

INQUIRY INTO PARTIAL DEFENCE OF PROVOCATION

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A submission, authorised by the full committee of the Victims of Crime Assistance League advocating for the retention of the defence of Provocation but in an amended form to that currently in operation.



Victims Of Crime Assistance League Inc NSW

Submission re the Partial Defence of Provocation and Self Defence

August 2012

VOCAL, the Victims of Crime Assistance League Inc NSW, is both a charity for crime victims in NSW and a funded non-government provider of services to a broad range of crime victims of all types. We have had a long exposure to homicide matters of all types, and make this short submission to the inquiry.

It is our understanding that the Select Committee was most recently prompted to initiate this inquiry following the public outrage in the matters of *Singh v R* (NSWSC 2012 637) and *R v WON* (NSWSC 2012 855), two intimate deaths. In the first case the female partner of the offender was killed and in the second, the offender killed the intimate partner's new male partner. When both cases resulted in penalties where each accused was sentenced to terms of minimal imprisonment, the public found the sentences unacceptably inadequate to reflect the severity of the crimes committed.

VOCAL recognises that while both terms fell within the average penalty for Manslaughter, that being five years (Singh's sentence was eight years with a non-parole period of six years, Won's sentence was 7 years 6 months with a non-parole period of 5 years, the public clearly responded to the poor reflection of the value of a life taken by homicidal violence in these circumstances.

In our view, the perception by the Public as to the inadequacies of the sentences, appears to be based on the fact that each accused successfully advanced the defence of provocation and due to that defence, the perceived flaw with the system occurred because of that defence. The outcry indicates that the public is increasingly dissatisfied about the trend to plea bargain in serious matters, and about the readiness to accept unacceptable excuses for murder. VOCAL commonly hears the same types of concern in other similar cases.

However, the question that we believe requires attention is 'Was the perceived failure in the sentence due to the defence adopted or was it also due to a failure by the relevant Sentencing Judges, to place the abject seriousness of the crime in the correct scale of seriousness for the purposes of determining an appropriate penalty?'

To suggest that the manner in which this complex issue and its abnormalities can be addressed is to 'remove the defence of provocation' is in our view, demonstrating a serious misunderstanding of the principles of sentencing, the practice of charge or plea negotiation and the actual manner in which prosecutions are conducted in the state of New South Wales.

It is our view that in order to address what we agree is clearly an injustice and inadequate penalties, the inquiry should be broadened to encompass the full range of Legal practice in NSW regarding prosecutions and sentencing. To simply adopt the approaches taken in other Jurisdictions such as Victoria (in 2005) and Tasmania(in 2003), ignores the true, base flaws in a system. The flaws cumulatively serve to fail to protect the sanctity and safety of life, and frequently fail to hold perpetrators accountable. They must be identified, addressed and removed.

Our laws must not only protect the rights of an accused but must be in place to assure the public that it also protects society, particularly Victims of Abuse and violence. Many cases have at their base an extensive history surrounding Domestic Violence and Sexual Abuse. Both are areas of crime which continue to increase. Both of these crime types take a substantial amount of court time in prosecuting at first instance. All these cases are often heard in ways that are to the detriment of the real Victim, who in our legal system, are not parties to the proceedings and are not represented in the court process, and can rarely be properly heard because of the minimisation of their experience to discrete, individual acts. This has little respect for the lived experience or consequences that flow to the victim, yet in a provocation partial defence in the event of a domestic homicide, is suddenly to be relied on.

We do not intend to regurgitate the minute details of the briefing paper presented for the purposes of this inquiry although we would like to recognize the excellent work of Ms Kate Fitz-Gibbon who has presented a very detailed breakdown of relevant cases between Jan 2005 and Dec 2010, which has assisted us in formulating a response to the inquiry and confirmed our opinion for the need to retain the defence, albeit clearly within a more refined process.

As a Victim Support Agency we see a large number of women who have been the Victims of long term, complex, severe, unrelenting Domestic Violence who may have tried to seek relief through the NSW Criminal Legal System. And still they find themselves bound to relationships from which they are unable to escape because of the behaviour of their tormentor. There are often children of the relationship, and these victims are frequently ordered by courts, both state and federal, to maintain contact with an abusive parent, often because the state legal system has failed to produce outcomes to ensure their safety or to hold the perpetrator accountable. This situation places some people in insidious situations where they cannot avoid the abusive partner, whose violence and threats generally escalate over time. (We should comment that although the majority of Victims of Domestic Violence are adult females, we also see males and children who are the Victims of abusive relationships.

