

INQUIRY INTO PARTIAL DEFENCE OF PROVOCATION

Organisation: Office of the Director of Public Prosecutions (NSW)
Name: Mr Lloyd Babb SC
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SUBMISSION OF THE OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS (NSW)

NSW Legislative Council Select Committee on the partial defence of provocation

This submission has been prepared on behalf of the Office of the Director of Public Prosecutions (NSW) (ODPP). The ODPP is responsible for prosecuting indictable offences in the District and Supreme Courts of NSW and some related matters in the Local Courts. Between 70 – 90 homicide trials are handled by the ODPP annually. The ODPP also prosecutes offences relating to domestic violence which are charged as attempt murder, assaults of varying degrees of severity and other related offences (arson, kidnapping etc). In 2010/11 the ODPP Witness Assistance Service provided a service to 318 victims of domestic violence in predominately the higher courts.

The ODPP does not keep statistics on the number of cases where provocation is raised as a defence, however in preparation for this submission ODPP lawyers were requested to identify any cases they had recently been involved in involving the defence. A summary of those matters is attached at Appendix A.

We note that a significant volume of work has been created from Law Reform Commissions across Australia and other common law jurisdictions on the issues raised in this inquiry. Although the decision of *Singh v R* [2012] NSWSC 637 and the community reaction to this decision is the genesis of this inquiry, the fact that the community reaction in New South Wales has been echoed in other jurisdictions is of significance.

The essential facts of *Singh* are that the accused was the husband of the deceased, the relationship was on the rocks and the accused was under personal stress as a result of the breakdown of the relationship. It is also important to note that there was independent evidence of domestic violence within that relationship for some time prior to the murder. Sadly, the facts of this case are not uncommon features of many cases before the courts exercising jurisdiction in criminal and family law in New South Wales, the great majority of which do not end in the death of one of the parties. The community reaction to this decision may be explained by the fact that the accused could successfully rely on the defence of provocation in response to words allegedly uttered by the deceased. This allowed the reduction of his criminal responsibility. The community rightly expects that men in the same circumstances should not resort to violence, and certainly not the level of violence perpetrated by this accused on the deceased. In other words the rationale of the defence of provocation is inconsistent with contemporary community values and views on what is acceptable behaviour. In our submission this case taken together with the developments in other jurisdictions clearly raises the need for reform of the law of provocation in New South Wales.

Terms of Reference 1 (a): the retention of the partial defence of provocation including (i) abolishing the defence,

The view of most ODPD prosecutors is that the partial defence of provocation should be abolished.

The main arguments we advance in support of abolition are as follows;

- The defence is illogical in the sense that it requires the defendant to lose control so as to form an intention to kill or inflict grievous bodily harm. It is illogical to require that a person lose self-control and act with intent.
- There is an inherent gender bias in the defence and it is unjust in its application since it has been created to address typically male patterns of aggression. Developments to expand the defence to accommodate women and the battered women's syndrome may be criticised for forcing women to adopt a passive and stereotyped image in order to utilise the defence.
- The defence promotes a culture of blaming the victim. The fact that the deceased is not there to give their side of the story and there are often no independent witnesses to the homicide, leads to criticism that the allegations about provocation have been fabricated or exaggerated by the accused.
- The defence is an anachronism as there is no longer a mandatory sentence for murder, which we understand was the main reason for the development of the defence at common law.
- Further the rationale for the defence is unclear as it seems to be a fusion of justification and excuse. To characterise the defence as justification condones acts of violence which are not acceptable in a modern society as exemplified in the *Singh* case. An excuse based rationale gives priority to loss of self control which may be criticised by treating hot blooded killers more leniently than cold-blooded killers. Both have committed extremely violent acts. There is no logical reason why people who kill in the heat of passion through anger or fear, provoked by words or other non violent actions should be convicted of manslaughter as opposed to murder. Sentencing can adequately deal with any difference in culpability.
- Further it is a defence based on an unacceptable loss of control, in our view there is a problem in saying that some homicides are more "acceptable" than others.
- It is anomalous as it only applies to the offence of murder, in respect of other offences it is a matter to be taken into account on sentence.

In summary our views accord with the recommendations of the Victorian Law Reform Commission namely;

- The differences in degrees of culpability for intentional killing should be dealt with on sentence. This approach allows greater flexibility for the court to take provocation into account when it is appropriate to do so, and to ignore it when it is not.
- The only circumstances that should justify a person being completely excused from criminal responsibility for murder, are
 - (1) where a person has killed out of necessity in self protection or to protect the life of another person, provided his or her actions were not unreasonable in the circumstances;
 - (2) or a person has or is suffering from a mental impairment at the time of killing; and
 - (3) where the person's actions were not voluntary.
- The criteria for particular defences to homicide should be readily understandable by juries.

(ii) amending the elements of the defence in light of proposals in other jurisdictions

Taking up our last point above, if the defence were to be amended, our primary concern would be to ensure that the test to be applied by the jury is easily understood and applied. As is evident from the reported decisions and the various Law Reform Commission reports concerning provocation, where there is a combination of a subjective and objective test the directions to the jury become overly complicated.

We are also concerned that if the defence is amended that it retain flexibility to encompass women in domestic violence situations. Although in this regard our preference is that women should be entitled to rely on the defence of self defence rather than provocation.

We note that the Victorian Law Reform Commission considered the exclusion of certain defined contact as a basis for provocation. A similar approach was considered by the working party established in 1995 to review the operation of the Homosexual Advance Defence in New South Wales. Such an approach would protect against potential prejudices by judges and jurors and would also send a message that the accused's response was contrary to the rights of the deceased and explicitly, unacceptable and inexcusable. The types of circumstances considered were where the deceased was leaving or attempting to leave an intimate sexual relationship, suspected discovered or confessed infidelity, or non-violent sexual (including homosexual) advance.¹ It appears to us that excluding the above types of behaviour would bring into question the whole purpose of the defence of provocation, as the defence is

¹ Victorian Law Reform Commission Defences to Homicide Final Report page 43
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said to be about human frailty and the above circumstances are the circumstances where the defence tends to manifest itself most often.

