Submission No 24

INQUIRY INTO PARTIAL DEFENCE OF PROVOCATION

Organisation: Justice Action

Name: Ms Christabel Richards-Neville

Date received: 10/08/2012

To: The Select Committee on the Partial Defence of Provocation

Submission to the inquiry into the partial defence of provocation

We recommend

a) the current statutory regime be altered to recognize further the role it currently plays in providing for women in violent domestic situation
b) that this alteration does not remove the objective person test, but a clarification of it by the legislature be undertaken to reduce the conceptual struggles currently experienced by juries

Alternatively;

a) the defence of provocation be abolished and it
b) not be incorporated into the discretionary sentencing powers of judges
c) but it be made clear that the appropriate defence to be raised shall be self-defence to prevent the promulgation of a perception of women as irrational and the removal of the possibility of total acquittal that is often the consequences of a strategy of pleading provocation.

Initially we wish to stress the importance of developing a clear consensus regarding the policy statement that underpins a concession by the courts that

> "there are circumstances in which a person's responsibility for an unlawful killing is reduced as a result of a loss of self-control to an extent which should, in any fair system of punishment be taken into account."[1]

Currently considerable confusion exists regarding whether the law pays head to 'human frailty' because of a policy decision of justification or excuse. Without this consensus, it is not only unclear to juries and directing judges why the accused should be deserving of a diminished charge, but it inhibits the law's progression. This was clearly delineated by the confusion expressed by the court in relation to 'hearsay provocation' in *Davis*[2]

We disagree with the recommendation made by the NSWLRC[3], that a 'excuse based' approach should be preferred. A 'justification' approach highlights the external factors at play. As opposed to a 'excuse' driven policy, which focuses on the actual loss of self-control by the accused. A philosophical underpinning that there are certain killers whose loss of self-control is so extreme as to reduce moral culpability amount to, in the words of Chief Justice Gleeson, "a concession to male frailty… to the frailty of

---

[1] New South Wales Law Reform Commission (1997) *Partial Defenses to Murder: Provocation and Infanticide* Report No 83
[2] (1998) 100 A Crim R 573 NSWCCA .
[3] New South Wales Law Reform Commission (1997) *Partial Defenses to Murder: Provocation and Infanticide* Report No 83

Trades Hall Level 2, Suite 204, 4 Goulburn St, Sydney NSW 2000 | **PO** Box 386, Broadway NSW 2007
T 02 9283 0123 | **F** 02 9283 0112 | **E** ja@justiceaction.org.au | **www**.justiceaction.org.au

those whose blood was apt to boil, rather then those who blood simmered, perhaps over a long period, and in circumstances at least worthy of compassion."[4]

The NSWLRC suggested that the underlying problem with a 'justification' approach, one that assigns a degree of moral blameworthiness to the victim, is that it represents an anachronistic hangover from the time when men carried guns and responded to apparent violations of their honor with tacitly approved violence. Their issue with such an approach is that social attitudes towards violent retribution have changed. We suggest that it is precisely because of these changing standards that this policy approach should be preferred. Unlike that static concern with an actual loss of self-control, a 'justification' base allows that law to respond to changing social norms. Consequently, it permits the law to view with considerable sympathy the abused woman who kills her abuser after decades of torture. The results of the current ability of judges to pick and chose their reason for denying culpability were sharply delineated in *R v Osland*[5] And the comments made, in relation to the weight to be given to Battered Woman's Syndrome that "The law expects a greater measure of self-control in unwanted situations where human life is at stake. It reserves cases of provocation and self-defence to truly exceptional circumstances."[6] A statement which not only focused almost exclusively on the issue of control (thereby representing an excuse based justification) but also utterly failed to regard the physically, psychologically and sexually abuse her and her children had endured for over a decade.

1.
(a) retaining status quo

In 1982, as a result of the *Government Task Force on Domestic Violence*, the statutory scheme relating to provocation was reviewed. The aim of this review was to accommodate women who murdered their partners after a long history of domestic abuse.[7] Demonstrably it has failed to do this. The new, statutory regime, as defined by s 23 of the *Crimes Act 1900* (NSW), has continued to allow men such as Chamanjot Singh to murder their victims of long term abuse with impunity: *R v Singh.*[8] Singh's sentence of 8 years, with a 6 year non-parole period must be compared against Heather Osland's 14.5 year sentence with a 9.5 year non-parole period. In light of this it would be an indictment of the express purposes of the 1982 reform to allow the current legislation to stand.

