Submission No 32

INQUIRY INTO PARTIAL DEFENCE OF PROVOCATION

Organisation: NSW Council for Civil Liberties Inc.

Name: Mr Cameron Murphy

Date received: 20/08/2012

NSW Council for Civil Liberties Inc.

Postal address: PO BOX A1386 SYDNEY SOUTH NSW 1235
Office address: suite 203, 105 Pitt Street SYDNEY NSW 2000
Phone: 02 8090 2952 Fax: 02 8580 4633
Email: office@nswccl.org.au Website: www.nswccl.org.au

New South Wales Council for Civil Liberties

Reverend the Honourable Fred Nile

Chair

Select Committee on the Partial Defence of Provocation

Legislative Council

Parliament House

Macquarie Street

SYDNEY NSW 2000

Dear Reverend Nile

Legislative Council Select Committee Inquiry on the Partial Defence of Provocation

The following submission is made on behalf of the NSW Council for Civil Liberties to the Select Committee on the Partial Defence of Provocation.

The NSW Council for Civil Liberties supports the retention of the partial self-defence of provocation in the absence of a compelling case for reform. The NSW Council for Civil Liberties notes the absence, as yet, of a compelling case for reform.

At the outset, the NSW Council for Civil Liberties notes that an important democratic principle at the heart of our criminal justice system is at stake in the committee's deliberations – and involves the proper role of the jury in reflecting community values and in determining moral questions.

Murder remains the most serious offence in the *Crimes Act.* As a statement of principle, the NSW Council for Civil Liberties believes that there should be no attempt to "water down" or "unwind" the important function of the jury system in our criminal justice system in the absence of an evidence base

suggesting that the system is not working or is leading to flawed outcomes. It will have consequences – not the least of which include public confidence in our criminal justice system.

The issues before the Select Committee ultimately impact on the question of whether an accused is guilty of the murder or of the lesser charge of manslaughter, and whether it is a serious enough question to be entrusted to a jury. As a statement of principle, the NSW Council for Civil Liberties believes that the jury system is best placed to reflect enduring community values in the determination of this vexed issue.

Safeguards are in place. Matters can be taken from a jury if there is insufficient evidence to substantiate a provocation defence. Careful directions to the jury further safeguard against injustice. In an adversarial system, these "checks and balances" are monitored by both prosecutors and defence lawyers.

The NSW Council for Civil Liberties is concerned that attempts to "hamstring" the abilities of juries and/or sentencing judges could lead to unintended consequences and injustices. This is why garnering an evidence base should be the first step in assessing proposed reform in this area.

The NSW Council for Civil Liberties notes that the partial defence, introduced into Australian law in 1974 as section 23A of the *Crimes Act 1900*, has traditionally provided juries and sentencing judges greater flexibility to take into account mental states that fell short of a plea of 'not guilty by way of mental illness' and yet which justified some amelioration in the eventual sentence.It has also meant that enduring community values and emerging conditions - such as battered women syndrome - can be properly taken into account as factors of mitigation in sentencing outcomes.

The NSW Council for Civil Liberties would support referring the matter to the NSW Law Reform Commission for a thorough and evidence-based review. The NSW Council for Civil Liberties notes that the NSWLRC Consultation Paper 6 [2010], titled "People with Cognitive and Mental Health Impairments in the Criminal Justice System: Criminal Responsibility and Consequences", at 4.20, did review the operation of the law in this area favourably. The report did favourably cite a report from the Judicial Commission as follows:

> Only those cases in which the impairment is severe, or the moral circumstances are highly compelling, appear to be accepted. A greater proportion of these offenders are assessed as being poor vehicles for punishment and deterrence, of greatly reduced culpability, or presenting a low level of threat to the community.

The Council for Civil Liberties notes that the Law Reform Commission are best placed and resourced to conduct a thorough review reflecting the evidence base in this area. However, in the absence of any such report, the Council for Civil Liberties is of the view that judicial discretion, guided by the application of legal principle, is most likely to achieve just outcomes for those convicted of this serious offence.

Retention of the partial defence reflects the reality present in the factual matrix present in many cases – that there may be some contribution to the loss of control by accused due to the acts (intended or unintended) by the deceased. Such acts are relevant as factors of mitigation in a sentence: see s21A(3)(c) of the *Crimes (Sentencing Procedure) Act 1999.*

1. What is provocation?

Under s 23 of the *Crimes Act* 1900, murder is reduced to manslaughter where the act or omission causing death was done or omitted under provocation. The partial defence is available where the act or omission is the result of a loss of self control induced by the deceased's conduct where that conduct 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 inflict grievous bodily harm. For this reason, it is often referred to as a "sudden and temporary loss of control" induced by provocative conduct.

2. Is it a soft option?

Despite provocation often beingviewed as a concession to human frailty: *R v Chhay* (1994) 72 A Crim R 1 Gleeson CJ at 11, manslaughter is still recognised as a major crime and which still sees heavy sentences for offenders. A review of sentencing outcomes in this area is demonstrative of the false premise so often relied upon by proponents of reform in this area.

