

INQUIRY INTO PARTIAL DEFENCE OF PROVOCATION

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In this submission, Legal Aid NSW:

- provides a background outlining the partial defence of provocation, and noting criticisms and recent issues regarding the defence
- summarises recent cases involving the partial defence of provocation
- discusses the role of the jury, and
- considers the importance of maintaining the partial defence of provocation, and its interplay with self-defence and excessive self-defence, from the perspective of victims of domestic violence.

In the conclusion to this submission, Legal Aid NSW:

- supports the retention of the partial defence of provocation, and
- suggests consideration be given to amending the ordinary person test in circumstances where the accused claimed to be provoked as a victim of domestic violence.

INQUIRY INTO THE PARTIAL DEFENCE OF PROVOCATION

Submission by Legal Aid NSW

to the

Legislative Council Select Committee on the partial defence of provocation

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About Legal Aid NSW

The Legal Aid Commission of New South Wales (Legal Aid NSW) is an independent statutory body established under the *Legal Aid Commission Act 1979 (NSW)* to provide legal assistance, with a particular focus on the needs of people who are economically or socially disadvantaged.

Legal Aid NSW provides information, community legal education, advice, minor assistance and representation, through a large in-house legal practice and private practitioners. Legal Aid NSW also funds a number of services provided by non-government organisations, including 36 community legal centres and 28 Women's Domestic Violence Court Advocacy Services.

The Legal Aid NSW criminal law practice provides legal assistance and representation in criminal courts at each jurisdictional level throughout the State, including proceedings in Local Courts and Children's Courts, committals, indictable sentences and trials, and appeals as well as the Drug Court. Our specialist criminal law services include the Children's Legal Service, Prisoners' Legal Service and the Drug Court.

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Background

Legal Aid NSW welcomes the opportunity to make a submission to the Legislative Council Select Committee on the partial defence of provocation.

Under s 23 of the *Crimes Act 1900* (the Act) the partial defence of provocation (the provocation defence) provides that where a jury would have found an accused guilty of murder, it must instead find the accused guilty of manslaughter where the provocation defence is established. Pursuant to s 23(3) of the Act there are two elements required to establish the provocation defence, namely:

- (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 [the ordinary person test],*

whether that conduct of the deceased occurred immediately before the act or omission causing death or at any previous time.

It has been claimed that the provocation defence should be maintained essentially because:

...there are circumstances in which a person's responsibility for an unlawful killing is reduced as a result of a loss of self-control to an extent which should, in any fair system of punishment, be taken into account when dealing with that person.¹

In contrast, critics of the provocation defence generally argue that it:

- essentially provides a justification or excuse for murder²
- favours men³
- is unnecessary as it can be taken into account by a judge as a mitigating factor in sentencing,⁴ and
- is too complex for a jury to determine, particularly in relation to the application of the ordinary person test.⁵

These issues have been the subject of ongoing debate and concern regarding retention of the provocation defence, in both the criminal law sphere and the wider community. The debate has been fuelled in part by:

- recent cases where the provocation defence has been successful

¹ New South Wales Law Reform Commission (1997) *Partial Defences to Murder: Provocation and Infanticide* at par 2.38.

² See for example *id* at par 2.26-2.27.

³ A large majority of offenders who successfully argue the provocation defence are men as are the victims: Judicial Commission of New South Wales (2006) *Partial Defences to Murder in New South Wales 1990-2004* at 37.

⁴ Note 1 at par 2.32.

⁵ As discussed in Legislative Council Select Committee on the partial defence of provocation (2012) *Defences and Partial Defences to Homicide* at 4-5.

- the impact on relatives of a victim caused by a successful provocation defence, a resulting conviction for manslaughter rather than murder, and a reduced sentence, and
- reporting in the media.

This has culminated in various legislative reviews and ultimately the abolition of the provocation defence in Tasmania, Victoria, and Western Australia.⁶

Legal Aid NSW therefore believes the inquiry into the provocation defence offers an opportunity to:

- review the application of the provocation defence in New South Wales following the recommendation by the New South Wales Law Reform Commission in 1997 that it be retained,⁷ and
- consider amending elements of the provocation defence, such as simplifying the ordinary person test.

Retention of the provocation defence

The retention of the provocation defence has been questioned following two recent cases where the defence was successfully established by the defendants in circumstances relating to their marriages.

In *Singh v R*⁸ (*Singh*) McClellan CJ said the offender lost control as a result of: "[u]ltimately, being told that his wife had never loved him and was going to leave him" and "offensive remarks of the deceased's brother-in-law."⁹ This trigger caused the offender to lose self control and strangle his wife before he "cut her throat at least eight times with a box cutter."¹⁰

In *Singh* the jury "was not satisfied that an ordinary person would not respond in the manner alleged."¹¹ As a result the offender was acquitted of murder and convicted of manslaughter. He was sentenced to a non-parole period of six years with a balance of term of two years.

