



4 October 2012

Legislative Council Select Committee on the Partial Defence of Provocation
NSW Parliament
Parliament House,
Macquarie Street,
Sydney NSW 2000

**Select Committee on the Partial Defence of Provocation:
Response to Reform Options**

This response supplements my original submission and evidence to the committee, and deals primarily with specific matters raised in the Committee's paper 'Consultation on reform options'. However, I also urge the committee to consider i) the need for legislative guidance to clarify the relevance and value of social framework evidence in matters dealing with domestic violence and ii) pending any change they might recommend to provocation, to consider how to limit the problems that might emerge with respect to provocation in sentencing.

Reversal of the onus of proof

I do not endorse the proposal to reverse the onus of proof for several reasons.

First, I find Associate Professor Julia Tolmie's argument (in the hearings of 21 September 2012) compelling, that is, that provocation should be retained for truly exceptional cases, and that it would be unjust to raise the bar for people facing truly exceptional circumstances by reversing the onus of proof. Battered women facing trial have historically faced difficulties having the context in which they killed understood; this proposal would add an additional obstacle. And, since much domestic violence occurs in private without witnesses, it may be difficult to meet this requirement even on the balance of probabilities.

Secondly, the argument that this would bring provocation into line with the partial defence of substantial impairment does not seem well considered. There is good reason why the prosecution should be able to rely on an assumption that an accused has the capacity to be put to trial, and not have to prove that; the reverse onus for substantial impairment follows logically from that position. However, that does not apply in the same way to provocation. Also, bringing provocation into line with substantial impairment in this way would mean that the onus of proof for provocation was inconsistent with other defences (self defence, etc).

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Thirdly, changing the onus would not necessarily simplify things for the jury. It is likely that provocation in any of the forms suggested in the reform proposals would be run in conjunction with self defence, or excessive self defence. The jury in such cases would need to be directed on the different way in which the onus falls for the different defences, adding to the complexity of jury directions.

Proposed options for reform

Proposed options and selected provisions for comment	Comment/Questions
<p>Appendix A Proposed by the Hon. Adam Searle MLC</p>	<p>Summary of my views:</p> <p>not supported as this overlaps with self defence (or excessive self defence) and may undermine the use of self defence (or excessive self defence) by battered women, including by being seen to suggest that this is <i>the</i> appropriate (partial) defence for domestic violence related homicides</p>
<p>(1) 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:</p> <p>(a) was an act or omission that constitutes <i>violent criminal acts or acts which constitute domestic or family violence</i>; and</p> <p>(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,</p> <p>whether that conduct of the deceased occurred immediately before the act or omission causing death or at any previous time.</p>	<p>violent criminal acts – what distinguishes this from the circumstances faced by a person arguing self defence or excessive self defence?</p> <p>domestic violence has a broad definition in NSW – this would mean that there is lack of correspondence between ‘violent criminal acts’ and acts that might constitute domestic or family violence?</p>
<p>(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</p>	<p>Yes – retain the current onus for the reasons stated above</p>

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.	
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Appendix B Proposed by the Hon. James Wood AO QC	Summary of my views: not supported as the removal of the objective test may have undesirable consequences and due to the reversal of the onus of proof
<p>(2) For the purposes of subsection (1), an act or omission causing death is an act done or omitted under provocation where:</p> <p>(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</p> <p>(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.</p> <p>whether that conduct of the deceased occurred immediately</p>	<p>– is this intended to exclude words or gestures that are not grossly insulting?</p> <p>- would this achieve the exclusion of non-violent sexual advances?</p> <p>-in the absence of an objective test, what would be considered sufficient to ‘warrant his or her liability being reduced to manslaughter’ ?</p> <p>-would this open up provocation to other behaviours (e.g. the honour killing by a father of his daughter because she has had a sexual relationship)?</p>

	before the act or omission causing death or at any previous time.	
(5)	<p>For the purpose of subsection (1), a person does not commit an act or omission causing death under provocation if:</p> <p>(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.</p> <p>(b) the conduct of the deceased constituted <i>sexual infidelity or a threat to end a domestic relationship with that person.</i></p>	-Since s 2 seems to have the potential to open up the use of provocation, are the range of exclusions ' <i>sexual infidelity or a threat to end a domestic relationship</i> ' sufficient?
(6)	On the trial of a person for murder, the <i>onus shall be on the accused</i> 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).	Not supported for the reasons stated above

Appendix C Proposed by the Hon. Trevor Khan MLC		Summary of my views: While limiting the conduct that may constitute provocation may have merit, the current proposal is not supported because : it is very complex, unclear in parts and reverses the onus of proof
(1)	<p>For the purposes of subsection (1), an act or omission causing death is an act done or omitted under gross provocation where:</p> <p>(a) the defendant acted in</p>	justifiable to whom?

