

INQUIRY INTO PARTIAL DEFENCE OF PROVOCATION

Organisation: Hawkesbury Nepean Community Legal Centre Inc.
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Date received: 24/08/2012

Hawkesbury Nepean Community Legal Centre makes the following recommendations regarding the inquiry into the partial defence of provocation:

- Recommendation 1: We submit that the question of whether the partial defence of provocation should be abolished should be referred to the NSW Law Reform Commission and form part of a comprehensive review of all homicide defences.
- Recommendation 2: We submit that the NSW Government should move towards abolishing the partial defence of provocation.
- Recommendation 3: We submit that the NSW Government should amend the partial defence of provocation to prevent people raising the defence following an allegation of infidelity, or the end or threat to end a domestic relationship, or a non-violent sexual advance.
- Recommendation 4: We submit that victims of domestic violence who are be tried for killing their violent partners should be able to introduce and rely on expert evidence, which goes to explaining the nature and dynamics of domestic violence.
- Recommendation 5: We submit that programs should be developed to educate prosecutors and members of the judiciary about the dynamics and nature of domestic violence.



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24 August 2012

Select Committee on the Partial Defence of Provocation
Parliament House
Macquarie Street
Sydney NSW 2000

Dear Committee,

RE: Inquiry into the partial defence of provocation

The Hawkesbury Nepean Community Legal Centre (**HNCLC**) welcomes this opportunity to provide a submission on the inquiry into the partial defence of provocation.

Hawkesbury Nepean Community Legal Centre

HNCLC located in Windsor NSW, is a non-government community-based legal service providing free legal information, advice and casework to people living in the Hawkesbury, Riverstone, Nepean and Hills areas and is one of thirty community legal centres (**CLCs**) in NSW.

CLCs are actively involved in human rights by:

- having a human rights focus;
- working within human rights frameworks;
- advocating for human rights on behalf of our clients and communities of interest;
- informing, advising and representing individuals and groups where human rights are at issue;
- educating individuals, groups and communities of interest about human rights and related legal and societal processes; and
- undertaking law reform activities to improve human rights protections and processes.

Our Services

HNCLC has 3 services - a legal service, a women's domestic violence court advocacy service and an Aboriginal legal access program.

1. Legal Service

The Legal Service provides free legal services to people living in the Hawkesbury, Hills and Nepean areas. We provide legal advice and representation on a broad range of legal issues and in particular, target our casework services to those clients who are the most economically and socially disadvantaged in our community.

Our client base consists of Aboriginal and Torres Strait Islander people, people from culturally and linguistically diverse backgrounds, women, prisoners, young people and other people who, because of mental illness, disability or social or economical disadvantage, find it difficult to access legal services.

In addition to advice and casework, the Legal Service also provides community legal education and advocates for reform to laws and practices which negatively impact upon our clients.

2. North West Sydney Women's Domestic Violence Court Advocacy Service

HNCLC has been the auspice of a Women's Domestic Violence Court Advocacy Service (**WDVCAS**) since 1995. The service provides a holistic support, referral and legal advocacy service for women experiencing domestic violence and who are applying for Apprehended Domestic Violence Orders at Windsor Court and Blacktown Court.

3. Aboriginal Legal Access Program

HNCLC has provided an Aboriginal Legal Access Program (**ALAP**) for more than ten years. The program is involved in a variety of groups and committees advocating for increased access and participation to legal and community services for Aboriginal families and individuals in the Hawkesbury. The ALAP also provides outreach services at locations South Windsor and Riverstone.

While providing legal services to individuals, the descriptions above also illustrate that we work beyond the individual. Our centre undertakes community development, community legal education and law reform projects that are based on client need, are preventative in outcome, and that develop the skills of individual clients and strengthen our communities.

We make the following submissions from an international human rights perspective, which recognises the rights of women and same-sex attracted people to live free from violence and discrimination.

Yours sincerely,
Hawkesbury Nepean Community Legal Centre

Kellie McDonald
Solicitor

SUBMISSION ON THE PARTIAL DEFENCE OF PROVOCATION

Executive summary

It is our position that the partial defence of provocation does not fulfil its policy purposes and can serve to perpetuate and entrench violence against women and gay men.

The defence of provocation is most commonly, and successfully, used by men who kill domestic partners and gay men for reasons of control, jealousy and homophobia.

Self-defence and provocation is of little assistance to women who kill their violent partners for reasons of self-preservation because prosecutors, juries and members of the judiciary often have a poor understanding of the nature and dynamics of domestic violence and the reasons why victims of domestic violence kill their violent partners in particular circumstances.