In the more recent NSW Supreme Court case of *R v Won*,¹² a provocation defence was successfully established by a husband who stabbed a man six times after coming home to find him having sex with his wife.¹³ It was commented in the media that:

"[t]he jury took less than an hour to return a verdict of not guilty to murder but guilty of manslaughter

...

[j]uries, it seems, are prepared to let some men get away with murder."¹⁴

⁶ As noted in *id* at 7-8.

⁷ Note 1 at par 1.15.

⁸ [2012] NSWSC 637.

⁹ *Id* at [29].

¹⁰ *Id* at [30].

¹¹ *Id* at [2].

¹² [2012] NSWSC 855.

¹³ *Id* at [1] - [5].

¹⁴ Adele Horin, "Out-of-step excuse is no defence" (14 July 2012) *Sydney Morning Herald*.

On sentencing the offender Fullerton J said:

*Whilst I am obliged to accept that the offender did lose his capacity to exercise self-control I do not regard the degree of provocation presented by the deceased engaged as he was in sexual activity with the offender's wife as grave even allowing for some build up of suspicion due to the unhappy state of his marriage and his strained marital relations.*¹⁵

...

*Although the degree of provocation was obviously sufficient for the jury to be satisfied that the offender lost his self-control (albeit only for a short time), and for them to be satisfied that the Crown had not removed the reasonable possibility that an ordinary person in the offender's position may have lost self-control, I am of the view that for sentencing purposes the degree of provocation was not such as to reduce the objective gravity of the offending to any significant degree. I am also of the view that the degree of violence reflects the need for the sentence to denounce the offender's conduct that resulted in a loss of life and to provide some measure of general deterrence.*¹⁶

Despite this, Her Honour was satisfied that there was no need for personal deterrence in the circumstances and the defendant was sentenced to a non-parole period of five years and a balance of term of two years and six months,¹⁷ which is significant given the maximum sentence available for manslaughter is 25 years.

Notwithstanding media sensationalism, such findings raise genuine concerns about how juries determine that the type of factual circumstances outlined in the above cases could induce an ordinary person to form an intent to kill.

It has been acknowledged by the judiciary that juries may struggle with the differences between the first two steps of the ordinary person test, which enables personal characteristics to be taken into account when assessing the perception of gravity of the provocation but not when assessing the person's power to exercise self-control in relation to that provocation.¹⁸

For example, in *R v Mankotia*,¹⁹ Smart J in the NSW Court of Criminal Appeal noted that:

*In practice the gravity of provocation/self-control distinction has proved hard to explain to a jury in terms which are intelligible to them.*²⁰

His Honour went on to relay a New Zealand Judge's comments regarding:

*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.*²¹

¹⁵ Note 12 at [29].

¹⁶ *Id* at [30].

¹⁷ *Id* at [37]-[38].

¹⁸ The three components of the ordinary person test are set out in Note 5 at 4.

¹⁹ (2001) A Crim R 492 in Note 3 at 35.

²⁰ *Id* at [18].

²¹ *Ibid*.

Smart J added:

*I would go a little further...Juries struggle with the distinction and find it hard to grasp. Many do not do so.*²²

However the Privy Council disagreed in *Attorney General for Jersey v Holley (Jersey)*,²³ viewing the difficulty faced by juries as overstated and more an issue of "presentation" rather than substance.²⁴

Further, community disquiet with the provocation defence may be based more on a judge's sentencing decision following a finding of manslaughter than the jury's acceptance of provocation. For example, in *Singh McClellan* CJ had discretion to impose a sentence of up to 25 years imprisonment for manslaughter but decided to impose a non-parole period of 6 years due to the finding of provocation and various other mitigating factors. In making this determination, McClellan CJ noted that the offender's:

*expectation of a continuing and happy relationship [with his wife] was lost and without the necessary personal resources and family support he was vulnerable to the provocation that ultimately caused him to take the life of the deceased.*²⁵

It should also be noted that juries regularly reject a provocation defence. Despite recent cases given prominence by the media, there has been a relatively small number of matters where the provocation defence has been successful. For example, between 1 January 1990 and 21 September 2004, the provocation defence was raised as the sole defence in 99 matters and was successful in 65 of those matters.²⁶ During that time the provocation defence was raised in conjunction with defences of diminished responsibility and/or substantial impairment in an additional 16 matters and was successful in 10 of those matters.²⁷ Of the 75 successful partial defences of provocation, 41 followed a jury trial and two followed a judge-only trial. In the remainder of matters the Crown accepted a plea of manslaughter.²⁸ This further demonstrates that the provocation defence is being accepted by juries in similar proportion to its acceptance by the Crown, which suggests that juries have the ability to apply the provocation defence appropriately in accordance with the Act and community expectations.

A recent example of an unsuccessful provocation defence is *R v Iskander*.²⁹ In this case one of the defendants attempted to rely on the provocation defence after he was accused of killing a man by stabbing him with a knife because he was having an affair with his wife. Despite being described as an "honour killing"³⁰ arising out of the shame the accused suffered as a result of the knowledge of his wife's adultery within the context of a small Indonesian community, the jury appeared to disregard the cultural aspect from the second part of the ordinary person test, as it did not accept

²² Id at [19].

