Submission No 15

INQUIRY INTO PARTIAL DEFENCE OF PROVOCATION

Organisation: NSW Bar Association

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The New South Wales Bar Association

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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

Thank you for your letter of 29 June 2012 inviting the New South Wales Bar Association to make a submission to the Select Committee on the Partial Defence of Provocation.

The primary position of the Association is that the question of whether or not the partial defence of provocation should be retained is a matter which should be referred to the New South Wales Law Reform Commission. The Law Reform Commission has staff with the research skills and resources to make a detailed examination of the evidence on the operation of the partial defence of provocation in practice.

The Criminal Law Committee of the Association is divided as to whether or not to support the retention of the partial self-defence of provocation. A majority of the Committee supports the retention of the defence. However, a minority of the Committee, all prosecutors, favours its abolition.

The basis of a defence of provocation

The defence of provocation has been described as 'a limited concession to a certain type of human frailty' (per Gleeson CJ in Regina v Chhay (1994) 72 A Crim R 1 at 13). In particular, it is an acknowledgement that in many cases, where interactions between people result in the death of a man or a woman, there may be some contribution to the loss of self control of an accused by the acts (and in some cases) words of the deceased. In other words, it is an acknowledgement that it is not the case that every case of homicide can be considered in black and white terms.

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The defence of provocation, if made out, does not entitle the accused to an acquittal; it reduces murder to manslaughter. Many lawyers explain the meaning of the expression 'manslaughter' by telling their clients that it is equivalent to 'second degree murder'; in other words, that the accused caused the death of the deceased, but that there was some feature of the case which reduced the culpability of the accused. The offence of murder being the most serious offence on the criminal calendar, the question of whether the accused is guilty of the murder or of the lesser charge of manslaughter, is so serious that for over 100 years in New South Wales, that question has been entrusted to a jury. That is the case regardless of the basis on which it is argued that murder should be reduced to manslaughter, whether it be involuntary manslaughter (such as manslaughter by an unlawful and dangerous act) or by voluntary manslaughter (that is, by way of provocation, substantial impairment or excessive self-defence).

The Association is firmly of the view that a person accused of murder has the right to have the question of whether he or she is guilty of murder, or of manslaughter, or acquitted outright, determined by a jury. The Association considers that juries are an important and central part of our criminal justice system and are very well placed to decide issues that relate to common human experience.

The defence of provocation

Section 23 of the *Crimes Act 1900* (NSW) provides that there is a partial defence of provocation to murder which, if successful, reduces murder to manslaughter.

The critical subsection of s. 23 is subsection 23 (2), which reads as follows:

> (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.

The defence of self-defence

Self-defence, or the defence of others, can provide a complete defence to murder. For convenience, and hopefully added clarity, the defence of self defence and the defence of others will be referred to as 'the defence of self-defence'.

Conduct of an accused causing death is conduct done in self defence, or the defence of others, if:

(1) the accused believes that the conduct causing death is necessary to defend himself or another person, or prevent or terminate the unlawful deprivation of liberty of himself or another person, and

(2) the conduct was a reasonable response in the circumstances as he or she perceived them.

(see ss. 418 and 420 *Crimes Act 1900* (NSW)).

For the offence of murder, even if self-defence is not made out, there is a partial defence of excessive self-defence, reducing murder to manslaughter, if the first but not the second of the two matters referred to above is not negatived by the prosecution (s. 421 *Crimes Act 1900 (NSW)*). Excessive self-defence is to be distinguished from provocation as it turns on belief in defence of self or another.

Some cases demonstrating why a defence of provocation is necessary

The Association is of the view that there is insufficient evidence to demonstrate that the existing form of the defence of provocation works injustice such as to significantly amend it, let alone abolish it. Indeed, without such a defence being available, many injustices are likely to occur – especially where accused persons respond to significant acts of violence but in a manner which cannot be characterised as self defence. Many of these people are likely to be women. The case of *Chhay*, where the jury rejected a defence of self-defence was one where provocation remained to be considered by the jury. It is instructive to consider a number of other cases where verdicts of murder would have likely resulted if the defence of provocation was unavailable.

