

CASE STUDY: MALCOLM BAKER

draft 5/9/12



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1. Introduction

On the 27th October 1992 Malcolm Baker killed 6 people, including his son, within a 50-minute timeframe. Mr. Baker has been incarcerated for 20 years, 15 of which have been served in effective solitary confinement in Australia's highest security prison. He has been subjected to adverse conditions that are in direct opposition to basic standards of human rights outlined in the ***Optional Protocol to the Convention against Torture***, and which are inconsistent with his non-violent prison history. He has been forced to endure prolonged periods of isolation as well as poor ventilation and lighting that fail to meet minimum standards under international law. He is moved from cell to cell every four weeks, which denies him the stability of a home. Within the prison system he is unnecessarily deprived of any basic sense of personal liberty and security: when out of his unit, he is put in leg irons and handcuffs, assaulted and his possessions smashed, all while in the presence of guards. Malcolm is told he is mentally ill and is forced to take drugs that 2 of 6 psychiatrists agree are inappropriate. Furthermore, Mr. Baker is faced with a complete lack of access to essential independent social and legal support. Justice Health has refused to intervene or support his request for us to be nominated as his primary carer, or be present at his Mental Health Review Tribunal hearings. Justice Action has been denied the right to visit him.

Justice Action has sought to assist Malcolm through attempting to reconnect him with his family and friends, and has maintained a long term mentoring relationship with him. Additionally, we have arranged an independent lawyer and psychiatrist for him. Through our careful research, we have established that the rationalisation used to classify Malcolm as an Extreme High Security Inmate and subsequently torture him, is a vague provision legislated under the *Crimes (Administration of Sentence) Regulation 2008* that lists 'public interest' as a consideration when categorising a prisoner. The Justice Action Team share a common goal in urgently reminding the Department of Corrective Services and other government departments, that the ongoing torture of Malcolm Baker is by no means acceptable and that there should be no place for complacency towards the treatment of a prisoner.

On numerous occasions Justice Action has attempted to gain support from various organisations that are responsible for Malcolm. These organisations include: the Minister for Justice, Justice Health, the Mental Health Advocacy Services, the Department of Corrective Services NSW, the Mental Health Review Tribunal and the NSW Ombudsman. Evidently, our concerns have not been taken seriously. Malcolm is still being forcibly medicated, continues to spend at least 23 hours per day locked in solitary confinement, has been denied the right to a primary carer and visitors from Justice Action.

Justice Action has been heavily involved in Malcolm's case and established a support network that includes members of Malcolm's family, Phillip Ryan (his lawyer) and psychiatrists. Malcolm's wellbeing has been enhanced as a result of our relationship with Malcolm and this lovely group of people. Due to our intervention, Malcolm's forced medication stopped for a period, unfortunately, and in contradiction to positive results and opinions from psychiatrists, Justice Health caved and now continues to medicate Malcolm. From the mistreatment Malcolm experiences he feels unsafe and is not being given the opportunity to grow without violation.

The treatment of Malcolm Baker has fallen short of the human rights standards set by the International Covenant on Civil and Political Rights (ICCPR). He is treated in an inhumane manner through placement in solitary confinement. Additionally, he is tied down, having his legs bound together while being forced to take medication. A senior psychiatrist has even commented that Malcolm is being kept in an, 'unsuitable environment'. Malcolm shows continued frustration and concerns at being labeled 'mentally ill'. Malcolm is not suicidal. He is not a threat to himself.

Therefore, Malcolm feels that he is being treated in an unjust manner in regards of the process of his rehabilitation.

2. Malcolm's Life Prior to Offence

2.1 Traumatic youth

A report prepared by social worker Ms Jean Alexander, tendered to Newcastle Supreme Court, claims Malcolm was violently abused by his mother and father. Malcolm's sister supports these allegations. The report also shows that Malcolm was exposed to gun violence at an early age – incidents involving guns are detailed in the profile below.

2.2 Early life

Malcolm left school at age 15 and moved out of his family home at age 17. He relocated to the Central Coast and was in-and-out of several professions, primarily trades. In addition to work, Malcolm maintained a steady income for seven years by renting out his privately owned caravans in Terrigal. At the time of the offence Malcolm was unemployed due to a back injury that hindered his ability to work. Malcolm's personal life consisted of six relationships from which he had sired 9 children.

2.3 Lack of violent behavior

Friends of Malcolm have described his actions as "completely out of character"¹. They described him as "helpful to everyone" and willing to "do anything to help you."² At trial, Newman J acknowledged that Malcolm had been an "industrious member of the community"³ and had no previous record of violence. According to police records, over the period of his life, Malcolm was convicted and charged with a number of matters involving mostly driving or stealing⁴. However, there are no charges for assault or any other violent incidents.