Terms of reference 1 (b) the adequacy of the defence of self defence for victims of prolonged domestic and sexual violence.

As a general proposition we are in favour of ensuring the defence of self defence accommodates victims of prolonged domestic and sexual violence. It is preferable to maintain this defence as one of the limited complete excuses to murder.

However we do perceive that there are a number of problems with the use of self defence for victims of prolonged domestic and sexual violence. One of the main problems is that men are usually physically stronger than their female partners, which means that women when they retaliate usually have to find a moment when their partners are asleep or have their guard down. This retaliation always requires some degree of planning. This means generally that there is not an immediate connection between the threat and the reaction. It also means that it is difficult to establish the proportionality of their response to the threats and the necessity of their conduct. All these factors may influence the jury's assessment of whether or not the accused believed her actions were necessary or the reasonableness of her conduct in all the circumstances.

Reform should concentrate on taking account of women's experiences of violence through reforms to evidence and the clarification of the scope of the defence.

The Victorian Law Reform Commission considered and rejected a number of ways that the defence could be reformed to incorporate the needs of women in a violent relationship. The first is the "battered woman's syndrome model" which would require the woman to establish that she was suffering from the "battered woman's syndrome" at the time of the offence;

The "self-preservation" model which would apply in circumstances where a woman believes that there is no protection or safety from the abuse and is convinced that killing is necessary for the self-preservation;

The "coercive control" model which would focus on a person's need to free him or herself from the circumstances of coercive control.²

In our view there are a number of problems with the above approaches particularly as it would tend to suggest that people who kill in the context of family violence have an automatic claim to self defence.

**Office of the Director of Public Prosecutions
August 2012**

² Victorian Law Reform Commission at page 64

Provocation

Table of cases referred by ODPP Lawyers

Reference number	Facts	Outcome
201006328 Won	The accused and his wife were friends with the deceased and his wife. The accused discovered that his wife and the deceased were having an affair, and stabbed the deceased fatally. At the time of murder the deceased and his wife were separated.	Verdict manslaughter sentenced to 7 years and six months with a non-parole period of five years.
200821457 Cavanagh	Accused killed his elderly mother. The deceased moved in with the accused 3 years prior to the murder, following a property settlement between the accused and his former defacto. The deceased assisted the accused with the settlement. The relationship between the pair deteriorated and on the day of the fatal assault the deceased had taunted the accused about his financial predicament. The accused snapped and grabbed the deceased around the throat and strangled her until she fell to the ground, he then placed an electrical cord around her neck and pulled the cord until she stopped moving. Accused admitted offence to hospital staff and then police. Mental assessment of accused at time was he was extremely distressed but showed no signs of psychosis.	Verdict manslaughter Sentenced to 9 years Imprisonment. Non-Parole period of 5 years to date from 28/8/2008 to expire 27/8/2013. Additional term of 4 years to expire 27/8/2017.
200810982 Gabriel	Domestic violence – all evidence of previous domestic violence was excluded as prejudicial and the defence presented the deceased as manipulative, motivated by money and having extra marital affairs.	Found guilty of manslaughter sentenced to 9 years and three months with a non-parole period of six years and three months.
200114244 Mehmet [2004] NSWCCA 24	Accused stabbed his wife, following discovery of her having an affair. Ferocious attack. Attempted to deflect suspicion	Jury rejected defence and convicted of murder. Sentenced to 18 years non parole

	from himself. Judge found accused under emotional strain and had to some degree lost self control. Judge found murder to be not premeditated and uncharacteristic.	period 13 ½ years.
201008990	Deceased is estranged partner of the accused, they had one child together. Witness accounts indicate that the accused was verbally abusive towards the victim , he threaten to kill her, was upset about paying child support and other relationships the deceased may of be having. The accused attends the deceased property armed, they have an argument he shoots her 5 times. The accused makes a "000" call and states "I gave her 3 of the best".	Not yet listed for trial
201008374 Filoppou	Neighbourhood dispute, the 2 deceased are brothers. Following acrimonious relationship with neighbour brothers attended the accused home. The accused shot both dead.	Verdict guilty murder – listed for hearing against conviction and sentence in CCA November 2012
200914883 Sidiroglou	Accused and deceased married three children of the relationship. Eldest daughter leaves the family home and makes complaint are made against the accused of sexual abuse. The deceased sided with the accused over the allegations, but relationship soured and accused indicated that he wanted a divorce. The deceased was very upset about this, over ensuing day they argued and deceased was struck to head numerous times with a plumbing implement which caused her death.	Plea to manslaughter rejected by crown. Jury verdict guilty to murder. Sentence 20 years, non parole period 15 years.
200712460 Goundar [2012] NSWCCA 87	The deceased and the wife of the accused had an affair, the accused discovered the affair. The deceased and the accused had previously been best friends. The accused and his wife discussed divorce. The relationship was rocky prior to the wife commencing the affair, the accused was	Jury verdict manslaughter on basis of provocation. Sentence 10 years 8 months , non parole period 8 years.

	<p>drinking heavily and abusing prescription medicine. The wife invited the deceased to her home, the accused was hiding in a wardrobe , when he came out of the wardrobe the deceased had his hand around the waist of the wife and he believed he intended to have sexual intercourse with her. The accused was armed and attacked the deceased, fatally stabbing him. The wife pleaded guilty to accessory to murder and gave evidence against the accused.</p>	
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