



POLICE ASSOCIATION OF NEW SOUTH WALES

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The Director
Criminal Law Review
NSW Department of Attorney General and Justice
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To The Director,

Please accept a copy of the Police Association of New South Wales submission regarding the draft Bill: Crimes Amendment (Provocation) Bill 2013. The Police Association of NSW thanks the Director for the opportunity to submit a response to its draft Bill. The Police Association looks forward to the release of the final copy of the Report.

Yours sincerely

A handwritten signature in black ink, appearing to read 'S. Weber', with a horizontal line extending to the right.

SCOTT WEBER
President

Police Association of NSW



Crimes Amendment (Provocation) Bill 2013

Police Association of New South Wales Submission

November 2013

Version Control

Purpose

The purpose of this document is to provide to the Director, Criminal Law Review, the Police Association of New South Wales response to its draft Bill: the Crimes Amendment (Provocation) Bill 2013.

Document Control

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Crimes Amendment (Provocation) Bill 2013

The NSW Government has invited interested persons to provide written submissions on the draft Bill. In June 2012, the Legislative Council established a Select Committee on Provocation following the high profile Singh case. The case of *Singh v R*, and the public outcry that followed, highlights the need for reform of the partial defence of provocation in cases of intimate partner homicide. Chamanjot Singh was found guilty of manslaughter by provocation after he successfully argued that he was provoked to kill because he suspected his wife had been unfaithful and intended to leave the marriage. Mr Singh strangled his wife and cut her throat at least eight times with a Stanley knife. Mr Singh was sentenced to 8 years' imprisonment with a non-parole period of 6 years. Earlier provocation cases have produced similar community outrage. The Committee's Terms of Reference required it to inquire into and report on, amongst other things, whether the partial defence of provocation should be retained, abolished or amended.

Provocation is a partial defence to the offence of murder. If the prosecution or jury accepts the defence, it results in a conviction for manslaughter instead of murder. Without repeating the inquiry's comprehensive and exhaustive findings, of which involved an examination of complex and technical legal and social issues, and concerns raised as to the use of the partial defence in the context of intimate and family relationships, and non-violent sexual advances, the Police Association lends it support to the partial defence of provocation reforms, that is, retaining but amending the partial defence and supporting the intent behind the recommendations. The Police Association raises the following concerns regarding the Bill in general.

Via the Committee's examination, a series of arguments for abolishing the partial defence was presented. In particular, that the said defence had tended to favour men and the archetypal male response to 'provocative' circumstances. It was also argued that the defence's historical roots no longer justified retaining it, as NSW no longer has the death penalty or mandatory sentencing provisions for murder. It was rightly stated in the inquiry's findings that in today's modern society, one would expect that citizens would maintain their self-control, even in circumstances that might be 'provocative'. It is unacceptable that the law offers a partial defence to people who kill in response to 'provocative' circumstances which are, in fact, a normal part of human experience, such as being told a relationship is going to end, discovering infidelity, or feeling jealous or betrayed.

However, the Committee was unable to reach a consensus on whether the partial defence of provocation should be abolished; particularly some defendants such as women who have been victims of long-term domestic abuse, for whom the partial defence of provocation may appropriately reflect their legal and moral responsibility in circumstances where self-defence would be difficult to establish.

The Committee therefore developed a reform model, which draws on the extensive consultation undertaken by the Committee throughout the Inquiry. The model seeks to restrict the availability of the partial defence in several ways, including by requiring that the conduct relied upon be 'grossly provocative', and by clearly identifying a number of circumstances in which the defence will not be available, or will only be available in extreme and unusual circumstances. An example of the latter includes where the deceased indicates an intention to end the relationship. The Committee has rightly recommended reform to section 23 of the Crimes Act 1900 to restrict the availability of the partial defence:

"The Committee has recommended that the defence be reformed to restrict its availability in a number of ways, including by 'raising the bar' to require that the conduct relied upon by the defendant be 'grossly provocative'. In addition the Committee has identified a number of circumstances in which the partial defence should not be available or should only be available in extreme and unusual circumstances. Such circumstances include where the 'provocative conduct' comprises a non-violent sexual advance, discovering a partner committing adultery, or the deceased indicating an intention to leave a domestic relationship."

As methodical as the Inquiry findings are, it is important to note that provocation has been abolished as a partial defence to murder in Victoria, Western Australia, Tasmania and New Zealand. These jurisdictions have recognized that this partial defence to murder is conceptually flawed; mainly that it was designed and implemented in England in the 17th century by men and for men and consequently its current operation in the 21st century is gender biased and upholds the notions of male honour that are out of line with current community values and expectations of justice¹. In Queensland, the defence was recently amended to reduce the scope of it being available to those who kill out of sexual possessiveness or jealousy. In the ACT and Northern Territory, the defence was amended to exclude non-violent sexual advances.

