

INQUIRY INTO PARTIAL DEFENCE OF PROVOCATION

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The Inner City Legal Centre (ICLC) is a community legal centre in Kings Cross that provides legal assistance to socially and economically disadvantaged clients in the Inner City of Sydney. ICLC also provides a specialist state-wide legal service to people who identify as Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI). Our service includes legal advice on criminal matters and our clientele includes those who are victims of domestic violence.

Recommendations:

- (i) That the provocation defence in NSW law be abolished.
- (ii) In the alternative, the defence of provocation should be amended to exclude the use for 'gay panic' in line with the legislative reforms in the NT and ACT.
- (iii) That reform is made to the defences to murder to take into account circumstances of domestic violence suffered by the accused and to exclude the use of the gay panic defence.
- (iv) That there be more community education of domestic violence and same-sex relationships.

The Director
Select Committee on the Partial Defence of Provocation
Parliament House
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Sydney NSW 2000

By email: provocationinquiry@parliament.nsw.gov.au

23 August 2012

Dear Committee Members

SUBMISSION: INQUIRY INTO THE PARTIAL DEFENCE OF PROVOCATION

Thank you for the opportunity to make a submission to the inquiry into the partial defence of provocation. The Inner City Legal Centre (ICLC) is a community legal centre in Kings Cross that provides legal assistance to socially and economically disadvantaged clients in the Inner City of Sydney. ICLC also provides a specialist state-wide legal service to people who identify as Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI). Our service includes legal advice on criminal matters and our clientele includes those who are victims of domestic violence.

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1 Summary

Recommendations:

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- (ii) In the alternative, the defence of provocation should be amended to exclude the use for 'gay panic' in line with the legislative reforms in the NT and ACT.
- (iii) That reform is made to the defences to murder to take into account circumstances of domestic violence suffered by the accused and to exclude the use of the gay panic defence.
- (iv) That there be more community education of domestic violence and same-sex relationships.

1.1 Abolition of the provocation defence

In our submission, the partial defence of provocation should be abolished.

The provocation defence is an 'anachronism' that has led to unjust outcomes. The historical development of provocation suggests that its use is associated with 'honour killings', for example, where men who kill their spouses in response to alleged infidelity or relationship breakdown have reduced the charge of murder to manslaughter. Provocation has been used this way in recent cases including *Singh*¹ and *Ramage*² as discussed below.

It is our view that the other defences to murder, such as self-defence and excessive-self-defence, once reformed, should provide adequate grounds for mitigating the punishment faced by people who kill as a proportional response to threats, including threats of sexual harassment and domestic violence.

1.2 Gay panic

Provocation currently provides protection to killers who claim 'gay panic'. The defence has been used to reduce murder to manslaughter by those who claim that they were responding to an unsolicited sexual advance by someone of the same-sex. If the provocation defence is not abolished, we recommend reforms similar to those enacted in the Australian Capital Territory (ACT) and the Northern Territory (NT) that preclude the use of the provocation defence in cases of a non-violent sexual advance.

¹ *Singh v R* [2012] NSWSC 637.

² *R v Ramage* [2004] VSC 508.

1.3 Domestic violence

We urge the Committee to take into account the full implications of any reforms for victims of domestic violence. The existing defences are inadequate for victims of domestic violence because they do not take into account the long term abuse experienced by many victims. We recommend creating a new defence, reforming the existing defences, or adopting a new model of sentencing, to specifically take the accused's history of domestic violence into account.

2 Historical Context of the Defence of Provocation

The doctrine of provocation in unlawful homicide was first developed in English courts in the 16th and 17th centuries.³ Its historical use related to 'honour killings'. A wife's infidelity was considered an 'invasion of property' at the time and, as such, it was considered a provocation.⁴

During the 19th century, this kind of honour killing was less prevalent in society, and the defence evolved to incorporate a 'reasonable person' test and a requirement that the killer 'lost self-control'. This is the current formulation of the defence in NSW.

The defence of provocation developed at a time when murder attracted a mandatory sentence of the death penalty. It was important in these circumstances to offer the accused a means by which they could escape such a fate. The death penalty has been abolished in NSW, although there is a presumption of mandatory life sentences in other states and other common law jurisdictions that retain the provocation defence.

3 The Current Status of Provocation

The provocation defence was established in common law and is enshrined in s 23 of the *Crimes Act 1900* (NSW) (*Crimes Act*). The statutory defence includes an objective 'reasonable person' test and a requirement that the killer 'lost self-control'. That means that the accused must show that they temporarily lost control of their actions and were not responsible for their actions, and that another 'reasonable person' would have also acted in this way.

