

Supplementary
Submission
No 8a

INQUIRY INTO PARTIAL DEFENCE OF PROVOCATION

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Supplementary Submission

on the

Partial Defence of Provocation

to the

Select Committee on the Partial Defence of Provocation

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TABLE OF CONTENTS

1. Introduction.....	1
2. Partial defence of provocation: intent to kill.....	1
3. Partial defence – option 1: restriction to violent conduct	2
4. Partial defence – option 2: exclusion of certain conduct.....	2
5. Partial defence – option 3: reversing the onus of proof.....	2
6. Partial defence – option 4: gross provocation	3
7. Conclusion	4

1. Introduction

On 14 June 2012 the Legislative Council of the Parliament of New South Wales passed a motion as follows:

That this House notes ongoing concerns regarding the use of provocation as a partial defence to a charge of murder.

That a select committee be appointed to inquire into and report on:

- (a) the retention of the partial defence of provocation including:*
 - (i) abolishing the defence,*
 - (ii) amending the elements of the defence in light of proposals in other jurisdictions,*
- (b) the adequacy of the defence of self-defence for victims of prolonged domestic and sexual violence, and*
- (c) any other related matters.*

The Select Committee invited written submissions addressing these issues to be received by 10 August 2012. FamilyVoice Australia made a submission in response to this invitation.

The Select Committee has now issued an options paper reflecting some of the proposals for reform made in submissions. Supplementary submissions have been invited to be received by 4 October 2012.

2. Partial defence of provocation: intent to kill

The Options Paper presents several approaches to amending Section 23 of the *Crimes Act 1900* but fails to mention the proposal made by FamilyVoice Australia in its primary submission that the partial defence of provocation should not be available on a charge of murder where the mental element is proved beyond a reasonable doubt to have been “*an intent to kill*”.

As argued in the primary submission, the law should make it clear that no provocation justifies forming and acting on an intention to kill and that the onus is on each of us not to act on any murderous thoughts that arise no matter how impassioned we may be. In these circumstances provocation could still be considered in sentencing.

Provocation should be retained as a partial defence to murder where there is **no** clear intent to kill but where they may be a “reckless indifference to human life” or an “intent to inflict grievous bodily harm”.

Recommendation 1:

The partial defence of provocation should not apply where it is proved by the Crown that the accused intended to kill but retained where the mental element is “reckless indifference to human life” or “intent to inflict grievous bodily harm”.

3. Partial defence – option 1: restriction to violent conduct

Option 1 is to restrict the defence of provocation to violent criminal behaviour or more narrowly to ‘acts which constitute domestic or family violence’.

The specific proposal set out in Appendix A seems to set the bar very low for a successful partial defence of provocation wherever a defendant claims a prior act of domestic violence. The proposal includes allowing the defence even when there is no “*reasonable proportion between the act or omission causing death and the conduct of the deceased that induced the act or omission*” and in response to an act of domestic violence committed “*at any previous time*”. So a relative minor act of domestic violence even in the distant past could be used as the basis for a partial defence of provocation for a murder carried out with full intent and careful planning.

As stated in the primary submission a partial defence based on prior acts of domestic violence may encourage resort to murder of a spouse with a careful attempt to establish apparent evidence to sustain the defence. There are always alternative responses to domestic violence.

Recommendation 2:

Option 1, to allow the partial defence of provocation when the deceased committed any prior violent criminal act, is too open to abuse and should not be supported.

4. Partial defence – option 2: exclusion of certain conduct

Option 2 is to exclude certain conduct from conduct that could be held to justify a partial defence of provocation. Specifically it is proposed to exclude anything said or done by the deceased to indicate a change in the nature of the relationship.

The primary submission has already addressed this proposal which has been adopted in Queensland law and recommended against adopting it in New South Wales.

As argued in the primary submission this proposal:

seems to imply the extraordinary proposition that no one – including husbands and wives – has any right to expect fidelity or lifelong commitment in a relationship; and that marital betrayal or desertion, even without notice and announced in a way that is viciously cruel or taunting, should never give rise to any reaction other than a cool response of ‘I wish you the best in your freely chosen autonomous decision about your personal and sexual life’.

It seems perverse to continue to allow the defence for all sudden provocations other than those that touch on intimate relationships including marriage. This is unrealistic and reflects an extreme, ideological, individualistic view of marriage and of personal, sexual relationships.

Recommendation 2:

Option 2, to exclude certain conduct such as ending a relationship, reflects an extreme individualistic view of personal relationships and should not be supported.

5. Partial defence – option 3: reversing the onus of proof

Option 3 involves, among other changes, reversing the onus of proof so that the defendant would be required to establish provocation on the balance of probabilities.

The primary submission already addressed this approach which has been adopted in Queensland. It noted:

The argument for this reversal is the obvious difficulty of the prosecution proving beyond a reasonable doubt that the defendant's account of an alleged sudden provocation was not how things happened. However, reversing the onus of proof creates for the defendant the difficulty of proving that a sudden provocation actually took place when the defendant may well be the only living witness to that provocation. This seems unjust.

Recommendation 3:

Option 3, to reverse the onus of proof, would place an unreasonable burden on the defendant and should not be supported.

6. Partial defence – option 4: gross provocation

Putting aside the elements of reversing the onus of proof and of excluding from the defence anything said or done by the deceased to indicate a change in the nature of the relationship, each of which is addressed above, the additional elements in this option are (i) a change from “provocation” to “gross provocation” as the threshold test for the defence and (ii) a change from the “ordinary person in the same circumstances” test to “a person of the defendant’s age and of ordinary temperament” test.

The test for provocation in the current law is that:

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. (Crimes Act 1900, s23 (2) (a))

Option 4 proposes would allow the partial defence of provocation when the defendant acted in response to:

(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 (ii) fear of serious violence towards the defendant or another; or (iii) a combination of both (i) and (ii).

Defences involving a fear of serious violence are surely better dealt with as cases of self-defence rather than as cases of provocation.

Is a “*sense of being seriously wronged*” the key, if there is not a “*loss of self-control*”? This seems to allow for more calculated, deliberative responses to provocation than the current test.

The reference to “a person’s age” in the proposed new test seems to pick out one element that is already covered in the current tests reference to “an ordinary person in the same circumstances”. And the reference to “ordinary temperament” similarly seems to merely recast the phrase “ordinary person”.

It seems unclear what effect the proposed changes would have other than to require new guidance from the bench as to the meaning of these new phrases. Over time this could lead to either a narrowing or a broadening of the use of the defence depending on how judges interpret the phrases.

There seems to be no obvious reason to make these changes.

Recommendation 4:

Option 4, to replace a “loss of self-control” with a “sense of being seriously wronged”, could permit a deliberate and calculated response to provocation and should not be supported.

7. Conclusion

The options put forward in the Options Paper all include objectionable elements, including being:

- too open to abuse,
- too extreme and individualistic,
- too onerous for the defendant, or
- too open to premeditated vengeance.

Consequently, none of these options should be supported.

On a charge of murder, where the Crown proves beyond reasonable doubt that there was intent to kill, no partial defence of provocation should be available to the accused. However, where the mental element is reckless indifference to life or intent to cause grievous bodily harm, the partial defence of provocation should remain available in its present form. In this case, to reject such a partial defence, the Crown should retain the burden of proving beyond reasonable doubt that there was no provocation.

The current form of the partial defence of provocation should be retained, subject to excluding its application where an intent to kill is proved beyond reasonable doubt.