

INQUIRY INTO PARTIAL DEFENCE OF PROVOCATION

Organisation: Attorney General and Justice NSW
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Attorney General
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Domestic Violence Death Review Team

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25 September 2011

Reverend the Hon F Nile MLC
Chair
Select Committee on the Partial Defence of Provocation
Legislative Council, Parliament House,
Macquarie Street
SYDNEY NSW 2000

Dear Reverend Nile,

I respond, on behalf of the NSW Domestic Violence Death Review Team ('the Team'), to your invitation to make a submission in relation to the inquiry into the partial defence of provocation.

I note that in accordance with the recent communication between Ms Anna Butler, the Manager of the Team, and Ms Vanessa Viaggio, the Committee's request is limited to any information or data that the Team may be able to provide that is relevant to the Inquiry's terms of reference.

I also note my request that this submission remain confidential until the Team's 2011-12 Annual Report has been tabled, and that report has been authorised for public release.

The Team hopes that the information set out herein assists the Committee in its endeavours.

Should you have any further questions or require any clarification of the information provided, please do not hesitate to contact Ms Anna Butler on

Yours Sincerely,

Magistrate Mary Jerram
State Coroner
Convenor, Domestic violence Death Review Team

INTRODUCTION TO THE TEAM

The Domestic Violence Death Review Team was established on 16 July 2010 by the *Coroners Amendment (Domestic Violence Death Review Team) Act 2010* which amended the *Coroners Act 2009* through the insertion of Chapter 9A. Chapter 9A of the *Coroners Act 2009* sets out in detail the functions, powers, constitution, access to information and confidentiality provisions of the Team.

The Team's mandate is to provide for the investigation of the causes of domestic violence deaths in New South Wales, so as to reduce the incidence of domestic violence deaths and facilitate improvements in systems and services.¹

The core functions of the Team are to review and analyse individual closed cases of domestic violence deaths, establish and maintain a database so as to identify patterns and trends relating to such deaths and develop recommendations and undertake research that aims to prevent or reduce the likelihood of such deaths.²

THE RESEARCH METHODOLOGY OF THE TEAM

The Team's legislative definition of a *domestic violence death* is:

*the death of a person that is caused directly or indirectly by a person who was in a domestic relationship with the deceased person.*³

The Team is currently building a dataset which captures all unnatural and violent deaths caused by a perpetrator⁴ from 1 July 2000. In order to develop the dataset, the Team conducts surveillance of all unnatural and violent deaths caused by a perpetrator using various data sources, to determine the relationship between the perpetrator and deceased.

¹ *Coroners Act 2009* (NSW) s 101A.

² *Coroners Act 2009* (NSW) s 101F(1).

³ *Coroners Act 2009* (NSW) s 101B(1).

⁴ Including cases of manslaughter by criminal negligence but excluding 'motor vehicle manslaughter'.

The Team classifies each relationship as follows:

- **Category 1 - Intimate Partner** [as set out in ss 101C(1)(a)-(c) of the Act] including spouse, separated spouse, de facto, ex-de facto, extramarital partner, former extramarital partner, boyfriend, ex-boyfriend, girlfriend, ex-girlfriend, and any other current or former intimate personal relationship, whether or not the intimate relationship involved or had involved a relationship of a sexual nature;
- **Category 2 - Relative/kin** – [as set out in ss 101C(1)(e) and 101C(2) of the Act] includes the usual familial relationships (including in-laws of an intimate partner) and extended family or kin where kinship systems are relevant to a person's culture;
- **Category 3 - No Relationship** – encompasses non-intimate friends, acquaintances, flat-mates, and strangers; or
- **Category 4 - Unknown** - the identity of the perpetrator is unknown.

From this initial level of classification based on relationship, the Team then undertakes a comprehensive analysis of all available material for each case and further classifies each death based on whether or not there is a domestic violence context.

