



The New South Wales Bar Association

12/153

20 September 2012

Reverend the Honourable Fred Nile  
Chair  
Select Committee on the Partial Defence of Provocation  
Legislative Council  
Parliament House  
Macquarie Street  
SYDNEY NSW 2000

Dear Reverend Nile

**Legislative Council Select Committee Inquiry on the Partial Defence of Provocation - further submission of the New South Wales Bar Association**

The New South Wales Bar Association made a written submission to Select Committee on the Partial Defence of Provocation on 10 August 2012.

Members of the Select Committee asked the New South Wales Bar Association a number of supplementary questions in relation to the issues before the Inquiry. The members of the Association who gave evidence at the hearing on 29 August 2012 were asked other questions. The Association was also requested to comment on reform options circulated on 13 September 2012.

**A. Supplementary questions**

**1. The NSW Council for Civil Liberties argues in its submission (Sub 32, p 5) that abolishing provocation will see more defence lawyers plead their cases as self-defence and that the result could see more acquittals and other unintended outcomes. Can you comment on that suggestion?**

It is possible that there will be a greater reliance on self-defence (which, if successful, would result in acquittal) and on excessive self-defence (which, if successful, would result in acquittal of murder and a verdict of guilty of manslaughter). It may be noted that this may be the case even if the provocation partial defence is retained but the onus of proof in respect of that defence is changed. Abolition of the provocation partial defence may also result in greater reliance on the substantial impairment by abnormality of mind partial defence. While that defence requires an "underlying condition" which is not "of a transitory kind", it is likely that arguments will be

advanced that provocative conduct interacted with some “underlying condition” to cause a violent response. Of course, it is also the position of the Association that one significant unintended outcome of abolishing provocation is likely to be that a number of women who have been victims of domestic violence (and might have relied on the partial defence to avoid conviction for murder) will be convicted of murder and will be sentenced to significantly longer terms of imprisonment that they would otherwise have faced (as appears to have happened in, for example, Victoria and New Zealand).

**2. Page 3 of your submission states that “without such a defence being available, many injustices are likely to occur - especially where accused persons respond to significant acts of violence but in a manner which cannot be characterised as self defence.” Can you expand on this, and explain why this is a rationale for retaining provocation, rather than amending the way in which self-defence operates?**

The critical distinction between the provocation partial defence in s 23 and the excessive force partial defence in s 421 is that the latter requires a belief that the response to prior violence is “necessary to defend himself or herself or another person”. If the prior violence is unlikely to recur imminently, or the accused is well aware that there is no “need” to respond violently, the s 421 partial defence will not be available. The s 421 partial defence is about acting to prevent imminent violence and no amendment could change that without distorting the basis of the defence. The provocation partial defence inhabits a quite distinct area of moral discourse, involving an ordinary and understandable (albeit not justifiable or excusable) human response to provocative conduct, whether that conduct was violent or not.

**3. When battered women who kill their abusers do raise provocation, do these matters usually proceed to trial, or is a plea to manslaughter on the basis of provocation more commonly accepted as part of charge negotiations?**

The Association is not in a position to provide accurate figures in response to this question, particularly given the fact that whether or not the accused has been “battered” may be a matter in dispute. However, it is possible that, if the provocation partial defence is abolished or significantly modified (by, for example, changing the onus of proof), more cases will go to trial than would otherwise have been the case.

**a. 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 Association considers that the current guidelines are satisfactory.

**4. The Committee understands that the partial defence of provocation offers recognition of ‘human frailty’ by recognising the reduced blameworthiness of the offender who lost their self control. If an offender was not acting in self-defence when they intentionally killed a person, why should the law recognise that the offender has a reduced level of**

## **culpability?**

The Association repeats the point made above that the provocation partial defence, if established, involves an ordinary and understandable (albeit not justifiable or excusable) human response to provocative conduct, such as to significantly reduce the culpability of the offender. It is important to appreciate that the defence is not made out simply by loss of self-control. It also requires the jury to conclude that an "ordinary person in the position of the accused" could have reacted in the same way. If an ordinary person might have done the same thing, the law should say that the offence is not murder but the lesser (albeit still serious) offence of manslaughter.

These observations raise a question whether the loss of self-control requirement itself (criticized by some as reflective of gender bias in favour of men) should be retained. It requires that the accused acted in an emotional state rather than from premeditation but circumstances might well arise where a jury might consider that a premeditated homicide was something that an "ordinary person in the position of the accused" might have done. The obvious example is a "mercy" killing, where the accused acts out of love for a terminally ill parent or partner. Another example is a "battered wife" who, psychologically damaged and unable to think rationally about her predicament, ultimately forms a plan to take revenge and proceeds to do so in a premeditated way. It might be appropriate to broaden the scope of this partial defence, rather than abolish or narrow it.

