

## **INQUIRY INTO PARTIAL DEFENCE OF PROVOCATION**

**Organisation:** Wirringa Baiya Aboriginal Women's Legal Centre  
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# WIRRINGA BAIYA

## ABORIGINAL WOMEN'S LEGAL CENTRE INC

Wurringga Baiya provides free legal advice to Aboriginal and Torres Strait Islander women, children and youth who are or who have been victims of violence.

23 August 2012

The Director  
Select Committee on the Partial Defence of Provocation  
Parliament House  
Macquarie St  
Sydney NSW 2000

### **RE: INQUIRY INTO PARTIAL DEFENCE OF PROVOCATION**

#### **The work of our Centre**

Wurringga Baiya Aboriginal Women's Legal Centre is a New South Wales statewide community legal centre for Aboriginal women, children and youth. The focus of our service is to assist victims of violence, primarily domestic violence, sexual assault and child sexual assault.

Over the thirteen (13) years of our operation we have given advice and support to many hundreds of women and children who have been victims of violence. We have also acted for many clients in applications for statutory victims compensation for the violence they have endured. Furthermore, we have provided numerous community legal education workshops to community members in New South Wales, in both regional and metropolitan locations.

In addition to our day-to-day advice and casework services, we also provide legal advice clinics in several outreach locations including in women's correctional centres and community centres. We also provide support to women through our involvement with the Women's Domestic Violence Court Advocacy Service (WDVCAS) at the Downing Centre and Waverly Court and have some exposure in this capacity to the process of obtaining and enforcing ADVOs.

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Wurringga Baiya is a non-profit organisation managed by Aboriginal women.

ABN: 60 382 206 441

However, we wish to state from the outset we do *not* run a criminal practice and have not acted for, nor assisted any women who have been charged with a homicide offence. Nor, have we supported any families of women who have been killed by their spouse where provocation has been raised as a defence. Therefore our brief submission is one of principle with reference to many other imminent legal experts who have studied this defence in detail.

We have an interest in this issue due to our work with Aboriginal women who are victims of violence. Crime statistics consistently show that Aboriginal women and children are over-represented as victims of violence.<sup>1</sup> A brief by the NSW Bureau of Crime and Statistics (NSW BOCSAR) looking at domestic violence homicide in NSW from 2003 to 2008, showed that 9 per cent of domestic homicide victims were recorded as being Aboriginal.<sup>2</sup>

## **Introduction**

As has been noted, New South Wales is one of the last remaining Australian jurisdictions to retain, with very little reform, the partial defence of provocation.<sup>3</sup> The partial defence of provocation, as it is found in s 23 of the *Crimes Act 1900* (NSW) is a relic of 17<sup>th</sup> Century English society, when violence was socially sanctioned as a righteous and understandable response to insults to a man's honour. In its modern form, provocation is conceived of as a 'concession to human frailty'; an individual who commits a crime in a mental state prejudiced by a lack of self control does not warrant the label of 'murderer',

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<sup>1</sup> A recent NSW Bureau of Crime and Statistics analysis of domestic violence trends and patterns in the last ten years showed that Aboriginal women in NSW continue to be dramatically over-represented as victims of violence see: NSWBOCSAR, "*Trends and Patterns in domestic violence assaults: 2001 to 2010*", May 2011 at p 8. The rate of domestic violence for Aboriginal women is six times more likely than that for non-Aboriginal women.

It has also been found that nationally Indigenous women are 31 times more likely than other Australian women and men to be hospitalized for family violence related assaults (Steering Committee for the Review of Government Service Provision, "*Overcoming Indigenous Disadvantage: Key Indicators 2011*" Productivity Commission, Canberra at page 23).

<sup>2</sup> NSW Bureau of Crime and Statistics, "Domestic Homicide in NSW, January 2003- June 2008" Issue paper no.42, October 2009, page 5.

<sup>3</sup> *Legislative Council Select Committee on the partial defence of provocation; Inquiry into the partial defence of provocation*, July 2012, page 6.

and should be extended the empathy of the law.<sup>4</sup> This position has attracted enormous criticism.<sup>5</sup> Generally these submissions concur with that criticism, and generally we argue that the partial defence of provocation in New South Wales should be abolished. First, we submit that the defence effectively operates as a legally-sanctioned excuse for fatal male violence against their intimate partners. Second, we submit that the test in its current form is confusing and anachronistic, and out of line with other jurisdictions in Australia. However, the call for abolition must be considered in a context where provocation is used to partially excuse women who kill their intimate partner in response to serious and long-term abuse. It is our view that any abolition of provocation is accompanied by law reform to provide an alternative defence to women in this scenario.

