

INQUIRY INTO PARTIAL DEFENCE OF PROVOCATION

Name: Dr Kate Fitz-Gibbon

Date received: 10/08/2012

This submission argues that provocation should be abolished as a partial defence to murder in New South Wales. In arguing for the abolition of provocation, it speaks directly to three of the Terms of Reference of the Legislative Council's Inquiry into the Partial Defence of Provocation. The submission also highlights concerns that the operation of the provocation defence in NSW complicates the law of homicide beyond what members of the jury can be expected to understand and that the operation of provocation is no longer in line with community expectations of justice given its propensity to legitimise the perpetration of lethal male domestic violence. The final section of this submission considers how provocation could best be relocated to the sentencing stage of the criminal process.

Submission:

**Legislative Council Inquiry
Partial Defence of Provocation
August 2012**

Dr Kate Fitz-Gibbon

Criminology, School of Humanities and Social Sciences
Faculty of Arts and Education
Deakin University, Victoria.

Submission Contents:

1. Introduction and Relevant Research
2. Response to Inquiry Terms of Reference
3. Other concerns pertaining to the operation of provocation
4. Transferring provocation to sentencing
5. Summary of Recommendations
6. References cited to support submission

Contact details:

Dr Kate Fitz-Gibbon

Criminology, School of Humanities and Social sciences

Faculty of Arts and Education

Deakin University, Victoria.

1. Introduction and Relevant Research

My interest in the Legislative Council's Inquiry stems from my own research examining the operation of the partial defence of provocation in several Australian and international jurisdictions. A key section of this research has focused specifically upon the operation of provocation in New South Wales (NSW) since January 2005. As such, this submission is supported by an ongoing research agenda. As part of that research, in-depth interviews were conducted in 2010 with 29 members of the NSW Supreme Court (NSWSC) judiciary, Office of the Director of Public Prosecutions (ODPP) and current defence counsel.

In supporting its argument, this submission draws upon the 2010 interview data as well as data obtained from a case analysis of the successful use of the partial defence of provocation in NSW from 1 January 2005 to 9 August 2012. The analysis shows that there have been 17 cases of manslaughter by reason of provocation during that period – 10 resulting from a juror verdict and seven from the Crown's acceptance of a guilty plea. Drawing from my analysis of these cases, it is argued that since 2005, the operation of provocation has raised serious questions surrounding the continued viability of this partial defence in NSW.

It may also be of interest to the Inquiry that as part of my research thirty qualitative interviews were also conducted in England and thirty-one interviews in Victoria with similar samples of legal stakeholders. These interviews were utilised, alongside an analysis of relevant case law post-reform, to examine the effects of divergent approaches taken to reforming the law of provocation in the Victorian and English criminal justice systems.

This submission will speak directly to the Legislative Council's *Inquiry into the Partial Defence of Provocation: Terms of Reference*. In doing so, it responds to questions pertaining to whether provocation should be abolished or amended in light of proposals in other jurisdictions, and the adequacy of the defence of self-defence for victims of prolonged domestic and sexual violence. Additionally, this submission also addresses concerns that the operation of the provocation defence in NSW complicates the law of homicide beyond what members of the jury can be expected to understand and that the operation of provocation is no longer in line with community expectations of justice given its propensity to legitimise the perpetration of lethal male domestic violence. The final section of this submission considers how provocation could best be relocated to the sentencing stage of the criminal process.

2. Response to Inquiry Terms of Reference

Terms of Reference 1(a)(i): Should the partial defence of provocation be abolished?

The partial defence of provocation should be abolished. The two main reasons for abolition being that the use of the defence in intimate homicides and in one-off violent confrontations between males is more deserving of a murder conviction than a verdict of manslaughter, and secondly, that the defence promotes a culture of victim blaming that is no longer in line with community expectations of justice. Furthermore, whilst historically provocation has been used to mitigate against the harsh consequences of mandatory capital and life sentencing policies, neither apply in sentencing for murder in NSW, and as such, its relevance to reducing these cases from murder to manslaughter is questionable.

The first key concern relating to the operation of provocation is whether the culpability of homicide cases that fall within this category are being adequately recognised and addressed through this partial defence. Given the presence of an intent to kill or cause really serious injury within these cases it is unclear why these homicides cases should warrant a conviction less than murder. It is important that the justice system recognises where a killing has occurred with intent and is not seen to partially legitimise that use of lethal violence. If provocation were abolished, the varied levels of culpability associated with that intent could then be adequately addressed at sentencing, as is the current model for considering mitigation of culpability due to provocation in Victoria, Tasmania, Western Australia (WA) and New Zealand (NZ).