### **5. If the Committee considered that reform to the partial defence of provocation were necessary, do you have any suggestions on what type of changes should be considered?**

The Association does not support any significant changes to the existing partial defence. The Association is not persuaded that particular controversial cases in recent years demonstrate that the partial defence requires reform. The Association has faith in the capacity of juries to decide whether the actions of an accused were the result of a loss of control and whether an ordinary person in the position of the accused could have reacted in the same way. Further, the Association considers that any reform of the partial defence should be a matter for the NSW Law Reform Commission. Only that body would have the resources and expertise, along with the capacity for extended public consultation with regard to reform options, necessary to ensure that well-intended reforms do not result in unintended consequences and miscarriages of justice.

## **B. Other questions**

Apart from the supplementary questions, several questions were also asked at the hearing on 29 August 2012. To some extent, they have been answered in the responses to the supplementary questions. The questions asked on 29 August 2012 have been reformulated and numbered to facilitate discussion.

### **6. Should the partial defence be available "in cases of jealousy and relationship breakdown"? Should it be limited to "circumstances of serious or violent criminal acts or domestic and family violence"?**

No and No. The Association accepts that the partial defence should not be available in cases where the only suggested provocative conduct was infidelity or a non-violent sexual advance or something similar. The Association is confident that, in such circumstances, a contemporary jury would not consider that "the conduct of the deceased was such as could have induced an ordinary person in the position of the accused to have so far lost self-control as to have formed an intent to kill, or to inflict grievous bodily harm upon, the deceased". The position at common law has for many years that a confession of adultery, of itself, cannot constitute provocation. In *Moffa v The Queen* (1976-7) 138 CLR 601 Stephen J said at 619:

5. ... This is to be judged in the context of and cumulatively upon both the other two matters and the events leading generally up to the killing. The question to be asked is whether it would have been open to a jury to conclude on this material that a reasonable, or ordinary, man might, in such circumstances suffer such a loss of self-control as to act as the applicant did. It is clear, as the applicant said, if believed, that this in fact happened to him; it is the objective test, what effect it might have upon an ordinary man, that is in question.

6. In answering this question one bears in mind that no mere confession of adultery, however sudden, suffices (*Holmes v. Director of Public Prosecutions* (1946) AC 588, at p 600 ). Words alone, whether in themselves insulting or obscene or which recount a necessarily provocative event or fact, would, as Viscount Simon there said, have to involve "circumstances of a most extreme and exceptional character" if they were to reduce murder to manslaughter.

If it were felt necessary to ensure that outcome by amendment of s 23, the issue should be referred to the NSWLRC in order to develop a carefully formulated exception to the partial defence. However, the Association would oppose an amendment that limited the availability of the defence to "circumstances of serious or violent criminal acts or domestic and family violence". That would not extend to, for example, such provocative conduct by a person as

- constant verbal abuse, belittling and humiliation of the accused over the course of a relationship

- cruel and persistent non-violent harassment of a person on the basis of gender, sexuality, race, intellectual disability, etc

- telling the accused that the person had sexually assaulted the accused's daughter in the past (where, unknown to the accused, this had not in fact occurred)

- informing the accused that the person had caused the accused's child to commit suicide

- making deliberately false allegations that the accused had sexually abused children.

The Association does not suggest that any of these circumstances would necessarily

result in the provocation partial defence being established. It should be a question for the jury whether, in the particular circumstances of the case, an ordinary person might have reacted as the accused did to such provocative conduct so that, while not excused, the accused should be liable to imprisonment for 25 years rather than life.

### **7. Should the “ordinary person” test be replaced by a test similar to that found in s 23A(b)?**

The Chair of the NSW Law Reform Commission has raised the possibility of replacing the “ordinary person” test with a test similar to that found in s 23A(b). That provision states that a requirement of the s 23A substantial impairment partial defence is that “the impairment was so substantial as to warrant liability for murder being reduced to manslaughter”. For a number of reasons, the Association would not support a comparable test for the provocation partial defence in terms of “the loss of control was so substantial as to warrant liability for murder being reduced to manslaughter”. The critical question regarding the availability of the provocation partial defence is not so much the factual one as to the degree of loss of self-control but rather the normative one (ie involving a judgment about moral culpability) of whether the provocative conduct supports a significant reduction in the offender’s culpability. Even if there has in fact been a high degree of loss of control, the jury might properly conclude that the partial defence is not available given the nature of the provocative conduct. The “ordinary person” test necessarily focuses the attention of the jury on that normative issue. A test expressed in terms of “the circumstances warrant his or her liability being reduced to manslaughter” is too open-ended – it provides no guidance at all to the jury regarding relevant criteria.