### **Provocation: developed by men, for men**

It is no accident that the partial defence of provocation is used to reduce the sentence of men who kill their intimate partners. Such a context is deeply entrenched into the origins of the defence. A historical paradigm case of provocation was a man's discovery of his wife's adultery; in one emblematic provocation case, it was written, "jealousy is the rage of a man, and adultery is the highest invasion of property."<sup>6</sup> The ghost of this outdated notion of proprietary violence is very present in the modern case-law of provocation. Proprietariness is a distinctive feature of intimate partner violence, which is invariably characterised by feelings of ownership, exclusivity and jealousy.<sup>7</sup> The threat of actual separation, suspicion or confession of infidelity and a failure to maintain control of their partners have been identified as key determinants of the killing by men of their female partners.<sup>8</sup> Conceptualising such behaviour as a loss of 'self-control', and therefore deserving of lenience is wrong-headed. The use of anger and violence by men

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<sup>4</sup> *R v Thornton* (1992) 1 AER 306

<sup>5</sup> See, for example: Amanda Clough, 'Loss of Self-control as a Defence: The Key to Replacing Provocation' (2010) 74 *Criminal Law Journal* 118; Caroline Forrell, 'Gender Equality, Social Values and Provocation Law in the United States, Canada and Australia' (2006) 14(1) *American University Journal of Gender, Social Policy & the Law* 27; Graeme Coss, 'Provocative Reforms: A comparative critique' (2006) 30 *Crim LJ* 138; Helen Brown, 'Provocation as a Defence to Murder: to Abolish or to Reform?' (1999) 12 *Australian Feminist Law Journal* 137; Julia Tolmie, 'Is the Partial Defence an Endangered Defence? Recent Proposals to Abolish Provocation' (2005) 1 *New Zealand Law Review* 25.

<sup>6</sup> Per Lord Holt in *R v Mawgridge* [1707] Kel. 119, reprinted in 84 Eng. Rep. 1107, 1115

<sup>7</sup> Coss, 'The Defence of Provocation: An Acrimonious Divorce from Reality' (2006) 18 *Current Issues in Criminal Justice* 51; Wilson & Daly (1998), 299.

<sup>8</sup> *Ibid.*, 54.

in these circumstances is often instrumental – a deliberate and conscious process with the intent of regaining control over their partners.<sup>9</sup>

The way the partial defence of provocation effectively excuses this behaviour is evidenced in a number of prominent cases where provocation was successfully plead by a man who killed his female partner:

*Moffa v The Queen* (1977)<sup>10</sup>

Provocative conduct: a wife's admission of 'wholesale promiscuity', her refusals of his sexual advances and her ending of the relationship.

*R v Butay* (2001)<sup>11</sup>

Provocative conduct: A wife told her husband she was leaving him and confessed to having an affair.

*R v Ramage* (2004)<sup>12</sup>

Provocative conduct: A wife told her husband the relationship was over and she had found a new lover.

*R v Singh* (2012)<sup>13</sup>

Provocative conduct: A wife told her husband she never loved him, she was in love with someone else, and threatened to have him deported.

The defence of provocation allows men who kill their wives in these bursts of jealous anger to receive lenient sentences and not be labeled 'murderers', a situation which is at odds with the values and concerns of a civilized society that strives for gender equality in the 21<sup>st</sup> century. Provocation provides an opportunity for defence counsel to focus on the victim's own conduct as the triggering factor in her death. This approach necessitates a 'he-said, she said', scenario, when the victim, no longer present to give a

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<sup>9</sup> Victorian Law Reform Commission, *Defences to Homicide: Final Report*, No. 94 (2004), 31.

<sup>10</sup> (1977) 138 CLR 601.

<sup>11</sup> [2001] VSC 417.

<sup>12</sup> [2004] VSC 508.

<sup>13</sup> [2012] NSWSC 637.

different version of events, is painted- through her alleged promiscuity, sexual rejection or cruelty – as being responsible for her own killing.<sup>14</sup>

Take, for example, Barwick J's judgement in *Moffa v The Queen*<sup>15</sup>:

The totality of the deceased's conduct on that occasion, according to that account was that there was vituperative and scornful rejection of the applicant's connubial advances ... an expression of pleasure in having had intercourse promiscuously with neighbouring men. This statement of enjoyment in that course of conduct might reasonably be thought, particularly if coupled with the manner of her rejection of the applicant, to contain an assertion, contemptuously expressed by the deceased, of sexual inadequacy on the part of the applicant.