³ New South Wales Law Reform Commission (1997) *Report 83 – Partial Defences to Murder: Provocation and Infanticide*, chapter 2, 2.2-2.3.

⁴ Victorian Law Reform Commission (2004) *Defences to Homicide Final Report*, chapter 2, 2.1.

Defendants who successfully rely on the provocation defence serve substantially lower total effective sentences. A Victorian study indicates that the most common combination of total effective sentence and non-parole period for murder was eighteen years with a fourteen year non-parole period, whereas for provocation manslaughter it was eight years with a six year non-parole period.⁵

In our view, the provocation defence should be regarded as an 'anachronism', considering how the defence has evolved from its historical context. The historical background of the defence of provocation was given a great amount of weight by the Victorian Law Reform Commission when it considered the abolition of the defence in that state.⁶ The Victorian government adopted its recommendation to abolish provocation in 2005.⁷ In Tasmania, where the defence has also been abolished, the second reading speech by the Minister for Justice refers to the defence as an 'anachronism'⁸ where the death penalty and mandatory life imprisonment for murder have been removed.⁹

We are particularly concerned with how the provocation defence has led to unjust outcomes, particularly in domestic circumstances, as demonstrated by the recent, controversial cases summarised below.

3.1 Case Study: Singh

The most high-profile recent case concerns Chamanjot Singh, who had a murder charge reduced to manslaughter after he raised provocation in defence to the killing of his wife.¹⁰ Mr Singh believed that his marriage was about to end and that he would have nowhere to live. During an argument, he strangled his wife and slit her throat repeatedly with a box cutter. The victim bled to death. Following a successful plea of provocation, Singh was sentenced to a non-parole period of six years in gaol.

⁵ F Stewart and A Frelberg, Sentencing Advisory Council Victoria (2009) *Provocation in Sentencing: Research Report*, 2nd ed, 73.5.

⁶ Victorian Law Reform Commission (2004) *Defences to Homicide Final Report*.

⁷ See *Crimes (Homicide) Act 2005* (Vic).

⁸ Hon J Jackson MHA, Minister for Justice and Industrial Relations, Second Reading Speech, *Criminal Code Amendment (Abolition of the Defence of Provocation) Act 2003* (Tas) *Parliamentary Debates*, Tasmanian House of Assembly, 20 March 2003.

⁹ This is specific to the state of Tasmania. Section 305 of the Criminal Code in Queensland retains mandatory life sentences for murder. This is true also in South Australia. Western Australia and the Northern Territory have presumptive life sentences for murder.

¹⁰ *Singh v R* [2012] NSWSC 637.

3.2 Case Study: *Ramage*

The Victorian reforms which led to the abolition of provocation followed the infamous case of *Ramage*,¹¹ in which a man strangled his wife to death in an argument and, similarly to Singh, had his charge reduced from murder to manslaughter. James Ramage claimed that he was provoked by his wife, who criticised his sexual prowess and threatened to leave him. Ramage successfully raised the provocation defence and served only eight years in a Victorian gaol.

3.3 Case Study: *Sebo*

This is a Queensland case which led to calls for reform of the defence of provocation in that state. Sebo, 28, bashed his 16 year old girlfriend, with whom he had been in a relationship for 20 months, with a steering wheel lock after she drunkenly taunted him that she was going to sleep with other men.

These high profile cases show how the provocation defence has been used by men who cite the infidelity of their partners or relationship breakdowns as a partial justification for their actions. This is consistent with the historical view of the defence as it relates to 'honour killings'.

4 Gay Panic Defence

The defence of provocation has been invoked in cases of 'gay panic'. The so-called gay panic defence or homosexual advance defence is raised when an accused uses one of the defences to murder (provocation, self-defence or excessive self-defence) following the killing of a person of the same sex who they allege made a sexual advance toward them. Gay panic is not a defence on its own, but relies on successfully raising another defence in those particular circumstances.

The gay panic defence is problematic because it legitimises murder that is informed by bigotry. It is a gender-biased application of the law. It is unheard of for women killing men who make sexual advances upon them to raise this defence.

Almost all cases of gay panic occur in places where there is no witnesses or surveillance (for example, a bedroom, or in the case discussed below, a toilet block) and this means that the accused's evidence is often difficult to test in court.

¹¹ *R v Ramage* [2004] VSC 508.