It is not uncommon for a partner in a Domestic Violence relationship to bear the brunt of physical violence in order to protect the children of the relationship and to that end will "take a beating" in preference to seeing their children be the subject of direct violence. This response to the aggressive partner can become entrenched to the point that some victims see the beatings as being "normal" and have lost the capacity to understand that no one has the right to beat another, especially when they received no legal remedy.

There however comes a breaking point, where rationality and thought of consequences is completely lost or certainty that there is only one way to survive is reached and the only

apparent response available to the abused victim is direct action against the offender, whether the threat is immediate or not. A large number of Victims "know" from the very approach by the offender in that moment, in a backdrop of experience and threat, that they are to be the subject of another "episode" and when that point is reached, the response can be fatal. 'When will a perpetrator of violence escalate to the point where this time they choose to actually carry out their threats, to kill?' To argue that such a Victim, who decides to protect themselves in that type of situation, by killing their tormentor, should have the defence of Diminished Responsibility available to, fails to recognise that at law, unless they have received specialised psychiatric treatment prior to the fatal act, the defence fails.

The statistics provided by Ms Fitz-Gibbon in relation to Domestic Violence cases between Jan 2005 and December, 2010, clearly indicate that there were such cases where the defence of provocation has been successfully argued by the victims of long-term abuse and to remove that defence, would have seen these Victims found guilty of the charge of Murder. There is a standard non-parole period of twenty years for murder. We do not believe that this would be an appropriate response to someone who has been the victim of long term physical and/or mental abuse. We would also argue that there would be times when such a defence should be available to a victim of long term abuse, where the acts of abuse do not contain a physical aspect but relate to brainwashing, verbal, economic and isolationist actions. Again, a threat to kill, rape or maim is an effective controlling mechanism often employed by abusers. It only takes one terrifying event to render the victim 'a captive of the relationship' especially where attempts to get legal responses fail. From that point, the victims have a new reality of the dominance and power and lack of boundaries of the perpetrator. Irrespective of the volume, frequency and severity of ongoing abuse and violence and other forms of control, sometimes the victim recognises that the only way they can survive is to kill the perpetrator.

Similarly Victims of long term or violent sexual abuse should not, in our view, be denied the defence of Provocation where the actions of the offender are such that a victim believes that his or her actions against the offender, are such that they will prevent further harm being committed against them or others. This is not say that we would support an Act of Vigilantism but an act where there is an imminent fear that either the Victim themselves or a co-victim are to be the subject of a further sexual assault. It seems far more reasonable and compelling than the well-worn blaming argument that a man 'lost it because he thought his spouse might leave him or had been unfaithful'.

A substantial number of Victims of long-term sexual assault may have the defence of Diminished Responsibility available to them. Many of the Victims of Historical Sexual Assault that are known to us, were in receipt of psychiatric assistance well prior to offences committed against the perpetrator, but we are equally aware of Victims who have been denied effective healing, who find themselves in further confrontation, which has resulted in acts of fatal violence against the person who has offended against them. Diminished Responsibility would not be available to the latter class of Victims and the removal of Provocation as a partial defence would see then exposed to a standard non-parole period of twenty years.

There are those who argue for the abolition of the Defence of Provocation and point to S22A 3(c) of the Crimes (Sentencing Procedure) Act, 1999 which requires a sentencing Judge to take into account, matters of mitigation, the quoted section relating directly to provocation as a mitigating feature. There are two problems with such application.

The first and in our view, the more important, is the baseline from which the section operates. The offence of murder attracts a maximum penalty of life imprisonment, with a standard non-parole period of twenty years and therefore the application of S22A (3) (c) operates from an extremely high tariff. Manslaughter on the other hand starts at a maximum penalty of twenty five years.

