

**Submission
No 47**

INQUIRY INTO PARTIAL DEFENCE OF PROVOCATION

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REASONS FOR ABOLITION

When successfully argued, provocation reduces a murder charge to manslaughter on the basis that the offender's culpability is reduced as he or she was provoked by the deceased's conduct. Between January 1990 and September 2004, 115 offenders raised the defence of provocation, of which 75 were successful. Out of the 75 successful cases, 58 of those involved male offenders.

Inherent gender bias

A key reason for the abolition of provocation, particularly in terms of intimate partner homicide, is that it operates in a manner that is biased towards males. In the aforementioned period, 11 of the 75 successful provocation cases were raised in the context of intimate relationship confrontations, with males being the perpetrators in every case, reflecting how in terms of intimate partner homicide, the defence operates in favour of males.

This inherent gender-bias is a product of the historical period in which the defence arose. Provocation developed in English courts in the 16th and 17th centuries, a time when murder was punishable by death, "to express tolerance for human frailty ... when men bore arms and retaliated affronts to their honour." Despite the enormous social change that has occurred since that time, provocation still appears to favour the male response. The requirement that the accused must have lost self-control at the time of the killing to successfully argue the defence outlines the inherently masculine nature of the defence.

Numerous studies have found that men are far more likely to respond to events that provoke them with violent retaliatory anger than females. A study by Kenneth Polk found that 79% of men who killed in context of sexual intimacy did so out of jealousy or for control reasons, particularly when they believe their partner has been unfaithful. In contrast, the comparatively few women who are driven to kill their male partners usually do within a context of ongoing domestic violence. This has made it difficult for women to argue they were provoked, given that the manner in which they kill often appears to be premeditated rather than due to a loss of self-control.

Although there is no longer a requirement that the killing must have been a "sudden" response to the provocation, "the relative inaccessibility of the provocation partial defence by women is more deep-rooted than these cosmetic changes to the operation of the doctrine." As indicated above, women do not commonly lose their self-control in abusive contexts, rather they may kill when the violence has temporarily ceased or when their partner is asleep, as exhibited by Chhay. "Cumulative provocation" has since been successfully argued in a number of cases, however it is arguably a tenuous link to the loss of self-control requirement in the defence. Therefore, it appears that what was true historically remains true to the

present: that “the law’s concession seemed to be to the frailty of those whose blood was apt to boil, rather than those whose blood simmered, perhaps over a long period, and in circumstances at least as worthy of compassion.”

Inconsistent application

The gender-biased nature of the defence has led to disparity and inconsistency in the way it has been applied to offenders of either sex over the years. This is starkly illustrated in comparison of Singh and King. In the former, the accused killed his wife, strangling her and cutting her throat at least 8 times with a box cutter during an altercation. Despite the level of provocation being relatively low, the jury returned a verdict of manslaughter and he was sentenced to 8 years, with a 6 year non-parole period. In contrast, the defendant in King killed her husband with a single stab wound, following years of physical and verbal abuse. She was sentenced to 6 years for manslaughter. It is difficult to accept that these sentences reflect the relative culpability of the offenders, particularly given the vastly different contexts in which the killings took place.