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Select Committee on the Partial Defence of Provocation

Legislative Council, Parliament House

Macquarie Street, Sydney NSW 2000

Supplementary Submissions to the Legislative Council Select Committee on the Partial Defence of Provocation

This letter is in response to supplementary questions on notice in relation to the Partial Defence of Provocation Inquiry.

Question 1

What is the view of the Public Defenders as to whether the partial defence of provocation should only be available in relation to violent criminal behaviour or serious violent behaviour? (pages 81 and 82-83 of the transcript)

The Public Defenders are not in favour of an amendment to the partial defence limiting it to cases where there is '*violent criminal behaviour'* or '*serious violent behaviour'*. Our objection to such a pre-condition is that it incorporates an imprecise test. What would constitute '*serious violent behaviour*?' Would some degree of temporal nexus be required between the commission of the '*violent criminal behaviour'* and the loss of self control?

We are also concerned that there may be cases where female accused charged with murder would not be able to avail themselves of the partial defence if it was limited in the way that has been suggested. For example, a pre-condition of '*violent criminal*

behaviour' or '*serious criminal behaviour* would not cover a case where a woman had been subjected to a history of verbal, psychological and emotional abuse over the course of a relationship causing her to lose control and kill. Some forms of humiliation and psychological abuse are just as debilitating as acts of physical abuse.

To limit the partial defence by requiring a precondition of *violent criminal behaviour* may therefore give rise to injustices that the Committee is concerned to prevent. Instead of recommending an inclusionary provision by requiring a pre-condition of *violent criminal behaviour*, we suggest that the Committee consider two exclusionary provisions: that the partial defence is not available where:

(i) the only provocation is a non-violent 'homosexual advance'.

(ii) the only provocation is infidelity or sexual jealousy.

<u>Question 2</u>:

Do you have a view on whether there should be better guidelines for prosecutors in respect of the charges they pursue against battered women who kill and the nature of domestic violence resulting in homicide when perpetrated by men and women?

The current DPP guidelines in relation to accepting pleas of guilty to manslaughter involve an assessment of whether there is a reasonable prospect of conviction. That assessment is necessarily discretionary based upon the evidence available to the DPP. A decision to accept or reject a plea will therefore depend upon subjective assessments made on the basis of police investigations. Some police investigations may be comprehensive and disclose all the relevant evidence. Other investigations are not as efficient and fail to provide a comprehensive background of facts relevant to a partial defence of provocation.

Even where the defence provide evidence supportive of the partial defence in a 'No Bill' application, the prosecution often reject the plea on the basis that the ultimate decision as to whether murder is reduced to manslaughter is a question for the jury.

It is preferable for the DPP guidelines to include specific consideration of the background of battered women in respect of the charges they pursue. However,

changes to the DPP guidelines in this regard do not mean that there will necessarily be an increase in the number of manslaughter pleas accepted.

The decision will necessarily remain a discretionary one, ultimately resting on an assessment, on all the evidence, of whether there is a reasonable prospect of conviction.

Question 3

The Victorian LRC, the Model Criminal Code Officers Committee, and some submissions to this inquiry argue that the partial defence of provocation inappropriately privileges a loss of self control as a reason for reducing an offenders culpability, while other factors that may be equally or more important in assessing blameworthiness of a person who intentionally kills, are considered during sentencing and do not absolve a person of liability for murder. A commonly cited example is where a person intentionally kills a terminally ill spouse, out of compassion. Can you explain why killing as a result of loss of self control, as opposed to other factors, be able to form the basis of a partial defence?

This criticism is misconceived. The question of whether the provocation should continue to operate as a partial defence cannot be decided on the basis that there may be other defences that are equally or more deserving of recognition. There may well be other factors, such as the compassionate killing of a terminally ill spouse that should lead to manslaughter rather than a murder conviction. However, the fact that at present the law has not sufficiently developed to recognise that factor as a defence does not logically lead to the conclusion that provocation must be relegated to sentencing alone.

