

21 September 2012

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

Response to Question taken on-notice on 28 August 2012
At the Inquiry into the Partial Defence of Provocation
Public Hearing, Day One

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Question taken on notice:

The Hon. Trevor Khan: Indeed, if we reverse the onus, so that we replace the onus in provocation-that has been one of the suggestions-that would increase the prospect of people giving evidence in those circumstances, would it not?

Dr. Fitz-Gibbon: I think certainly a lot of the cases are resolved by plea, so a lot of them do not go through to trial ... but I would be happy to look and find out for you which offenders gave evidence otherwise.

Response to Question taken on notice:

As indicated in *Table 1* (included on page 4) from January 2005 to August 2012 there were 17 cases in New South Wales (NSW) where provocation was successfully raised as a partial defence to murder. Seven of these cases were resolved by the defendant entering a guilty plea prior to trial, however, the remaining 10 cases proceeded to trial and resulted in a jury verdict of guilty to manslaughter by reason of provocation. In the majority of these cases (7 of the 10 cases) the defendant gave evidence at trial. This would suggest that whilst reversing the onus of proof would arguably increase the prospect of defendants giving evidence at trial, in NSW since 2005 the majority of defendants who have successfully raised provocation at trial have given evidence to support their defence.

Mirroring the controversial Victorian trial of James Ramage,¹ in two of the three cases where the defendant did not give evidence, the sentencing judge relied heavily upon the police interview given by the defendant.² In one of these cases, *Hamoui*, the male defendant had killed his estranged female intimate partner in response to a non-violent confrontation arising in the context of the victim's alleged infidelity. In the remaining case, where a defendant did not give evidence, during sentencing the judge did not refer to a police interview but instead relied heavily upon the agreed statement of facts, which was tendered during the sentencing hearing.³

Beyond questions of whether a defendant has given evidence in provocation cases, it should also be noted from *Table 1* that in its most recent operation male defendants have been the key beneficiaries of the partial defence of provocation in NSW. Over this nearly eight-year period only two female defendants successfully relied upon the provocation defence (both entered guilty pleas to manslaughter on this basis and neither case proceeded to trial).⁴ In contrast, during the same period, 15 male defendants were convicted of manslaughter on the basis of provocation. In these 15 cases, the majority of cases involved a male victim and male offender (9 of 15 cases), whilst 6 cases involved a male offender and female victim (in 5 of these 6 cases the female was a current or estranged intimate partner of the offender).

This predominant use of the provocation defence by male defendants is supported by the NSW Judicial Commission's report published in 2006.⁵ The report observed that between 1990 and 2004, 75 offenders successfully raised a partial defence of provocation. Of those 75 offenders, 58 offenders were male and 17 offenders were female. The report concluded that during this period the provocation defence was most commonly raised in alcohol-fuelled violent confrontations involving both a male offender and victim. Specifically, Indyk, Donnelly and Keane observed that over the 14 year period studied there were 10 female defendants who successfully relied upon the partial defence of provocation where they had killed a male partner

¹ *R v Ramage* [2004] VSC 508, hereinafter *Ramage*.

² See – *R v Jeffrey Dunn* [2005] NSWSC 1231; *R v Hamoui* [no 4] [2005] NSWSC 279, hereinafter *Hamoui*.

³ *R v Ari Hayden Bullock* [2005] NSWSC 1071.

⁴ See – *R v Joyce Mary Chant* [2009] NSWSC 593; *R v Russell* [2006] NSWSC 722.

⁵ Indyk, S., Donnelly, H. & Keane, J. (2006), *Partial Defences to Murder in New South Wales 1990-2004*, Judicial Commission of New South Wales, Sydney.

in the context of prolonged family violence, this accounted for 13 per cent of cases. During the same period, there were 11 cases where a male who had killed a female intimate partner successfully relied upon the provocation defence – the use of lethal violence in these 11 cases occurred in the context of infidelity or the breakdown of an intimate relationship. The report provides context as to how the provocation defence has been historically used in this jurisdiction, and in doing so, supports Table 1 which highlights that male defendants – whether they have killed a female or male victim – are most likely to benefit from the availability of a partial defence of provocation in NSW. This is an important note, and does contrast with some evidence given during the initial two days of the public hearings, which suggested that the provocation defence has been evenly relied upon by male and female defendants. The case analysis conducted by the Judicial Commission (as reviewed above) and by Fitz-Gibbon⁶ (as represented in *Table 1* below) shows that this is not the case.