The second key concern in the operation of provocation in NSW is that it provides a mechanism through which a victim of homicide can be blamed for his or her own death. As recognised in comparable jurisdictions, by its very nature the provocation defence allows the words or actions of the victim to be put on trial. This is highly problematic, particularly given the obvious inability of a victim of homicide to contradict the version of events as given by the offender. In the vast majority of cases where provocation was successfully raised in NSW between 1 January 2005 and 9 August 2012 only the victim and offender were present during the homicide, allowing the offender's version of events to be relatively uncontested.

Furthermore, an examination of relevant case law for the period studied, illustrates that in the 17 cases where a conviction of manslaughter by reason of provocation was attained¹, an incident of actual physical violence by the victim provoked the offender to use lethal violence in only nine of the cases. In the remaining eight cases a non-violent confrontation was cited as the provoking act that caused the offender to lose their self-control. The acceptance of provocation in these eight cases, and the

¹ For the purpose of this submission the successful use of the provocation defence in *R v Jones & Others* [2007] NSWSC 1333 has not been included in this table given that multiple offenders were involved in the case and only some of the offenders in this case were sentenced on the basis of provocation manslaughter.

subsequent categorisation of these offences as less than murder, would appear contradictory to current community expectations of human behaviour. This is especially so in the cases where the lethal violence was perpetrated between intimate partners in response to verbal allegations of infidelity or relationship separation, as seen most recently in *Singh v R* [2012] NSWSC 637 (hereinafter *Singh*), and previously in *Regina v Stevens* [2008] NSWSC 1370 (hereinafter *Stevens*), and *R v Hamoui* [no 4][2005] NSWSC 279.

Terms of Reference 1(a)(ii): Should the elements of the partial defence of provocation be amended in light of proposals in other jurisdictions?

If provocation is to be retained as a partial defence to murder rather than abolished, then it is this submission's argument that the offence should be further restricted to minimise the situations within which it can be applied. As discussed by Morgan (2002), in relation to the partial defence of provocation in Victoria prior to its abolition, key consideration must be given to whether in operation the law is over inclusive (does it allow cases that should not amount to a partial defence) or under inclusive (does it exclude situations that should be permitted a partial defence to murder). It is this submission's contention that provocation has become over inclusive in its operation in NSW.

Reform and restriction of the provocation defence could be achieved through a similar model to that adopted in the UK through the new loss of control partial defence (implemented in October 2010 in the *Coroners and Justice Act 2009*). In seeking to overcome the problems historically associated with the provocation defence, this new partial defence was formulated to include a specific provision to exclude situations of sexual infidelity from giving rise to a partial defence (s. 55[6][c]). In justifying this exclusion, the MOJ (2009: 14) commented that:

The Government does not accept that sexual infidelity should ever provide the basis for a partial defence to murder. We therefore remain committed to making it clear – on the face of statute – that sexual infidelity should not provide an excuse for killing.

However, since its October 2010 implementation, critiques have already emerged from scholarly commentary² and in case law³, suggesting that the government's attempt to overcome the gendered problems associated with the provocation defence may not have been fully achieved through this new partial defence.

As such, the UK experience emphasises the need for ongoing monitoring and evaluation of the law's operation if provocation is to be retained in NSW but its application limited. Ongoing monitoring post-reform would ensure that the effects of any reforms to limit the applicability of provocation are operating as intended, and that the problems previously associated with provocation do not continue unidentified. This is particularly important given recent research that has recognised

² See, for example, Clough 2010; Fitz-Gibbon 2012b; Yeo 2010

³ See *R v Clinton (Jon-Jacques)* [2012] EWCA Crim 2

the unintended consequences of homicide law reform targeted at the partial defence of provocation, and the difficulty of overcoming gender bias in the law's operation through the implementation of legislative reform.⁴

It is not recommended that NSW follow the Victorian experience, where in November 2005 the partial defence of provocation was abolished and a new offence of defensive homicide was implemented through s. 9AD of the *Crimes (Homicide) Act 2005* (Vic). The implementation of this alternative offence to murder has had several unintended consequences in practice, most relevant of which is the continued legal legitimisation of lethal violence between males. The implementation of this new offence would also be unsuitable to NSW, given that there is already a partial defence of substantial impairment by abnormality of the mind and a partial defence of excessive self-defence available in this jurisdiction, which both cover several of the same elements of mitigation, which are made available through defensive homicide in Victoria.

