Submission No 8

INQUIRY INTO PARTIAL DEFENCE OF PROVOCATION

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Submission

on the

Partial Defence of Provocation

to the

Select Committee on the Partial Defence of Provocation

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1. Introduction

On 14 June 2012 the Legislative Council of the Parliament of New South Wales passed a motion as follows:

> *That this House notes ongoing concerns regarding the use of provocation as a partial defence to a charge of murder.*
>
> *That a select committee be appointed to inquire into and report on:*
>
> *(a) the retention of the partial defence of provocation including:*
>
> *(i) abolishing the defence,*
>
> *(ii) amending the elements of the defence in light of proposals in other jurisdictions,*
>
> *(b) the adequacy of the defence of self-defence for victims of prolonged domestic and sexual violence, and*
>
> *(c) any other related matters.*

The Select Committee has invited written submissions addressing these issues. Submissions are due by 10 August 2012.

2. Partial defence of provocation: intent to kill

Section 23 of the *Crimes Act 1900* sets out the current law on provocation as a partial defence to a charge of murder.

> *(1) Where, on the trial of a person for murder, it appears that the act or omission causing death was an act done or omitted under provocation and, but for this subsection and the provocation, the jury would have found the accused guilty of murder, the jury shall acquit the accused of murder and find the accused guilty of manslaughter.*
>
> *(2) For the purposes of subsection (1), an act or omission causing death is an act done or omitted under provocation where:*
>
> *(a) the act or omission is the result of a loss of self-control on the part of the accused that was induced by any conduct of the deceased (including grossly insulting words or gestures) towards or affecting the accused, and*
>
> *(b) that conduct of the deceased was such as could have induced an ordinary person in the position of the accused to have so far lost self-control as to have formed an intent to kill, or to inflict grievous bodily harm upon, the deceased, whether that conduct of the deceased occurred immediately before the act or omission causing death or at any previous time.*
>
> *(3) For the purpose of determining whether an act or omission causing death was an act done or omitted under provocation as provided by subsection (2), there is no rule of law that provocation is negatived if:*

(a) there was not a reasonable proportion between the act or omission causing death and the conduct of the deceased that induced the act or omission,

(b) the act or omission causing death was not an act done or omitted suddenly, or

(c) the act or omission causing death was an act done or omitted with any intent to take life or inflict grievous bodily harm.

(4) Where, on the trial of a person for murder, there is any evidence that the act causing death was an act done or omitted under provocation as provided by subsection (2), the onus is on the prosecution to prove beyond reasonable doubt that the act or omission causing death was not an act done or omitted under provocation.

(5) This section does not exclude or limit any defence to a charge of murder.

The terms of reference for this inquiry require the Select Committee to consider whether this partial defence of provocation should be abolished, amended or retained as its stands.

Section 18 (1) (a) of the *Crimes Act 1900* defined murder as follows:

Murder shall be taken to have been committed where the act of the accused, or thing by him or her omitted to be done, causing the death charged, was done or omitted with reckless indifference to human life, or with intent to kill or inflict grievous bodily harm upon some person, or done in an attempt to commit, or during or immediately after the commission, by the accused, or some accomplice with him or her, of a crime punishable by imprisonment for life or for 25 years.

This definition incorporates a range of distinguishable mental states including "reckless indifference to human life"; "intent to kill"; and "intent to inflict grievous bodily harm".

The partial defence of provocation should not be available where the accused has formed and acted on a clear intention to kill. The law should make it clear that no provocation justifies forming and acting on an intention to kill and that the onus is on each of us not to act on any murderous thoughts that arise no matter how impassioned we may be. In these circumstances provocation could still be considered in sentencing.

Recommendation 1:

The partial defence of provocation should not apply where it is proved by the Crown that the accused intended to kill.

3. Partial defence of provocation: no intent to kill

However, provocation should be retained as a partial defence to murder where there is no clear intent to kill but where there may be a "reckless indifference to human life" or an "intent to inflict grievous bodily harm".

Queensland recently passed the *Criminal Code and Other Legislation Amendment Bill 2010* which limited the partial defence of provocation.

This limited the circumstances in which the defence is available by excluding from those matters which could be considered to be a "*sudden provocation*" firstly anything "*based on words alone*" and secondly "*anything done to end a* [domestic] *relationship; or to change the nature of the relationship;*

or to indicate in any way that the relationship may, should or will end, or that there may, should or will be a change to the nature of the relationship".

In both cases the phrase "*other than in circumstances of a most extreme and exceptional character*" qualifies the exclusion.

It is relevant to note that those Justices who attended a consultation with the Queensland Law Reform Commission "*were not in favour of any definition by exclusion of the behaviour that may amount to provocation. One Justice made the point that lawful behaviour might, in certain circumstances, be very offensive and that, without experiencing the atmosphere of a particular trial, it was impossible to judge the merits of a claim of provocation simply by categorising the behaviour alleged as 'mere words' or 'lawful conduct'. Another Justice suggested that the difficulty with creating defined exclusions was that one could always think of examples in which the defined conduct amounted to a serious wrong in response to which violent retaliation was justified.*"[1]

The Law Reform Commission subsequently ignored the wise advice of the Justices that "*without experiencing the atmosphere of a particular trial, it was impossible to judge the merits of a claim of provocation*". The Commission's Report – on which the *Criminal Code and Other Legislation Amendment Bill 2010* l was based, repeatedly categorised decisions made by juries – who were in the court room – as good or bad decisions and drew conclusions from this exercise in second-guessing verdicts. This is not an appropriate methodology for law reform.