A death is held to have occurred in a context of domestic violence where there is any evidence or reference to a relevant history of domestic violence behaviour between the perpetrator and the deceased or any other relevant parties. A death that occurs following a recent relationship breakdown/separation or where there are known child custody issues will be considered to have occurred in a context of domestic violence regardless of an otherwise unknown history of domestic violence between the parties.

Accordingly, Categories 1-3 are further classified as follows:

- **Category 1A** – Perpetrator and deceased were intimate partners and the death occurred in a context of domestic violence;
- **Category 1B** - Perpetrator and deceased were intimate partners but there is no identifiable domestic violence context;
- **Category 2A** – Perpetrator and deceased were relatives/kin and the death occurred in a context of domestic violence;
- **Category 2B** – Perpetrator and deceased were relatives/kin but there is no identifiable domestic violence context;
- **Category 3A** – Perpetrator and deceased were not intimate partners or relatives/kin but the death occurred in a context of domestic violence (for example where a person is killed intervening in a domestic violence incident or where a person is killed by their partner's former intimate partner);
- **Category 3B** – Perpetrator and deceased were not intimate partners or relatives and there is no identifiable domestic violence context.

The Team's database captures basic demographic information for each category of death.

Where a death is identified as having occurred in the context of domestic violence, a comprehensive range of data variables capture detailed information about: the deceased, the perpetrator, their

relationship, the death, and identifiable risk and vulnerability indicators. The database also captures sentencing information and information on judicial or coronial outcomes.

MULTIPLE PERPETRATORS

In some cases a deceased may be killed by multiple perpetrators acting together. In these cases the relationship between the deceased and each perpetrator may be such that the death may sit in different categories. For example, if a deceased is killed by both their intimate partner and their child, in the context of domestic violence, this would be both a Category 1A death (deceased killed by intimate partner) and a Category 2A death (deceased killed by relative/kin).

In these circumstances the death is effectively counted twice, once as a Category 1A death and once as a Category 2A death. As a consequence, the individual deaths recorded in each category may not necessarily add up to the total number of deceaseds (and adding the Categories together may result in a greater number of deaths being recorded).

When calculating the total number of deaths in a particular review period, any double counting is rectified to ensure that the total number of deaths recorded is accurate.

DATA AND RESEARCH RELEVANT TO THE INQUIRY

In the course of developing its dataset, the Team has generated data which gives consideration to the use of the partial defence of provocation in cases classified as Category 1A and Category 3A deaths.

In order to demonstrate the prevalence of both successful and unsuccessful uses of the provocation defence in Category 1A and 3A cases, an overview of the data is set out below.

THE DATASET

During the period 1 July 2000 to 30 June 2009, there were a total of 724 incidents resulting in 763 unnatural and/or violent deaths across all Categories 1 to 4 (**Figure 1.1**). Of the 763 deaths, 131 were classified as Category 1A and 20 were classified as Category 3A.

Figure 1.1 - ALL DEATHS ALL CATEGORIES (1 July 2000 – 30 June 2009)

Total Number of Incidents	724
Total Number of Deaths	763
Total Number of Category 1A Deaths	131
Total Number of Category 3A Deaths	20

The gender breakdown for the 131 Category 1A deaths was 101 females and 30 males (**Figure 1.2**).

Within Category 1A incidents, 25 perpetrators were female and 105 perpetrators were male (**Figure 1.2**).

The gender breakdown for the 20 Category 3A deaths was 1 female and 19 males (**Figure 1.3**).

Within Category 3A incidents, all 20 perpetrators were male (**Figure 1.3**).

Figure 1.2 - CATEGORY 1A: DECEASED/PERPETRATOR GENDER (1 July 2000 - 30 June 2009)

	MALE	FEMALE	TOTAL
Deceased	30	101	131
Perpetrator	105	25	130

Figure 1.3 - CATEGORY 3A: DECEASED/PERPETRATOR GENDER (1 July 2000 - 30 June 2009)

	MALE	FEMALE	TOTAL
Deceased	19	1	20
Perpetrator	20	0	20

MULTIPLE PERPETRATORS, CATEGORIES 1A AND 3A, 1 JULY 2000 – 30 JUNE 2009

During the reporting period there were 2 cases in the Category 1A and 3A deaths where a deceased was killed by multiple perpetrators.

