

**Submission
No 42**

INQUIRY INTO PARTIAL DEFENCE OF PROVOCATION

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Redfern Legal Centre and Sydney WDVCS recommend that the partial defence of provocation be abolished. Further, to reflect community standards and to adequately address the social context of victims of domestic violence who kill their partners, we recommend that the law of self-defence be reformed to take circumstances of domestic violence into account. In this respect we support the Australian and NSW Law Reform Commission recommendation 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.

Redfern Legal Centre



Parliament of New South Wales
Parliament House
Macquarie St
Sydney NSW 2000

23 August 2012

Attention: Vanessa Viaggio

Please find attached our policy submission in response to Legislative Council Select Committee Inquiry into the Partial Defence of Provocation.

We would welcome the opportunity to appear before the Parliamentary Committee addressing this issue.

Yours faithfully,
Redfern Legal Centre

Jacqui Swinburne
Acting Chief Executive Officer

Redfern Legal Centre



SUBMISSION:

REDFERN LEGAL CENTRE AND SYDNEY WOMEN'S DOMESTIC VIOLENCE COURT ADVOCACY SERVICE

SUBMISSION TO LEGISLATIVE COUNCIL SELECT COMMITTEE INQUIRY INTO THE PARTIAL DEFENCE OF
PROVOCATION

AUTHOR: Susan Smith

DATE: 23 August 2012

Redfern Legal Centre



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1. Introduction: Redfern Legal Centre

This is a submission by Redfern Legal Centre (RLC) and Sydney Women's Domestic Violence Court Advocacy Service (Sydney WDVCS) to the Legislative Council Select Committee Inquiry into the partial defence of provocation.

RLC, established in 1977, was the first community legal centre in NSW and the second in Australia. It is an independent, non-profit, community-based legal organisation with a prominent profile in the Redfern area.

RLC has a particular focus on human rights and social justice. Our specialist areas of work are domestic violence, tenancy, credit and debt, employment, discrimination and complaints about police and other governmental agencies. By working collaboratively with key partners, RLC specialist lawyers and advocates provide free advice, conduct case work, deliver community legal education and write publications and submissions. RLC works towards reforming our legal system for the benefit of the community.

2. Redfern Legal Centre and Sydney WDVCS' work in domestic violence

RLC and Sydney WDVCS are well placed to comment on and make recommendations to the Inquiry. The Sydney WDVCS is a service provided by RLC (an independent, non-profit, community-based legal organisation) and is funded by Legal Aid NSW through the Women's Domestic Violence Court Advocacy Program (WDVCSAP). The Sydney WDVCS operates at the Downing Centre (central Sydney), Balmain, Newtown and Waverley Local Courts in the Sydney metropolitan region. In the period 1 January 2011 to 31 December 2011, the Sydney WDVCS provided services to female clients in 2,043 domestic violence related court matters.

We have an interest in ensuring that women and children experiencing domestic violence are adequately protected by the courts, and in particular that Aboriginal and Torres Strait Islander women, culturally and linguistically diverse women, women with disabilities, women in same sex relationships, transgender women, and women in regional and remote areas are not disadvantaged by the court process.

We have been actively involved in domestic and family violence law and policy reform for many years, and have advocated for improvements to domestic and family violence legislation and processes. Sydney WDVCS is a member of the NSW Attorney General's Apprehended Domestic Violence Legal Issues Coordinating Committee (AVLIC), participates in state-wide domestic violence focus groups and forums, and makes law reform submissions on domestic violence laws and family law. The Sydney WDVCS Coordinator is a member of the NSW Victims Advisory Board.

3. Redfern Legal Centre and Sydney WDVCS' view in summary

RLC and Sydney WDVCS recommend that:

- (1) the partial defence of provocation be abolished; and**
- (2) the law of self-defence be reformed to reflect community standards and to adequately address the social context of women who kill violent partners.**

RLC and Sydney WDVCS recommend that the partial defence of provocation be abolished. Further, to reflect community standards and to adequately address the social context of victims of domestic violence who kill their partners, we recommend that the law of self-defence be reformed to take circumstances of domestic violence into account. In this respect we support the Australian and NSW Law Reform Commission recommendation 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.¹

4. Responses to specific issues

Community attitudes to the partial defence of provocation

Criticism of the current statutory defence in NSW has been widespread, and includes claims that the defence favours proprietary, violent men, privileges a loss of self-control and promotes a culture of blaming the victim.²

The recent case of *Singh v R*,³ and the public outcry that followed,⁴ highlights the need for reform of the partial defence of provocation in cases of intimate partner homicide. Chamanjot Singh was found guilty of manslaughter by provocation after he successfully argued that he was provoked to kill because he suspected his wife had been unfaithful and intended to leave the marriage. Mr Singh strangled his wife and cut her throat at least eight times with a Stanley knife. Mr Singh was sentenced to 8 years' imprisonment with a non-parole period of 6 years.