The law recognises that there are circumstances where the moral culpability of an offender charged with murder may be reduced to manslaughter. That recognition is not limited to cases of provocation. Excessive self-defence and substantial impairment exist as partial defences capable of reducing an offender's moral culpability to such a degree so as to reduce murder to manslaughter.

In any given case, that decision is usually made by a jury. Jurors are judges of the facts. Juries are made up of randomly selected individuals of different gender, ages, backgrounds and life experience. They represent community standards and

community values. The jury is a fundamental and pivotal part of our criminal justice system.

In cases of provocation jurors decide not only whether the accused killed as a result of loss of control. Importantly, a jury must decide whether an ordinary person, in the position of the accused, could have so far lost self control as to form an intention to kill or cause grievous bodily harm. The second limb of the test is often ignored by critics of the partial-defence. It is not simply a question of whether the accused killed as a result of loss of self control. Before the partial defence can be successfully relied upon, a jury must have decided that an ***ordinary person*** could have so far lost control as to have formed the relevant intention.

Killing as a result of loss of self control should, in addition to other factors also recognised by the law, be able to form the basis of a partial defence. It should be able to do so in recognition of the varying degrees of culpability associated with homicide. The law recognises that in appropriate circumstances the culpability is so reduced as to warrant a reduction from murder to manslaughter. What constitutes appropriate circumstances is left to a jury as representatives of community values.

Essentially, the partial defence of provocation recognises human frailty. In ***Regina v Muy Ky Chhay*** *NSW CCA (unreported 4 March 1994)*, Gleeson CJ (at 22)referred to the distinction between premeditated killing or acts of revenge on the one hand and killing committed under provocation, on the other:

> *'..it is still necessary to address the question of the distinction between killing as the result of a loss of self control, and killing which, even though it follows ill-treatment of an accused by a deceased, is nevertheless regarded as murder. This is because, with all its theoretical imperfections, and practical roughness, the law of provocation is still only a limited concession to a certain type of human frailty, and is not intended to allow a jury to reduce what would otherwise be murder to manslaughter upon a view that a deceased person received his or her just deserts. The law is not intended to encourage resort to self-help through violence'.*

In ***Chhay*** the accused was a woman charged with the murder of her husband. The Crown case was that she had killed her husband while he was asleep. There was a long history of violent physical abuse by her husband and there had been an argument a few hours before he died. The main defence at trial was self-defence. The trial judge refused to leave provocation to the jury. Self defence was rejected by the jury and the accused was convicted of murder.

The availability of the partial defence of provocation is justified in cases like ***Chhay,*** where the moral culpability of an offender is appropriately reduced as a result of the circumstances giving rise to the killing. The suggestion that a category of 'defensive homicide' is a suitable alternative to provocation is not supported by the evidence.

The newly introduced defensive homicide provisions in Victoria have attracted criticism.[1] The complexity of the issue is demonstrated by the fact that although intended to provide a safety net for battered women, the Victorian provisions appear to have been used by male accused in unintended ways. Furthermore, in the three cases where women have been dealt with under the provisions they have received higher periods of imprisonment when compared with the median sentences for manslaughter where a woman killed her partner.[2] The Victorian law has not achieved a more just response for battered women.

Supporters of some form of extended self-defence or defensive homicide ignore the fact that a number of female accused who have relied successfully on the partial defence of provocation have done so in circumstances that do not lend themselves to alternative defences.

In ***Regina v Nelson*** *NSWSC (25/6/1996)* the accused successfully relied on the partial defence of provocation where, together with her brother, she participated in the beating to death of the deceased believing he had molested her daughter. She received a minimum term of 6 years.

In ***Regina v Fiu*** *NSWSC (1/6/2000)* the accused successfully relied on provocation and substantial impairment in circumstances where she killed her husband because he told her he would not marry her and did not love her. She was provoked by the fact that he used her for sexual gratification. The offender received a non-parole period of 3 years and 6 months.