"an era in which assumptions about male and female behavior were steeped in misogyny" when women were treated within marriage as goods and chattels... spoken by Victorian Attorney General, Rob Hulls

The defence therefore must be reformed and in the words of the Inquiry's findings; must be seen to *raise the bar* and come into line with community standards.

¹ Dr Kate Fitz-Gibbon, Submission on the Partial Defence of Provocation, August 2013.

This finding was also noted in the Committee on Provocation. It is important that the reform measures are not viewed as out of line with community expectations of justice. In cases where provocation by men who have killed a female intimate partner in response to allegations of sexual infidelity or threat of relationship separation, by men who kill in response to a non-violent homosexual advance and by persons who kill in response to prolonged family violence; as Fitz-Gibbon (2013) states, when considered together these three contexts of homicide give rise to the question of how to reform the provocation defence in order to exclude unmeritorious male defendants whilst providing an avenue less than murder for battered women. It is this that Fitz-Gibbon (2013) states, would be best achieved by abolishing provocation as a partial defence to murder and transferring any consideration of provocation to the sentencing stage of the court process. Fitz-Gibbon's believes that the range of contexts of lethal violence in which provocation is raised could then be adequately accounted for at sentencing for murder. This cannot be ignored and the draft Bill must make sure that its law reform measures ensure that husbands (as in several recent high—profile cases) do not use the defence of provocation to justify the murder of women.

There does need to be a limit to what kinds of behavior qualify as provocative. Explicitly stating in law that certain behaviours, such as infidelity, jealousy or possessiveness, are not to be taken into account is required. There needs to be a tightening of the laws so that men cannot use arguments about infidelity or words in the way they do. As stated in its Final Report, the Association does not consider it appropriate that the partial defence be available to a defendant who, absent some 'extreme and exceptional circumstance' kills a person with whom they are (or have been) in a domestic relationship:

- The deceased indicates to the defendant they wish to end a relationship
- The deceased discloses infidelity to the defendant
- The deceased taunts the defendant about sexual inadequacy
- The defendant discovers their partner or ex-partner in flagrante and kills that person
- The defendant discovers their partner or ex-partner in flagrante and kills the third party
- The defendant kills a third party who they know or believe has been having a relationship with their partner/ex-partner.

The partial defence should also not be available to defendants who:

- incite a response to provide an excuse to respond with violence; or
- responds to a non-violent sexual advance by the victim.

Another important point that was flagged by stakeholders was that the defence of provocation works to trivialize violence because the rules of evidence in effect ensure that a jury does not get to hear evidence of any history of violence against the victim, and yet in many provocation cases the relationship has been marked by violence by the accused. In Singh, Ramage and Stevens there were allegations of previous domestic violence by the offender towards the victim, most of which was not able to be heard in evidence. This needs to be resolved. Perhaps consideration should be given to an amendment to the law of self-defence in NSW to provide for persons who have reasonable grounds for believing that their conduct was necessary to defend themselves, even if they were responding to harm that was not immediate or their response involved the use of excessive force.²

The Victorian example of special provisions that apply when domestic or family violence is alleged may provide guidance for an amendment to self-defence in NSW. Section 9AH of the Crimes Act 1958 (Vic) provides:

- (1) Without limiting section 9AC, 9AD or 9AE, for the purposes of murder, defensive homicide or manslaughter, in circumstances where family violence is alleged a person may believe, and may have reasonable grounds for believing, that his or her conduct is necessary:*
- (a) to defend himself or herself or another person; or*
 - (b) to prevent or terminate the unlawful deprivation of his or her liberty or the liberty of another person even if:*
 - (c) he or she is responding to a harm that is not immediate; or*
 - (d) his or her response involves the use of force in excess of the force involved in the harm or threatened harm.*
- (2) Without limiting the evidence that may be adduced, in circumstances where family violence is alleged evidence of a kind referred to in subsection (3) may be relevant in determining whether:*
- (a) a person has carried out conduct while believing it to be necessary for a purpose referred to in subsection (1)(a) or (b); or*
 - (b) a person had reasonable grounds for a belief held by him or her that conduct is necessary for a purpose referred to in subsection (1)(a) or (b); or*
 - (c) a person has carried out conduct under duress.*
- (3) Evidence of:*
- (a) the history of the relationship between the person and a family member, including violence by the family member towards the person or by the person towards the family member or by the family member or the person in relation to any other family member;*
 - (b) the cumulative effect, including psychological effect, on the person or a family member of that violence;*
 - (c) social, cultural or economic factors that impact on the person or a family member who has been affected by family violence;*
 - (d) the general nature and dynamics of relationships affected by family violence, including the possible consequences of separation from the abuser;*

² Jacqui Swinburne, Inquiry into Partial Defence of Provocation, Redfern Legal Centre 2012.