The Explanatory Memorandum to the Bill stated that the exclusion from matters that could be considered a "sudden provocation" of things done to end or change a relationship was necessary to "*recognise a person's right to assert their personal or sexual autonomy*".

This seems to imply the extraordinary proposition that no one – including husbands and wives – has any right to expect fidelity or lifelong commitment in a relationship; and that marital betrayal or desertion, even without notice and announced in a way that is viciously cruel or taunting, should never give rise to any reaction other than a cool response of "I wish you the best in your freely chosen autonomous decision about your personal and sexual life".

The exclusion would effectively rule out the classic case of a husband unexpectedly arriving home to find his wife engaged in a sexual act with another man.

(What was Frankie thinking when she shot Johnny because he was making love to Nelly Bly! He wasn't '*doing her wrong*' at all – just exercising his right to personal and sexual autonomy.)[2]

It seems perverse to continue to allow the defence for all sudden provocations other than those that touch on intimate relationships including marriage. This is unrealistic and reflects an extreme, ideological, individualistic view of marriage and of personal, sexual relationships.

Of course, such provocation should never completely excuse an unlawful killing. However, the defence of provocation is a *partial* defence which operates to reduce the charge from murder to manslaughter. It seeks to take into account human frailty and the possibility that under sudden provocation there may be a loss of self-control. While not excusing violence resulting in death these circumstances have traditionally been held to warrant a reduction in the seriousness of the offence from murder to manslaughter.

Queensland law puts the onus of proof on those seeking to rely on the partial defence of provocation. The argument for this reversal is the obvious difficulty of the prosecution proving beyond a reasonable doubt that the defendant's account of an alleged sudden provocation was not how things happened. However, reversing the onus of proof creates for the defendant the difficulty of proving that a sudden provocation actually took place when the defendant may well be the only living witness to that provocation. This seems unjust.

Recommendation 2:

Apart from the change recommended in Recommendation 1 above, the partial defence of provocation should be retained in its current form. In particular the changes made to Queensland law by the Criminal Code and Other Legislation Amendment Bill 2010 should not be adopted in New South Wales.

4. Self-defence and victims of prolonged domestic and sexual violence

The terms of reference require the Select Committee to consider "*the adequacy of the defence of self-defence for victims of prolonged domestic and sexual violence*".

Section 418 of the *Crimes Act 1900* provides that:

> *(1) A person is not criminally responsible for an offence if the person carries out the conduct constituting the offence in self-defence.*
>
> *(2) A person carries out conduct in self-defence if and only if the person believes the 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, or*
> >
> > *(c) to protect property from unlawful taking, destruction, damage or interference, or*
> >
> > *(d) to prevent criminal trespass to any land or premises or to remove a person committing any such criminal trespass,*
>
> *and the conduct is a reasonable response in the circumstances as he or she perceives them.*

Where this defence is raised, Section 419 puts the onus of proof on the prosecution to establish that the accused did not carry out the conduct act in self-defence.

Section 421 provides a partial defence of excessive self-defence to murder where the full defence does not apply as follows:

> *(1) This section applies if:*
>
> > *(a) the person uses force that involves the infliction of death, and*
> >
> > *(b) the conduct is not a reasonable response in the circumstances as he or she perceives them,*
>
> *but the person believes the conduct is necessary:*
>
> > *(c) to defend himself or herself or another person, or*

(d) to prevent or terminate the unlawful deprivation of his or her liberty or the liberty of another person.

(2) The person is not criminally responsible for murder but, on a trial for murder, the person is to be found guilty of manslaughter if the person is otherwise criminally responsible for manslaughter.

Queensland law has a specific provision in its Criminal Code, section 304B, that provides a partial defence of murder for "*killing for preservation in an abusive domestic relationship*".

The defence requires that "*the person believes that it is necessary for the person's preservation from death or grievous bodily harm to do the act or make the omission that causes the death*" (s304B (1) (b)). This is similar to the requirement in s421 (1) (c) of the *Crimes Act 1900.* However the other elements of the Queensland partial defence go beyond the current partial defence of excessive self-defence.

The Queensland defence includes provisions that "*A history of acts of serious domestic violence may include acts that appear minor or trivial when considered in isolation*" (s304B (3)) and that the defence may apply "*even if the act or omission causing the death (the response) was done or made in response to a particular act of domestic violence committed by the deceased that would not, if the history of acts of serious domestic violence were disregarded, warrant the response*" (s304B (4)).

Extraordinarily the defence is made explicitly available to persons who have themselves engaged in prior acts of domestic violence. (s304B (5)).

This means that there is a partial defence to murder for the first partner in a mutually violent domestic relationship who escalates the violence to the point of killing the other one.

This partial defence should not be introduced in New South Wales. Introducing it may encourage resort to murder of a spouse with a careful attempt to establish apparent evidence to sustain the defence. There are always alternative responses to domestic violence.

Recommendation 3:

No specific partial defence of "killing for preservation in an abusive domestic relationship" should be introduced into New South Wales law.

5. Endnotes

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1. Queensland Law Reform Commission, *A review of the excuse of accident and the defence of provocation: Report*, September 2008, p 445: http://www.qlrc.qld.gov.au/reports/R%2064.pdf

2. "Frankie and Johnny", *Wikipedia*: http://en.wikipedia.org/wiki/Frankie_and_Johnnie; "Frankie and Johnnie", *Wikisource*: http://en.wikisource.org/wiki/Frankie_and_Johnnie