In ***Regina v KMB*** *NSWSC (23/9/2003),* the accused successfully relied on the partial defence of provocation after killing her uncle who had admitted to sexually

[1] Kate Fitz-Gibbons & Sharon Pickering "Homicide Law Reform in Victoria, Australia: From Provocation to Defence Homicide and Beyond"(2012) 52 British Journal Criminology 159; Tyson D (2011) Victoria's New Homicide Laws: Provocative Reforms or More Stories of Women 'asking for it'?' Current Issues In Criminal Justice 23: 203-233

[2] Professor P Easteal & L Bartels 'Domestic Violence: How the law treats women who kill their partners', http//theconversation.edu.au

interfering with the offender's children. The accused was sentenced to a non-parole term of 3 years and 6 months.

Question 4

The Committee has received evidence from the Office of the DPP (Sub 34, p 2) that there 'is no logical reason why people who kill in the heat of passion through anger or fear, provoked by words or other non-violent actions should be convicted of manslaughter as opposed to murder'. They note that the defence is anomalous as it only applies as a partial defence in respect of murder and go on to suggest that 'sentencing can adequately deal with any difference in culpability'. Do you have any comment in respect to those statements?

An argument that the interests of women who kill in the context of domestic violence and are convicted of murder can be adequately addressed at sentencing, fails to acknowledge the substantially different sentences that apply to murder as compared to manslaughter. Sentencing laws in New South Wales cannot adequately deal with the difference in culpability in a case where a battered woman kills her partner or where a mother kills a perpetrator of child abuse. New South Wales has a regime of standard minimum non-parole periods under the ***Crimes (Sentencing Procedure) Act 1999.*** For murder the standard minimum non-parole period is 20 years or 25 years, depending on the status of the deceased.

While the standard minimum is no longer determinative, it must be taken into account on sentencing in the same way that regard must be had to the maximum penalty. In her submissions to the Committee, Professor Julie Stubbs points out the following:

> *A NSW Judicial Commission study notes that 100% of people convicted of murder in NSW over the period 2003-2007 received a prison sentence, regardless of plea.[3] Following the introduction of standard minimum sentences in NSW in 2003,[4] the length of prison sentences for murder increased significantly, especially for those who had pleaded not guilty.[5] While data are not provided*

[3] Poletti P & Donnelly H the impact of the standard non-parole period sentencing scheme on sentencing patterns in New South Wales Research monograph, NSW Judicial Commission, 2010 at 25.

[4] 20 years for most cases, and 25 years for cases involving children under 18 yrs or specified categories of victims such as those working in public service roles; Part 4, Div 1A (ss54A-54D) was inserted into the Crimes Sentencing Procedure) Act 1999.

[5] 'For offenders who pleaded not guilty, the median full term increased by 27.8% from 18 years to 23 years, 123 and the median non-parole period increased by 17.9% from 14 years to 16 years 6 months'…'For offenders who pleaded guilty, the median full term and the non-parole period increased by 8.3% from 18 years to 19

separately for women offenders, the median terms of imprisonment for murder were substantial – a median non parole period of 16 yrs 6 months and a median full sentence of 23 yrs.

By contrast, sentences for manslaughter do not have a standard minimum non-parole period, and are able to be more targeted to the specific case. Thus, convictions for manslaughter based of provocation properly attract 'a wide range of sentences…indicative of the variable objective and subjective circumstances in which provocation offences occur'.[6]

A second Judicial Commission study reported that over the period 1990-2004, five women who had successfully raised provocation received non-parole custodial sentences (two of these raised provocation together with diminished responsibility/substantial impairment). For those women sentenced to imprisonment, head sentences ranged from 36 to 126 months and non-parole periods from 18 to 96 months.

While the data presented in the two Judicial Commission reports are not strictly comparable, they demonstrate the very markedly different sentences handed down for murder as compared with manslaughter, and thus give good reason to believe that, should provocation be abolished, battered women convicted of murder who might currently be able to argue provocation will face much harsher sentencing that is currently the case. That would be an undesirable outcome.

We agree with these observations and share the concern that in the absence of the partial defence of provocation, substantial injustices will occur in the sentencing of offenders.

