Submission No 19

INQUIRY INTO PARTIAL DEFENCE OF PROVOCATION

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THE LAW SOCIETY OF NEW SOUTH WALES
young LAWYERS

Criminal Law Committee

Submission

Select Committee on the Partial Defence of Provocation

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The Director
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Preface

The NSW Young Lawyers Criminal Law Committee ("the Committee") is grateful for the opportunity to provide a submission to the Select Committee on the Partial Defence of Provocation ("the Inquiry").

NSW Young Lawyers is a Division of the Law Society of NSW. It is made up of legal practitioners and law students who are under the age of 36 or in their first 5 years of practice. Our membership is made up of some 13,000 members.

The NSW Young Lawyers Criminal Law Committee provides education to the legal profession and wider community on current and future developments in the criminal law, and identifies and submits on issues in need of law reform. The Committee regularly submits to inquiries by law reform agencies and Parliaments.

The partial defence of provocation

The Committee has unfortunately been unable to reach a consensus view in relation to the partial defence of provocation. The views represented included members who were in favour of retaining the current test, through to members who were in favour of amendment (chiefly, in the name of simplification) and members who supported abolition.

Identifying the core concern

In the light of our inability to reach a consensus, the Committee would primarily invite the Inquiry to carefully identify its core concern with the partial defence.

The task is particularly important for this reason: if the real concern with the defence in its current form is the (perceived) inadequacy of sentences following conviction for manslaughter (i.e. when the defence is made out), the solution to the problem may not necessarily mean abolishing or amending the defence.

It would appear that there is more than sufficient scope to impose an appropriate sentence given the 25 year maximum penalty the offender still faces when convicted of manslaughter.[1] Accordingly, if post-provocation sentences are perceived to be inadequate, it may be that one solution could be for Parliament to impose a Standard Non-Parole Period ("SNPP"), which under the current state of the law would be a guidepost,[2] and an indication that sentences for that offence should increase.[3]

To be clear: the Committee is ***not*** advocating in favour of such an addition (indeed, the Committee has uniformly indicated its opposition to the SNPP scheme). We merely seek to draw attention to the fact that the *core* problem may not lie with the defence itself. Indeed, if the concern is one of sentencing practices, then it may be one considered appropriate to refer to the New South Wales Law Reform Commission's ("NSWLRC") Review into the Law of Sentencing – although it is noted that previous NSWLRC recommendations on this topic have not been taken up – in order to investigate why sentences are perceived to be disproportionately low.

On the other hand, if the primary objection is a *moral* opposition to the reduction in *terminology* from "murder" to "manslaughter", then it might be necessary to consider abolishing the defence. Because circumstances of provocation can be taken into account to reduce a sentence,[4] and (but for the provocation) an offender who falls within s23 fulfils

[1] *Crimes Act 1900* (NSW) s24.
[2] *Muldrock v The Queen* [2011] HCA 39, [27].
[3] Ibid, [31].
[4] *Crimes (Sentencing Procedure) Act 1999* (NSW) s21A(3)(c).

all the other criteria for murder, it may be considered appropriate to reflect that fact by applying the label “murder”.

The Committee notes that the core concern varies among advocates for and against the abolition of the defence, and submits that the Inquiry would be well-served by establishing priorities for legislative amendment by reference to those concerns.

The complicated nature of the test

Some Committee members expressed the view that the existing test is relatively complicated, and may be hard for juries to understand. Thomas J, writing a judgment for the New Zealand Court of Appeal, has recalled:

> *"the glazed look in the jurors' eyes as, immediately after instructing them that it is open to them to have regard to the accused's alleged characteristic in assessing the gravity of the provocation, they are then advised that they must revert to the test of the ordinary person and disregard that characteristic when determining the sufficiency of the accused's loss of self-control."*[5]

Even though there is no direct evidence that the Committee is aware of, it is reasonable to consider it difficult for juries to grapple with:

1. The dual subjective / objective character of the test; and
2. The fact that this partial defence is (theoretically) the last in an often-complex chain of issues that a jury has to determine in respect of the trial.

Any simplification of the test ought validly to ask whether the reaction of the accused was reasonably proportionate to the provocation apparently faced, whilst bearing in mind that an offender must still form the intention to kill.

Moreover, any such amendment ought to bear in mind that a court will be required to explain the test to a jury of ordinary community members.

Existing recommendations

Finally, the Committee notes that, as it understands it, the NSW Law Reform Commission’s Report into this topic, completed as long ago as 1997, was never implemented.[6] The Inquiry might be assisted by considering the reasons that the Government at that time declined to implement the recommendations.

The Committee has not reviewed the recommendations of the Attorney-General’s inquiry, conducted at the same time, into the “homosexual advance defence”. However, if the provocation defence is retained, the Committee supports consideration of the legislative exclusion of non-violent sexual advance adopted in the Australian Capital Territory.

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[5] *R v Rongonui* (13 April 2000) unreported, Court of Appeal, CA 124/99.

[6] New South Wales Law Reform Commission, *Partial Defences to Murder: Provocation and Infanticide*, Report 83, October 1997.

The adequacy of the defence of self-defence for victims of prolonged domestic and sexual violence

The Committee has no particular comments to make in respect of the adequacy of the defence of self-defence in the circumstances described.

However, it is to be noted that there may be cases where a victim of prolonged domestic violence would more accurately fall into the category of someone who has been provoked.

For example: where such a victim of prolonged domestic or sexual abuse kills while the perpetrator of the violence (the deceased) is asleep, it may be hard to show that the victim of the domestic violence (the accused) felt the need to "defend" themselves (pursuant to s418(2)(a) *Crimes Act 1900* (NSW)) rather than to show that they were provoked to the point of a loss of control (pursuant to s23(2) *Crimes Act 1900* (NSW).[7] In other words: it is conceivable that the removal of the partial defence of provocation would be against the interests of a victim of prolonged domestic or sexual violence who kills their partner.

Accordingly, it may be that in the event that the provocation defence is abolished, it might be necessary to consider an addition to the self-defence provisions[8] in order to create a particular test for such victims.

The Committee thanks you for the opportunity to comment. The Committee would welcome any opportunity to appear before the Inquiry in respect of any evidentiary hearing.

If you have any questions in relation to the matters raised in this submission, please contact:

Yours faithfully,

Thomas Spohr | Executive Councillor, NSW Young Lawyers | Chair, Criminal Law Committee
NSW Young Lawyers | The Law Society of New South Wales

[7] See, eg, *R v R* (1981) 28 SASR 321 at 325-6.
[8] *Crimes Act 1900* (NSW) Part 11, Div 3.