The second and perhaps more complex issue is how a Sentencing Judge would calculate the appropriate discount under S22A (3) (c). Based on a conviction of Murder it may well be that the discount provided would be so infinitesimally small that the overall penalty would well exceed the average sentence for the reduced conviction of manslaughter on the basis of Provocation. It could be possible to issue some instruction via a Bench Book to practising Judges as to how to apply such a discount, but from our experience this would merely lead to appeals and years of further interpretation before a benchmark is set. We would see this as the least preferable way of addressing the issue.

Another perplexing issue for the public to consider relating to the defence of Provocation is the "ordinary" person test, with such decisions being left to a jury to determine whether the defence is available to an offender, based on admissible evidence presented to the court. However, particularly in Domestic Homicide matters, unless jury members had been in Domestic Violence themselves as a victim or had studied or worked in the field, there is a high chance of them not understanding either the complexity, myths or social science understandings of research on the topic. Indeed, instead there may be a high expectation that male jurors may be quite ordinary in not having a clue, and therefore making decisions based on ignorance or falling for the skilful entreaties of defence lawyers whose role is often to get the guilty off.

We note that when there was agitation in 2010 to change the election for Judge Alone Trials by the NSW Parliamentary Joint Select Committee, we, as an organisation, spoke against any changes to S132A of the Criminal Procedure Act, 1986, commenting that we felt that the ODPP was the best organisation to determine whether there was a need to seek a Judge Alone Trial. This was an argument that we lost and on the 14th January, 2011, S132A was amended, leaving a decision for seeking a Judge Alone Trial in the hands of the defence. Since that change we have seen an increase in the number of Judge Alone Trials, which we find to be concerning, and we are also informed that Senior Crown Prosecutors of the ODPP share our concerns.

Having said that however, and after following both trials in the *Singh v R* and *R v Won*, it was clear that the jurors in both cases could have had no idea as to what was meant by the "ordinary" person test and as a result returned verdicts of Manslaughter on the basis of Provocation. This was not just the view of VOCAL but also of prosecutors in both cases and which gives rise to our next submission.

The two leading cases in relation to the ordinary person test are *Stingel* (1990 171 CLR 312) and *Masciantonio* (1995 185 CLR 58) both argued in the High Court where even Justice McHugh had some difficulties with the earlier decision of *Stingel*. It is clear however that the application of the "ordinary" person test is complex and one which should be decided in an analytical not emotional manner. It is our view that the response by Jurors in both *Singh v R* and *R v Won* were emotional responses, resulting in jury decisions that must be seen to be of a questionable nature, and therefore not what the legislation or courts intended.

As a result we would contend that the defence of Provocation be retained but that the decision as to whether the facts support the "ordinary" person test be left to a Judge Alone. We appreciate that the Office of the Public Defender would oppose such an approach, which in our view further re-enforces the approach we are recommending.

In conclusion we would contend that this issue is a complex and often highly emotive argument and one which needs to be approached in a very clinical but practical approach. As a result we would recommend that prior to any decision being made to amend legislation, that the Law Reform Commission be tasked to review their Report of 1997 (No 83) and provide a detailed report to government as to the best method by which to address the inconsistent approach to provocation.

In the final analysis there is, in our view, a need to provide a legislative framework, whereby Victims of Abuse and violence, can rely on a level of protection, and a system where they are not further punished by a Legal System which fails to take account of the unique misery to which these hapless Victims have been exposed, often over a substantial period of time. The law and courts must look to the disregard of it in the community, the rise in malicious violence and the absence of proper strategies or protections for victims because of the very nature and process of the criminal justice legal system.

All members of society must be entitled to the proper protection of the Law, which should be there to protect not punish victims of crime for being victimised.

And lastly, the year is 2012. Sexual liberation began more than 50 years ago. Women are no longer chattels to controlling men. It remains inconceivable that a woman is expected negotiate the law, to escape, or if she stays, to prove she was battered, for a long time, so that her killing of her tormentor can receive mercy, but a man, in an instant, is so easily made fierce, without control, and so cruel that he can viciously kill the woman he no longer owns, then his word is heard but not her history. And the law allows it. Perhaps some killings would stop if the law were more balanced.

Thank you for the opportunity to make known our thoughts on the subject.

Yours sincerely

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On behalf of the VOCAL Inc NSW Committee