Regina v Hill

Regina v Hill (1980) 3 A Crim R 397 was a case where a woman was convicted of murdering her de facto partner. Ms Hill was described as a 'frail and slight woman'. A photograph of the deceased showed him to be, as Ms Hill described him in her dock statement, 'a big strong man'. Ms Hill said that the deceased had savagely attacked her on a number of occasions. These attacks were associated with his being intoxicated. There was a large body of independent evidence supporting what Ms Hill said, including a nursing sister, who said that the deceased had admitted that he dragged Ms Hill around by the hair, and that this was a common occurrence.

Ms Hill asked the deceased to leave her house shortly before she shot him. On the day Ms Hill shot the deceased, he said to her 'I'm going to bash you, you black bastard. It's a good job I haven't been drinking now or I would throw you straight back through that window.'

Later that day the deceased returned home, apparently intoxicated. He was 'swearing, screaming his head off.' Ms Hill took a rifle and warned the deceased to stay away from her or she would shoot him. The deceased started to walk towards her. Ms Hill shot the deceased three times, fatally.

Ms Hill went to trial, arguing both self-defence and provocation. She was convicted of murder.

On appeal, the Court of Criminal Appeal found that the murder verdict was unsafe and unsatisfactory and substituted a verdict of manslaughter, not on the basis of self-defence, but on the basis of provocation. Ms Hill's sentence was reduced from life imprisonment to four and a half years with a non-parole period of twelve months.

Regina v Russell

Regina v Russell [2006] NSWCCA 722 was a case where Ms Russell was charged with the murder of her de facto husband. There was evidence that they were living in a domestic relationship 'characterized by alcohol abuse and violence, such violence mostly occurring when the deceased was inebriated' (at para [5]). On the day of the offence Ms Russell was talking to her daughter on the telephone. The daughter gave evidence that she could hear the deceased in the background saying 'Why is she on the phone? She is nothing but a slut', and 'You had better not be talking to that slut again, fuck her off.' Later Ms Russell said that the deceased struck her. Ms Russell's daughter heard Ms Russell scream 'Please Jeff, no more.' Ms Russell's daughter then terminated the phone call to summon help.

Ms Russell gave evidence that the deceased took a knife and flashed it in her face, saying 'I'll kill you stone dead.' However he then put the knife down. He said 'Stab me, you bitch, you have not got the balls', and 'Go on, do it stab me'. Ms Russell stabbed the deceased once. The wound was fatal.

The Crown accepted a plea of guilty to manslaughter, but there was a dispute about the basis of the plea. The Crown argued that the plea was on the basis of provocation. The defence was that the plea was available on the basis that Ms Russell did not intend to kill the deceased, or inflict grievous bodily harm upon him. The sentencing judge rejected the defence basis for the plea, but accepted that Ms Russell had the defence of provocation open to her.

Regina v Duncan

Regina v Duncan [2010] NSWSC 1241 was a case where Ms Duncan was an Aboriginal woman brought up in the Moree area. She had worked for many years as a District Officer in the Department of Youth and Community Services, now the Department of Community Services.

Ms Duncan's partner was the deceased, Mr Chatfield. There was evidence, both from Ms Duncan, and from other witnesses, that he abused her both emotionally and physically. She did not seek professional assistance because she felt that she was perceived as a role model in her community.

On the night of the offence, the deceased went to a party, while Ms Duncan remained at home. The deceased returned home at about 2.30 am. He had heard her phone ring and listened to a message left on her phone. The deceased assumed that the message was left by a lover of Ms Duncan. The message was in fact left by a cousin of Ms Duncan, who was simply inquiring if she and the deceased were still awake, so he could come around and have a drink with them.

The deceased woke Ms Duncan at about 2.30 am. He called her a 'slut' and a 'moll' and pushed her off the bed. He asked her 'Who are you running around with?' He then knocked

Ms Duncan down. She seized a knife, and stabbed the deceased once in the stomach, as it turns out fatally. She ran out of the house, fearing that he would come after her.