Earlier provocation cases have produced similar community outrage: the Victorian case of *R v Ramage*⁵ provided some of the impetus for changing the law regarding provocation in Victoria. James Ramage bashed and strangled his wife after she separated from him, and then meticulously concealed his crime. The jury accepted Ramage's argument that he was provoked by his wife's behaviour when she said 'hurtful' things to him. He was sentenced to 11 years' imprisonment with a non-parole period of 8 years.

In another Victorian case that has been the subject of criticism, *R v Butay*,⁶ Jesus Butay battered his wife to death with a hammer after she allegedly used verbal taunts and intimidation. He was found guilty of manslaughter on the grounds of provocation and sentenced to 8 years' imprisonment, with a non-parole period of 6 years.

¹ Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence – A National Legal Response*, 2010, Recommendation 14.1.

² G Coss, *The Defence of Provocation: An Acrimonious Divorce From Reality*, Legal Studies Research Paper, Sydney Law School, 2007.

³ *Singh v R* [2012] NSWSC 637.

⁴ See for example A Horin, 'Out-of-step excuse is no defence', *Sydney Morning Herald*, 14 July 2012; and 'Bi-partisan call for NSW to ditch provoke defence', *ABC News*, 12 June 2012.

⁵ *R v Ramage* [2004] VSC 508.

⁶ *R v Butay* [2001] VSC 417.

In a NSW case, *Regina v Stevens*,⁷ Bradley James Stevens pleaded guilty to manslaughter by means of provocation. Stevens' de facto wife, Katrina McMahon, was found to have 76 separate injuries to her body, with those about her head and face being consistent with being dragged by her hair and having her head repeatedly bashed on a hard surface. The age of the injuries varied, but the most recent injuries were due to 'blunt trauma': a 50cm x 2-3 cm metal bar was found next to her body. Her most recent injuries included:

- Intra-abdominal bleeding from a spleen injury, which according to a pathologist would have caused drowsiness and then a loss of consciousness and then cardiac arrest. The pathologist said Ms McMahon would have been bleeding from this injury for several hours before her death.
- Multiple contusions scattered on the face and scalp with bleeding on both sides consistent with heavy punching or kicking.
- A subdural haemorrhage due to repeated blunt trauma to the head.

Bradley Stevens was sentenced to 8 years and 9 months' imprisonment, with a non-parole period of 6 years and 7 months.

Before the defence of provocation was abolished in Victoria, a study found that the average total effective sentence for provocation manslaughter was significantly less than the average sentence for murder; namely, 8 years with a 6 year non-parole period for provocation manslaughter, compared to 18 years with a 14 year non-parole period for murder.⁸

Provocation promotes a culture of blaming the victim

In provocation cases, the defence is readily able to portray the victim as inadequate, unfaithful or a bad mother, often despite a documented history of violence against the victim. In homicide matters the deceased victims are unable to defend their reputations or provide their side of the story and there are usually no independent witnesses, so any claims that an assault was provoked can be easily fabricated.

There were no independent witnesses to the attacks on Manpreet Kaur (the victim in *Singh*), Julie Ramage, Ruth Butay and Katrina McMahon, and in each case the offender was able to impugn the reputation of the deceased: in *Singh* it was claimed that the victim was being unfaithful, pressured him for money and threatened to have him deported; in *Ramage*, the offender claimed his ex-wife was a liar and an adulterer in evidence that for one commentator amounted to 'the post-mortem slandering of his ex-wife's character';⁹ in *Butay* the offender said his wife had taunted him and had told him she was having an affair; in *Stevens* the offender claimed his wife was a bad mother and should have been at home caring for their two children but was instead at the local hotel (where it seems she may have gone to seek assistance for injuries inflicted on her earlier in the day). In *Stevens* the sentencing judge heard uncontested submissions on behalf of the accused directed to provocation, including:

⁷ *Regina v Stevens* [2008] NSWSC 1370.

⁸ F Stewart and A Freiberg, *Provocation in Sentencing: Research Report*, Sentencing Advisory Council Victoria, 2nd ed, 2009 at [73.5].

⁹ A Horin, 'Out-of-step excuse is no defence', *Sydney Morning Herald*, 14 July 2012.

