intoxication” in this subsection has the same meaning as it does in s 428A (of the Crimes Act 1900).

- (5) For the purpose of subsection (1), a person does not commit an act or omission causing death under provocation if:
 - (a) **that person provoked the deceased with a premeditated intention to kill or to inflict grievous bodily harm or with foresight of the likelihood of killing the deceased in response to the expected retaliation of the deceased.**
 - (b) **the conduct of the deceased constituted sexual infidelity or a threat to end a domestic relationship with that person.**

- (6) On the trial of a person for murder, the onus shall be on the accused to prove on a balance of probability that the act or omission causing death was an act or omission done or omitted under provocation as provided by subsection (2).
- (7) This section does not exclude or limit any defence to a charge of murder.

Trial for murder-gross provocation

- (1) Where, on the trial of a defendant for murder, it appears that the act or omission causing death was an act done or omitted under gross provocation and, but for this subsection and the gross provocation, the jury would have found the accused guilty of murder, the jury shall acquit the accused of murder and find the accused guilty of manslaughter.
- (2) For the purposes of subsection (1), an act or omission causing death is an act done or omitted under gross provocation where:
 - (a) the defendant acted in response to:
 - (i) gross provocation (meaning words or conduct or a combination of words and conduct) which caused the defendant to have a justifiable sense of being seriously wronged; or
 - (ii) fear of serious violence towards the defendant or another; or
 - (iii) a combination of both (i) and (ii); and
 - (b) a person of the defendant's age and of ordinary temperament, i.e., ordinary tolerance and self restraint,

in the circumstances of the defendant might reasonably have reacted in the same or in a similar way.
- (3) In deciding whether a person of the defendant's age and of ordinary temperament, i.e. ordinary tolerance and self-restraint, in the circumstances of the defendant, might have reasonably reacted in the same or in a similar way, the court should take into account the defendant's age and all the circumstances of the defendant other than matters whose only relevance to the defendant's conduct is that they bear simply on his or her general capacity for self-control.
- (4) The partial defence should not apply where:
 - (a) the provocation was incited by the defendant for the purpose of providing an excuse to use violence; or
 - (b) the defendant acted in considered desire for revenge; or
 - (c) other than in circumstances of a most extreme and exceptional character, if—
 - (i) a domestic relationship exists between the defendant and another person; and
 - (ii) the defendant unlawfully kills the other person (the deceased); and
 - (iii) the provocation is based on anything done by the deceased or anything the person believes the deceased has done—
 - (ai) to end the relationship; or
 - (aii) to change the nature of the relationship; or
 - (aii) to indicate in any way that the relationship may, should or will end, or that there may, should or will be a change to the nature of the relationship.

- (d) the defendant acted in response to conduct of the deceased consisting of a non-violent sexual advance.
- (5) A person should not be treated as having acted in a considered desire for revenge if he or she acted in fear of serious violence, merely because he or she was also angry towards the deceased for the conduct which engendered that fear.
- (6) A judge should not be required to leave the defence to the jury unless there is evidence on which a reasonable jury, properly directed, could conclude that it might apply.
- (7) Where, on the trial of the defendant for murder, there is any evidence that the act causing death was an act done or omitted under gross provocation as provided by subsection (2), the onus is on the defendant accused to prove that he or she is not liable to be convicted of murder by virtue of this section..
- (8) This section does not exclude or limit any defence to a charge of murder.