- Case 1 – killed by intimate partner (Category 1A death) and killed by husband of intimate partner (Category 3A death).
- Case 2 – killed by former intimate partner (Category 1A death) and killed by former partner's current intimate partner (Category 3A death).

Case 1 concerned the killing of a man perpetrated by his extramarital intimate partner (Intimate Partner relationship - Category 1A death), and her husband (No relationship to deceased - Category 3A death). Provocation was argued successfully by the male perpetrator in this case, and the case is discussed below (**R v Munesh Goundar [2010]**).

Case 2 concerned the killing of a man by his former girlfriend (intimate partner – Category 1A death) and her current intimate partner (No relationship to deceased – Category 3A death). Provocation was not argued in this case.

Consequently, the deaths in both Case 1 and Case 2 are counted as deaths in both Categories 1A and 3A. This means that the number of deaths in Category 1A and 3A do not accurately reflect the actual number of deaths in the dataset.

The total number of deaths referred to in this submission rectifies the double-counting caused by these instances of multiple perpetrators, but caution needs to be used when considering the proportion of specified Category deaths to the whole number of deaths in the dataset.

CATEGORY 1A PERPETRATOR OUTCOMES

Out of the 131 Category 1A incidents, the following outcomes were recorded (**Figure 1.4**).

- In 29 cases the perpetrator pleaded guilty to murder (2 females; 27 males);
- In 29 cases the perpetrator was found guilty of murder at trial (1 female; 29 males);
- In 25 cases the perpetrator pleaded guilty to manslaughter (10 females; 15 males);
- In 6 cases the perpetrator was found guilty of manslaughter at trial (2 females; 4 males);
- In 5 cases the perpetrator was found not guilty by reason of mental illness (0 females; 5 males);
- In 6 cases the perpetrator was acquitted (5 females; 1 male);
- In 3 cases the matters were not billed (1 female; 2 males);
- In 23 cases a coronial finding was handed down as the perpetrator committed suicide (1 female; 22 males); and
- In 4 cases enquiries are still being made in relation to the outcome.

From the Category 1A deaths that occurred during this period, there were 16 cases⁵ where the partial defence of provocation was raised by the perpetrator. Of these 16 perpetrators, 14 were male and 2 were female.

Of the 6 cases where the perpetrator was found guilty of manslaughter, 3 were so determined on the basis of provocation. All 3 of these perpetrators were male.

The remarks on sentence have been reviewed for 27 of the 29 cases where the perpetrator was found guilty of murder.⁶ Of the 27 cases reviewed, 10 perpetrators raised the defence of provocation without success. All 10 of these perpetrators were male.

⁵ Note: This may not be an exhaustive list as it does not include cases where self-defence was successfully argued resulting in a successful defence. In such cases provocation may have been argued in the alternative as a partial defence, but was trumped by self-defence. Note also, in two cases the remarks on sentence were not available and therefore not reviewed.

⁶ In one case the perpetrator was tried and sentenced in Queensland. In one case the remarks on sentence were not available.

The remarks on sentence have been reviewed for 24 of the 25 cases where the Crown accepted a guilty plea to manslaughter.⁷ Of the 24 cases reviewed, in 1 case the Crown accepted the guilty plea to manslaughter and in 1 case provocation could not be negated.

Figure 1.4 – CATEGORY 1A: PERPETRATOR OUTCOMES (1 July 2000- 30 June 2009)

Outcome	Female Perpetrator	Male Perpetrator	Total
Guilty Plea Murder	2	27	29
Verdict – Guilty Murder	1	28	29
Guilty Plea Manslaughter	10	15	25
Verdict – Guilty Manslaughter	2	4	6
Verdict – Not Guilty by Reason of Mental Illness	0	5	5
Acquittal	5	1	6
No Billed	1	2	3
Coronial Finding	1	22	23
Still enquiring	2	2	4
Total	25	105	130

CATEGORY 3A PERPETRATOR OUTCOMES

Out of the 20 Category 3A incidents, the following outcomes were recorded (**Figure 1.5**).