Terms of Reference 1(b): The adequacy of the defence of self-defence for victims of prolonged domestic and sexual violence.

This submission does not intend to provide an evaluation, or opinion, on the adequacy of the law of self-defence, however, it does argue that provocation should not be retained as a partial defence to murder to 'capture' the cases that are unable to raise a complete defence of self-defence. An analysis of the use of provocation by victims of prolonged domestic and/or sexual violence reveals that since 1 January 2005 in NSW two female defendants were able to successfully raise provocation and be convicted of the manslaughter, not murder, of their abusive male partners.⁵ However, from these cases, the question arises as to whether a conviction of manslaughter by reason of provocation was the appropriate categorisation for these killings, or whether these unique types of homicides should be better catered for under the complete defence of self-defence.

In light of this, I would argue that alongside the abolition of provocation, it is essential to ensure that the law of self-defence is adequately structured to capture the genuine cases of killing in response to prolonged domestic and sexual violence. Ensuring this may require future reform to the defence of self-defence. Beyond these genuine cases, factors that are relevant – but not enough as to raise a complete defence – can be considered at sentencing for murder, where relevant mitigation can be accounted for in the discretionary sentence imposed.

⁴ See Fitz-Gibbon & Pickering (2012), for a detailed analysis of the initial effects, both intended and unintended, of the 2005 Victorian homicide law reforms.

⁵ See *R v Joyce Mary Chant* [2009] NSWSC 593 and *R v Russell* [2006] NSWSC 722.

3. Other concerns pertaining to the operation of provocation

Beyond the issues raised in response to the Terms of Reference, there are two further areas of concern relating to the current operation of provocation in NSW. Both of these issues support the need for reform to the law as it presently stands, reform that this submission argues would be best achieved through the abolition of provocation as a partial defence to murder in NSW.

Complicating the law of homicide

In its present format there is a key concern that the partial defence of provocation serves to over complicate the law of homicide in NSW beyond comprehension for members of the justice system, and particularly for members of the jury. The interviews conducted in 2010 revealed a dominant concern amongst all stakeholders that at present provocation is perceived to be too complicated, and that consequently stakeholders doubt that members of a jury could adequately comprehend, and apply, the various aspects of it.

The current complication of the law of homicide through the operation of the partial defence of provocation emphasises the need for any future reforms to place simplifying the law as a key priority, particularly if the defence is to be retained. Without simplification of the law, it is unclear whether juries can adequately understand and comprehend the nuances of this offence, and thus whether a jury verdict is based upon the elements of the partial defence as set out by law or a desire to compromise to a lesser offence when given the option. Several stakeholders involved in the interviews discussed their own concern that this desire for compromise was often influential in juror verdicts in cases where provocation was raised as a partial defence.

Legitimising Lethal Male Domestic Violence

An analysis of successful provocation defence cases in NSW, since January 2005, raises serious concern over the viability of a partial defence that arguably acts to excuse the use of lethal male violence. Particularly in the context of intimate homicides, the successful use of provocation in NSW, in cases such as *Singh*, *Stevens* and *R v Williams* [2004] NSWSC 189⁶, serves to legitimise the male perpetration of lethal domestic violence. As highlighted by the Victorian Law Reform Commission (2004: xx) in their review of the partial defences to murder in Victoria, the criminal justice system has an important 'symbolic function', which serves to set the 'limits of acceptable and unacceptable behaviour.' As such, when the law is seen to legitimise the use of male violence in an intimate context, a standard of acceptable violence against women is further enforced. For this reason in itself, this submission argues that provocation should no longer constitute a partial defence to murder in NSW.

⁶ See Fitz-Gibbon (2012a) for a more detailed analysis of the successful use of provocation in *Stevens* and *Williams*.

4. Transferring Provocation to Sentencing

Alongside the recommendation to abolish provocation as a partial defence to murder, this submission proposes how best provocation can be transferred to the sentencing stage of the criminal process. In light of the February 2003 introduction of standard non-parole periods for serious offences⁷, including murder, in NSW, it is recognised that transferring cases that may have otherwise have been considered manslaughter by reason of provocation to sentencing for murder is likely to have significant implications in terms of sentence length. However, it is proposed that if a clear directive is given on how provocation should be considered at sentencing, including the formulation of guideline sentencing judgments, which establish what provocative behaviour should and shouldn't be considered as mitigating at sentencing for murder post-abolition, then the transfer of provocation to sentencing represents a welcomed step forward.