<p>response to:</p> <p>(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</p> <p>(ii) fear of serious violence towards the defendant or another; or</p> <p>(iii) a combination of both (i) and (ii); and</p> <p>(b) a person of the defendant's age and of ordinary temperament, i.e., ordinary tolerance and self-restraint,</p> <p>in the circumstances of the defendant might reasonably have reacted in the same or in a similar way.</p>	<p>what does 'seriously wronged' mean?</p> <p>The construct of 'reasonably reacted' is out of place in provocation which assumes that the person lost control</p>
<p>(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.</p>	<p>This is very complex.</p> <p>Not clear what 'ordinary tolerance and self-restraint' mean.</p> <p>The construct of 'reasonably reacted' is out of place in provocation which assumes that the person lost control</p> <p>'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.' – this is complex. Is it necessary given that person is required to be of 'ordinary tolerance and self-restraint' ?</p>

<p>(4)The partial defence should not apply where:</p> <p>(a) the provocation was incited by the defendant for the purpose of providing an excuse to use violence; or</p> <p>(b) the defendant acted in considered desire for revenge; or</p> <p>(c) other than in circumstances of a most extreme and exceptional character, if—</p> <p>(i) a domestic relationship exists between the defendant and another person; and</p> <p>(ii) the defendant unlawfully kills the other person (the deceased); and</p> <p>(iii) the provocation is based on anything done by the deceased or anything the person believes the deceased has done—</p> <p>(ai) to end the relationship; or</p> <p>(a ii) <i>to change the nature of the relationship</i>; or</p> <p>(a ii) 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.</p>	<p>does domestic relationship include ex-spouses?</p> <p>seems to leave provocation open to the person who kills their former partner's lover?</p> <p>does 'change in relationship' adequately capture infidelity as referenced in footnote 1 of the options paper)?</p> <p>there are cases where provocation has been raised in exceptional circumstances that would seem to be precluded by the provisions of s4 – see <i>Ko</i>¹</p>
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¹ In *R v Ko* I20001 NSWSC 1130; the facts include that the defendant had married the deceased out of shame after he raped her and forced her to have an abortion and that he had been brutal to her in their marriage. On the day of the killing the deceased had said he wanted a divorce and told her she should kill herself. She responded by stabbing him 17 times. She was sentenced to 4 years imprisonment with a non-parole period of 18 months. In this case, the partial defence of substantial impairment by abnormality of mind was also established. Would she be precluded from using provocation by s (4) (c) (iii)?

Other matters

Legislative guidance as to the use of social framework evidence

While evidence concerning domestic violence can be admitted where relevant, as indicated by Mr Odgers in his evidence to the committee, this relies on the prosecution, defence and judiciary having a good understanding of domestic violence and its context.

A legislative provision would make the relevance and value of such evidence clear to all parties, and may assist in making self defence more readily available to battered women in appropriate cases. For the reasons set by the VLRC² and the ARLC/NSWLRC,³ I recommend that the committee propose that a similar provision to that adopted in Victoria (Section 9AH(3)(a)-(f), Crimes Act 1958 (Vic)) be introduced in NSW..

Sentencing issues

As argued in my original submission, any changes to provocation will have implications for sentencing, including that the problems that they seek to redress by limiting or removing provocation may be transferred into the domain of sentencing.⁴ I urge the committee to give due consideration to this matter.

Julie Stubbs,

Professor

² Victorian Law Reform Commission (VLRC) *Defences to Homicide*, Final Report (2004) at 68.

³ ALRC and NSWLRC *Family Violence – A National Legal Response*, Final Report (2010), at [14.87]

⁴ Stewart F & Freiberg A *Provocation in Sentencing Research Paper* 2nd ed. 2009 (Victorian Sentencing Advisory Council)

