Submission to the Queensland Law Reform Commission

Review of Particular Criminal Defences

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The purpose of this submission is to respond to one proposal currently posed by the Queensland Law Reform Commission in their review of particular criminal defences (Consultation paper February 2025).

Proposal 5 – The partial defence of killing on provocation in section 304 of the Criminal Code should be repealed.

In my opinion, the partial defence of killing on provocation should be repealed. Many existing arguments concerning abolition of the partial defence, focus on shortcomings with the way the provision is worded. It has been described as complex and confusing, utilising language that is not consistent with current standards of parliamentary drafting.[1] Amendments to s 304 of the Criminal Code (Qld) in 2011 and 2017 reflected a need to limit the circumstances in which the provocation defence should apply. These amendments have increased the complexity of the provision, without increasing confidence in the operation of the provision. The split High Court decision of *Peniamina v The Queen*[2] is a pertinent example of interpretive difficulties that exist within s 304, and a judicial result that defeated the policy intentions of the provision.

It is important to consider why the drafting of the partial defence of provocation has proven so difficult in Queensland. It is submitted that ineffective drafting of the provocation defence is not due to any lack of effort or understanding, but is rather a manifestation of a deeper problem/concern – that the partial defence should not exist at all.

If a person responds with lethal force to another person who has assaulted them leading to apprehension of death or grievous bodily harm, then the appropriate excuse for a defendant to rely upon is self-defence (s 271(2)). This is despite the fact that a defendant may have been provoked by the initial assault. In such a scenario, a defendant would rationally rely on self-defence instead of provocation as it would completely negative criminal responsibility (a complete excuse) as opposed to mitigating criminal responsibility (murder reduced to manslaughter).

The defence of provocation involves not only a provocative incident, but a requirement that there be a sudden and temporary loss of self-control by the defendant when applying lethal force to another.[3] The difficulty here is that for the provocation defence to be relevant, there must be a murder charge, and it is usually the case that a murder charge is brought by the Crown on the basis that the defendant unlawfully killed the victim, with the intention to either kill them, or do them grievous bodily harm (s

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[1] James Duffy, 'Provocation, Murder and the Modern Approach to Interpretation: How Do You Solve a Problem Like Peniamina?' (2024) 47 *Criminal Law Journal* 342, 344; *Peniamina v The Queen* (2020) 271 CLR 568, [13]; 284 A Crim R 558; [2020] HCA 47.
[2] *Peniamina v The Queen* (2020) 271 CLR 568; 284 A Crim R 558; [2020] HCA 47.
[3] *Masciantonio v The Queen* (1995) 183 CLR 58; 80 A Crim R 331; *Pollock v The Queen* (2010) 242 CLR 233; 203 A Crim R 321; [2010] HCA 35.

302(1)(a). This means that for the provocation defence to apply, a defendant must lose self-control and do an act causing death in that state of loss of self-control. However, the defendant cannot totally lose self-control, because they must still be capable of forming the intention to kill or do GBH. If a defendant completely loses self-control, the appropriate excuses to rely upon would be act independent of will (s 23(1)(a)) or insanity (s 27).

The defence of provocation as the law currently stands, should only apply where a defendant is subject to conduct (words or action) that could cause an ordinary person in the position of the defendant to lose self-control and act the way the defendant did. The provocative conduct should not be constituted by a threat of death or serious harm to the defendant or another person. The loss of control should be partial and not complete. As a result, the parameters in which the provocation defence might operate are exceptionally narrow. It is submitted that they are so narrow, that the abolition of the provocation defence can occur without problematic consequence, with the caveat that the mandatory sentencing regime for murder is also amended.