Recommendations

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What is domestic violence?

We submit that it is important to understand the nature and dynamics of domestic violence in order to understand why, and the circumstances in which, victims of domestic violence may kill their violent partners and why victims of domestic violence are not often able to successfully use existing defences to homicide.

Domestic violence is behaviour, within a domestic relationship, that involves an abuse of power and is usually, though not exclusively, perpetrated by men against women and children.

Domestic violence encompasses a range of behaviours including intimidation, coercion, emotional abuse, financial abuse, sexual abuse, physical abuse, isolation and psychological manipulation.

Domestic violence is a deliberate and intentional pattern of behaviours designed to control another person or people in a family.

Perpetrators control their victim's behaviour and thoughts by brainwashing them. Perpetrators brainwash their victims by criticising, belittling and changing stories and confusing their victims' memories. Perpetrators use brainwashing to reduce their victims' self esteem and independence, make the victim believe that the violence is their own fault and destroy their victims' support networks.

The nature and dynamics of domestic violence may make a victim feel that they cannot escape the violence or that they deserve the violence. Victims may also stay in relationships with violent perpetrators because they fear that if they leave, the perpetrator may harm their children, family members or pets.

Victims who kill their violent partners may do so because they feel it is the only way to get themselves and their families out of a violent situation. Due to the often physical and psychological power imbalance between victim and perpetrator, the victim may choose to kill the perpetrator by using a weapon against an unarmed perpetrator in a non-confrontational situation, such as when the perpetrator is asleep.

What is the policy purpose of the partial defence of provocation?

Provocation is a partial defence to the offence of murder, which if accepted, results in a conviction of manslaughter, instead of murder.

The partial defence of provocation is established when an act or omission causing death is the result of a loss of self-control by the accused that was induced by any conduct of the deceased and 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 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.¹

The partial defence of provocation is aimed to provide "a limited concession to a certain type of human frailty"², that is, to provide an avenue to find the accused less culpable for their actions.

Prior to the 1982 amendments, the defence of provocation required the accused to have acted immediately and in direct response to provocative conduct by the deceased.

It was intended that the 1982 amendments which removed the requirement that the accused act immediately in response to provocative conduct, would broaden the defence and make it more available to victims of domestic violence who kill their violent domestic partners after a long history of abuse.

We submit that while some women have successfully used this partial defence in response to killing violent partners, men have more often raised and successfully used the defence.

¹ Section 23, *Crimes Act 1900* (NSW)

² Gleeson CJ in *Regina v Chhay* (1994) 72 A Crim R 1 at 13.

How has the defence of provocation been operating in practice?

We submit that men and women have used this defence in very different circumstances, both in ways that it was not intended to be used.

The Victorian Law Reform Commission (VLRC) reviewed the circumstances in which men and women successfully raised the defence of provocation and found that:

"When many men who kill their partners successfully raise provocation, the provocation is often their partners' alleged infidelity and/or their partner leaving or threatening to leave. Their actions are therefore primarily motivated by jealousy and a need for control. In comparison, when women kill their partners and successfully raise the defence, there is often a history of physical abuse in the relationship."³

Men have also successfully raised the defence of provocation when they have responded with lethal force to a non-violent sexual advance by gay men.⁴ In 1998 the Working Party on the homosexual advance defence recommended that defence of provocation be amended to exclude non-violent homosexual advances from forming the basis of the defence, fearing that:

"A jury might apply the standards of a prejudiced community, thus reflecting and perpetuating the idea that homosexual victims deserve the violence they receive."⁵

When the NSW Law Reform Commission (NSWLRC), examined the circumstances when women raise the defence of provocation they found that:

"While some women may kill their aggressors as a result of losing self-control, others may not. Some women may kill in cold blood, but in an attempt at self-preservation."⁶

The VLRC found that:

"with its strong emphasis on a loss of self-control, provocation does not, nor has it ever, truly reflected the reality of women's experiences and responses to prolonged and serious violence."⁷

We submit that the partial defence of provocation has been operating to allow some men who murder in situations of jealousy, a need for control and homophobia to be convicted of the lesser offence of manslaughter, thus perpetuating and entrenching violence against women and gay men.

We further submit that women who have murdered their violent partners have been convicted for manslaughter in circumstances where they may be acting in self-defence, believing their conduct is necessary and reasonable in the circumstances, to defend themselves (or another person).

Is self-defence an adequate defence for victims of domestic violence?