---

[4] R v Chhay (1992) 72 A Crim R 1, 11.
[5] [1998] HCA 75
[6] *R v Osland* [1998] HCA 75, [165]
[7] "New South Wales Law Reform Commission (1997) *Partial Defenses to Murder: Provocation and Infanticide* Report No 83
[8] [2012] NSWSC 637

Trades Hall Level 2, Suite 204, 4 Goulburn St, Sydney NSW 2000 | PO Box 386, Broadway NSW 2007
T 02 9283 0123 | F 02 9283 0112 | E ja@justiceaction.org.au | www.justiceaction.org.au

The second issue of concern is the conceptual difficulty that juries experience with the current demand that they apply the test of an 'ordinary reasonable person'. Although concessions regarding this difficulty abound, for example McHugh J's dicta in *Masciantonio*[9] that "the notion of an ordinary person is pure fiction." We still demand of jurors what many consider to be far beyond their capacity. The discord amongst Australian judges, who have spent much of their careers grappling with "the man of the Bondi tram" illustrates the extent of this expectations. In *Stingel* the High Court held that the test had three components; the ordinary person's perception of the gravity of the provocation; the ordinary person's power to exercise self-control in response to that provocation; and the form of the ordinary person's response after losing self-control in comparison to the accused's response.[10] Personal characteristics may be included in relation to the gravity of provocation, but not in the response of the ordinary person. However, in *Green*[11], 7 years later, the High Court declared that juries should be considering "all the accused attendant circumstances and sensitivities" as they related the "the effect of the provocation on an ordinary person in the position of the accused." Meanwhile, despite the directions prior to *Green* juries in the Northern Territory continue to take consideration of whether or not the accused is Indigenous, in defiance of the High Court.[12] Thus, it is clear that despite the best attempts by Judge's to make their summing up accessible and comprehensible to the lay person this area of the case will inevitable present considerable problems. However, is the challenge posed by this test great enough that it should be removed altogether and replaced with a subjective test? We think not.

A subjective test, along the lines of the kind employed in Ireland merely asks a jury whether the accused was provoked as a result of loosing self-control and killed the victim. It contains a proviso that the jury is satisfied unreasonable force was not used, upon consideration of the gravity of the provocation.[13] The inherent problem with this test is that it denies the jury their power to assign a degree of moral culpability to the accused, and reduce to charge to manslaughter according to that degree of blameworthiness. Instead, a Jury must decide, as a matter of fact, whether or not the accused lost control, and if they find he or she did then manslaughter automatically follows. While the problems faced in applying an objective test are numerous, they are not so numerous that the power of the jury to assign a community standard should be nullified. A subjective test would allow the law to present the decisions of juries as being community sanctioned, while in actual fact denying them of any real power.

---

[9] (1995) 183 CLR 58

[10] v The Queen (1990) 171 CLR 312, 324-328 and reaffirmed in *Masciantonio* (1995) 183 CLR 58

[11] (1997) 191 CLR 334

[12] Mitch Riley, "Provocation: getting away with murder?", *Queensland Student Review* 1(1), 67

[13] *The People v MacEoin* [1978] IR 27, 34.

Trades Hall Level 2, Suite 204, 4 Goulburn St, Sydney NSW 2000 | PO Box 386, Broadway NSW 2007

T 02 9283 0123 | F 02 9283 0112 | E ja@justiceaction.org.au | www.justiceaction.org.au

Moreover, the objective test has been a bastion against an overt focus on the loss of control by the accused, one that this submission considers favorable. It allows juries to condemn victims, despite finding an actual loss of self-control because they do not feel their response to the provocation deserved community sympathy. Moreover, the test of provocation is not the sort of test that unfairly delineates between cultural groups through imposing a western-centric, heterosexual, male ideal upon disparate groups. Rather, the assertion by the objective test that all cultural groups should be held to an equal standard of personal control undermines this proposition. Suggestions that varying cultural norms should dictate the level of control we expect in our society are at best stereotypes and at worst totally disregards the proposition of equality before the law. Culpability for the killing of a person should not be reduced because of the statistical prevalence of violence towards women, or men, in a certain ethnic group and an assertion that this is indicative of a group wide problem with 'control'.