3. Circumstances Surrounding Malcolm's Crimes

3.1 Prior to 27th October 1992

Malcolm and Ms Kerry Anne Gannan, 23, lived together for seven years (in a de facto relationship) and split up six weeks prior to the murder.⁵ In the weeks leading up to the events of 27th October 1992 Kerry had taken out a domestic violence order against Malcolm, based on an assault that resulted in Kerry sustaining a black eye.⁶ This was Malcolm's first violent offence and as a result he was required to surrender any weapons he had in his possession. In compliance he surrendered 5 firearms, but kept a 12-gauge shotgun.⁷ Malcolm told his doctor that he blamed Kerry's relatives for the breakup. He also alleged that his son, David Baker, had slept with Kerry and supplied her with drugs.⁸ However, Baker wished to reconcile with Kerry Anne and placed an advertisement in the classifieds section of the Central Coast Express, which stated, "*Avoca Nursing Home (where Kerry had worked) Kerry Gannan. Sorry, but I still love you. Mac.*" This was to be published on the day following the shooting.⁹

¹ 'Daughter's Anguish in Poetry' SMH, 5 August 1993.

² 'Couple Split Up Before Massacre' SMH, 29 October 1992.

³ Newman J, Sentencing Report, *R v Malcolm George Baker*, 6 August 1993, Supreme Court of NSW.

⁴ See Malcolm Baker MHAS file in server

⁵ 'Court told of Terrigal's night of murder' SMH 24 December 1992.

⁶ Newman J, Sentencing Report, *R v Malcolm George Baker*, 6 August 1993, Supreme Court of NSW.

⁷ *ibid.*

⁸ *ibid.*

⁹ Newman J, Sentencing Report, *R v Malcolm George Baker*, 6 August 1993, Supreme Court of NSW.

3.2 The 27th October 1992

Malcolm went to Kerry's residence, which she shared with her father, aged 43, and sister, aged 18. He overheard a conversation through Kerry's bedroom window, between her and Christopher Michael Anthony Gall, 22, which he believed to be related to sexual matters.¹⁰ Malcolm went home and returned back to the residence with a loaded shotgun. Baker fired the gun and Mr. Gall was struck on the right side of his face, but would survive¹¹ and then shot Kerry. Malcolm and Kerry's father got into a struggle during which Kerry's pregnant sister was shot. Malcolm then shot Thomas Gannan, Kerry's father. Malcolm then drove his Volvo to Bateau Bay and shot dead his son David Baker, 27.¹² He then drove to the house of Ross Smith, who owed him money, and shot him while he was in the bath. He then shot Leslie Read who was at Mr. Smith's house at the time. Baker then departed, taking Smith's Mazda and went to the residence of his friend, John Frederick Thompson. Mr. Thompson then convinced Baker to hand himself in to Toukley police station later that night.

4. Court History

4.1 The Trial

On the 6th August 1993, Malcolm Baker pleaded guilty to six murders and also to the crime of wounding with intent to murder. He was sentenced to penal servitude for life. The reasoning for this sentence was the categorisation of Malcolm's crimes as the 'worst type'. Reasons for this categorisation include the weapon used, the circumstances of the shooting, and the gravity of the particular crimes (particularly important in regards to public perception of this gravity).

Given the circumstances of his case, it may be worthwhile to consider whether Malcolm could have relied on the partial defence of provocation to reduce his sentence to manslaughter instead of murder in the worst case (see Appendix).

4.2 Sentencing

When determining Mr. Baker's sentence, Newman J discussed that although a maximum sentence is viewed as detrimental to a prisoner's rehabilitation, public opinion puts pressure on the law to be applied in particular ways. "The community rightly expects its courts to apply the criminal law, in certain cases with mercy and in other cases with rigour."¹³

Mr. Baker believed he was suffering from "some form of mental illness". However, at the trial, psychiatrists were of the opinion that this condition did not avail him of a defence of either mental illness or diminished responsibility. Both psychiatrists were of the view that Malcolm Baker would not be a danger to the community in the future, and neither found him psychotic.¹⁴ It is therefore difficult to understand how exactly Mr. Baker has come to be in his present position at Long Bay Prison Hospital.

Mr. Baker's previous criminal record containing no offences of violence was completely disregarded at sentencing.¹⁵

¹⁰ *ibid.*

¹¹ *ibid.*

¹² 'Couple split up before massacre' SMH Article 29 October 1992

¹³ *ibid.*

¹⁴ *ibid.*

¹⁵ *ibid.*

4.3 Appeal

On 9th September 1996, Malcolm Baker applied for an appeal against his 'life sentence' based on the fact that he would not be a danger to society if released after an extended period of incarceration and where there are possibilities of rehabilitation in his case. Both these arguments were refused and the issue of public pressure came to the forefront again.

McHugh J said, "What would the community think of a sentence of 15 years, 18 years for six murders in those circumstances?" The gravity of the offence, along with community standards and public pressure meant that special leave was refused.

5. Time in Prison

5.1 Transfers

Baker has been transferred to a number of institutions for treatment and detention. From 1997 to 2004 he was held at both Goulburn and Lithgow Correctional Centres in segregated custody¹⁶. It is our understanding, from what Mr. Baker has confirmed, there was an alleged incident in 1997 between Mr. Baker and another inmate that ended in a physical conflict. Mr. Baker confirms he acted in self-defence and was pinned against a wall by the inmate. It is believed this incident resulted in Mr. Baker's segregation.