A key law reform initiative of ICLC has been to lobby for legislative reform for LGBTI communities. We advocated for and supported the many important legislative changes contained in the *Miscellaneous Acts Amendment (Same Sex Relationships) Act 2008 NSW*. As noted in the second reading speech (Minister's 2R Speech: Wed 7 May 2008) below:

As these amendments reflect, the Government does not condone a legal structure that perpetuates this sense of social isolation, particularly when it is directed towards same-sex parents... Same-sex parents are entitled to our support in the same way that all parents, regardless of their relationships status, are so entitled. These reforms reflect this support.

It is submitted that reforming the partial defence of provocation to remove the 'gay panic' defence will remove another piece of legislation that isolates individuals based on their sexual orientation. We submit that archaic pieces of legislation that perpetuate differential treatment of gay and lesbian victims of crime have no place in our legal system.

4.1 Case Study: The Gerard Fleming Case

The most recent application of this 'defence' in NSW was the murder of Gerard Fleming.¹² Fleming was fatally stabbed by a teenage boy with whom he was sharing beers in a Narrabeen toilet block while sheltering from the rain. The accused stated that Fleming, an intellectually disabled man, had made a sexual advance towards him. In sentencing the court found him not guilty of murder but guilty of manslaughter on the basis of excessive self-defence. The teenager was sentenced to a non-parole period of three and a half years for manslaughter.

4.2 Proposal of the 1998 Working Party

In 1998 a Working Party reporting to the NSW Attorney-General produced a report on using homosexual advances as a defence in NSW.¹³ The Working Party concluded that the defence of provocation should be amended to exclude gay panic. This was the key recommendation of the Working Party, but it was not adopted.

We support the recommendation, provided that it is supplemented by further amendments to other defences to murder. If provocation were removed from NSW law, this would not solve the gay panic

¹² *R v CR* [2008] NSWSC 1208.

¹³ Working Party (1998) *Homosexual Advance Defence: Final Report of the Working Party*, Recommendation 1.

problem. Cases like Fleming, discussed above, relied on excessive-self-defence. In that case the sentencing judge referred to the fact that the accused was 'panicked', which is similar to the criteria of provocation that one 'loses self control'. The removal of the defence of provocation would not prevent defendants from raising gay panic under another defence.

4.3 ACT and NT Reforms

The ACT and NT have formulated reforms to their provocation laws. The text of the legislation is the same in both territories, as follows:

However the conduct of the deceased consisting of a non-violent sexual advance (or advances) toward the accused:

(a) is not to be sufficient, by itself, to be conduct to which [provocation subsection] applies.¹⁴

The way that the law has been reformed in the territories successfully excludes the use of gay panic. However, we submit that the use of similar provisions across all relevant defences – provocation, self-defence and excessive self-defence – is required to exclude the use of gay panic completely. We recommend that the reforms in the ACT and NT be applied to all defences to murder in NSW.

5 Domestic Violence

The defence of provocation has been used in two very different ways in domestic violence matters:

- (i) By men who kill their wives then claim to have been provoked, as in the recent Singh case; or
- (ii) By people who suffer long-term violent abuse in relationships who kill their attacker out of fear.

As submitted above, the provocation defence should not be available in the first category of cases. The other defences to murder, including self-defence and excessive self-defence, provide sufficient protection to defendants who killed in proportional response to threats.

However, we submit that the existing defences are inadequate for victims of domestic violence because they do not generally take into account the long-term abuse experienced by many victims and the extreme power imbalance that victims face in attempting to defend themselves from abuse. We

¹⁴ Crimes Act 1900 (ACT) s 13(3)(a); Criminal Code (NT) s 158(5).

recommend enacting amendments that take into account the circumstances of domestic violence suffered by an accused.

5.1 Current Issue of Domestic Violence

The Judicial Commission found that, between 1990 and 2004, 28 out of the 75 (37%) uses of the defence of provocation were related to a violent physical confrontation and 21 (28%) involved family or domestic violence.¹⁵ Further to this, there were 26,656 incidents of domestic violence related assault in NSW between 2007 and 2011, not including those assaults which were not reported to police, or those that police did not take reports on.¹⁶

ICLC recognises that domestic violence is perpetrated in all kinds of relationships, including same-sex relationships. This means that a man, transgender, intersex or gender queer person can be the victim of domestic violence perpetrated by any person with whom they are in a domestic relationship with. Most of the literature, and existing law reform projects, refer to only women as victims of domestic violence. This is most common form of reported domestic violence. It is nonetheless important that any law reform recognises the true nature of domestic violence, which impacts across all gender identities. It is also important to recognise the experience of women who are victims of unlawful killing, or who use a defence or proposed defence in court.

