

INQUIRY INTO PARTIAL DEFENCE OF PROVOCATION

Organisation: Women's Electoral Lobby

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Select Committee on the Partial Defence of Provocation
WEL's response to proposed reform options 3 October 2012

Abolish provocation Repeal section 23 of the <i>Crimes Act 1900</i>	WEL is strongly opposed to this option.
Retain provocation without amendment Retain section 23 of the <i>Crimes Act 1900</i> in its current form	WEL fully supports this option.
Retain provocation with amendments Various reform options have been proposed	WEL does not support this option.
Reversal of the onus of proof	WEL is strongly opposed to this proposal.
<p>A reversal of the onus of proof is completely inappropriate, as it has long been established by common law that the prosecution must prove an accused's guilt beyond reasonable doubt. The prosecution bears this burden in relation to offence elements as well as negating defence elements, with two exceptions: the defence of mental illness and the partial defence of substantial impairment by abnormality of the mind. The rationale behind these exceptions is the presumption of sanity. Every person is presumed to be of sufficient soundness of mind to be criminally responsible for his or her actions until the contrary is proved.</p> <p>There is no logical reason for reversing the onus of proof for provocation when all other 'non-mental incapacity' defences – self-defence, excessive self-defence, necessity, duress, (sane) automatism – require the prosecution to negate the defence elements.</p> <p>Reversing the onus would increase the complexity of jury directions in cases where provocation, self-defence and excessive self-defence are in issue. The jury would have to be directed that the <i>accused bears the burden</i> of proving on the <i>balance of probabilities</i> that they were provoked and yet the <i>prosecution bears the burden</i> of proving <i>beyond reasonable doubt</i> that the accused did not kill in self-defence or excessive self-defence.</p> <p>Furthermore, murder is the most serious crime on the criminal calendar carrying with it the possibility of life imprisonment without parole. The seriousness of the offence demands the prosecution prove its case beyond reasonable doubt. It would be entirely unjust to require individual accused to disprove their guilt. In cases where the defence of mental illness and/or substantial impairment is in issue, there is, ordinarily, cogent medical evidence to support the accused in his or her reliance on these defences. Such evidence is not usually available in provocation cases.</p>	
Appendix A – Proposed by the Hon. Adam Searle (2) <i>For the purposes of subsection (1), an act or omission causing death is an act done or omitted under provocation only where the conduct of the deceased:</i> (b) <i>was an act or omission that constitutes violent criminal acts or acts which constitute domestic or family violence</i>	WEL does not support this proposition. The terminology in this section could undermine the use of self-defence. What distinguishes 'violent criminal acts' from the circumstances faced by a person who kills in self-defence or excessive self-defence? If a woman kills in response to conduct of the deceased that amounts to 'violent criminal acts or acts which constitute domestic or family violence' then self-defence and/or excessive self-defence might be more appropriate. WEL shares Professor Tolmie's concerns about the need to have a well-informed jury when the immediate event that the defendant is reacting to does not amount to 'domestic or family violence' or a 'violent criminal act', but something that is only provocative because of that background. In <i>R v Ko</i> [2000] NSWSC 1130 the female defendant had married the deceased out of shame after he raped her and forced her to have an abortion. Their sexual life was attended by significant brutality and degrading conduct on the part of the deceased. On the day of the killing the deceased had said he wanted a divorce. She responded by stabbing him 17 times. Would she be precluded from relying on provocation? In <i>R v Fiu</i> (Unreported, NSWSC, Ireland J, 1 June 2000) the female defendant stabbed her lover 17 times when he told her he would not marry her and did not love her. She had been provoked by the fact the deceased used her only for sexual gratification over a period of years. Would she be precluded from relying on provocation? Does the deceased's conduct constitute 'domestic or family violence'? WEL shares Professor Stubbs (and others) concern that such a narrow drafting of the legislation could have unintended consequences. WEL supports the retention of the existing onus of proof for the reasons provided above.