Mr. Baker was admitted to *D Ward* at the Long Bay Prison Hospital Complex on at least 2 occasions during this period. At this stage, Justice Action cannot provide reasons for these placements as the Mental Health Review Tribunal and Justice Health are not required to justify patients admission to forensic hospitals so long as it is for less than 7 days. It is natural that the commission of such actions by a non-violent man (such as Malcolm) would lead him to question his actions in an attempt to justify them and thus it is likely that – in a confined environment – such questioning could be misrepresented as a mental instability. However, Malcolm Baker denies having a mental illness and explains that the psychiatrists' view his actions as delusional or psychotic.

The first admission of Mr. Baker into Long Bay lasting more than 7 days was on 26th April 2004. Pursuant to Section 97(1) of the repealed Mental Health Act 2007 (the Act), Malcolm was admitted to Long Bay Prison Hospital as a mentally ill inmate. An order was made pursuant to Section 100(A)(1) of the Act to hold Malcolm in Long Bay for more than 7 days due his mental illness and lack of appropriate care in prison. He was transferred back to Goulburn in July 2005 under s100A(2) of the Act, on the basis that he was not mentally ill and appropriate care in fact could be provided for him.

Mr. Baker was transferred back to Long Bay 6 months later on 29th December 2005 pursuant to s98 of the Act, on the basis that Mr. Baker was again deemed mentally ill. A judgment made under s100A(1) of the Act ensured Mr. Baker was held at Long Bay past the required 7 day limit. Two weeks later Mr. Baker was transferred back to Goulburn Correctional Centre because he was once again established as not having a mental illness and that appropriate care could be provided in prison.

In November 2001, 2 months after the opening of the new High Risk Management Unit in Goulburn (HRMU), the Department of Corrective Services (DCS) recommended Mr. Baker's placement there. In 2006, Mr. Baker was confirmed as a High Risk Security Inmate, a requirement for placement in the HRMU. From this date, he was held in ankle cuffs. In September 2009, Malcolm was transferred to the HRMU.

¹⁶ Phone call from Malcolm 29/03/2012

The most recent transfer to Long Bay Prison Hospital was on 31st January 2011 under the Mental Health (Forensic Provisions) Act s55(1) due to Mr. Baker's reclassification as mentally ill. He was transferred firstly to the Mental Health Screening Unit at Silver Water Correctional Complex, then to the new Prison Hospital at Long Bay Correctional Complex. In August 2011, Mr. Baker was transferred back to Goulburn HRMU. Justice Action has attempted to find out the reason for the transfer and we have been led to believe by Mr. Baker and other sources that it was due to a lack of beds.

5.2 Abuse

A report on the 24th September 2003 by prison guard C.L. Jackson, records the abuse Mr. Baker was receiving whilst being held. Mr. Baker has described the abuse ranging from threats, to garbage and faeces being left outside his door. He was hospitalised in 2010 by a physical attack, allegedly from another prisoner *Toki*, in which three ribs were broken.

6. How Organisations Have Dealt With Malcolm

6.1 Minister for Justice - Attorney-General Greg Smith

On the 21 of March 2012, an extensive email was sent regarding the torture of Malcolm Baker and demanded immediate intervention. It outlined concerns for Malcolm's welfare and asked for immediate access to visit him. Our concern for the lack of social support for Malcolm was at the forefront of the email, in reference to the blocking of our access to his Mental Health Tribunal Hearings and visitation rights as support persons. Why Malcolm was transferred to the HRMU was another concern which we demanded an explanation. We received an acknowledgement of our email but did not receive a response. Due to this lack of response, another email was sent to follow up the issue on the 30 of March 2012.

Finally, David Clarke responded on behalf of the Minister on the 17 May 2012. He inadequately explained that Malcolm is classified as an 'A1' maximum-security inmate who is placed in the HRMU because it is "appropriate at this time". He advised us that he is being cared for and supported by Justice Health. David ignored our request for access to Malcolm's tribunal hearings. Justice Action responded on 5 June 2012 with repeated requests for access to Malcolm's tribunals, stating that without Justice Action's physical support at the hearings Malcolm was not receiving a fair trial. Justice Action also demanded an explanation for a recent incident that saw Malcolm's TV smashed by another prisoner in the presence of 9 correctional officers.

On the 27 July 2012, David Clarke replied advising us to contact the MHRT with issues regarding access tribunal hearings. However, this had already been done and been denied without legitimate reason. He also stated that the inmate who damaged Malcolm's TV was ordered to pay Malcolm damages. However, no explanation was given for the incident being watched without intervention by the prison staff.

He also stated that Justice Action's application to visit Malcolm was being processed, but that in order to visit prisoners a Criminal Record Inquiry was required. The following day we received notification from the DCS that Justice Action was denied access.