ICLC runs a Safe Relationships Project for those who are in same-sex relationships and are victims of domestic violence. The following de-identified case study provides an example of the type of issues our clients require assistance with:

Kim identifies as a lesbian in a violent relationship. Kim contacted ICLC to seek legal advice after sustaining a physical assault by her partner at her workplace. Kim was verbally attacked by her partner "you treat me like shit" and then punched to the head. Kim fell to the ground and was repeatedly kicked to the head and to the side of her body. Five other workers witnessed this assault. Eventually, another worker intervened to stop the attack. Management were informed of the incident, however, did not act. No security or police were called and Kim received no medical attention. Kim's ex-partner left work without being questioned. Kim was left to get herself home. In the days that followed the assault, no action was taken against the ex-partner by

¹⁵ L Roth (2007) *Briefing Paper No 3/07: Provocation and Self-defence in Intimate Partner and Homophobic Homicides*, 9-10.

¹⁶ Bureau of Crime Statistics and Research, *Official NSW Crime Statistics*, http://www.bocsar.nsw.gov.au/lawlink/bocsar/ll_bocsar.nsf/pages/bocsar_crime_stats (last accessed 29 July 2012).

management. Kim presented requiring assistance with various issues. ICLC was able to refer her to an employment solicitor and to assist her with mediation, community engagement and an application for victim's compensation.

Same-sex domestic violence remains under reported and under recognised. The Australian Domestic and Family Violence Clearinghouse¹⁷ released a special collection of research and resources in 2010 on domestic and family violence in same-sex relationships. The findings included:

- Domestic and family violence occurs at the same rate in same-sex relationships as in heterosexual relationships;
- Same-sex victims may experience the same forms of relationship abuse;
- Same-sex victims may also be subject to additional threats and abuse related to their chosen sexuality or gender, such as 'outing' to family, friends and others; and
- Same-sex victims may also experience specific challenges around help seeking such as combating homophobia and a lack of services.

ICLC supports an education campaign, which explicitly includes the experiences of domestic violence in the LGBTI communities.

5.2 Amendments to the Provocation Defence in Light of Domestic Violence Issues

In 2004, the England and Wales Law Reform Commission discussed the abolition of provocation along with other defences such as self-defence. It was suggested that these defences be replaced with one new defence of 'mitigating circumstances'.¹⁸

A variation of this exists in Western Australia where the existing defences are retained, but there is a further defence known as 'extraordinary emergency' that is available for all crimes, including homicide.¹⁹

This allows a judge or jury to take 'extraordinary circumstances' into account when considering the circumstances of a murder and could potentially take sustained domestic violence into account. This kind of reform allows for more judicial (or jury) discretion in dealing with cases, which for some reason do not attract the existing defences, but do not justify a finding of murder due to circumstances of domestic violence.

¹⁷ The Australian Domestic and Family Violence Clearinghouse, "Same Sex and Domestic an Family Violence" <http://www.adfvc.unsw.edu.au/specialcollectionssamesex.htm>

¹⁸ England and Wales Law Commission (2004) *Partial Defences to Murder*, 30 ff.

¹⁹ *Criminal Code Act Compilation Act 1913 (WA)*, s 25.

This kind of flexibility may be retained in the existing defence of provocation. The Victorian Law Reform Commission commented that:

From a practical perspective, many supported the continued retention of provocation on the basis that it provides an important 'halfway house'. If there is no basis for a jury to return a manslaughter verdict for someone who kills intentionally, it is argued that there is a danger that juries will acquit an accused because they are sympathetic towards him or her, or will convict a person of murder where manslaughter might have been the more appropriate outcome.²⁰

The Victorian Law Reform Commission report particularly notes that a victim of domestic violence who, on technical grounds, is unable to raise self-defence, may be in danger of an unjust outcome.

In spite of this, the existing rules of provocation still suffer from a rigidity that the proposals discussed above do not have. This is because under the existing rules of provocation in NSW, the defendant must still prove that they acted as a 'reasonable person' would act. The person must also have 'lost self-control'. This does not take into account various experiences of victims that could extend to specific psychological conditions, such as battered woman syndrome, which is discussed below.

