

INQUIRY INTO PARTIAL DEFENCE OF PROVOCATION

Name: Miss Natasha Godwin

Date received: 24/08/2012

A report demonstrating that provocation is an outmoded and inappropriate defence and should be abolished.

PROVOCATION

An outmoded and discriminatory defence

Provocation developed in the 17th century, when showing anger ‘in hot blood’ in the act of personal revenge was the badge of a man of honour.¹ The defence was enacted to protect men who overreacted in a display of ‘human frailty’. Such a response is no longer acceptable; the ‘frailty’ moreover deemed to be ‘largely from a male-centred perspective.’² This claim does not lack empirical support; a report by the Judicial Commission of NSW found that, from 1990 to 2004, provocation was successfully raised in 75 of 115 cases; 58 of these 75 offenders were male.³ The types of provocative conduct were predominantly ‘violent physical’ and ‘intimate relationship’ confrontations.⁴ The VLRC noted that for men, ‘the provocation is often their partners’ alleged infidelity or threatened departure. Their actions are primarily motivated by jealousy and a need for control. In comparison, when women...raise the defence, there is often a history of physical abuse in the relationship.’⁵ A defence which implies that the actions of a man who murders after a relationship confrontation and those of a battered woman driven to desperation to kill are on a par should not continue to be tolerated, the MCCOC commenting that this is ‘offensive to common sense.’⁶ The availability of provocation sends an outmoded and intolerable message that male use of violence against women is justifiable. Legislative amendments made to accommodate women in abusive relationships,⁷ as well as the ruling that an interval between the provocative conduct and the accused’s response is not fatal,⁸ have failed to adequately solve issues of gender-bias. Tolmie claims that, in fact, the increasing flexibility of provocation may restrict the development of self-defence - a complete defence - disadvantaging women who kill violent partners.⁹ The Tasmanian Minister for Justice’s comment ‘it is better to

¹ *Smith* [2000] UKHL 40.

² Jeremy Horder, *Provocation and Responsibility* (Clarendon Press, (1992) 194.

³ Lenny Roth and Lynsey Blayden, ‘Provocation and self-defence in intimate partner and sexual advance homicides’ (Briefing Paper No 5, NSW Parliamentary Research Service, 2012) [4].

⁴ Victorian Law Reform Commission, *Defences to Homicide: Final Report* (2004) [2.22].

⁵ *Ibid.*

⁶ Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code, Chapter 5, Fatal Offences Against the Person*, Discussion Paper (1998) 91.

⁷ In April 1982, the *Crimes (Homicide) Amendment Act 1982* was passed, substituting a new *Crimes Act 1900* s 23.

⁸ See *Chhay* (1992) 72 A Crim R 1 and *Pollock* [2010] HCA 35.

⁹ Julia Tolmie, ‘Provocation or Self-Defence for Women Who Kill’ in S Yeo (ed), *Partial Excuses to Murder* (Federation Press, 1990).

abolish the defence than to try to make a fictitious attempt to distort its operation to accommodate the gender behavioural differences'¹⁰ is highly pertinent and resonating in light of manifest gender discrimination.

Appropriateness

There is an increasing belief that a 'provoked' killer should not be distinguished from an 'intentional' killer; a 'loss of self-control' not sufficient to mitigate culpability as everyone has a duty to practice self-restraint. It is argued that the abolition of provocation would culminate in an increased rate of murder convictions; moreover those who are provoked should not be unfairly stigmatised by the label 'murderer'¹¹ as provoking conduct significantly impairs an accused's mental state. Conversely, it is contended that the eradication of a 'half-way house' for provoked killers could result in a higher rate of acquittal, due to jury reluctance to convict for murder. These somewhat contradictory arguments do not provide sufficient grounds for retention.

The provoking circumstances can constitute mitigating factors and be taken into account at sentencing. Claims that a judge, as opposed to a jury, is not equipped to make factual findings are unconvincing; the New Zealand Law Commission commented, 'the task of crafting penalty to blameworthiness has long been the daily diet of judges'.¹² While it is undeniable that allocating matters affecting culpability to the discretion of a sentencing judge will not promote public confidence in the justice system, the community demand for condemnation of violence against women is significantly more crucial; made clear in the community outrage sparked by the inadequate sentences of offenders in *Singh*¹³ and *Ramage*.¹⁴

Procedurally flawed

The formulation of provocation is problematic in procedure. While the test in s 23(2)(a) is entirely subjective, (2)(b) is a hybrid in that the examination of the gravity of the provocative conduct allows individual characteristics to be taken into account, however whether the

¹⁰ Tasmania, *Parliamentary Debates*, House of Assembly, 20 March 2003, 60 (Judy Jackson, Minister for Justice).

¹¹ Victorian Law Reform Commission, *Defences to Homicide: Final Report* (2004) [2.28].

¹² *Ibid* [1.27].

¹³ [2012] NSWSC 637.

¹⁴ [2004] VSC 508.

ordinary person would have lost self-control as to kill is determined objectively. It is unlikely that jurors are capable of making such distinctions; the MCCOC observed that the ordinary person has 'a split personality in that his/her character suddenly chang[es] depending on which part of the test is being addressed'.¹⁵ While *Stingel*¹⁶ established that the 'ordinary person' is of the accused's age, it has frequently been asserted that other characteristics, such as ethnicity, should be vested in the accused;¹⁷ a failure to do so would 'result in inequality before the law'.¹⁸ It is difficult, however, to see how this would be incorporated into the defence without making offensive assumptions about a culture. Would one assume that people of Mediterranean descent are more 'hot-blooded' than Anglo-Celts?¹⁹ Such problems will clearly not be solved by amendment.

Other jurisdictions

Provocation has been abolished in Tasmania, Victoria, WA and New Zealand. In Queensland, provocation was recently amended to reduce the scope of availability to those who kill out of sexual possessiveness or jealousy, while non-violent sexual advances have been excluded in the ACT and NT.

RECOMMENDATION

Provocation is procedurally problematic, calling for amendment if not abolishment. It is conceptually flawed, perpetuating antiquated views of women. I believe that the notion of the law providing justification for those who fail to practice self-restraint is intolerable. The need to abolish a gender-discriminatory offence whose underlying rationale runs contrary to fundamental principles of modern society is, in my opinion, more pressing than the need to abolish a redundant defence. Provocation must be abolished.

¹⁵ Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code, Chapter 5, Fatal Offences Against the Person*, Discussion Paper (1998)79.

¹⁶ (1990) 171 CLR 312.

¹⁷ *Masciantonio* (1995) 183 CLR 58.

¹⁸ *Ibid*, per McHugh J (dissenting).

¹⁹ Jenny Morgan 'Provocation Law and Facts: Dead Women Tell No Tales, Tales are Told about Them' (1997) 21 *Melbourne University Law Review* 237, 269.