The NSWLRC in examining alternative defences open to victims of domestic violence stated:

"It has been suggested that the defence of self-defence may often be the most appropriate defence for women who kill following a history of domestic violence, since self-defence recognises that many of these

³ Victorian Law Reform Commission, *Defences to Homicide*, Final Report, October 2004, 29.

⁴ In Judicial Commission of NSW, *Partial Defences to Murder in NSW 1990-2004*, June 2006 p 36 it was found that of the 75 offenders who successfully relied on provocation, 11 successfully relied on provocation after an alleged homosexual advance.

⁵ NSW Attorney General's Department, *Final Report of the 'Homosexual Advance Defence' Working Party* September 1998, p 30.

⁶ NSW Law Reform Commission, *Partial Defences to Murder: Provocation and Infanticide* Report 83, October 1997, p 71.

⁷ Victorian Law Reform Commission, above 3, p 55.

women are acting in self-preservation rather than as a result of loss of self-control or a disturbed mind. Moreover, a successful plea of self-defence results in a complete acquittal, whereas a successful plea of provocation results in a conviction for manslaughter...⁸

However, statistics show that very few women who kill their violent partners have been acquitted on the grounds of self-defence, and those who have been acquitted on the grounds of self-defence, killed in direct response to a physical attack by the deceased,⁹ demonstrating that immediacy, although not required, is still a very relevant consideration in determining whether an accused acted in self-defence.

We submit that women have not successfully raised self-defence because prosecutors, juries and members of the judiciary do not believe that their conduct was necessary to defend themselves, for example their partner was asleep and they were not facing an imminent threat of harm, and/or their conduct was not reasonable in the circumstances, for example they could have left the relationship.

We submit that a better understanding of the nature and dynamics of domestic violence may result juries acquitting victims of violence who kill their violent partners for reasons of self-preservation.

Recommendations

Recommendation 1: Comprehensive review of all homicidal defences

We submit that the question of whether the partial defence of provocation should be abolished should form part of a comprehensive review of all full and partial defences to homicide by the NSW Law Reform Commission.

We submit that comprehensive review should be carried out in a similar manner and contain similar terms of reference to the review of homicide defences that was carried out by the VLRC between 2001 and 2004.

In their review the VLRC examined how the criminal law accounts for the fact that people kill in a range of different situations and how culpability may be affected by a variety of factors.¹⁰ The VLRC also considered whether new defences or partial defences to homicide should be introduced.¹¹

We submit that the current inquiry is not broad enough to take into consideration all relevant factors necessary to make a decision regarding the whether the partial defence of provocation should be abolished.

Recommendation 2: Abolishing the partial defence of provocation

We submit that the NSW Government should move towards abolishing the defence of provocation on the grounds that the defence does not serve its policy purposes and perpetuates and entrenches violence against women and gay men.

⁸ NSW Law Reform Commission, above 6, p 89.

⁹ In Law Reform Commission of Western Australia, *Review of the law of homicide*, Final Report, September 2007, p 238-284 it was found that of 25 cases between January 2000 and June 2007 in which women who had been victims of domestic violence had killed their partners, one of these cases (*Dzuiba* unreported, Supreme Court of Western Australia, 14 May 2007) which involved the woman killing her violent ex-boyfriend during a struggle, was acquitted on the basis of self-defence. At p 287 of the same report it was noted that 3 of the 4 Australian cases involving women who had been acquitted on the basis of self-defence (not relying on battered women's syndrome) the killing occurred during a confrontation.

¹⁰ Victorian Law Reform Commission, above 3, xix.

¹¹ *Ibid*, 4.

Recommendation 3: Amend the defence of provocation

We submit that until such time as the partial defence of provocation is subject to a comprehensive review and/or abolished, the defence should be amended to reduce the scope of the defence being available to those who kill following:

- an allegation of infidelity; or
- the end or threat to end a domestic relationship; or
- a non-violent sexual advance.

We submit that reducing the scope of the defence will limit men being able to rely on the defence when they kill out of jealousy, control and homophobia.

Recommendation 4: Use of social framework evidence

We submit that victims of domestic violence who are be tried for killing their violent partners should be able to introduce and rely on expert social framework evidence which explains the nature and dynamics of domestic violence.

We submit that this evidence would assist juries understand why victims of domestic violence kill and the circumstances which in they kill their violent partners and would result in increased findings that women who killed their violence partners acted in self-defence.

Recommendation 5: Education of prosecutors and members of the judiciary

We submit that programs should be developed to educate prosecutors and members of the judiciary about the dynamics and nature of domestic violence.

We submit that such programs would assist prosecutors and members of the judiciary understand why victims of domestic violence kill, and the circumstances in which they kill, their violent partners.