- In 6 cases the perpetrator pleaded guilty to murder;
- In 3 cases the perpetrator was found guilty of murder at trial;
- In 4 cases the perpetrator pleaded guilty to manslaughter;
- In 5 cases the perpetrator was found guilty of manslaughter at trial
- In 1 cases the perpetrator was acquitted;

⁷ In one case the remarks on sentence were not available.

- In 1 case enquiries are still being made in relation to the outcome.

Figure 1.5– CATEGORY 3A: PERPETRATOR OUTCOMES (1 July 2000- 30 June 2009)

Outcome	Female Perpetrator	Male Perpetrator
Guilty Plea Murder	0	6
Verdict – Guilty Murder	0	3
Guilty Plea Manslaughter	0	4
Verdict – Guilty Manslaughter	0	5
Acquittal	0	1
Still enquiring	0	1
Total	0	20

From the Category 3A deaths that occurred during this period, there were 6 cases where the partial defence of provocation was raised by the perpetrator. All perpetrators of deaths in this category were male.

Of the 5 cases where the perpetrator was found guilty of manslaughter, 3 were so determined on the basis of provocation.

Of the 3 cases where the perpetrator was found guilty of murder, 2 raised the defence of provocation without success.

Of the 4 cases where the Crown accepted a guilty plea to manslaughter, 1 was on the basis of provocation.

PROVOCATION CASES –1 JULY 2000 – 30 JUNE 2009

Set out below are short summaries of the facts and outcomes in each Category 1A and Category 3A cases where provocation was successfully raised as a defence, for deaths occurring during the period 1 July 2000 – 30 June 2009.

CATEGORY 1A PROVOCATION CASES

CATEGORY 1A – GUILTY VERDICT MANSLAUGHTER

R v Hamoui [No. 4] [2005] NSWSC 279 was a case where a man (Abdul Razzak Hamoui) was charged with the murder of his ex-girlfriend Julie Haklane, who had recently started seeing another man. Ms Haklane had gone missing one evening after making contact with Mr Hamoui, who was out of prison on bail at the time. Several days after going missing, Ms Haklane's body was found in her car which was parked on a suburban street. Ms Haklane had been strangled and there was evidence that her wrists had been bound prior to her death. At trial, Mr Hamoui pleaded not guilty to murder and was found guilty of manslaughter. According to the judgment, this verdict was reached by the jury because the Crown failed to negate the defence of provocation which had been argued by Mr Hamoui. The court was unable to speculate on which aspect of provocation the jury determined the verdict in this case.

R v Williams [2004] NSWSC 189 was a case where a man killed his intimate partner, Donna Pearce, by striking her numerous times with a dumbbell, and dumped her body in the bush, before robbing her flat and fleeing to Queensland. After a few days, his friend suggested to him that the location where he had dumped the body may have been too obvious at which time he returned to NSW and moved the body to another location. Mr Williams was successful in claiming provocation at jury trial. According to the judge, Mr Williams was a person who was short tempered and that this characteristic was exacerbated by his protracted and heavy use of amphetamines and cannabis over a period that relevantly extended some months before the killing. According to the judge;

"The killing of Donna Pearce involved the actual use of violence. She was beaten to death. The attack on her was cruel. Her death was caused by a man who has a long history of previous criminal convictions, a number of which involved violence. The outcome for Donna Pearce was fatal. The prisoner was a powerful man. Donna Pearce was vulnerable. However, her killing was not planned. It was a consequence of a man who was bad tempered by nature and who had made matters worse by his persistent and high level use of illicit drugs, being provoked by her. What she did was not all that provocative but it was sufficient, consistently with the jury's verdict, to meet the criteria of provocation. Although the killing did not amount to murder, it was a very bad case of manslaughter in the high, indeed very high, levels of culpability for such crime."