Such a conclusion was drawn, of course, solely on the defendant's version of events.

### **The two-tiered test: confusing and complex**

The current test of provocation, a two-tiered test, is extremely complex and difficult for jurors to apply. The first step requires jurors to ask whether the act or omission causing death is done under provocation by the deceased resulting in a loss of self-control on the part of the accused.<sup>16</sup> This is a subjective test; jurors would be required to assess all the evidence of provocative conduct and determine if *in fact* the defendant lost self-control.

Secondly the juror must ask whether the conduct of the deceased is capable of producing a loss of self-control in 'an ordinary person in the position of the accused'.<sup>17</sup> This ordinary person test has three further components.<sup>18</sup> First, how would the ordinary person perceive the gravity of the provocation? Here, the 'ordinary person' is imbued with any personal characteristics of the defendant.<sup>19</sup> Secondly, how could the ordinary person exercise self-control in response to the provocation. Here, the 'ordinary person'

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<sup>14</sup> Jenny Morgan, 'Dead Women Tell No Tales, Tales Are Told About Them' 21 *Melbourne University Law Review* 237 (1997), 255.

<sup>15</sup> (1977) 138 CLR 601, 5.

<sup>16</sup> S23(2)(a) *Crimes Act 1900* (NSW).

<sup>17</sup> S23(2)(b) *Crimes Act 1900* (NSW).

<sup>18</sup> *Legislative Council Select Committee on the partial defence of provocation; Inquiry into the partial defence of provocation*, July 2012, page 4.

<sup>19</sup> *Ibid.*

is *not* imbued with any of the characteristics of the accused except their age and maturity.<sup>20</sup> Finally, the jury must ask how the ordinary person would response after losing self-control in comparison to the accused's response.<sup>21</sup>

It is obvious that the most well-directed, conscientious jury would have enormous difficulty applying this test. As noted by the Law Reform Commission of Western Australia, the jury will also have just heard a wealth of evidence of provocative conduct as part of the application of the first, subjective limb of the test.<sup>22</sup> Turning to an objective test would be nigh impossible in those circumstances.

For all the reasons discussed above, all jurisdictions in Australia but South Australia have either reformed or abolished their provocation laws, and New South Wales retains by far one of the country's most easily-obtainable provocation defences in cases of intimate partner violence. It is our view that New South Wales is seriously lagging behind the development of the law on this issue.

The time frame for the inquiry has not permitted us to fully analyse and understand all the different views about how the law of provocation and self-defence should be changed to better ensure justice and protection for women who have suffered domestic violence. At a preliminary glance it can be seen that there are a diversity of views about the best way forward.

### **Provocation and women who kill violent partners**

One application of provocation law in New South Wales should give hesitancy to calls for an all-out abolition of the partial defence of provocation. It has been used in recent decades to reduce the charge from murder to manslaughter when women kill their partners in response to long term and severe domestic violence (for ease of reference referred to as 'battered women').

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<sup>20</sup> *Stingel v The Queen* (1990) 171 CLR 334.

<sup>21</sup> *Legislative Council Select Committee on the partial defence of provocation; Inquiry into the partial defence of provocation*, July 2012, page 4.

<sup>22</sup> Law Reform Commission of Western Australia, *Final Report, Review of the Law of Homicide* 'Chapter 4: Defences to Homicide', Project 97 (2007), 208.

However, the utility of the law in protecting battered women from unfair outcomes is best served by reforming self-defence, rather than allowing provocation to be retained to serve as an imperfect 'back-up' defence.

Women who have experienced prolonged domestic violence have found it far more difficult to use the defence of provocation than men who kill in the circumstances described above.<sup>23</sup> The High Court has refused to allow the jury to consider the accused's gender as part of the 'objective person' test.<sup>24</sup> As a result, when women seek to use the defence, gender bias issues inevitably arise, from the fundamental distinctions between male and female violence. The traditional provocation defence is not well suited to the circumstances when 'battered' women commonly kill – after long periods of violence and abuse, waiting until it is considered 'safe' to do so.<sup>25</sup>

Thus, though provocation has been used successfully by women who kill in response to domestic violence, it is a precarious defence and poorly adapted for this purpose. Between 1995 and 2002, only 38% of women who killed their spouses successfully relied on provocation;<sup>26</sup> relatively low, given that nearly all cases where a woman kills her intimate partner involves domestic violence.<sup>27</sup>

Further, the availability of provocation to battered women currently serves as a deterrent to legislative or judicial activism in amending the law of self-defence to incorporate an understanding of battered women and their experiences. As long as provocation is available in the most 'sympathetic' cases, defence counsels have little incentive to challenge the letter of the law and force the development of self-defence in this area.

