

INQUIRY INTO PARTIAL DEFENCE OF PROVOCATION

Organisation: Women's Electoral Lobby

Date received: 7/08/2012



66 Albion Street
Surry Hills NSW 2010
wel@welnsw.com.au
7 August 2012

The Director
Select Committee on the Partial Defence of Provocation
Parliament House
Macquarie St
Sydney NSW 2000
provocationinquiry@parliament.nsw.gov.au

WEL NSW SUBMISSION

Authorised by the NSW WEL Executive on 1 August 2012

NSW WEL recommendation

That the partial defence of provocation be RETAINED

The defence of provocation should be retained. The NSW Judicial Commission's report(attached) illustrates that between 1990 and 2004 the partial defence was relied upon by 17 female defendants to reduce a charge of murder to manslaughter.¹

The impact on women defendants of abolishing provocation is much greater than even shown in the report. The majority of cases do not go to trial because the prosecution accepts a plea of guilty to manslaughter in full discharge of an indictment for murder. If provocation is abolished the ability of these defendants to plead to the lesser offence of manslaughter will be lessened.

There have been a number of recent cases where women have pleaded guilty to manslaughter on the basis of provocation even though self-defence may have been open to them had they decided to go to trial. But contesting a murder charge at trial runs the risk of being convicted of that offence and receiving a substantial sentence of full-time imprisonment. The most lenient sentence imposed for the offence of murder in NSW between 1994 and 2001 was 9 years imprisonment with a non-parole period of 5 years. Moreover, this was an unusual case where the judge derived sentencing guidance from manslaughter cases rather than murder since the defendant had pleaded guilty to murder in circumstances akin to manslaughter.²

In *R v Chant*³ the prosecution accepted the defendant's plea of guilty to manslaughter on the basis of provocation. The defendant had shot her husband following a violent assault on her accompanied with threats to shoot her and the firing of the gun. She was sentenced to 4 years and 9 months imprisonment with a non-parole period of 3 years and 4 months.

¹ S Inkyk, H Donnelly and J Keane, *Partial Defences to Murder in NSW 1990-2004*, Judicial Commission of New South Wales (2006). See <http://www.judcom.nsw.gov.au/publications/research-monographs-1/monograph28/monograph28.pdf>

² See J Keane and P Poletti, *Sentenced Homicides in NSW 1994-2001*, Judicial Commission of New South Wales (2004). See <http://www.judcom.nsw.gov.au/publications/research-monographs-1/monograph23/homicide.pdf> See also discussion in E Sheehy, J Stubbs and J Tolmie, 'Defences to Homicide for Battered Women: A Comparative Analysis of Laws in Australia, Canada and New Zealand' (forthcoming) *Sydney Law Review*

³ [2009] NSWSC 593.

In *R v Russell*⁴ the prosecution accepted the defendant's plea of guilty to manslaughter on the basis that the deceased, her de facto partner, had provoked her. The deceased had verbally abused the defendant for talking on the phone, struck her in the face, flashed a knife in her face and threatened to kill her. The defendant picked up a knife and stabbed the deceased. She was sentenced to 6 years imprisonment with a non-parole period of 3 years.

Women defendants who kill in the context of domestic or family violence plead guilty to manslaughter for many reasons. These include:

- the obvious benefits of avoiding a murder conviction;
- a guilty plea generally entitles the defendant to a reduction in sentence; a manslaughter conviction carries with it the possibility of a non-custodial sentence; avoiding the incredibly stressful experience of standing trial;
- and the reluctance to testify publicly about the humiliating and degrading nature of the violence they suffered at the hands of the deceased.

If provocation is abolished and other partial or full defences are not available on the evidence, female defendants may be convicted of murder in circumstances that arguably fall far below the level of culpability reserved for that offence.

In *R v KMB*⁵ the defendant was convicted of the provocation manslaughter of her uncle who she had suspected had been sexually abusing her 3 young children. When she discovered him masturbating in front of her 4-year old son she lost control and fatally assaulted him. She was sentenced to 6 years imprisonment with a non-parole period of 3 years and 6 months.

In *R v Ko*⁶ the defendant had married the deceased out of shame after he raped her and forced her to have an abortion. Their sexual life was attended by significant brutality and degrading conduct on the part of the deceased, including him burning her breasts with cigarettes. On the day of the killing the deceased had said he wanted a divorce and told her she should kill herself. She responded by stabbing him 17 times. She was sentenced to 4 years imprisonment with a non-parole period of 18 months. In this case, the partial defence of substantial impairment by abnormality of mind was also established. If the manslaughter conviction had been based solely on this defence the substantial level of victim precipitation on the part of the deceased would have been obscured by the focus on the defendant's depressive disorder.

If provocation was abolished it is likely NSW would return to the unsatisfactory position prior to the significant law reforms in the early 1980s. Women who resort to lethal violence in the context of abusive relationships – but who fall short of the requirements of self-defence or excessive self-defence – will be convicted of murder. Or if they opt to plead guilty to manslaughter on the basis of substantial impairment by abnormality of mind (and the plea is accepted by the prosecution) they will be viewed as 'sick' rather than ordinary people pushed to extreme by their intolerable circumstances.

It is important to retain the defence of provocation and not repeal it as in Victoria and Tasmania as the powerful mitigating considerations seen in the above cases and many others (including some involving male defendants) would be relegated merely to the judge's discretion at sentence. Among the NSW Law Reform Commission's reasons in 1997 for recommending the defence of provocation be retained was the recognition that community acceptance of sentences is vital to the due administration of justice. The Commission noted that 'a conviction of manslaughter ensures a greater likelihood that the community will understand and accept a reduced sentence which reflects a lesser degree of culpability.'⁷

Further information

For more detailed discussion on the Judicial Commission's report and the NSW Law Reform Commission's recommendations, as well as further reasons to retain the defence of provocation in NSW a copy of Chapter 6 of D Brown et al, *Criminal Laws: Materials and commentary on Criminal Law and Process of New South Wales* (2011, 5th ed) is attached. The most relevant pages are 583-5, 591-6, 603-18 (esp 614-618). Pp 665-667 also contains a more general and theoretical account of why it is important to keep the defences and not repeal as in Victoria and Tasmania.

⁴ [2006] NSW 72.

⁵ [2003] NSWSC 862.

⁶ [2000] NSWSC 1130.

⁷ NSWLRC, *Partial Defences to Murder: Provocation and Infanticide*, New South Wales Law Reform Commission (1997) at 2.24. See <http://www.lawlink.nsw.gov.au/lrc.nsf/pages/R83CHP2>.