R v Gabriel [2010] NSWSC 13 was a case where the Mr Gabriel killed his wife by striking her seven times to the head with a hammer. It was the offender's case that when he struck the deceased with the first blow with the hammer that he did not intend to kill or to inflict grievous bodily harm upon her and was acting in self-defence, as she was threatening him with a knife. He argued that for the 6 subsequent blows with the hammer he was acting under provocation. The jury accepted that his wife had threatened him with a knife and that he had struck her 7 times with a hammer. The jury rejected his contention that he had struck his wife in self defence, but accepted his defence of

provocation. In assessing the gravity of the crime, the judge noted that that his mental state, including his depressive illness, factored into assessing provocation as a mitigating factor in sentencing. According to the judge;

"The degree of provocation offered to the offender cumulatively over the years by the deceased was not to my mind of a high order. The offender's underlying conditions, however, increased his negative perception of his wife's conduct and the hurt that he experienced. The provocation was materially heightened when the deceased placed the knife to the offender's throat. This was followed shortly thereafter by the loss of self-control. Tragically but for the introduction of the knife into the argument, the manslaughter would not have occurred. These are considerations, in my opinion, which reduce the objective gravity of the offence: R v Alexander (1994) 78 A Crim R 141 at 144"

CATEGORY 1A – GUILTY PLEA MANSLAUGHTER

R v Russell [2006] NSWSC 722 was a case where a woman (Ms Russell) was charged with the murder of her de facto husband. The relationship between Ms Russell and the deceased was characterised by domestic violence and directly prior to the killing, there is evidence that the deceased struck Ms Russell and made derogatory comments about Ms Russell's daughter. Ms Russell argued that the deceased threatened her life and goaded her to 'stab him', which caused her to take the knife and stab the deceased once. He died as a consequence of the single stab wound. The Crown accepted a plea of guilty to manslaughter, stating that the defence of provocation could not be negated.

R v Stevens [2008] NSWSC 1370 was a case where a female deceased was killed by her intimate partner. The female deceased was addicted to drugs, and there was a substantial history of domestic violence, where the offender (Mr Stevens) was the perpetrator. Prior to killing the deceased, Mr Stevens confronted the deceased in a public place - at the pub – and dragged her away. Neighbours recorded hearing arguments and fighting throughout the night. Later than night the deceased was found dead with 76 separate injuries. Mr Stevens argued provocation on the basis that he had received a message earlier in the evening stating that the deceased was 'off her face' at the pub while he was at home with the couple's child, and that he suspected the deceased had been unfaithful to him. Mr Stevens argued that he had lost control when the deceased had told him that she had been unfaithful, the evening of her death. The Crown accepted a plea of guilty to manslaughter on the basis of provocation.

CATEGORY 3A PROVOCATION CASES

CATEGORY 3A – GUILTY VERDICT MANSLAUGHTER

Regina v Ronnie Phillip Lovett [2009] NSWSC 1427 was a case where a man, Ronnie Lovett, killed the new intimate partner of his former de facto wife, stabbing the deceased multiple times with a knife, garden stake and kicking him until he died. The sustained attack on the deceased occurred following the discovery earlier in the day that the deceased had commenced a relationship with Mr Lovett's former de facto partner. Mr Lovett confronted the deceased about the relationship, which the deceased allegedly denied. Later that day, Mr Lovett attended his former de facto partner's home with a knife he had obtained from his mother's house. Upon entering the house he found the deceased and his former partner engaged in sexual intercourse, at which time he commenced attacking the deceased by stabbing and kicking him. Although the judge in this case conceded that the conduct of the deceased earlier in the day in denying the new relationship was only 'mildly provocative', he stated that upon finding the deceased and his former partner having sex, Mr Lovett would have been surprised and at this point, would have lost control. According to the judge, the verdict shows that an ordinary person in Mr Lovett's position 'could have been provoked to form the intent that he formed.' Mr Lovett successfully argued the defence of provocation and was found guilty of manslaughter.