The NSW Council for Civil Liberties notes:

- The maximum penalty for manslaughter is 25 years imprisonment. The maximum penalty for the offence remains an important factor to be taken into account on sentence – representing views of both the legislature and the community as to the serious nature of this category of offence;

- The defence of provocation, if made out, does not entitle the accused to an acquittal; it reduces murder to manslaughter. Manslaughter is simply not a "soft option", nor is an offender facing charges of manslaughter guaranteed a more lenient sentence than they otherwise would;

- The application of sentencing principle to the objective and subjective factors posed by the factual matrix of a particular case remains the task accorded ultimately to the "judgeof law" in our system of justice – who must balance competing sentencing

principles including general deterrence, specific deterrence and the protection of the community.

3. Are the principles of general and specific deterrence still enlivened in matters where provocation is found?

The NSW Council for Civil Liberties notes:

- Specific and general deterrence remain important sentencing principles under the existing legislative schema. In *R v Ali* [2005] NSWSC 334 at [56], it was said that "it is often not of any great consequence whether a killing is characterised as coming within any particular head of manslaughter. Rather, the critical question is what sentence is required to reflect the objective and subjective facts, and, if necessary, deterrence". The NSW Council for Civil Liberties notes that individual sentencing judges are best placed to balance these at times competing principles;

- Flexibility in the application of sentencing principle is a necessary element of the law in this area. In *R v Bolt*(2001) 126 A Crim R 284 at [35] it was observed that "as a matter of logic, the degree of provocation must reduce the objective gravity of the offence, and also the degree of violence employed must increase the objective gravity of the offence". A "one-size fits" approach is most likely to lead to outcomes at odds with community standards;

- There remains no hierarchy of seriousness between voluntary and involuntary manslaughter: *Isaacs* at 381. As Smart AJ put it in *R v Dally*(2000) 115 A Crim R 582 at [64],"It is not the variety of manslaughter but the facts which determine the objective gravity of the offence. Neither variety is inherently more serious than the other".

4. Provocation and the vexed position of battered women

The NSW Council for Civil Liberties notes:

- The 'protean quality' often attributed to the offence of manslaughter arises from the evolution of a defence used by battered women who kill their partners after prolonged abuse. The NSW Council for Civil Liberties would urge the committee to ensure that flexibility when a sentencing judge is faced with these unusual cases;

- Only in exceptional cases involving a history of domestic violence perpetrated by the deceased a non-custodial sentence is viewed as an appropriate sentencing outcome: *R v Bogunovich* (1985) 16 A Crim R 456. However, these cases often reflect the experience of women as victims of domestic abuse and the growing pool of empirical

evidence in this area validating these sentencing outcomes – and should not be "hamstrung" by legislative change;

- The legislature, in recognition of the difficulties posed by attempts to fetter sentencing discretion in this area, has repeatedly refused to assign a standard non-parole period to the offence of manslaughter. This recognised the difficulties of limiting judicial discretion in certain circumstances. Indeed, the "protean quality" inherent in manslaughter cases generally means reference to other provocation cases may not be helpful. Barr J said *R v Green* [1999] NSWCCA 97 at [32]:

> "… comparison of the sentences in each of the cases to which I have referred and the similarities and dissimilarities in the facts which gave rise to those sentences illustrate the difficulties faced not only by a trial judge in determining a proper sentence but by an appellant who seeks by reference to such cases to demonstrate that the sentence imposed was outside the available range of sentencing discretion".

5. Could there be other unintended consequences?

The NSW Council for Civil Liberties notes:

- There is obvious potential overlap between the defences of provocation – a partial defence –and self-defence – a complete defence. One potential consequence of legislating the abolition of the partial defence will see more defence lawyers plead their cases as issues of self-defence. The result could see more acquittals and other "unintended outcomes".

- One such unintended consequence could see battered women spending unacceptably lengthy periods incarcerated. As cited in the submission to this committee by the NSW Bar Association:

> the New South Wales Law Reform Commission Report no. 83, 'Partial Defences to Murder', referred to a study of the killing of sexual partners amongst sentenced homicide offenders in New South Wales between 1990 and 1993. The study showed that 47 sentenced male offenders in that period killed their sexual partners. Of those, only 5 successfully raised the defence of provocation. On the other hand, there were nine sentenced female offenders who killed their sexual partners. Eight of them had killed in response to physical abuse or threats immediately prior to the killing. All 9 women were convicted of manslaughter, of whom 5 relied on the defence of provocation.

Conclusion

The NSW Council for Civil Liberties urges retaining the defence in the absence of compelling evidence to justify legislative change. The current approach facilitates community involvement, through the jury, in making moral judgments as to the level of criminal responsibility to be attached to an offender's conduct. The NSW Council for Civil Liberties notes the protean quality of the offence of manslaughter and the inherent difficulties in fettering judicial discretion in this otherwise vexed area of human interaction.

It is noted that these cases are often among the most serious in the criminal lexicon. The cases which will be directly impacted upon by the Committee's deliberations will often include offenders with personality disorders, mental illnesses or conditions, syndromes (including battered women syndrome) or who come before the court as "one-off offenders" unlikely to pose danger to the community. To remove the democratic functioning of the jury in this area would necessarily diminish the input from the community in making these determinations.

The NSW Council for Civil Liberties would therefore support any move by the committee to broaden the evidence and knowledge base in this vexed area.

Yours sincerely

Cameron Murphy

President