6.2 Mental Health Review Tribunal (MHRT)

The Mental Health Review Tribunal plays a significant role in the treatment of mentally ill prisoners. Each prisoner's 'mental illness' is reviewed every six months via a tribunal hearing. There is a huge responsibility on the MHRT to ensure the health and well-being of each prisoner is priority. These hearings establish whether the prisoner has a mental illness and therefore needs to be forcibly

medicated, so it is extremely important that each prisoner has the right to a fair trial and representation. However, the MHRT have continuously denied Justice Action access to the tribunal hearings even though Malcolm has stated numerous times that he wants us to be there.

On 9 June 2011, Justice Action was denied access to Malcolm's tribunal hearing. On 9 February 2012, we were blocked from another. An email was sent from us on February 10, 2012 to the MHRT requesting justification of our blocked access. The MHRT replied on 17 February in a letter that did not give reasons for the denial of access. Instead, they stated that Malcolm already had sufficient legal representation, and that "no issue arose that required the Tribunal to seek further evidence or [to] contact someone else". This statement was despite the fact that in our initial email we had emphasised that the Mental Health Advocacy Service (MHAS), Malcolm's legal representation, had acknowledged Justice Action's role and trusted us to work with them to help Malcolm.

We also stated "they (the MHAS) agreed that my participation at the hearing would be able to assist both Malcolm Baker and MHRT". Justice Action responded on 22 February stating that the MHRT's response did not give any reasons for the denial of access and that according to s151(3) of the Act, the proceedings of the Tribunal are to be open to the public. Justice Action again demanded reasons for the blocking of access. On 7 March 2012, MHRT responded with the same response as their previous letter - that Malcolm already had legal representation so there was no need for further contacts. In addition to this, they said that although the tribunal hearings were 'public', the DCS can block access due to security, and these were matters to do with DCS. They refused to make any further comments.

On 24 July 2012, Justice Action sent an email to the MHRT advising them that we have organised and prepared an independent lawyer to represent Malcolm and an independent psychiatrist to examine and prepare a report on the mental state of Malcolm. The MHRT responded on 27 July advising us that it is at the Tribunal's discretion whether such evidence as the psychiatrist report is relevant and whether or not it should be received. They asked for a copy of the report in advance of the hearing to avoid delay at the hearing itself. They also refused to state their support for us to visit Malcolm.

On July 30, 2012, in preparation for his hearing on August 7, Malcolm wrote a detailed letter to the MHRT regarding his incorrectly diagnosed mental illness, the negative effects of his medication, and the ways in which Justice Health have mistreated him. Justice Action was denied access yet again to the Tribunal hearing on the 7th of August 2012.

6.3 Legal Aid/Mental Health Advocacy Service (MHAS)

Malcolm Baker has been given legal support by the MHAS since 1997. However, Malcolm has chosen to refuse their advice due to the fact that he is still being forcibly medicated.

There have been numerous letters sent by Malcolm to the MHAS displaying his frustrations at being labeled mentally ill when he strongly believes that he isn't. However, Malcolm frequently discusses conspiracy theories that results in him being labeled as delusional and unstable by his psychiatrists.

His letters have also displayed his anguish at being held down and forcibly medicated. The latest letter sent to Justice Action dated 16 August 2012 states:

"I had an interview with MHRT today 15/8/12 as you know! And she said she hadn't made up her mind to send me to the hospital. The team she spoke of was Dr Scott, Dr O'Dea, Mike Harris and Robert who said I should be hospitalized. But the clinical

director John Flockton and Vicky Walcot both said I've improved since being off anti-psychotic drugs. But 4 against 2 I guess. I'm destined to be hospitalised against my will!"

Malcolm is currently being held in Long Bay and is still forcibly medicated.

In this sense, the MHAS have been misleading and inconsistent in the treatment of Mr. Baker, considering that he successfully went without forced medication for a number of weeks and showed improvement.

6.4 Justice Health NSW

Justice Health, through their mistreatment of Malcolm, has instilled in him a sense of vulnerability and fear. Currently, Malcolm is being forcibly medicated and this is concerning, considering the overall improvements Malcolm has been making. Justice Health is supposed to provide him with support and care, not torture and misdiagnosis.

We initially made contact with Justice Health at the beginning of 2012 in regards to the issue of Malcolm nominating Justice Action as his Primary Carer. Malcolm advised us he had nominated Justice Action for this role in June 2011 when he was situated at Long Bay Prison Hospital and at 9 months later had not received a response. Justice Health finally responded and denied the nomination based on the premise that Baker was no longer a patient at the hospital when the decision was made (March 2012). He had been moved back to Goulburn by way of a Community Treatment Order in August 2011.

Questions arose as to why he had been moved back to Goulburn so suddenly and why his Primary Carer nomination took so long to process. Two emails were sent to David Chaplow before we received a response. The response was an invitation for a meeting between Mr David Chaplow, Ms Karen Lines, Mr. Brett Collins, Mr. Douglas Holmes and Ms Angharad Owens-Strauss. We hesitantly accepted the invitation and set an agenda for the meeting, which we sent to Justice Health in advance. We asked for stated support to have physical access to Malcolm and to be present and assist him in his tribunal hearings. This agenda was not adhered to and no results came from the meeting.