- A reference to an SMS message received by the offender stating that Ms McMahon was at the hotel 'off her face' and a reference to his having been left with the baby.
- An allegation by the offender that Ms McMahon had told him she had stayed in a caravan park with a male person in the period before the fatal attack, causing him to believe she was being unfaithful.
- An allegation by the offender that Ms McMahon had told him she had been involved in orgies.
- An allegation by the offender that Ms McMahon had told him she would 'turn to prostitution'.
- An allegation by the offender that Ms McMahon had recently stayed with a male after leaving the hotel and having sexual intercourse with him.
- Complaints by the offender that Ms McMahon was not home enough and was using drugs instead of caring for their children.

The sentencing judge in *Butay*, Flatman J - who heard evidence from Ruth Butay's family that she was a respectful, caring and considerate person, and loved by her family - pointed out the problem with the inability of the victim to be heard on the allegations levelled against her:

The Victims Impact Statements show that your wife's family have found the trial an ordeal. They were shocked at the savagery of your attack on their daughter and sister Ruth. They were also hurt by the words you attributed to her before your attack. From their perspective, just as Ruth was unable to defend herself from your violent and savage attack with the hammer, equally she was unable to defend herself from your allegations as to her use of provocative and abusive words.

Provocation trivialises any history of domestic violence

The defence of provocation works to trivialise domestic violence because the rules of evidence in effect ensure that a jury does not get to hear evidence of any history of violence against the victim, and yet in many provocation cases the relationship has been marked by violence by the accused. In *Singh*, *Ramage* and *Stevens* there were allegations of previous domestic violence by the offender towards the victim, most of which was not able to be heard in evidence.

A law that recognises a history of domestic violence

There is evidence to suggest that, in the context of family or domestic violence homicides, men and women kill for different reasons.¹⁰ The contention that men and women use violence for different reasons is reflected in Sydney WDVCS client casework: our casework indicates that the use of violence by men against a partner is usually not a spontaneous loss of control, but is calculated to manipulate their partner in order to gain compliance and control. Our female clients tell us that when they use violence it is usually out of fear, or to protect themselves and/or their children, or as a last resort when they feel there is nowhere to turn for help.¹¹

¹⁰ See for example, P Dobash and R Dobash, 'Women's Violence to Men in Intimate Relationships: Working on a Puzzle' (2004) 44 *British Journal of Criminology*; J Morgan, *Who kills whom and why: looking beyond the legal categories*, Victorian Law Reform Commission, 2002; G Coss, *The Defence of Provocation: An Acrimonious Divorce From Reality*, Legal Studies Research Paper, Sydney Law School, 2007.

¹¹ Sydney WDVCS assists women in approximately 2,000 domestic violence-related court matters annually. Between 5% - 10% of these clients are female defendants who report they have acted in self-defence.

The defence of provocation has been said to privilege the use of male violence against women, whereas it cannot always be relied upon by women who kill their partners following a long-standing history of domestic abuse.¹² In order to ensure that the court takes into account evidence of domestic violence suffered by the accused, we propose that amendments be made to the law of self-defence in NSW, similar to the Victorian reforms.¹³

The common law on self-defence

We submit that the existing law on self-defence is not sufficient for allowing the context of domestic violence experienced by the defendant to be considered by the judge or jury.

The Australian and NSW Law Reform Commissions Report on Family Violence points out that the common law of self-defence may be capable of requiring the fact-finder to consider the context of domestic violence against a woman who claims self-defence.¹⁴ The common law recognises that a person is justified in using some force in legitimate self-defence: it says it can be lawful to act in self-defence, and therefore self-defence acts as a complete defence to criminal liability, with the onus on the prosecution to negate self-defence. The common law doctrine of self-defence limits the use of force to situations where it is necessary for the accused to use force, and the degree of force is not excessive in the circumstances.¹⁵

The common law test is articulated in *Zecevic v DPP*¹⁶ as having both a subjective and an objective element:

It is whether the accused believed upon reasonable grounds that it was necessary in self-defence to do what he did. If he had the belief and there were reasonable grounds for it, or if the jury is left in reasonable doubt as to the matter, then he is entitled to an acquittal.

The Report suggests that, because the common law test is based upon the accused's belief on 'reasonable grounds', it may be open for a jury to consider evidence of the nature and history of the accused's relationship with the deceased, including:

- evidence of prior violence against the accused, including: patterns of ongoing abuse; the escalation of violence over time; evidence of how the relevant threat was the same or different from previous threats; and the cumulative effects of violence upon the accused;
- relevant physical and psychological characteristics of the accused, as well as his or her cultural background and personal circumstances, such as social support structures, financial means and other social or cultural barriers to reporting or escaping from violence; and

¹² G Coss, *The Defence of Provocation: An Acrimonious Divorce From Reality*, Legal Studies Research Paper, Sydney Law School, 2007.

¹³ Crimes Act 1958 (Vic) s 9AC.