R v Munesh Goundar [2010] NSWSC 1170 was a case where a woman, Diana Goundar⁸ and her husband, Munesh Goundar, together murdered Ms Goundar's extra-marital partner. Mr Goundar had found out about his wife's extramarital affair several weeks earlier, and he and Ms Goundar were in the process of divorce (initiated by Mr Goundar). On the day of the incident, Ms Goundar called the deceased to her house where Mr Goundar stabbed him multiple times. According to Mr Goundar, he did not direct Ms Goundar to call the deceased, and was surprised to encounter the deceased and his wife in the master bedroom. Mr Goundar maintained that Ms Goundar told the deceased to tell her husband that he had 'raped' her. This version of events conflicted with the evidence of a neighbour. The judge in this case conceded that it was likely that Mr Goundar had instructed his wife to call the deceased. Nevertheless, Mr Goundar successfully argued the defence of provocation and was found guilty of manslaughter.

⁸ Ms Goundar pleaded guilty to murder and was sentenced to imprisonment for 12 years (NPP of 9 years). She appealed against the severity of her sentence upon the ground that she had a justifiable sense of grievance arising from the disparity between her sentence and that imposed upon her co-offender Munesh Goundar and upon the further ground that the sentence imposed was otherwise manifestly excessive. Ms Goundar's appeal succeeded on the basis that the sentence imposed was manifestly excessive and her sentence was reduced to 9 ½ years with a NPP of 7 years 2 months. (Goundar, Diana v R [2012] NSWCCA 154).

R v Mohamad Ali [2005] NSWSC 334 was a case where a man, Mohamad Ali, killed another man (the deceased) who was obsessed with his de facto wife, notwithstanding that he was dating the sister of his de facto wife. The deceased had exhibited ongoing stalking and obsessive behaviour towards Mr Ali's wife, including kidnapping her at gunpoint, firing shots into her waterbed, sexually assaulting her and burning her. The deceased subsequently visited Mr Ali at his home, at which time conflict ensued resulting in Mr Ali firing multiple gunshots at the deceased. Both provocation and excessive self defence were argued as partial defences to murder and put to the jury. It is unclear from the verdict which partial defence was successful, but it is evident that Mr Ali was found guilty of manslaughter.

CATEGORY 3A – GUILTY PLEA MANSLAUGHTER

Regina v Lynch [2002] NSWSC 1140 was a case where a man, Kevin Lynch, killed the new boyfriend of his estranged wife (Jason Phelps) by stabbing him multiple times. The attack on the deceased followed Mr Lynch finding out about his wife's new boyfriend, the deceased, and subsequently becoming increasingly angry at her to the point of killing the deceased. For some months prior to the deceased being killed, the wife of the perpetrator had been having a relationship openly with another man, whom she stayed with regularly on the weekends, due to the breakdown of her marriage with Mrs Lynch. Mr Lynch's estranged wife met the deceased and commenced a relationship with him several weeks prior to his death. The night before the killing, the deceased, Mr Lynch and his estranged wife, were all socializing with others at a local bar in town. As the night progressed, Mr Lynch became increasingly agitated at the displays of affection between the deceased and Mr Lynch's estranged wife, and Mr Lynch confronted her about it, before pouring four glasses of beer over her head. This resulted in Mr Lynch being removed from the venue. Later, in the early hours of the morning, Mr Lynch (who had since armed himself with two knives) went to his estranged wife's house and stabbed the deceased. The judge in the case was '*perfectly satisfied beyond reasonable doubt that the killing of Jason Phelps was an act done under provocation and in circumstances where the prisoner had lost his self-control and was induced to that state by the conduct of the deceased towards him.*' Mr Lynch successfully argued the defence of provocation and was found guilty of manslaughter.