We were quick to jump on their tail about topics we'd discussed in the meeting however they responded with little assistance and either avoided the questions we asked or did not accept responsibility. An email we sent on 21 June 2012 detailing exactly what we wanted and expected to achieve from the meeting was finally responded to on 10 July 2012.

The response raised issues we had never mentioned to David Chaplow such as smoking in the jails. Chaplow made no statement of support for physical access to Malcolm or entry into his tribunal hearings. Since we replied to his email on 10 July 2012, the same day, we have not heard a response, a month later.

6.5 Ombudsman

Malcolm wrote a complaint to the Ombudsman regarding Justice Health in March 2011, specifically regarding their diagnosis of his mental health problems and his issues with them giving him too much medication. Three months later, in June 2011, they replied stating they cannot review these types of decisions. They advised Malcolm to raise the issues at his next tribunal hearing on 9 June 2011. There is also extensive communication from Malcolm to the NSW Ombudsman stating concerns that Justice Action was not receiving his letters.

Justice Action lodged a complaint with the NSW Ombudsman regarding (1) Corrective Services blocking correspondence with Malcolm, including mail and visitation, and (2) Malcolm's application for Primary Carer. On 9 May 2012, they wrote to us stating that the Assistant Commissioner had already responded to us verbally regarding visitation rights and referred us to the Commissioner. And, in regards to Primary Carer, it was found that Justice Health had refused to provide Malcolm with an application for Primary Carer stating it was not their responsibility. The Ombudsman advised us that this was wrong advice and that Justice Health had now provided Malcolm with a primary carer application.

6.6 Department of Corrective Services

On 12 June 2012, after Justice Action was blocked from attending Malcolm's Tribunal Hearing on 9 June, an email was sent to Commissioner Rod Woodham from DCS and another on 28 June to Assistant Commissioner Brian Kelly and Shannon Bateman requesting a lift on the restrictions placed upon Justice Action's visitation rights. Shannon Bateman from DCS responded on 6 July advising us that our request has been transferred to the Commissioner.

For Malcolm's next hearing on 9 February it was arranged over a telephone conference between MHRT, the Ombudsman, MHAS and Justice Health, that Justice Action would attend the hearing, however Corrective Services refused. On 10 February 2012, another email was sent to DCS following up the issue of requesting a lift on Justice Action's visitation restrictions. We then received a letter from DCS notifying Justice Action that the restrictions on visitation rights had been lifted.

We were sent an application form on 15 May 2012 from DCS for visiting Malcolm, which Justice Action completed and faxed back on the same day. It wasn't until 28 July 2012 that DCS responded and denied our request to visit pursuant to s26(c) and s103 of Crimes (Administration of Sentences Act) Regulation 2001.

7.0 Profile of Malcolm Baker

7.1 Introduction

Malcolm Baker is serving a whole of life sentence of which he has served 20 years to date. Of these 20 years, he has been unjustifiably isolated in solitary confinement in the HRMU for approximately 15 years. Consequently, he is now too fearful to be in an area with others. He has suffered such ill treatment as would be considered torture if it were applied to anyone else in normal circumstances. Issues of involuntary medication and unjustified segregation have created a man who cannot trust anyone around him. There is no doubt such treatment has caused significant mental stress.

7.2 Background History

Malcolm George Baker was born on August 13, 1947. He grew up and was educated in Penrith, Sydney. He is one of three children, with two sisters, who grew up together with their parents.

A report prepared by Ms Jean Alexander, a social worker tendered to Newcastle Supreme Court states that Baker's childhood was "pervaded by violence and fear."¹⁷ His father, a war veteran, would frequently beat his mother and other members of the family. They lived in a constant state of anxiety whenever their father was home. He was also subjected to frequent abuse from his father who beat him with a "cat-o-nine tails".

In the report Baker admitted that he had never been shown any signs of love by his parents and that his mother was also violent toward him and his sisters. Once his mother had broken his nose

¹⁷ 'Murderer Warped by Sadistic Father' SMH, 5 August 1993.

when she threw a can of peas at him. Baker's sister, Mrs Dorothy Osborne, supports these allegations stating that Baker had once been knocked unconscious by his father for defending his mother.¹⁸

The report also shows Baker was exposed to gun violence at an early age. At only seven years old his father lined him, his sisters and mother, up against the back fence and threatened them with a gun. In another incident, his father fired a shot near his mothers head for talking to a neighbour that he considered to be "a whore because she was divorced from her husband".¹⁹

Malcolm left school at 15 and he left home at 17. He moved to the Central Coast and has had numerous jobs including: mechanic, panel-beater and he maintained a steady job for seven years renting out caravans he owned in Terrigal to couples. A back injury affected Bakers ability to work and he was unemployed at the time of the shootings.

Ms Alexander argues that the physical and emotional abuse endured by Baker left him "seriously impaired"²⁰ in developing trust and forming close relationships with others. This is evident throughout his life in that Baker has had six significant relationships and nine children. The report concluded:

*"The effects of being a witness or victim of abuse in the home at an early age not only present a warped view of family life to a growing mind, but also provides a model for the future."*²¹

Friends of Baker have described his actions as "completely out of character"²². They knew Baker to be a man who was "helpful to everyone" and willing to "do anything to help you."²³ His daughter, Julie (who was 17yrs at the time of killings) described her father as "an honest, gentle, trustworthy and loving man who was full of remorse for what he had done".²⁴ During the trial, Newman J also acknowledged that Baker had been an "industrious member of the community"²⁵ and had no previous record for violence.