¹⁴ Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence – A National Legal Response*, 2010 at 622.

¹⁵ D Brown and others, Brown, Farrier, Neal and Weisbrot's *Criminal Laws: Material and Commentary on Criminal Law and Process in New South Wales*, 4th ed, 2006 at 627.

¹⁶ *Zecevic v DPP (Vic)* (1987) 162 CLR at 645, 661.

- the means available to the accused to respond to the threat, and his or her efforts to resist or minimise it – for example, previous attempts to defend him or herself, flee or seek assistance, and reasons for returning to the relationship.¹⁷

The Report says that such evidence could take the form of evidence from the accused; evidence from others who witnessed the violence or who were told of the violence by the accused or the deceased; and the testimony of expert witnesses about the nature and dynamics of domestic violence.¹⁸

In spite of the Report's interpretation of the current law on self-defence, victims of domestic violence often have difficulty relying on this defence where they cannot point to harm experienced immediately before killing their partner (as domestic violence tends to involve a long-standing history of cumulative events), or cannot establish that their response to the harm was not excessive.

An amendment to the law of self-defence in NSW

Consideration should be given to an amendment to the law of self-defence in NSW to provide for persons who have reasonable grounds for believing that their conduct was necessary to defend themselves, even if they were responding to harm that was not immediate or their response involved the use of excessive force.

The Victorian example of special provisions that apply when domestic or family violence is alleged may provide guidance for an amendment to self-defence in NSW. Section 9AH of the *Crimes Act 1958* (Vic) provides:

- (1) Without limiting section 9AC, 9AD or 9AE, for the purposes of murder, defensive homicide or manslaughter, in circumstances where family violence is alleged a person may believe, and may have reasonable grounds for believing, that his or her conduct is necessary:
 - (a) to defend himself or herself or another person; or
 - (b) to prevent or terminate the unlawful deprivation of his or her liberty or the liberty of another person
 even if:
 - (c) he or she is responding to a harm that is not immediate; or
 - (d) his or her response involves the use of force in excess of the force involved in the harm or threatened harm.

- (2) Without limiting the evidence that may be adduced, in circumstances where family violence is alleged evidence of a kind referred to in subsection (3) may be relevant in determining whether:
 - (a) a person has carried out conduct while believing it to be necessary for a purpose referred to in subsection (1)(a) or (b); or
 - (b) a person had reasonable grounds for a belief held by him or her that conduct is necessary for a purpose referred to in subsection (1)(a) or (b); or
 - (c) a person has carried out conduct under duress.

- (3) Evidence of:

¹⁷ Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence – A National Legal Response*, 2010 at 623.

¹⁸ *Ibid* at 624.

- (a) the history of the relationship between the person and a family member, including violence by the family member towards the person or by the person towards the family member or by the family member or the person in relation to any other family member;
 - (b) the cumulative effect, including psychological effect, on the person or a family member of that violence;
 - (c) social, cultural or economic factors that impact on the person or a family member who has been affected by family violence;
 - (d) the general nature and dynamics of relationships affected by family violence, including the possible consequences of separation from the abuser;
 - (e) the psychological effect of violence on people who are or have been in a relationship affected by family violence;
 - (f) social or economic factors that impact on people who are or have been in a relationship affected by family violence.
- (4) ... violence means:
- (a) physical abuse;
 - (b) sexual abuse;
 - (c) psychological abuse (which need not involve actual or threatened physical or sexual abuse), including but not limited to:
 - (i) intimidation;
 - (ii) harassment;
 - (iii) damage to property;
 - (iv) threats of physical abuse, sexual abuse or psychological abuse;
 - (v) in relation to a child:
 - (vi) causing or allowing the child to see or hear the physical, sexual or psychological abuse of a person by a family member; or
 - (vii) putting the child, or allowing the child to be put, at real risk of seeing or hearing that abuse occurring.
- ...
- (5) Without limiting the definition of violence in subsection (4):
- (a) a single act may amount to abuse for the purposes of that definition;
 - (b) a number of acts that form part of a pattern of behaviour may amount to abuse for that purpose, even though some or all of those acts, when viewed in isolation, may appear to be minor or trivial.

5. Recommendations

RLC and Sydney WDVCS recommend that the partial defence of provocation be abolished, and the law of self-defence be reformed to take into account evidence of a history of domestic or family violence experienced by the accused.

With respect to reforming the law of self-defence, we recommend taking guidance from the amendments enacted in Victoria.

Thank you for the opportunity to make a submission to this Inquiry.

Yours sincerely

Susan Smith
 Solicitor/Coordinator
 Sydney Women's Domestic Violence Court Advocacy Service
 Redfern Legal Centre