### **8. Should the onus of proof be placed on the accused?**

The Association considers that, as regards the factual question whether or not the accused lost self-control, it is appropriate that the onus rest on the prosecution to prove beyond reasonable doubt that the accused did not lose self-control but acted in a premeditated or “cold-blooded” manner. The “golden thread” of our system of criminal justice is that the prosecution bears the onus of proof in respect of both elements of offences and defences. An exception is made in respect of the defences of insanity and diminished responsibility where psychiatric issues arise and expert evidence is necessarily required. However, no exception is made simply because it may be difficult for the prosecution to prove the state of mind of the accused (for example, proving such states of mind as intention, recklessness, knowledge, belief, etc). There is no justification for making an exception in respect of the lost self-control element of the provocation partial defence. Indeed, such a change would create great confusion for juries in those, not uncommon, cases where the defence relies on both excessive self-defence and provocation. The accused may testify that he or she was reacting to violence by the victim and believed that violence was necessary in self-defence, but the circumstances may show that such a belief could not have been held – raising the question whether the accused simply lost control and snapped. Directing a jury that different rules apply regarding the onus and standard of proof in this context will only make the jury’s task more difficult.

However, the Association would not oppose amendment of s 23 to make it clear that the

question for a jury in respect of the “ordinary person” test is whether the jury is satisfied that the conduct of the deceased was such as could have induced an ordinary person in the position of the accused to have so far lost self-control as to have formed an intent to kill, or to inflict grievous bodily harm upon, the deceased.

#### **9. Is a provision similar to s 9AH *Crimes Act 1958* (Vic) necessary in NSW?**

No. That provision was introduced into Victoria some years prior to the enactment there of the *Evidence Act 2008* (Vic), which is uniform with the *Evidence Act 1995* (NSW). Section 9AH(2) provides, in part:

(2) Without limiting the evidence that may be adduced, in circumstances where family violence is alleged evidence of a kind referred to in subsection (3) may be relevant in determining whether [a number of issues which may arise in prosecution for murder, defensive homicide or manslaughter, in circumstances where “family violence” is alleged]

Section 9AH(3) lists a number of categories of evidence, including “the history of the relationship between the person and a family member” and related matters.

It is not at all clear what evidence would be rendered admissible under this provision. It provides that specified evidence “may be relevant” without stating that it is relevant. More importantly, the provision does not state clearly that the evidence is admissible, as distinct from relevant. For example, it was presumably intended that admissibility rules relating to expert evidence would continue to have application. Nor is it clear whether the court retains the general discretion to exclude unfairly prejudicial evidence.

However, it is unnecessary to discuss s 9AH at length. There is no doubt that, under the *Evidence Act 1995* (NSW), “relationship evidence” relevant to facts in issue arising in respect of the application of the partial defence of provocation would be admissible, subject to the general discretionary provisions in Part 3.10. Such evidence is not classified as “tendency evidence” and would not be subject to the admissibility provisions in s 97 and s 101. The common law position in relation to this kind of evidence continues to prevail. In *Wilson v The Queen* (1970) 123 CLR 334, Barwick CJ said at 337:

The fundamental rule governing the admissibility of evidence is that it be relevant. In every instance the proffered evidence must ultimately be brought to that touchstone. The evidence of which the admissibility was challenged on behalf of the applicant consisted of accounts given by witnesses who had heard the utterances to which they deposed. There were two occasions on which a witness spoke of a then current quarrel between the applicant and his wife. In respect of the earlier of these occasions, said to have taken place in Tasmania in 1967, a witness stated that he heard the quarrelling though the parties were not within his sight and that he specifically heard the deceased arguing and say to the applicant, “I only know you want to kill me for my money”. In respect of the later of these occasions, said to have been in the month of March 1968 in Tasmania, a witness said that the applicant in the course of a quarrel with the

deceased in the presence of others besides the witness, pushed her to the ground for no other reason than that she had not desisted from rubbing the duco of her motor car when he had told her to stop doing so. Whilst on the ground the deceased according to the witness had said "I know you want to kill me, why don't you get it over with". On the first occasion the witness did not hear any reply by the applicant and on the latter occasion the applicant made no reply.

It is quite apparent that the nature of the current relationship between the applicant and his wife was relevant to the question to be decided by the jury. Evidence of a close affectionate relationship could properly have been used by the jury to incline against the conclusion, which might otherwise have been drawn from the circumstances, that the applicant killed his wife. Equally, evidence that there had developed mutual enmity could be used to induce the conclusion that he had killed his wife and that his story of an accidental shooting lacked credibility.