According to his full history of police records, over the period of his life Malcolm was convicted and charged with a number of matters involving mostly driving or stealing²⁶. There is not one charge for assault or any other violent incident:

- 6/8/1968: Stealing car parts (3 charges)
- 29/6/1968: Stealing a motor vehicle and Fraudulently using number plates
- 13/1/1969: Indecent Language and Resisting Arrest
- 20/1/1969: Goods in custody
- 24/10/1969: Drive speed dangerous to vehicle and Resisting arrest
- 17/11/1969: Goods in custody and Breach of court order
- 31/03/1980: Allowed himself to be carried in conveyance knowing that conveyance to be stolen
- 26/09/1980: PCA (drink driving BAL=.100) and Resisting arrest

¹⁸ *ibid.*

¹⁹ *ibid.*

²⁰ *ibid.*

²¹ *ibid.*

²² 'Daughter's Anguish in Poetry' SMH, 5 August 1993.

²³ 'Couple Split Up Before Massacre' SMH, 29 October 1992.

²⁴ *ibid.*

²⁵ Newman J, Sentencing Report, *R v Malcolm George Baker*, 6 August 1993, Supreme Court of NSW.

²⁶ See Malcolm Baker MHAS file in server

Baker's actions have demonstrated on numerous occasions that he is remorseful for what happened. John Thompson, the friend who convinced Baker to turn himself into police, said that he had never known Baker to be violent and that Baker has expressed genuine remorse when he visited him in gaol and Baker has often said he wished he could "turn back the clock".²⁷ During the trial he also told the court "I am very sorry for what's happened in regard to the other peoples families and being sorry is obviously not enough and never will be". Baker is apologetic for what he's done and regretful of his actions.

7.3 Deaths of 27th October 1992

According to documents tendered to Gosford Local Court, Baker and Ms Kerry Ann Gannan, 23, lived together for seven years (in a de facto relationship) and split up approximately six weeks prior to the murder.²⁸ It was believed that members of Ms Gannan's family and people at her workplace were not keen on the relationship.²⁹

In the weeks leading up to the events of 27th Oct 1992, Kerry Gannan had taken out a domestic violence order against Malcolm Baker, stemming from an assault in which her eye was blackened.³⁰ As part of that domestic violence order, Baker was required to surrender any weapons he might have. Baker was known to have six licensed firearms but only five firearms were surrendered, with Baker keeping a 12-gauge shotgun.³¹

His distress at the time of the breakdown of the relationship was expressed by Baker to a number of people prior to 27th Oct. In a letter written by Baker, he expressed that he and Kerry (Gannan) were in the process of reconciliation but "friends of hers had become involved and were influencing her and causing her to become confused and scared".³² Baker had also confided in his local practitioner, Dr Little, who he had been seeing for a number of years prior to the murders. Baker had been prescribed medication, but had not taken it two weeks prior to 27th Oct. Baker told the doctor that he blamed Kerry Ann Gannan's relatives for the cause of the breakup. He also alleged that his son, David Baker had slept with Kerry and supplied her with drugs and expressed hatred for his son.³³ Dr Little took Baker's statements as emerging from anger and frustration and did not see them as intent to kill.³⁴

On the evening of 27th Oct, Baker went to Kerry's house in Barnhill Rd, Terrigal, who lived with her father and sister. He did not enter the premises but overheard a conversation through Kerry's bedroom window, between her and Christopher Michael Anthony Gall, 22. Baker took the conversation to be related to sexual matters.³⁵ In his police statement, Baker said he intended just to threaten the family but snapped when he heard Ms Gannan talking with Christopher Gall.

Mr Baker then went home and returned back to the premises with his shotgun, which he had sawn off. Ballistics evidence also showed that the weapon was fully loaded, and that he had also retrieved an ammunition belt and inserted cartridges in it before returning back to the Gannan premises.³⁶

²⁷ 'Judge Thanks Killer's Cool-Headed Mate' SMH, 5 August 1993.

²⁸ 'Court told of Terrigal's night of murder' SMH 24 December 1992.

²⁹ 'Couple split up before massacre' SMH Article 29 October 1992.

³⁰ Newman J, Sentencing Report, *R v Malcolm George Baker*, 6 August 1993, Supreme Court of NSW.

³¹ *ibid.*

³² 'Mass killer tells judge: "I loved these people"' SMH 6 August 1993

³³ *ibid.*

³⁴ Newman J, Sentencing Report, *R v Malcolm George Baker*, 6 August 1993, Supreme Court of NSW.