(e) the psychological effect of violence on people who are or have been in a relationship affected by family violence;
(f) social or economic factors that impact on people who are or have been in a relationship affected by family violence.

(4) ... violence means:
(a) physical abuse;
(b) sexual abuse;
(c) psychological abuse (which need not involve actual or threatened physical or sexual abuse),
including but not limited to:
(i) intimidation;
(ii) harassment;
(iii) damage to property;
(iv) threats of physical abuse, sexual abuse or psychological abuse;
(v) in relation to a child:
(vi) causing or allowing the child to see or hear the physical, sexual or psychological abuse of a person by a family member; or
(vii) putting the child, or allowing the child to be put, at real risk of seeing or hearing that abuse occurring.

(5) Without limiting the definition of violence in subsection (4):
(a) a single act may amount to abuse for the purposes of that definition;
(b) a number of acts that form part of a pattern of behaviour may amount to abuse for that purpose, even though some or all of those acts, when viewed in isolation, may appear to be minor or trivial.

Conversely, the defence has also been used several times in NSW by 'battered' women who kill their abusive partners. This too cannot be ignored, hence the recommendations of reforms to the partial defence of provocation and by abolishing the defence might disadvantage some defendants, such as women who have been victims of long-term domestic abuse. Stakeholders such as the NSW Bar Association, along with the NSW Law Society, also believe that the law should be retained. Abolishing provocation would be detrimental to women who have killed partners after long periods of domestic violence. Without such a defence available, injustices are likely to occur especially (as mentioned) where accused persons respond to significant acts of violence but in a manner which cannot be characterized as self-defence (the legal definition of self-defence is very limited when applied to most cases of long-term physical and mental abuse of women by their male partners). As mentioned, tightening provocation so that a separation can never be the reason per se for using provocation, judges will then be forced to affirm a woman's rights, and violent men will then feel the full force of the law. This too reflects the view that, in contemporary society, there is an expectation that people otherwise faced with offensive, insulting or upsetting conduct should not resort to homicide.

As one can see from the arguments, it is a controversial area of the law and change is most certainly needed. In the words of Chrissa Loukas (defence counsel), "*provocation is not a male defence or a*

female defence, but a human defence”and consequently argued to take caution, as she thought by abolishing the defence, *‘will make the situation worse for [battered] women’*. This view was too supported by stakeholders in New Zealand who drew on from their research in comparable jurisdictions such as New Zealand in order to highlight that where provocation was abolished consequently battered women have been convicted of murder and were unable to fit within the confines of self-defence. Again, this cannot be ignored. The reforms are needed to bring the criminal law into line with community values and standards and expectations of human behaviour

In order to establish that the Bill operates smoothly (so to speak), and in agreement with the Committee’s findings, it is recommended that the Director of Public Prosecutions give serious consideration to the issue of the adequacy of existing guidelines as they relate to homicides occurring in a domestic context. As the findings state, specific guidelines are required to assist prosecutors determine the appropriate charge to lay against defendants in circumstances where there is a history of violence toward the defendant.

The Police Association also believes and agrees with the Inquiry’s findings that the Law Reform Commission should in five years’ time, conduct a comprehensive review of the law of homicide defences, including a review of any reforms to the law of provocation. For instance, a report by the Judicial Commission of NSW contains data on the use of provocation in NSW in the period from 1990 to 2004; the report found that provocation was raised in 115 cases and it was successful in 75 of these cases. Via the examination of these case studies, one will be able to see whether there are concerns over time that the defences have not been biased in favour of men against women, for instance. It noted, however, regular evaluation and assessment of the operation of the laws is vital and should be monitored at the end of its five years period of operation.

It is also important to ensure that any legal reform was supported by a broad education campaign. As stated in its findings, key legal stakeholders (including judges, lawyers, police, and law students as well as the community more broadly), need to be better educated about the nature and dynamics of family violence including addressing common misperceptions about victims of violence and, in particular, challenging views about why they do not ‘just leave ‘violent and destructive relationships.

In summary, the overall aim of the Committee's recommendations in placing strong restrictions on the partial defence of provocation will hopefully lead to the defence not being misused again. The Inquiry's recommendation in keeping the defence is in order that it can be used by long-term victims of domestic violence, but restricting it to cases where conduct has been "grossly provocative". Via its comprehensive examination, the Committee had compelling evidence that the defence of provocation serves as a critical part in the criminal justice system- women who have been subject to ongoing domestic violence.