<p>(4) <i>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.</i></p>	
<p>Appendix B – Proposed by the Hon. James Wood QC</p> <p>(2) <i>For the purposes of subsection (1), an act or omission causing death is an act done or omitted under provocation where:</i></p> <p>(a) <i>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</i></p> <p>(b) <i>that conduct of the deceased was such that taking into account all of the characteristics of the accused and the circumstances in which the provocation occurred, including the history of the relationship between the accused and the deceased and the manner in which the provocation came to the attention of the accused, was such as to warrant his or her liability being reduced to manslaughter.</i></p> <p>(5) <i>For the purpose of subsection (1), a person does not commit an act or omission causing death under provocation if:</i></p> <p>(b) <i>the conduct of the deceased constituted sexual infidelity or a threat to end a domestic relationship with that person.</i></p> <p>(6) <i>On the trial of a person for murder, the onus shall be on the accused to prove on a balance of probability that the act or omission causing death was an act or omission done or omitted under provocation as provided by subsection (2).</i></p>	<p>WEL does not support this proposal.</p> <p>Does this mean that a non-violent homosexual advance is not excluded from the defence?</p> <p>In the absence of any objective test, what would be considered sufficient to ‘warrant his or her liability being reduced to manslaughter’?</p> <p>Subsection (5)(b) only excludes killings of a spouse/partner from the defence. This means, for example, a man who kills his unfaithful wife is precluded from the defence of provocation but a man who kills his wife’s lover is not precluded from the defence. Why is the killing of a person outside of the domestic relationship more excusable than a killing within it?</p> <p>WEL is strongly opposed to the reversal of the onus of proof for the reasons stated above.</p>
<p>Appendix C – Proposed by the Hon. Trevor Khan</p> <p>(2) <i>For the purposes of subsection (1), an act or omission causing death is an act done or omitted under gross provocation where:</i></p> <p>(a) <i>the defendant acted in response to:</i></p> <p>i. <i>gross provocation (meaning words or conduct or a combination of words and conduct) which caused the defendant to have a justifiable sense of being seriously wronged; or</i></p> <p>ii. <i>fear of serious violence towards the defendant or another; or</i></p> <p>iii. <i>a combination of both (i) and (ii); and</i></p> <p>(b) <i>a person of the defendant’s age and of ordinary temperament, i.e., ordinary tolerance and self-restraint, in the circumstances of the defendant might reasonably have reacted in the same or in a similar way.</i></p> <p>(3) <i>In deciding whether a person of the defendant’s age and of ordinary temperament, i.e. ordinary tolerance and self-restraint, in the circumstances of the defendant, might have reasonably reacted in the same or in a similar way, the court should take into account the defendant’s age and all the circumstances of the defendant other than matters whose only relevance to the defendant’s conduct is that they bear simply on his or her general capacity for self-control.</i></p>	<p>WEL does not support this proposal</p> <p>Justifiable to whom? The defendant? The ordinary person? What does “seriously wronged” mean?</p> <p>Self-defence or excessive self-defence should be considered more appropriate for a person who kills another out of “fear of serious violence towards” themselves or another.</p> <p>It is not clear what “ordinary tolerance and self-restraint” mean.</p> <p>The defence of provocation has long employed an “ordinary person” test as opposed to a “reasonable person” test given that the defence is “a concession to human frailty” which recognises that ordinary (not necessarily reasonable) people pushed to extremes can lose self-control and kill.</p> <p>WEL notes that some commentators have raised concern in their submissions that jury directions are too complex. This would add to, rather than alleviate, the complexity.</p> <p>Is it necessary to direct the court to disregard “matters whose [sic] only relevance to the defendant’s conduct is that they bear simply on his or her general capacity for self-control” given that the person is required to be of “ordinary tolerance and self-restraint”?</p>

<p>(4) <i>The partial defence should not apply where:</i></p> <p>(c) <i>other than in circumstances of a most extreme and exceptional character, if—</i></p> <p style="padding-left: 40px;">(i) <i>a domestic relationship exists between the defendant and another person; and</i></p> <p style="padding-left: 40px;">(ii) <i>the defendant unlawfully kills the other person (the deceased); and</i></p> <p style="padding-left: 40px;">(iii) <i>the provocation is based on anything done by the deceased or anything the person believes the deceased has done—</i></p> <p style="padding-left: 80px;"><i>(ai) to end the relationship; or</i></p> <p style="padding-left: 80px;"><i>(aia) to change the nature of the relationship; or</i></p> <p style="padding-left: 80px;"><i>(aib) 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.</i></p> <p>(d) <i>the defendant acted in response to conduct of the deceased consisting of a non-violent sexual advance.</i></p> <p>(7) <i>Where, on the trial of the defendant for murder, there is any evidence that the act causing death was an act done or omitted under gross provocation as provided by subsection (2), the onus is on the defendant accused to prove that he or she is not liable to be convicted of murder by virtue of this section.</i></p>	<p>Subsection (4)(c) only excludes from the defence killings of a current spouse/partner. This means, for example, that a man who kills his unfaithful wife is precluded from the defence of provocation but a man who kills his wife's lover is not precluded from the defence. Why is the killing of a person outside of the domestic relationship more excusable than a killing within it?</p> <p>Does "domestic relationship" include former spouses/partners? Does it include sexually intimate partners who do not live together? Does it include flat-mates?</p> <p>Does "change in the nature of the relationship" adequately capture the problem of killings as a result of infidelity/jealousy?</p> <p>In <i>R v Ko</i> [2000] NSWSC 1130 the female defendant had married the deceased out of shame after he raped her and forced her to have an abortion. Their sexual life was attended by significant brutality and degrading conduct on the part of the deceased. On the day of the killing the deceased had said he wanted a divorce. She responded by stabbing him 17 times. Would she be precluded from relying on provocation by sub-s (4)(c)(iii)?</p> <p>In <i>R v Fiu</i> (Unreported, NSWSC, Ireland J, 1 June 2000) the female defendant stabbed her lover 17 times when he told her he would not marry her and did not love her. She had been provoked by the fact that the deceased used her only for sexual gratification over a period of years. Would she be precluded from relying on provocation by sub-s (4)(c)(iii)?</p> <p>What if the deceased had sexually assaulted the accused in the past? In <i>R v Johnson</i> [2003] NSWCCA 129, the deceased had sexually assaulted the accused when he was 13 years old. Many years later the deceased made a sexual advance towards the accused and the accused killed him. Would he be precluded from provocation by sub-s (4)(d)?</p> <p>WEL is strongly opposed to the reversal of the onus of proof for the reasons stated above. This section, combined with sub-s (4)(c), would mean that in a case where a man kills both his unfaithful spouse and her lover, the jury would have to be directed that provocation could not apply to the killing of the wife and the prosecution must prove the offence of murder beyond reasonable doubt, but that provocation could apply to the killing of the lover and that the accused must prove this on the balance of probabilities.</p>
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