³⁵ *ibid.*

³⁶ *ibid.*

On returning back to 75 Barnhill Rd, Baker fired the gun and Mr Gall was struck with contents of the shotgun cartridge on the right side of his face.³⁷ He then proceeded to shoot Kerry Ann Gannan. Moving through the house, Baker alleges he and Mr Gannan, 43, got into a struggle in an attempt to remove the shotgun and as a result Kerry's pregnant sister, Lisa, 18, was shot. Baker then proceeded to shoot Thomas Gannan, who staggered out to the road, but was shot again and died. Mr Gall was the only survivor.³⁸

Baker then drove his Volvo to Bateau Bay and shot dead his son David Baker, 27.³⁹ He then departed again in his Volvo to the premises of Ross Smith at Pacific Highway, North Wyong, where he entered the premises. Having ascertained that Ross Smith was in a bath, he entered the bathroom and shot Ross Smith. He then shot Leslie Read (whom he had never met before) who was at the house. Baker then departed, taking Smith's Mazda and went to the premises of his friend, John Frederick Thompson. Mr Thompson then convinced Baker to hand himself in to Toukley police station later that night.

"I just seen red. I just shouldn't have gone around there and done things," Baker told police that night. Malcolm said that he was "not by nature a violent person" and believed that he was suffering from "some form of mental illness" (contrary to the findings of the psychiatrists at trial).⁴⁰ He also said: "My actions indicated a definite picture of a person not aware of his actions, or (not) a fully coherent person who knew what was happening around him. I cannot even now comprehend how these things happened."⁴¹ Malcolm told the judge "these were people that I loved... I must live with the fact that I have made my family suffer."⁴²

7.4 The Trial

On the 6th August 1993 Malcolm Baker pleaded guilty to six murders and wounding with the intent to murder. At the judges discretion he was given the maximum penalty, penal servitude for life. At this decision, Justice Newman stated,

"It is a necessary part of the sentencing exercise for a judge to form an appreciation of the gravity of the particular crime viewed as part of a spectrum of offences of murder of which it can be postulated that some are so serious as to fall within the category of the worst type of case and thus attract a life sentence."⁴³

Newman J noted several aggravating features that placed Malcolm Baker's case in the 'worst type' category, including the weapon used, a shortened shotgun, whereby the "prisoner chose to disregard the likely effects of the use of a shotgun at short distance on human beings."⁴⁴ He goes to further explain the circumstances of the shootings as an aggravating factor, in particular relation to the shooting of Christopher Gall who although was not killed, was "shot coldly and viciously". The same applies to the shooting of Thomas Gannan Snr outside the house.⁴⁵ The murder of David Baker was a matter of assassination according to Newman J who noted that Malcolm Baker came to a short distance of the victim, engaged in no conversation and shot him. Also noted was the murder of Ross Smith who was murdered in his bath "completely defenceless."⁴⁶ To add to this

³⁷ *ibid.*

³⁸ 'Time of terrible rampage six shot dead by crazed gunman' Central Coast Express Advocate 18 March 2004

³⁹ 'Couple split up before massacre' SMH Article 29 October 1992

⁴⁰ 'Mass killer tells judge: I loved these people' SMH 6 August 1993

⁴¹ *ibid.*

⁴² *ibid.*

⁴³ Newman J, Sentencing Report, *R v Malcolm George Baker*, 6 August 1993, Supreme Court of NSW.

⁴⁴ *Ibid.*

⁴⁵ *ibid.*

⁴⁶ *ibid.*

was the fact that Leslie Read, whom Baker did not even know “and against whom he could bear no grievance whatsoever, was brutally shot from again, close range”.⁴⁷

In explaining his decision, Newman J discussed the options of a maximum sentence vs. determinate sentence. He discussed how although a maximum sentence is viewed as detrimental to a prisoner’s rehabilitation, public opinion puts pressure on the law to be applied in particular ways, “The community rightly expects its courts to apply the criminal law, in certain cases with mercy and in other cases with rigour”⁴⁸ - therefore affecting the sentences of prisoners. In his statement he referred to a variety of NSW judges in recent years that were against life sentences, quoting Hunt CJ at CL,

*“The indeterminate nature of a life sentence deprives a prisoner of any fixed goal to aim for, it robs him of any incentive and it is personally destructive of his morale” and “the purpose of punishment is also to reform the offender as far as possible”*⁴⁹.

Another factor impacting the extremity of Bakers sentence was his case being used as an example to deter future violence involving firearms,

*“If general deterrence is to have any meaning, sentences of this court should bring home to those who intend to use firearms that to visit violence on other, their actions will bring upon them stern retribution”*⁵⁰

At the trial, two psychiatrists were called to give evidence, Doctors Lucas and Strum. Both those psychiatrists were of the opinion that, whatever label they ascribed to the prisoners’ psychiatric state that evening, it did not avail him of a defence - whether the defence be of mental illness or of diminished responsibility. However, both were of the view that the crimes he committed on that evening were associated with a psychiatric state which manifested itself in a rage in which he committed the crimes.⁵¹ Newman J also agreed that there was “little difficulty in accepting the proposition that the prisoner was psychiatrically disturbed that evening... nobody acting rationally would commit the horrendous crimes which the prisoner did on this evening”.⁵² Nonetheless, Newman J was still driven to the conclusion that the case fell within the category, looked at in terms of total criminality: “the worst type of case.”⁵³

