

INQUIRY INTO PARTIAL DEFENCE OF PROVOCATION

Organisation: Outer West Domestic Violence Network (OWDVN)
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Working Together to Promote Safety

Committee Secretary
Legislative Council Select Committee on the Partial Defence of Provocation
Parliament House,
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Sydney NSW 2000
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By Email

22nd August 2012

Dear Committee Secretary,

Re: Inquiry into the Partial Defence of Provocation

The Outer West Domestic Violence Network

The Outer West Domestic Violence Network (OWDVN) thanks the committee for the opportunity to take part in this inquiry. The OWDVN is an active group in the Blacktown local government area which aims to work collaboratively to address domestic/family violence within a socio-political context, advocating social justice and rights to safety for all women and children. The network is made up of representatives from a range of government and non government agencies. All the services involved in the network play a role in supporting women, children and young people who have experienced domestic violence.

Context

In June 2012, a Western Sydney man was sentenced to six years imprisonment for the manslaughter of his wife¹. The sentence was reduced from murder to manslaughter after the defendant successfully argued the defence of provocation.

The defence of provocation is contained in NSW law under section 23 (2) of the Crimes Act. "Where the defendant kills in response to provocation, the law allows a partial excuse which reduces the offence from murder to manslaughter. This is

¹ ABC News Online (2012) *Inquiry to Examine NSW provocation defence* last viewed on the World Wide Web 20th August 2012 <http://www.abc.net.au/news/2012-06-14/inquiry-to-examine-nsw-provocation-defence/4071018>

recognition by the law that a person who kills in the face of provocation is less culpable; while the law will not condone killing in these circumstances, the courts, 'as a concession to human frailty', will admit provocation as a partial excuse or qualified defence."²

The partial defence of provocation has been abolished in Tasmania since 2003 and Victoria since 2005. At the time of the Victorian abolition, the Victorian Law Reform Commission commented that "The Commission has failed to be persuaded by arguments that provocation is a necessary concession to human frailty or that 'provoked killers are not murderers'. Both the serious nature of the harm suffered by the victim, and the fact the person intended at the time to kill or seriously injure the victim, in our view justifies a murder conviction in these cases."³

The partial defence of provocation was introduced at a time when the mandatory penalty for murder was death. "In the 17th century, the doctrine of provocation developed as a rule of mitigation which classified certain types of killing committed in anger or hot blood as manslaughter rather than murder, on the basis that these killings were less reprehensible"⁴ and did not warrant a death penalty.

Arguments

1. **The defence of provocation is outdated and no longer relevant in a post death penalty NSW**
 - As NSW has long since abolished the death penalty, there is no need to hold on to the archaic law that allows juries to apply the partial defence of provocation as it no longer serves its primary purpose of preventing the defendant receiving the death penalty. As a society we have deemed that no crime warrants the death penalty but this does not mean we believe that someone charged with murder is more or less culpable because they killed in 'hot blood' as opposed to cold. The law allowing for the partial defence of provocation is no longer needed; it does not align with the wider community's

² Australian National University College of Law, *Defences: Provocation* last viewed on the World Wide Web 13th June 2012 <http://law.anu.edu.au/criminet/tprov.html>

³ Victorian Law Reform Commission (2004) *Defence to Homicide: Final Report* Victorian Law Reform Commission, Melbourne.

⁴ Law Reform Commission of NSW (1997) *Report 83- Partial Defence to Murder and Infanticide* last viewed on the World Wide Web 13th June 2012

views and should no longer be applied to cases involving intimate partner homicide such as that referenced above.

- As with other types of offences, the judge has the ability at sentencing to take into account mitigating circumstance. There is therefore no reason that loss of temper, rage or fits of passion should be given special consideration by the jury prior to sentencing.

2. The defence of provocation is gender biased

- It is also argued in the Victorian Law Reform Commission (2004) *Defence to Homicide: Final Report* that provocation is predominantly used to excuse male anger and violence towards women (pg 27). As such the law runs the risk of confounding some of the harmful and already deep-set notions in society that “women ask for it.”
- The ordinary person test was created specifically to deal with male aggression patterns which, and therefore makes it harder for female defendants to meet the same criteria.⁵

3. Provocation promotes a culture of blaming the victim

- Essentially, the provocation defence in intimate partner homicide means that ‘the victim had it coming.’ It is saying that the victim’s behaviour prior to the violent act provoked the aggressive reaction of the defendant and therefore the deceased must be held at least partly accountable for their own murder. If a victim is partly accountable, then the defendant must be less accountable and therefore should be charged with manslaughter rather than murder. Given that concessions for self defence are taken into account at sentencing, the defence of provocation in intimate partner homicides perpetuates only serves to perpetuate outdated gender narratives.⁶

Recommendations

The OWDVN endorse the recommendations outlined in the Domestic Violence Committee Coalition’s submission to this inquiry. In particular we agree with the DVCC’s call for rigorous review of the laws pertaining to the partial defense of

⁵ Victorian Law Reform Commission (2004) *Defence to Homicide: Final Report* Victorian Law Reform Commission, Melbourne.

⁶ See Domestic Violence Committee Coalition (2012) *Inquiry into the partial defence of provocation- Submission by the domestic violence committee coalition*

provocation, which should "aim to challenge out-dated understandings and narratives about men and women, and intimate partner violence"⁷.

Although we endorse the DVCC's call for review and amendment of the law of provocation to address gender-bias and outdated gender narratives, the OWDVN ultimately agree with the recommendation of the Victorian Law Reform Commission that the "partial defence of provocation should be abolished. Relevant circumstances of the offence, including provocation, should be taken into account at sentencing as they currently are for other offences"⁸.

We also applaud the call by NSW Opposition Leader John Robertson for bipartisan collaboration with the Government to abolish the defence of provocation from NSW criminal law.⁹

Yours faithfully,

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On Behalf of the Outer West Domestic Violence Network

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⁷ Domestic Violence Committee Coalition (2012) *Inquiry into the partial defence of provocation- Submission by the domestic violence committee coalition* p.3

⁸ Victorian Law Reform Commission (2004) *Defence to Homicide: Final Report* Victorian Law Reform Commission, Melbourne. Recommendation 1, last viewed on the World Wide Web 20th August 2012 <http://www.lawreform.vic.gov.au/projects/defences-homicide/defences-homicide-recommendations>

⁹ ABC Online (2012) *Bi-partisan call for NSW to ditch provoke defence* last viewed on the World Wide Web June 13th 2012 <http://www.abc.net.au/news/2012-06-12/bi-partisan-call-for-nsw-to-ditch-provocation-defence/4066406/?site=sydney>