It is recommended that in implementing any reform, the Committee carefully consider the highly problematic use of provocation by male defendants. In five of the 17 cases during the period covered in *Table 1*, a male successfully raised provocation after killing a female intimate partner (either current or estranged).⁷ In a further three cases a male defendant raised provocation after killing a male who was in a sexual relationship with the defendant's estranged female intimate partner.⁸ Put together, this means that in 8 of the 17 cases of provocation manslaughter between January 2005 and August 2012 the provoked lethal violence was exercised in response to sexual infidelity, relationship separation or jealousy. As in the Victorian *Ramage* case, the problematic use of provocation in this context in NSW cannot, and should not, be ignored.

⁶ For a more detailed discussion of the gendered use of the provocation defence, see Fitz-Gibbon, K. (2012), 'Provocation in New South Wales: The need for abolition', *Australian and New Zealand Journal of Criminology*, 45(2): 194-213.

⁷ See – *Singh v R* [2012] NSWSC 637; *R v Gabriel* [2010] NSWSC 13; *Regina v Stevens* [2008] NSWSC 1370; *R v Frost* [2008] NSWSC 220; *Hamoui* [no 4] [2005] NSWSC 279.

⁸ See – *R v Won* [2012] NSWSC 855; *Regina v Munesh Goundar* [2010] NSWSC 1170; *Regina v Ronnie Phillip Lovett* [2009] NSWSC 1427.

Table 1: Successful Provocation Defences in New South Wales
(1 January 2005 – 31 August 2012)

Defendant Name (trial year)	Verdict/ Plea	Defendant gave evidence at trial	Defendant Sex	Victim Sex	Relationship between victim and defendant	Provocative Incident – general category
Won (2012)	Verdict	Yes	Male	Male	Victim was in a sexual relationship with the offender's estranged wife.	Non-violent confrontation
Singh (2012)	Verdict	Yes	Male	Female	Married	Non-violent confrontation
Goundar (2010)	Verdict	Yes	Male	Male	Victim was in a sexual relationship with the offender's estranged wife.	Planned confrontation ⁹
Lynch (2010)	Plea	n/a	Male	Male	Acquaintances	Violent confrontation
Gabriel (2010)	Verdict	Yes	Male	Female	Married	Violent confrontation
Lovett (2009)	Verdict	Yes	Male	Male	Victim was in a sexual relationship with the offender's estranged wife.	Non-violent confrontation
Chant (2009)	Plea	n/a	Female	Male	Married	Violent confrontation
Stevens (2008)	Plea	n/a	Male	Female	Defacto Relationship	Non-violent confrontation
Mitchell (2008)	Plea	n/a	Male	Male	Acquaintances	Violent confrontation
Forrest (2008)	Plea	n/a	Male	Male	Acquaintances	Violent confrontation
Frost (2008)	Plea	n/a	Male	Female	Divorced	Non-violent confrontation
Berrier (2006)	Verdict	Yes	Male	Male	Acquaintances	Violent confrontation
Russell (2006)	Plea	n/a	Female	Male	Defacto Relationship	Violent confrontation
Bullock (2005)	Verdict	No	Male	Male	Acquaintances	Violent confrontation
Dunn (2005)	Verdict	No	Male	Female	Close acquaintances – lived together	Non-violent confrontation
Ali (2005)	Verdict	Yes	Male	Male	Former acquaintances	Violent confrontation
Hamoui (2005)	Verdict	No	Male	Female	Estranged girlfriend	Non-violent confrontation

⁹ In the case of *Goundar* the defendant had planned for his wife to bring the victim, his best friend, to the marital home she shared with the defendant. The defendant was aware that the victim and his wife had been involved in a sexual relationship prior to this incident. The defendant was sentenced on the basis that he had become provoked upon realising that the victim intended to have sexual intercourse with his wife and that this realisation was further heightened by cultural factors (see *Regina v Munesh Goundar* [2010] NSWSC 1170: at 59).