²³ [2005] UKPC 33 at [26] in Note 3 at 35.

²⁴ Ibid.

²⁵ Note 8 at [43].

²⁶ Note 3 at 36.

²⁷ Ibid.

²⁸ Id at 37.

²⁹ *R v Hazairin Iskandar; R v Andrew Iskandar & R v Nita Iskandar* [2011] NSWSC 1192 at [5].

³⁰ *R v Andrew Iskandar & R v Nita Iskandar (No. 4)* [2012] NSWSC 149 at [91]. See also "Death and dishonour" (16 July 2012) *Sydney Morning Herald*.

that the circumstances could induce an ordinary person to have lost self control and formed an intent to kill in this case, and found the accused guilty of murder.³¹

In summary, the community is represented by the jury, which having considered the evidence should be able to recognise that the level of the person's culpability is reduced where there is evidence of provocation. Members of the community will not always support the jury's decision, but they do not have access to the evidence considered by the jury. Therefore the jury remains the most appropriate body to weigh the facts and make a determination. The judge then has discretion as to the level of mitigation the finding of provocation will have on the sentence imposed for manslaughter.

Legal Aid NSW thus supports the finding of the New South Wales Law Reform Commission where it said:

*The question of whether a person's culpability for an unlawful killing is so significantly reduced because of a loss of self-control is an issue which should be decided by a jury, as representatives of the community, and reflected in a conviction for murder or for manslaughter. The sentencing judge will then impose a sentence which reflects the jury's finding on the level of culpability involved.*³²

Victims of domestic violence and provocation

In most cases where the provocation defence is successfully raised, the conduct claimed to provoke loss of self control is violence committed outside of a domestic or intimate setting and often involves intoxication. The next most common category of cases involves violence between partners or ex-partners, including domestic violence and confrontations resulting from intimate relationships such as adultery.³³

Between 2005 and 2012 the provocation defence was successful in 15 cases in NSW and the proportion of matters arising due to arguments between partners and ex-partners was relatively minimal, namely:

*[i]n three of these cases the victim was the current or estranged female partner of the male defendant; and in two of these cases, the killing resulted from an allegation of infidelity by the defendant.*³⁴

The application of the provocation defence is problematic in matters where the accused is the victim of domestic violence. The victims, most commonly women, are generally provoked and lose self control as a result of fear, rather than acting in retaliation. However, the second part of the ordinary person test does not allow consideration of a range of subjective factors and personal characteristics such as mental health issues and suffering a cycle of violence and abuse, which may be crucial in assessing the extent of a victim's ability to exercise self-control against provocation. This would be particularly important in circumstances where the accused claims to have been provoked by words alone, which as discussed above was the primary motivation in *Singh*. In domestic violence matters, whether the words used by the deceased caused the offender to lose self control should be considered

³¹ As noted in the article in id. At the time of writing this submission the sentencing judgment is pending.

³² Note 1.

³³ Note 3 at 37-38.

³⁴ Lenny Roth and Lynsey Blayden, NSW Parliamentary Research Service, *Provocation and self-defence in intimate partner and sexual advance homicides* (2012).

against the history of domestic violence in the relationship and the impact of that violence on the accused.

Legal Aid NSW is therefore of the view that consideration should be given to amending the second part of the ordinary person test to allow for such considerations where the accused is the victim of domestic violence.

Victims of domestic violence and self-defence

Where the accused is a victim of domestic violence, because fear is generally the triggering factor, the provocation defence can often overlap with the defences of self-defence and excessive self-defence.

It has been argued that such offenders can more appropriately rely on the defences of self-defence and excessive self-defence.³⁵ However, Legal Aid NSW is of the view that there will be circumstances where some offenders will be unable to access the defences of self-defence and excessive self-defence and the provocation defence should be available where appropriate. In support of retention of the provocation defence where the accused is a victim of domestic violence it is noted that the previous requirement of a sudden response to provocation was removed from the Act in 1982 to enable recognition of "cumulative provocation over a long period of time, often in cases of domestic or family violence against women."³⁶

The broad coverage offered by the combination of these defences provides recognition of the complexities of domestic violence matters.

Conclusion

On balance, Legal Aid NSW supports retention of the partial defence of provocation for the preceding reasons.

In response to the criticisms listed above, it has been shown that the provocation defence:

- does not provide a justification or excuse for murder, but reduces culpability where the ordinary person could be induced to kill due to loss of self control
- is available equally to men and women, including victims of domestic violence, and
- is properly left to a jury to determine in accordance with community views.

However, Legal Aid NSW suggests consideration be given to amending the ordinary person test, to make the application of the test simpler and to allow subjective characteristics in the second limb of the test where the accused claims to be provoked as a victim of domestic violence.

Legal Aid NSW does not support exclusion of specific categories of conduct from the provocation defence such as non-violent sexual advances, as each matter should be considered with regard to its specific circumstances.

³⁵ This is the view of Dr Kate Fitz-Gibbon of Deakin University as noted in Note 14.

³⁶ Ibid.