The partial defence of provocation has historically been described as a concession to human frailty.[4] There has been longstanding acceptance that in certain circumstances, a person can say or do something so offensive to an individual (or someone close to them) that society is collectively prepared to acknowledge that offensive conduct when assessing the culpability of an offender who kills another. At the same time, Australian society has developed a decreasing tolerance for those who respond with violence to the words and actions of others. Understanding whether the partial defence of provocation should be repealed, involves an acknowledgment that there is a tension between these positions that is not easy to resolve.[5]

In Queensland in 2025, the provocation defence simply does not align with community views about appropriate responses to provocative words or conduct. For the provocation defence to apply, there must be provocative conduct of a deceased that could/might cause an ordinary person in the position of an accused to lose their self-control, form an intention to kill or do grievous bodily harm and act in the way the accused acted.[6] Simply put, an ordinary person does not lose their self-control, and kill their provocateur with the intention to kill or commit GBH. That response would be quite extraordinary,[7] and modern-day Queenslanders expect more self-control from individuals who have been subject to serious provocation. From a legal perspective, the High Court of Australia has long acknowledged that the level of self-control expected of

[4] See MJ Allen, 'Provocation's Reasonable Man: A Plea for Self-Control' (2000) 64 *Journal of Criminal Law* 216 and the references to case law within.
[5] In the case of *Johnson v The Queen* (1976) 136 CLR 619, 656, Gibbs J stated, 'the law as to provocation obviously embodies a compromise between a concession to human weakness on the one hand and a necessity on the other hand for society to maintain objective standards of behaviour for the protection of human life.'
[6] *Masciantonio v The Queen* (1995) 183 CLR 58, 66–67, 69; 80 A Crim R 331; *Pollock v The Queen* (2010) 242 CLR 233, [47]; 203 A Crim R 321; [2010] HCA 35.
[7] Graeme Coss, 'The Defence of Provocation: An Acrimonious Divorce from Reality' (2006) 18(1) *Current Issues in Criminal Justice* 51.

the ordinary person who is provoked, is something that will be affected by contemporary conditions and attitudes.[8]

That being said, it is my opinion that a person who kills another in a partial state of loss of self-control, caused by sudden provocation, may be less morally blameworthy than a person who kills another without provocation. Depending on the context, that distinction may be finely drawn, but in other circumstances, the experience of provocation quite demonstrably impacts on the culpability of a defendant who uses lethal force. The more difficult issue is how to reflect the differing levels of culpability of those who kill in response to provocation.

It is submitted that a defendant who kills another with intention to kill or do GBH commits the offence of murder, and that should be the case, regardless of whether the defendant has been subject to provocation in the legal sense. Murder should not be reduced to manslaughter on the basis that a defendant has been provoked to kill another. Instead, provocation should be a factor (along with other mitigating and aggravating factors) that is considered when a defendant is being sentenced for murder. I argue that provocation should be capable of affecting the sentence imposed on a person who is found guilty of murder. As acknowledged by the Model Criminal Code Officers Committee in 1998, some who kill in a state of loss of self-control induced by provocation are as 'morally culpable as the worst of murderers, [but] some are far less culpable.'[9] The nuance of this distinction cannot be properly captured at a trial, where a jury is confined by the binary guilty/not guilty outcome. An assessment of how provocation has impacted on the culpability of an offender is best conducted by a sentencing judge.

This outcome cannot be achieved with the current mandatory sentencing regime for murder in Queensland, where there is no scope for sentencing factors to reflect the differing culpability of those who kill another person. As a result, it is also submitted that the mandatory life sentence for murder, with associated minimum non-parole periods, must also be amended.

Conclusion

The partial defence of killing on provocation in s 304 of the Criminal Code (Qld) should be repealed. At present, the continued existence of the defence is only justified on the basis that its removal might cause unjustifiable hardship to certain groups of defendants (e.g. victims of domestic violence or those with a mental disorder) who use lethal force in response to provocation. Judgements about the moral culpability of those who kill when provoked are context laden and nuanced. When a defendant is liable to the most coercive sanction known to the criminal law in Queensland (mandatory life for murder), then the law must permit subtle judgements to be made about culpability and proportionate punishment. This is best achieved by removing the mandatory life sentence for the offence of murder, and treating provocation as a factor that is relevant to the sentencing of a person who has killed another.

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[8] *Stingel v The Queen* (1990) 171 CLR 312, 326-327.

[9] Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, Model Criminal Code Chapter 5 Fatal Offences Against the Person, Discussion Paper (June 1998).