Retaining the ordinary person test however will require a degree of uniformity amongst courts. In light of this a statutory regime that elucidates the concept to juries is recommended.

(b) total abolition and expansion of complete defence of self-defence

It has been suggested by a variety of stakeholders that in light of the numerous issues surrounding the objective test and the failure of the current legislative scheme to achieve its purpose, and having regard to the non-mandatory life sentence for murder in NSW, the defence should be abolished and left to the sentencing discretion of the Judge.

We reject this submission. The role that juries still have to play as the representatives of the community was made clear in the South Australia case of *R v R*, commonly referred to as the 'axe-murder case'. This concerned a woman who upon discovering that her husband, who had physically and mentally abused her for many years, had also been sexually abusing her 6 daughters, killed him with an axe. Following the initial trial, in which the Jury were compelled to deliver a verdict of guilty because of a misdirection by the trial judge that the provocation must be antecedent to the killing, a number of its members took the unprecedented step of contacting the press regarding their misgivings about the verdict. That this approval was mirrored amongst the broader community was clear by descriptions of the later acquittal, which described it as 'compassionate'.[14] This clear expression of community disapproval for the current state of the law spurred on both the common law changes and the statuary amendments that occurred in this period. [15]

---

[14] Patricia Easteal, "Battered Woman Who Kill: A Plea of Self-Defence"(Canberra: *Australian Institute of Criminology*). 45.

[15] Patricia Easteal, "Battered Woman Who Kill: A Plea of Self-Defence"(Canberra: *Australian Institute of Criminology*). 44.

Trades Hall Level 2, Suite 204, 4 Goulburn St, Sydney NSW 2000 | PO Box 386, Broadway NSW 2007
T 02 9283 0123 | F 02 9283 0112 | E ja@justiceaction.org.au | www.justiceaction.org.au

Moreover, to require trial judges to included provocation in sentencing would attract unnecessary and unjust criticism of their decisions, and further promulgate the "ivory tower' perception of the judiciary common amongst the community.

If the offence is to be abolished an alternative path should be considered. Rather, it should be included in the complete defence of self-defence. Self-defence is not of course a defence, in that as is the case in provocation, the onus rests of the Crown to establish that there was *not* self-defence.[16] It is defined by s 418 of the *Crimes Act 1900* (NSW). Two tests are currently required for self-defence. The Crown must prove that the accused did not believe at the time that what he/she did was necessary to defend him or herself. And secondly, that the conduct was not a reasonable response to the circumstances as perceived by the defendant.[17] If self-defence is raised in relation to murder a jury may also be satisfied beyond reasonable doubt that the infliction of death was intentional or reckless, but conclude that it is reasonably possible that the accused believed it was necessary in self-defence while feeling that the conduct of the accused did not constitute a reasonable response because the use of force was excessive (or in another way unreasonable.) In these circumstances a jury shall return a verdict of guilty of manslaughter.[18] Consequently, self-defence allows a jury much greater discretion in assigning moral blameworthiness by granting them a greater spectrum to operate within. It does not condemn them to delivering a verdict of manslaughter, no matter how lacking in culpability they find the accused.

Moreover, the occasionally successful use of provocation as a defence by women in abusive relationships has largely prevented these women from enjoying the advantage of a complete acquittal via self-defence. The use of provocation becomes the norm. This has a number of dangerous consequences as described by Tolmie. Firstly, its use inherently suggests that women are emotional and likely to lose control.[19] As opposed to being able to make a calculated decision in order to defend themselves or another person or to prevent or terminate the unlawful deprivation of liberty (of either themselves or another person.[20] Secondly, as mentioned above, it deprives them of a complete defence.

Thank you very much for considering our submission
Sincerely,
Christabel Richards-Neville
10/08/12

Justice Action

---

[16] *R v Dziduch* (1990) 47 A Crim R 378
[17] Judicial Commission of NSW [6-460]
[18] ibid.
[19] Patricia Easteal, "Battered Woman Who Kill: A Plea of Self-Defence"(Canberra: *Australian Institute of Criminology*). 43.
[20] *Crimes Act 1900* (NSW) s. 418(2)

Trades Hall Level 2, Suite 204, 4 Goulburn St, Sydney NSW 2000 | PO Box 386, Broadway NSW 2007
T 02 9283 0123 | F 02 9283 0112 | E ja@justiceaction.org.au | www.justiceaction.org.au