Similar reasoning would permit evidence of the relationship between the accused and the deceased to be admitted under the *Evidence Act 1995* in order to rebut a partial defence of provocation. In *Toki* (2000) 11 A Crim R 536, Howie J said at 540:

Where the accused and another person have been living together over a lengthy period of time before the occurrence of the acts which give rise to the charge before the court, the relationship between the parties will be admissible if it is relevant to the facts in issue in the trial; *Harriman v The Queen* (1989) 167 CLR 590 at 630. This was so under the common law; *Wilson v The Queen* (1970) 123 CLR 334; *S v The Queen* (1989) 186 CLR 266; *R v Frawley* (1993) 69 A Crim R 208. It remains so under the provisions of the *Evidence Act 1995*: *R v Serratorre* (1999) 48 NSWLR 101; *Conway v R* (2000) 172 ALR 185. The rules that govern the admission of the evidence will depend upon the purpose for which the evidence is to be admitted.

Evidence of the relationship between the accused and another person can be admissible in order to put the facts giving rise to the charge into a proper context so that the jury can understand the acts of the accused relied upon by the Crown against the background of the circumstances that existed at the relevant time: *Wilson v The Queen* at 399, 344. The evidence is admitted not simply because it describes the relationship of the parties, but because statements or acts of the parties occurring within the relationship are relevant to the issues before the jury.

At 541, Howie J added:

Where the relationship between the accused and the other person includes the infliction of injuries upon the other person by the accused, this fact can be proved by direct evidence of witnesses or, where admissible, statements made by the other person. It can also be proved by circumstantial evidence which raises a presumptive inference that the accused was the author of the injuries: *R v Hissey* at 289; *Shaw v The Queen* (1952) 85 CLR 365 at 377.

If the prosecution did wish to prove that the accused had a particular tendency (for example, to engage in violence against the victim), that evidence would be admissible if it had “significant probative value” and that value outweighed the danger of unfair prejudice. Expert evidence regarding the nature of the relationship would be admissible if the general requirements for opinions based on specialised knowledge in s 79 were satisfied, again subject to the general discretionary provisions in Part 3.10. The position with respect to “family violence evidence” under the NSW *Evidence Act 1995* is appropriate and adoption of a provision similar to s 9AH *Crimes Act 1958* (Vic) should not be contemplated.

#### **10. Should a requirement be placed on the defence to provide pre-trial disclosure that the partial defence of provocation will be raised?**

The Association is satisfied that Division 3 of Part 3 of the *Criminal Procedure Act 1986* (ss 134-149F), and current practice in the Supreme Court of New South Wales, provides an appropriate system of pre-trial disclosure and there is no need to make special provision in that regard for the partial defence of provocation.

#### **C. Reform Options**

It will be apparent from prior submissions made to the Inquiry and from the answers given above that the Association opposes repeal of the provocation partial defence. In general, the Association believes that the defence should be retained in its current form. In particular, the Association opposes:

- limiting the availability of the partial defence to a particular category or categories of provocative conduct (see answer to Q 6);
- shifting the onus of proof with respect to provocative conduct and loss of control to the accused (see answer to Q 8);
- replacing the “ordinary person” test with a test expressed in terms of “the circumstances warrant his or her liability being reduced to manslaughter” (see answer to Q 7);
- replacing the “ordinary person” test with a “reasonable person” or similar test - this will effectively abolish the partial defence because a “reasonable person” does not lose control or respond with homicidal violence other than in self-defence;
- changing the current applicable procedural and evidentiary rules (see answers to Q 9 and Q 10).

However, the Association would not oppose amendments to s 23 designed to make it clear that the partial defence is not available in cases where the only suggested provocative conduct was infidelity or a non-violent sexual advance or something similar (see answer to Q 6). Any such amendment would have to use the word “only” in order to make it clear that such conduct would not have to be disregarded where it was combined with provocative conduct of a different kind. Further, with regard to the



question of onus of proof, the Association would not oppose an amendment to s 23 to make it clear that the question for a jury in respect of the "ordinary person" test is whether the jury is satisfied that the conduct of the deceased was such as could have induced an ordinary person in the position of the accused to have so far lost self-control as to have formed an intent to kill, or to inflict grievous bodily harm upon, the deceased (see answer to Q 8).

Finally, as noted in the answer to Q 4, the Association invites consideration of the question whether the loss of self-control requirement should be removed, thereby significantly expanding the availability of this partial defence, including in circumstances such as "mercy killing".

The Association is grateful for the opportunity to provide a further submission to the Committee.

Yours sincerely

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President