Question 5

In its submission, the Office of the DPP suggests that there are seven key arguments in support of abolition. Could you provide a response to each of these from the perspective of the Public Defenders Office?

(i) The partial defence should be abolished because 'it is illogical in that it requires that a person lose self-control and act with intent'.

There is no inconsistency between a loss of self control and an intention to kill. If there was evidence of a complete loss of control to the point that an accused's volition was completely impaired, a defence of automatism would be available. Automatism provides a complete defence to murder. Instead, provocation

years 6 months, 125 and 7.4% from 13 years 6 months to 14 years 6 months, respectively'; Poletti & Donnelly above note 32 at 25.

[6] Indyk S et al., Partial Defences to Murder in NSW 1990-2004, June 2006 NSW Judicial Commission at 70.

requires a significant loss of self control. It is not illogical to significantly lose self-control and form an intention to kill or cause grievous bodily harm.

(ii) The defence should be abolished because it is inherently gender biased.

The history relating to the creation of the partial defence of provocation cannot be relied upon to assert gender bias in light of changes that have been made over the years. One such change is doing away with a requirement of a close temporal connection between the provocative conduct and the loss of self-control. Another change is that an accused can rely on an accumulation of acts to establish provocation. These changes have enabled women to rely on the defence.

There is no evidence to support the complaint that the partial defence is gender biased in the cases where it is successfully relied upon in court. In fact, the available research tends to show that the number of cases where the partial defence has been successfully claimed (either by way of jury verdict or negotiated plea) is equally split between male and female accused.

The Judicial Commission study into Partial Defences to Murder in New South Wales studied cases between 1990 and 2004 where provocation was raised. There were 115 such cases. 32 offenders (28%) had the plea accepted by the DPP. 83 offenders raised provocation at trial. 40 offenders were unsuccessful and were found guilty of murder.

Of the remaining 43 offenders, 11 cases resulted in male offenders successfully relying on provocation in circumstances of infidelity or breakdown of a relationship. In two of those cases the victims were the female partners of the offender; in two cases the victims were the homosexual partner of the offender, and seven cases involved male victims who were thought to be having a relationship with the offenders' partners.

Of these 11 cases only four were jury verdicts. The remaining 7 were cases where the DPP accepted pleas of guilty to manslaughter. In view of the fact that the DPP guidelines state that a plea to manslaughter will normally be accepted in cases

where there is no reasonable prospect of conviction for murder, the degree of provocation in these cases must have been high.

In the same period between 1990 and 2004 there were 10 cases where the offender was a woman who had killed her partner after physical abuse and successfully relied on provocation to reduce murder to manslaughter. In some of these cases the offender also relied on substantial impairment.[7]

A more recent study undertaken by Dr Kate Fitz-Gibbon, looked at cases between January 2005 and December 2010 where provocation was successfully raised. There were 15 cases. Many of these cases involved male offender and male victim in violent confrontation.

Three cases involved male offenders who had killed their female partners in circumstances where there was no violent confrontation. In one of these cases the DPP accepted a plea of guilty to manslaughter on the basis of provocation.

In the same period there were two cases where women had successfully claimed provocation in killing their male partners. Both cases proceeded by way of pleas of guilty being accepted by the DPP.[8] The existence of the partial defence facilitates the negotiation of pleas of guilty to manslaughter in appropriate cases. Women benefit from such negotiations.

(iii) The partial defence should be abolished because it promotes a culture of victim- blaming:

We do not agree that the partial defence promotes a culture of victim blaming. It is true that the victim in these cases is not able to refute allegations made against them. However, this is not limited to cases of provocation. All murder trials, by their very nature, potentially involve evidence about the deceased that cannot be refuted by him or her.