If the defence of provocation is to be retained we submit that it should *not* apply in the following circumstances:

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<sup>23</sup> Victorian Law Reform Commission report no 94, 2.95

<sup>24</sup> *Stingel v R* [1990] HCA 61; (1990) 171 CLR 312

<sup>25</sup> Queensland Law Reform Commission, *A Review of the Defence of Provocation: Discussion Paper*, No. 63, 4.4

<sup>26</sup> Rebecca Bradfield, 'Women who Kill: Lack of Intent and Diminished Responsibility as the Other 'Defences' to Spousal Homicide' (2001-2002) 12 *Current Issues in Criminal Justice* 143, 146-147.

<sup>27</sup> *Ibid.*



- Sexual jealousy upon the discovery of infidelity of the victim
- Confessions of infidelity by the victim
- Taunts by the victim about the accused's sexual inadequacy
- Threats by the victim to leave a relationship with the accused, or actual separation
- Non-violent homosexual advances made by the victim to the accused.<sup>28</sup>

### **The way forward?**

Responses by other states to this issue could provide a framework for an alternative defence for battered women, tailored specifically to their situation. Queensland provides a separate partial defense of 'Killing for preservation in an abusive domestic relationship.'<sup>29</sup> Victoria has a provision for 'defensive homicide' (effectively excessive self-defence) where the defendant kills a person in self-defense but does not have reasonable grounds to believe that the conduct was necessary for self-defence.<sup>30</sup> Although we note the criticism that in Victoria defensive homicide is self-defence is mostly being used by male offenders.<sup>31</sup>

We do not have any firm views on how the law of self-defence should be reformed to accommodate the experiences of battered women who kill. There has been much criticism of the failure of the defence to adequately cater for the experiences of women who have experienced long histories of domestic violence and kill their abusive partners. These criticisms are noted and discussed in the briefing paper.<sup>32</sup>

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<sup>28</sup> We have not discussed this issue in any detail and refer to other commentators for a more comprehensive critique of the use of provocation to provide a partial defence for homophobia violence. It is our view that is equally offensive to allow the defence of provocation to partially excuse the killing of a victim due to a homosexual advance.

<sup>29</sup> S 304B *Criminal Code 1889* (Qld).

<sup>30</sup> Note – there are concerns about the application of this defence – some have described it 'provocation in a new guise'.

<sup>31</sup> As summarised in the briefing paper by Lenny Roth and Lynsey Blayden *Provocation and self-defence in intimate partner and sexual advance homicides* Briefing Paper No 5/2012, at pp43-45.

<sup>32</sup> Ibid, pp 35-36

We are aware of the criticisms of the “battered women’s syndrome” as noted by the Victorian Law Reform Commission.<sup>33</sup> In particular we are aware of the criticism that the syndrome medicalises women’s response to domestic violence. Much of our work is acting for women seeking victims compensation for prolonged history of domestic violence. Almost all of our clients are diagnosed with significant psychological disorders ranging from depression, anxiety to post-traumatic stress disorder. It is our experience that for many of our clients domestic violence causes profound psychological trauma. It may be that in some cases the psychological circumstances of a woman who has suffered prolonged domestic violence and has killed her violent partner for self-preservation is indeed relevant.

However, we note Justice Kirby’s observations in *Osland v the Queen* that battered women’s syndrome denies the rationality of a battered women’s response to prolonged violence and presents the victim as irrational and emotional and thus “undercuts the very purpose which BWS was meant to serve: to show how a victim’s actions in taking lethal self-help against the abuser was reasonable in the extraordinary circumstances which the victim faced.”<sup>34</sup> Further, academics Julie Stubbs and Julia Tolmie argue that, in the context of an Aboriginal woman on trial for the murder of her spouse, the battered women’s syndrome narrative had a tendency to “reinforce racist and ethnocentric assumptions about the abused”; represented her as “inadequate” and “obscure[d] the violence she had suffered.”<sup>35</sup>

It is thus our view that any reform to the law of self-defence should require the consideration of the social realities of woman who has experienced domestic violence to determine if her conduct was reasonable, as noted by the Victorian Law Reform Commission in its report<sup>36</sup>. We note the Victorian provisions contained within section 9AH of the Victorian *Crimes Act*, which provides certain factors to be considered in determining whether there are certain other factors that may be relevant in determining

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<sup>33</sup> Victorian Law Reform Commission, note 93, page 170.