Interviews with members of the NSW criminal justice system revealed support amongst members of the ODPP, and a smaller sample of respondents from the NSWSC judiciary, for the relocation of provocation to sentencing. These respondents believed that given the flexible sentencing practices for murder in NSW, as well as the need to recognise the intent present in these offences, that provocation should no longer play a role in reducing murder to manslaughter. Whilst it is noted that throughout the interviews the majority of NSW defence counsel opposed the abolition of provocation, and thus its transfer to sentencing, this is largely to be expected and was also noted amongst defence counsel in the Victorian context, both before and after the 2005 abolition of provocation (Fitz-Gibbon and Pickering 2012).

Similar reforms to transfer provocation to sentencing have been introduced in comparable jurisdictions in Australia and internationally, including in Victoria, Tasmania, WA and NZ. As such, in considering provocation at sentencing, NSW could learn from the framework previously formulated in Victoria by Stewart and Freiberg (2008) as well as research that has begun to examine the effects of transferring provocation to sentencing in these jurisdictions (see Fitz-Gibbon and Pickering 2012; Tyson 2011).

⁷ Implemented through Part 4, Div 1A of the *Crimes (Sentencing Procedures) Act* 1999 (NSW)

5. Summary of Recommendations

This submission has recommended that provocation should be abolished as a partial defence to murder in NSW, and that any consideration of provocation should be moved to the realm of sentencing. Specifically, to ensure that the law correctly categorises offences of homicide, this submission has recommended the following reforms to the current law:

1. That the partial defence of provocation be abolished;
2. That, where appropriate, culpability relating to lethal violence that is provoked be considered as a mitigating factor at sentencing, rather than as an alternative verdict;
3. That a guideline judgment for considering provocation in sentencing for murder be produced which clearly outlines what provocative behaviour should and shouldn't be considered mitigating when sentencing for murder.

If the partial defence of provocation is to be retained, the following recommendations are made:

1. That the applicability of provocation be restricted to minimise its application in cases of male perpetrated lethal domestic violence and cases where the offender was responding to a non-violent confrontation, such as the victim's words alone;
2. That problematic trends previously associated with the partial defence of provocation be identified and monitored over the next five years, culminating in a follow-up review of the operation of provocation in NSW in 2017.

6. References cited to support submission

Cases cited:

R v Clinton (Jon-Jacques) [2012] EWCA Crim 2
R v Goundar [2010] NSWSC 1170
R v Hamoui [no 4][2005] NSWSC 279
R v Jones & Others [2007] NSWSC 1333
R v Joyce Mary Chant [2009] NSWSC 593
R v Russell [2006] NSWSC 722
R v Williams [2004] NSWSC 189
Regina v Stevens [2008] NSWSC 1370
Singh v R [2012] NSWSC 637

References:

Clough, A. (2010), 'Loss of Self-control as a Defence: The Key to Replacing Provocation', *The Journal of Criminal Law*, 74: 118–26.

Coroners and Justice Act 2009 (UK)

Crimes (Homicide) Act 2005 (Vic)

Crimes (Sentencing Procedures Act) 1999 (NSW)

Fitz-Gibbon K (2012a) Provocation in New South Wales: The need for abolition, *Australian and New Zealand Journal of Criminology*, 45(2): 194-213.

Fitz-Gibbon K (2012b) *The Aftermath of Provocation: Homicide Law Reform in Victoria, New South Wales and England*, PhD Thesis, Monash University: Victoria.

Fitz-Gibbon K and Pickering S (2012) Homicide Law Reform in Victoria, Australia: From provocation to defensive homicide and beyond. *British Journal of Criminology*, 52(1): 159-180.

Ministry of Justice (2009) *Murder, Manslaughter and Infanticide: Proposals for Reform of the Law – Summary of Responses and Government Position*, Ministry of Justice: London.

Morgan J (2002) *Who kills who and why: looking beyond legal categories*, Occasional Paper, Victorian Law Reform Commission: Melbourne.

Stewart F and Freiberg A (2009) *Provocation in Sentencing*, 2 edn, Sentencing Advisory Council: Victoria.

Tyson D (2011) Victoria's new homicide law: Provocative reforms or more women "asking for it"? *Current Issues in Criminal Justice*, 23(2): 203-233.

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

Yeo, S. (2010), 'English Reform of Partial Defences to Murder: Lessons for New South Wales', *Current Issues in Criminal Justice*, 22(1): 1-18.

Abbreviations:

MOJ	Ministry of Justice
NSW	New South Wales
NSWSC	New South Wales Supreme Court
NZ	New Zealand
ODPP	Office of the Director of Public Prosecutions
UK	United Kingdom
WA	Western Australia