A plea of guilty was accepted on the basis on unlawful and dangerous act. The sentencing judge, Justice Hidden said, in sentencing Ms Duncan (at paragraph [1]):

> It sometimes happens that a person who has led a blameless life commits a fatal act of violence in the heat of a moment. A human life is taken. The lives of the victim's loved ones are dealt a blow from which they may never recover. The life of the perpetrator is changed irrevocably. Cases of this kind present the courts with a particularly difficult sentencing exercise. This is such a case.

Comment on the three cases

It should be noted that in none of the three cases summarised above was the defence of self-defence successfully raised. In Hill, it was raised but rejected by the jury. The difficulty in raising a defence of self-defence in cases like those described above, is that it is difficult to persuade a jury that the defendant honestly believed that resort to a lethal weapon was necessary, let alone that it was a reasonable response in the circumstances. In the absence of a defence of provocation, it is likely that in each of the cases described above there would have been a conviction for murder.

Provocation and domestic homicide

The cases described above are by no means atypical of cases where provocation was successfully raised as a defence.

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.[1]

In 2006 the Judicial Commission of New South Wales published a report on the use of partial defences to murder in NSW in the period from 1 January 1990 to 21 September 2004. It showed that 10 women who had killed their husband after a history of physical abuse successfully relied on provocation. However very few males who have been in a relationship marked by domestic violence were able to rely on the defence. There were 11 males who successfully claimed the defence in a factual context of infidelity or the breakdown of an intimate relationship but the Judicial Commission found overwhelmingly that violent physical confrontation is most commonly relied upon in successful provocation cases. It is the experience of the members of the Association that juries normally require proof of serious physical violence before acting on claims of provocation.

[1] NSW Law Reform Commission, Report 83, 'Partial Defences to Murder: Provocation and Infanticide', paragraph 2.115 p. 16. The report is available in the internet at http://www.lawlink.nsw.gov.au/lrc.nsf/pages/R83TOC. Unfortunately the Judicial Commission report is not available on the internet.

Controls on the availability of provocation

It should be noted that there are limitations and controls on the availability of the defence of provocation. Firstly and most obviously, it is only a partial defence to murder, reducing murder to manslaughter, an offence which itself carries a maximum penalty of 25 years imprisonment.

Secondly, before the defence of provocation is left to the jury, the judge must decide whether or not there is sufficient evidence for the defence to be left to the jury.

Thirdly, and very importantly, for the defence to succeed, it is necessary for the defence to establish that there is a reasonable possibility that the conduct of the deceased was such that it could have induced an ordinary person in the position of the accused to have so far lost self-control as to have formed an intention to kill or inflict grievous bodily harm on the deceased.

Should the defence of provocation be abolished?

There has been some recent public concern about the outcome of some recent trials, particularly as a result of Regina v Singh [2012] NSWSC 637, where the husband of the deceased successfully relied on the defence of provocation to obtain a verdict of manslaughter in a case where the deceased had (amongst other things) confessed adultery to him.

It is submitted that the Committee should not leap to a conclusion that the defence of provocation should be abolished on the strength of one or two verdicts which were not expected in some quarters. It is submitted that the partial defence of provocation, which has existed in the common law system of justice in one form or another since the sixteenth century, should not be done away with in the absence of some detailed evidence-based research that the defence is causing injustice. Such a detailed examination of the evidence was undertaken by the New South Wales Law Reform Commission in 1997 and the Commission recommended the retention of the defence of provocation.

If, though, the Committee was minded to consider a form of statutory amendment, it is submitted that it would be advisable for the Committee to refer the question of the future of the defence of provocation to the New South Wales Law Reform Commission.

The abolition of the defence of provocation would probably lead to the conviction of more offenders such as Ms Hill, Ms Russell, and Ms Duncan, of murder rather than manslaughter. The position of the Association is that such a change would not be in the interests of justice.

The Association is grateful for the opportunity to make a submission to the Committee on this important issue.

Yours sincerely

Bernard Coles QC
President