<sup>34</sup> *Osland v the Queen*, (1998) 197 CLR 316 at 374-375

<sup>35</sup> Julie Stubbs, Julia Tolmie, ‘Race, Gender and the Battered Woman Syndrome: An Australia Case Study’ 8 *Canadian Journal of Women and Law* 122 (1995), 125. Stubbs and Tolmie were writing specifically in the context of the case *R v Hickey* (14 April, 1992) (Supreme Court NSW) [unreported].

<sup>36</sup> Known in Victoria as the ‘social framework’

whether there was a belief in the necessity of killing the abusive partner and whether there were reasonable grounds for this belief.

In assessing the social realities of a woman experiencing violence we assert that Aboriginal women must be able to lead evidence of the additional burdens an Aboriginal woman carries, including; significant social and economic disadvantage; community and family pressure not to report the violence or leave the relationship; and the systemic failure of government agencies such as police to respond and assist an Aboriginal woman when she did dare report the violence. The reality for many Aboriginal women that have experienced prolonged domestic violence is that leaving is simply not an option.

It is frustrating that the defence of self-defence, and its application, continues to be incapable of adequately understanding and catering for the perspective of women who have experienced prolonged domestic violence and who kill their abusive partners. This failure is fundamentally a reflection of how far we need to still to educate the community (which make up our juries, our lawyers, our magistrates and judges) about the complexity of domestic violence and the profound impact it has on a woman's life in its' every aspect. Too many people still ask the question: "But why didn't she just leave him?" Therefore any changes in the law need to be coupled with an extensive education campaign across the community and in our law schools. Such an education campaign should also specifically target legal professionals, especially prosecutors and defence counsel;p and the judiciary through the appropriate professional bodies and agencies.

As stated above, we note there are varying views about how the law with respect to provocation and self-defence should be reformed. Given the complexity of the issues and the possible options for reform we suggest that a parliamentary inquiry is not sufficient and that the issues should be referred to the NSW Law Reform Commission (NSWLRC) for review. We note that the defence of provocation was considered by the NSWLRC in 1997<sup>37</sup>, but we would argue that was some 15 years ago and since then a number of other jurisdictions have introduced reforms, which the NSWLRC can consider

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<sup>37</sup> NSW Law Reform Commission, *Partial Defences to Murder: Provocation and Infanticide*, Report 83, October 1997

and learn from. We would also argue that a review by the NSWLRC would give small organisations, such as ours, the opportunity to consider the defences more comprehensively, and thus make a more considered and comprehensive submission.

**To conclude, our recommendations are as follows:**

**Recommendation 1**

Given the complexity of the issues and the possible options for reform, we submit that a parliamentary inquiry is not sufficient and that the issue with respect to the operation of the partial defence of provocation and the full defence of self-defence should be referred to the NSW Law Reform Commission (NSWLRC) for a comprehensive review. We argue that such a review should give any interested organisations or individuals sufficient time to contribute to the review.

**Recommendation 2**

While we recommend a comprehensive review be conducted by the NSWLRC we submit that any reform to the law of self-defence should require the consideration of the social realities of woman who has experienced domestic violence to determine if her conduct was reasonable, as noted by the Victorian Law Reform Commission in its report<sup>38</sup>. In assessing the social realities of a woman experiencing violence we assert that Aboriginal women must be able to lead evidence of the additional burdens an Aboriginal woman must carry including; significant social and economic disadvantage; community and family pressure not to report the violence or leave the relationship; and the systemic failure of government agencies such as police to respond and assist a woman when she did dare report the violence.

**Recommendation 3**

In addition, any changes to the law of self-defence need to be coupled with an extensive education campaign across the community and in our law schools about the complexity

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<sup>38</sup> Known in Victoria as the 'social framework'

of domestic violence and the profound impact it has on a woman's life. Such an education campaign should also specifically target legal professionals and the judiciary through the appropriate professional bodies and agencies.

**Recommendation 4**

If ultimately the defence of provocation is to be retained we submit that it should *not* apply in the following circumstances:

- Sexual jealousy upon the discovery of infidelity of the victim
- Confessions of infidelity by the victim
- Taunts by the victim about the accused's sexual inadequacy
- Threats by the victim to leave a relationship with the accused, or actual separation
- Non-violent homosexual advances made by the victim to the accused.

If you have any questions about this submission please contact Rachael Martin of this office on (02) 9569 3847.

Yours faithfully,

**Wirringa Baiya Aboriginal Women's Legal Centre**

**Per: Rachael Martin**  
**Principal Solicitor**