

**Submission
No 23**

INQUIRY INTO PARTIAL DEFENCE OF PROVOCATION

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Australian Government

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The Director
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Submission to Inquiry into the partial defence of provocation

The Australian Law Reform Commission (ALRC) welcomes the opportunity to make a submission to this Inquiry by the Legislative Council Select Committee on the Partial Defence of Provocation.

ALRC/NSWLRC Family Violence Inquiry

This submission draws heavily on the experience and findings in the ALRC's Family Violence Inquiry, conducted jointly with the New South Wales Law Reform Commission (together referred to as 'the Commissions').

The ALRC Inquiry culminated in the production of the report, *Family Violence—A National Legal Response* (ALRC Report 114, 2010) (the Family Violence Report), which was launched by the federal Attorney-General and NSW Attorney General on 11 November 2010. An electronic version of the Family Violence Report (and Summary Report) and the preceding Consultation Paper are available on the ALRC website at www.alrc.gov.au.

The Terms of Reference required consideration of:

- the interaction in practice of state and territory family and domestic violence and child protection laws with the *Family Law Act 1975* (Cth) and relevant Commonwealth, state and territory criminal laws; and
- the impact of inconsistent interpretation or application of laws in cases of sexual assault occurring in a family/domestic violence context, including rules of evidence, on victims of such violence.

In relation to both issues, the Commissions considered what, if any, improvements could be made to relevant legal frameworks to protect the safety of women and their children.

The ALRC refers the Select Committee to Chapter 14 of the Family Violence Report, which deals with the recognition of family violence in homicide defences, including provocation, self-defence, and excessive self-defence. The relevant recommendations (Recommendations 14–1 to 14–5) and the reasons for them are briefly discussed below. The Committee may find the research and recommendations of some assistance in its deliberations into a partial defence of provocation in NSW criminal law.

Recognising family violence in homicide defences

The Family Violence Report summarises state and territory laws in relation to the offences of murder and manslaughter and different defences to those offences (see paras 14.5–14.73). Several states and territories have given substantial consideration to recognising family violence in the context of defences to homicide and important statutory reforms have resulted from this, including:

- reforms to the defence of self-defence—including removal of the requirement for the threat to be imminent (Western Australia);

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- reforms to the defence of provocation—including the removal for the requirement for the defendant to have ‘acted on the sudden and before there was a time for his passion to cool’ (Northern Territory), and removal of the requirement for the provocative conduct of the deceased to have occurred immediately prior to the act or omission causing death (for example, NSW);
- abolition of the defence of provocation in part because of its unsuitability for female victims of family violence (Victoria, Western Australia, Tasmania);
- expanding self-defence to take family violence into account, including express provision for the leading of evidence about family violence (Victoria); and
- creating a new defence of family violence (Queensland).

Full details of the relevant reforms may be found in the Family Violence Report. The Report noted that, with the exception of the Queensland legislation, most reforms have not introduced a separate defence specifically to accommodate victims of family violence.

Recognising family violence in homicide defences

The Family Violence Report took a high-level approach to the issues raised by defences to homicide and did not make recommendations about specific forms of defences or individual provisions in state and territory criminal legislation.

Rather, the Commissions recommended that state and territory criminal legislation should ensure that defences to homicide accommodate the experiences of family violence victims who kill, recognising the dynamics and features of family violence (Recommendation 14–1).

Considerations in the framing of defences

In addition, the Commissions identified several matters that should be taken into account in ensuring that the dynamics of family violence are accommodated in homicide defences. These matters were directed towards:

1. ensuring that homicide defences promote substantive equality in the treatment of persons who kill in response to family violence and those who kill in response to other forms of violence;
2. addressing technical limitations within existing homicide defences to recognise the full range of situational and psychological circumstances associated with family violence; and
3. ensuring that relevant homicide defences are applied consistently in individual cases involving persons who kill in response to family violence.

Equality of legal responses to violence

The Commissions concluded that separate, family-violence specific defences may result in the differential treatment of persons who have killed in response to family violence, compared with those who have killed in response to non-familial violence.

To this end, the Commissions concluded that it is preferable for family-violence related circumstances to be integrated into existing defences of general application. In the Commissions’ view, existing defences—in particular self-defence—are doctrinally capable of accommodating the diverse situational and psychological circumstances of family violence victims.

The Commissions also stated that the circumstances of family violence ought to be recognised in both complete and partial defences, given the different purposes served by each form of defence. While complete defences are intended to remove all criminal liability associated with fatal responses to family violence, partial defences recognise the circumstances of family violence only for the purposes of avoiding a murder conviction. The Commissions considered that an exclusive focus on partial defences falls short of accommodating the circumstances of family violence because it does not address limitations in complete defences.

Addressing technical limitations in existing defences

Given the disparate and jurisdiction-specific nature of existing approaches to homicide defences, the Commissions recommended that state and territory governments should review their existing defences with a view to assessing

the extent to which they accommodate the experiences of family violence victims who kill (Recommendation 14–2). The Commissions considered that such reviews should encompass:

- defences specific to family violence victims, as well as those of general application that may apply to victims of family violence; and
- both complete and partial defences, recognising the discrete purposes that each form of defence is intended to serve.

The Commissions recommended that reviews should consider:

- how the relevant defences are being used—including in charge negotiations—by whom and with what results; and
- the impact of rules of evidence and sentencing law and policy on the operation of defences.

The consistent application of defences

The Commissions acknowledged that a focus on the doctrinal content of defences is insufficient to ensure that the experiences of family violence victims who kill are accommodated in practice. Continuing legal professional and judicial education is essential to ensuring that judges and lawyers practising in criminal law understand the nature and dynamics of family violence, and how evidence of family violence may be relevant to criminal defences.

In this context, the Commissions recommended that a proposed national family violence bench book should include a section that provides guidance to judicial officers on the operation of defences to homicide where a victim of family violence kills the person who was violent towards him or her (Recommendation 14–3).

National consistency

The Commissions supported the development of a consistent or harmonious approach by the states and territories to the recognition of family violence in defences to homicide. The Commissions considered that there is no principled justification for the differential treatment of victims of family violence solely on the basis of jurisdiction. It was recommended that the Model Criminal Law Officers' Committee of the Standing Committee of Attorneys-General (now the Standing Council on Law and Justice)—or another appropriate national body—should investigate strategies to improve the consistency of approaches to recognising the dynamics of family violence in homicide defences in state and territory criminal laws (Recommendation 14–4).

Leading evidence of family violence

Finally, the Commissions recommended that state and territory criminal legislation should provide express guidance about the potential relevance of family-violence related evidence in the context of homicide defences, in similar terms to s 9AH of the *Crimes Act 1958* (Vic) (Recommendation 14–5). The Commissions endorsed the views of the Victorian Law Reform Commission that such a provision would assist in avoiding unnecessary arguments concerning relevance and ensure the range of factors which may be necessary to represent the reality of the accused's situation are readily identified.

We hope this has been of assistance to you. If you require any further information please do not hesitate to contact me on (02) 8238.6319.

Yours sincerely,