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Murder or manslaughter? NSW ponders the provocation problem

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In Parliament last week, NSW took steps towards better understanding, and potentially solving, the problems posed by the partial defence of provocation.

A defence predominately used by men, provocation is seen by many to represent an outdated and illogical excuse for murder. However, for others, it represents a halfway defence for battered women who are unable to raise the often restrictive complete defence of self-defence.

Over two days of public hearings, a Select Committee on the Partial Defence of Provocation sought opinions on the continued viability of provocation as a partial defence as well as possibilities for its reform. In examining these issues, the committee confronts a controversial area of the law that several other jurisdictions have sought to address in recent years.

In Victoria, Tasmania and Western Australia, provocation has been abolished. In Queensland, ACT and the Northern Territory a range of reforms have been introduced that restrict provocation to varying degrees.

Provocation for men

The NSW select committee was formed in June, following community outcry over the use of the provocation defence by Chamanjot Singh. Singh was able to successfully raise provocation after he slit his wife's throat with a box cutter.

Singh argued that he had been provoked to kill his wife, Manpreet Kaur, because of suspicions of infidelity, disparaging comments made about his mother by the victim and her sister's husband, and a belief that the relationship was ending and that he would be deported. Manpreet's sister, Jaspreet Kaur, continues to question the integrity of a defence that arguably saw her dead sister put on trial. On Wednesday, she commented to the committee:
He slit my sister’s throat eight times, you can’t say that is manslaughter … how come this case is a provocation case?

This week the committee pondered this question and in doing so, heard from a range of stakeholders, including academics, domestic violence practitioners, lawyers and two family members of homicide victims. Understandably among such a range of witnesses, the views presented to the committee were divided between reforming but restricting the defence and abolishing it altogether.

Cases such as Singh’s, and the well known provocation injustices in the cases of James Ramage and Peter Keogh, who both killed their partners and successfully used the provocation defence, were central to evidence given by witnesses who favoured abolition. Critiquing its use in this context, Graeme Coss from Sydney University described provocation as “an abomination of a defence”.

Witnesses argued that provocation would be better dealt with at sentencing for murder where the label imposed would recognise the intent of the killing. In the Victorian Ramage case, for example, many argued that a verdict of murder would have better reflected the level of violence inflicted by James Ramage on his estranged wife, Julie. Ramage bashed and strangled Julie to death in response to a discussion in which she admitted to being a new relationship and allegedly taunted his sex prowess. He was the last man to successfully raise provocation in Victoria.

In NSW, if abolished, witnesses posed that the extent to which the provocative conduct should be considered mitigating could then be addressed in the length of sentence imposed.

**Provocation for women**

The plight of women who kill in response to prolonged family violence was also a focus throughout the two days of public hearings.

Several defence practitioners, domestic violence practitioners and Professor Julie Stubbs from the University of NSW warned of any reform that could have negative consequences for this vulnerable category of offender.

Chrissa Loukas, the defence counsel for Singh, reminded the committee that “provocation is not a male defence or a female defence, but a human defence” and consequently urged them to take caution, as she argued abolition “will make the situation worse for [battered] women”.

This view supported previous evidence given by Stubbs who drew from her research in comparable jurisdictions, such as New Zealand, to highlight that where provocation has been abolished consequently battered women have been convicted of murder where unable to fit within the confines of self-defence.

The committee members themselves appeared to be considering a range of options, including an exclusionary model of reform, reversing the onus of proof and implementing a social evidence framework. In particular, to nearly every witness over the two days, the Honourable David Clarke questioned if provocation could be limited to provocative conduct arising from serious criminal or violent conduct.

It was posited that this would capture the case of the battered women who is unable to raise self-defence, while simultaneously excluding the jealous male who kills his partner. Could this be the way forward for provocation in NSW?
In light of the range of opinions, recommendations and cautions, two things are clear. Solving the infamous provocation problem in NSW is a task not easily achieved. And regardless of whether the committee decides to abolish, retain or reform the provocation defence, change is most certainly needed.

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