The point is that there have been improvements in the trial process to deal with legitimate concerns with respect to the possibility of baseless allegations being made

[7] 'Partial Defences to Murder in NSW', Judicial Commission of NSW at pp 36 & 37

[8] Provocation in NSW: The need for abolition", Dr Kate Fitz-Gibbon, Australian & New Zealand Journal of Criminology July 18 2012 at pp200-201.

against the victim. A significant change in the trial process is the abolition of the dock statement. An accused who raises the partial defence will normally give evidence and that evidence is tested through cross-examination. The jury has an opportunity to assess the credibility of the accused. It is a rare case where an accused does not give evidence in a provocation trial.

Another procedure that could be adopted to deal with a situation in which no evidence is adduced on behalf of the accused, is giving the jury appropriate directions of law entitling an adverse inference to be drawn. In cases where the victim is deceased and only the accused knows what happened, a failure to give evidence could lead to an adverse inference being drawn.

(iv) The partial defence should be abolished because it is an anachronism as murder no longer attracts a mandatory penalty:

Although murder no longer attracts a mandatory life sentence, in New South it attracts a maximum life sentence with a standard minimum non-parole period of either 20 or 25 years. The sentences for murder are significantly higher than sentences imposed for manslaughter. The fact that murder no longer attracts a mandatory life sentence is an irrelevant consideration in this debate.

Instead we must consider the policy question of whether there should be a distinction between murder and manslaughter in circumstances where an accused is so provoked as to significantly lose self-control. We are of the view that where an accused has significantly lost self control and an ordinary person in that situation could have so far lost self control as to form an intention to kill or cause grievous bodily harm, the culpability is significantly less. That significantly reduced culpability is properly reflected in the reduction of murder to manslaughter.

(v) The partial defence should be abolished because it fuses justification and excuse:

This complaint is misconceived. The partial defence of provocation does not justify or excuse a killing. The partial defence, if successfully raised, simply reduces murder to manslaughter. Manslaughter carries a maximum penalty of 25 years imprisonment. Manslaughter is an inherently serious crime, involving the unlawful killing of a human

being. The various considerations inherent in sentencing manslaughter cases are set out by Street CJ in ***Regina v Georgina Marie Hill*** (1981) 3 A Crim R 397 at 402:

> "*The circumstances leading up to the felonious taking of human life being regarded as manslaughter rather than murder can vary infinitely, and it is not always easy to determine in any given case what should be done in the matter of sentence. At the start it should be recognised that the felonious taking of human life is recognised both in the Crimes Act 1900 and in the community at large as one of the most dreadful crimes in the criminal calender. The Courts have, however, over the decades gradually manifested a willingness to recognise factual contexts which provide some basis for understanding the human tragedies that can lead to the taking of a life. The manifestation of this humanitarian tendency is necessarily attended by the utmost caution. It can be seen to be constantly written in the decisions of the courts and in the enactments of the legislature that the taking of a human life is a grave action calling for a correspondingly grave measure of criminal justice being meted out to the guilty party.*
>
> *In a case such as the present, where there is material justifying a degree of understanding and sympathy towards the appellant, the task of sentencing is particularly difficult. It is necessary to evaluate the demands of the criminal justice system, the expectations of the community at large, the subjective circumstances of the person coming forward for criminal judgment and the interests of society in protecting itself and its members from criminal activity amounting, as in the present case, to the taking of human life.'*

The partial defence of provocation does not condone killing. It simply recognises that there are significantly different levels of culpability in homicide cases.

(vi) & (vii) Is anomalous because it only applies as a partial defence in respect of murder, and has the effect of saying some homicides are more acceptable than others:

Once again it must be emphasised that the partial defence of provocation does not condone violence. It is not a question of whether one type of homicide is 'more acceptable' than others. As with the partial defences of excessive self defence and substantial impairment, the law recognises that killing can occur in circumstances where there is significantly reduced culpability. There is a tendency to focus on the first limb of the defence rather than recognising that a successfull claim of provocation requires a jury to find that the conduct of the deceased was such as could have induced an ordinary person in that situation to have so far lost self control as to have the relevant intention.

We do not accept that the partial defence of provocation has the effect of saying it is more acceptable to kill where there has been a significant loss of self control. The partial defence of provocation is a limited concession to ordinary human frailty.

Dina Yehia SC

Public Defender