Because domestic violence operates differently to other crimes, the specific circumstances of that crime would need to be taken into account. Recent reports by the Australian Law Reform Commission called for law reform to recognise the specific nature of domestic violence. This includes financial control, psychological control and other aspects of domestic violence that do not necessarily relate to striking the victim physically. Self-defence law in NSW, on the other hand, does not take this kind of abuse into account.

5.3 *Proposals Addressing Domestic Violence*

We support the creation of a new defence, or reform of existing defences, to acknowledge and address issues of prolonged domestic violence. Any reform should prevent the operation of the defence in cases like *Ramage* and *Singh*. The *Crimes Act* could be amended to exclude the use of the provocation defence where a person 'loses self-control' on the basis of their partner leaving a relationship or

²⁰ Victorian Law Reform Commission (2004) *Defences to Homicide Final Report*, 2.46.

committing adultery. This could be done in a similar way to reforms in the ACT and NT that excluded 'gay panic' forming the basis of a defence (as discussed above).

The Victorian Law Reform Commission investigated and discussed a new special defence for victims of domestic violence. These proposals included:

- A model based on the Battered Woman Syndrome principles.
- A 'self-preservation' model, which operated in the same way as existing self-defence law.
- A sentencing model, in which domestic violence would be considered in the sentencing, rather than the trial process.

All of these proposals adopt a more compassionate approach to victims of domestic violence who kill their attackers. The strengths and limitations of the proposals are discussed below.

5.4 Battered Woman Syndrome

The creation of a new defence of Battered Woman Syndrome (BWS) is an extension of existing principles in criminal law relating to victims of domestic violence. BWS is a psychological condition that occurs after a person has been subjected to prolonged domestic violence. It can be used in cases where the duress, provocation or self-defence defences are raised. However, it is subject to strict rules of evidence and, even if successfully raised, it does not guarantee an acquittal. It is also only available following prolonged physical and psychological violence, and subject to a mental health diagnosis.

The application of BWS is very rigid and may not be available in all cases of prolonged domestic violence that result in a homicide. Although a homicide may follow a major event in a violent relationship, such as an attempt to terminate the relationship, or remove children from danger, the general nature of individual domestic circumstances is usually very private, and not clearly demonstrable. For this reason it may be difficult to prove BWS in a situation where it would need to be proved both to a psychiatrist, in order to diagnose BWS, and then to the court to prove both the circumstances of the domestic situation and the condition. It is recommended that a separate defence based on BWS puts the burden of proof on the prosecution. This corresponds with the provocation defence, where the onus is on the prosecution to disprove provocation once it is raised by a defendant.

5.5 Self-Preservation Model

Self-preservation operates in substantially the same way as self-defence law. The current NSW provisions related to self-defence are contained in s 418 of the *Crimes Act*. These provisions are broad, and do not take the specific circumstances of domestic violence into account. The provisions only relate to defending self, another person, or property, and require that the response be reasonable as perceived by the person defending themselves in the circumstances. This test does not consider the domestic circumstances, such as when a person who is the victim of domestic violence has their movements or finances controlled, abuse of children of the relationship (or where the treatment of children is used as a form of abuse against one of the partners of a relationship), or where that person is subject to sustained psychological, physical and sexual abuse. For this reason, were provocation to be abolished, it would be necessary to reform the self-defence provisions contained in the *Crimes Act* to take into account the specific circumstances of victims of domestic violence.

5.6 Sentencing Model

This is the approach that was adopted in Victoria. Under this model, judges have the discretion to consider the history of domestic violence when sentencing. In jury trials, it would not be a question for the jury to decide whether or not the person was affected by domestic violence, but instead the sentencing judge must rely on an admission by the accused, and then must take domestic violence into account. If such a model were adopted, it would remove the ability of the jury to decide upon the circumstances of domestic violence. In order to fully address those issues, it would be important for judges to be properly trained in understanding the circumstances of people who experience domestic violence.

6 Recommendations

The Inner City Legal Centre recommends:

- (i) That the provocation defence in NSW law be abolished.
- (ii) In the alternative, the defence of provocation should be amended to exclude the use for 'gay panic' in line with the legislative reforms in the NT and ACT.
- (iii) That reform is made to the defences to murder to take into account circumstances of domestic violence suffered by the accused and to exclude the use of the gay panic defence.
- (iv) That there be more community education of domestic violence and same-sex relationships.

If we can be of any further assistance, please contact me or
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our Principal Solicitor on

Yours sincerely

INNER CITY LEGAL CENTRE

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