However, both psychiatrists were of the view that Malcolm Baker would not in future be a danger to the community, and neither found Baker to be psychotic.⁵⁴ Also noted was that Baker has the support of many members of his family and friends, which was also highly evident in Mr Baker’s life before the events that occurred that led him to this point. Baker’s previous criminal record also contained no offences of violence and was disregarded completely at sentencing.⁵⁵

It is important to note Newman J’s comment in the sentence statement of Baker’s case; “*in the instant case the prisoner had literally no matter which he could properly raise in a defence in relation to any of the charge*”. This leads to the ambiguity of whether he could not rely on the defence due to insufficient legal support or whether he was in fact not eligible for the defence on an evidentiary basis.

⁴⁷ ibid.

⁴⁸ ibid.

⁴⁹ Newman J, Sentencing Report, *R v Malcolm George Baker*, 6 August 1993, Supreme Court of NSW.

⁵⁰ ibid.

⁵¹ ibid.

⁵² ibid.

⁵³ ibid.

⁵⁴ ibid.

⁵⁵ ibid.

See Appendix for further discussion of potential defences available.

7.5 Sentencing

In the period shortly before the 1989 legislative reforms to sentencing, the average 'life' sentence was between 11-14 years in jail.⁵⁶

In the run up to the 1988 elections, the then Coalition promised to restore 'truth' in sentencing. They carefully chose the Anita Corby case, to highlight the fact that her killers had received 'life sentences' but there was the prospect of release after serving that period of time under the existing system. This resulted in significant legislative changes in 1989 and 1990 in the sentencing of offenders in NSW. These changes included the creation of the punishment of penal servitude for the term of an offender's natural life as the maximum sentence for the crime of murder under the s.19A *Crimes Act*, 1900. This sentence denies the prisoner any prospect of parole and release back into the community.

However when s.19A was initiated, there were no detailed legislative criteria for the circumstances in which it would be appropriate to impose a 'natural life' sentence. It was left entirely to the discretion of the judiciary. A speech from the Attorney General contained reference to the "very worst and most serious and heinous examples of this crime" but did not provide a specific prescription that these were the cases.

After intense scrutiny and a report from the Standing Committee on Law and Justice, the *Crimes Amendment (Mandatory Life Sentences) Act*, 1996 commenced operation on 30 June 1996. This amendment Act inserted a new s.431B into the *Crimes Act* legislatively prescribing that a natural life sentence be imposed in particular cases of murder (See s.431B(1) *Crimes Act*, 1900)

7.6 Appeal to the High Court Australia

On 9th September 1996, Malcolm Baker applied for an appeal of his 'life sentence' based on that he would not be a danger to society if released after an extended period of incarceration and that there are possibilities of rehabilitation in his case. A reference was made to *Veen [No 1] Case* and the factors contributing to the sentence of 'life' in that case. Three matters emerged from this case, in reference to the appropriateness of imposing penal servitude for life, two of which are absent in Baker's case,

*"The first one is that the offences are, in themselves, grave enough to require a very long sentence. That is present. Secondly, it appears from the nature of the offences or the offender's history, that he is a person of unstable character likely to commit such offences in the future and, thirdly, there is a need to protect the community from the consequences of such serious offences and that emerges."*⁵⁷

However, this argument was quick to be refuted due to a difference in conviction, namely, manslaughter in the *Veen* case, compared to murder in Baker's case. As well as this, it was mentioned to be of great importance that Baker's case had six murder victims, whereas *Veen* had one. As Kirby J argued, "You cannot just treat it as a murder of one person and say, 'Well, if all the considerations in *Veen* apply where it was one person' - we have got here a multiple murder of a most horrendous kind".⁵⁸

⁵⁶ Anderson, J, Research in Progress- The Judicial System, Sentencing for 'Life' in NSW

⁵⁷ *Baker v The Queen* S139/1995 [1996] HCATrans 346 (9 September 1996)

⁵⁸ *ibid.*

In spite of this, Mr J.L Trew QC, representing Malcolm Baker, went on to emphasize the basis of the application for special leave for appeal,

“Our submission that penal servitude for life which, we submit, is correctly characterised as a death sentence but incurred over a long period of time, is only appropriate for exceptional circumstances or, as other members of the Supreme Court have described it, as extraordinary circumstances. Those very extraordinary and very exceptional circumstances are not present in a case, we submit, where the offender suffers from a psychiatric illness and where the un-contradicted evidence is that in the future, if released, he will not be a danger to the community and there is some chance of rehabilitation.”⁵⁹

To this however, the issue of public pressure and the perception of the public on the criminal justice system came to a forefront. As McHugh J stated,

“Law and order is such a powerful political tool these days because there is a public perception that courts are out of touch with what the public or what community standards require... on any view in this case, supposing you gave this man 15 years. He is not insane; he could not even qualify for a defence of diminished responsibility. What would the community think of a sentence of 15 years, 18 years for six murders in those circumstances? It would be outrage and that is why the Chief Justice, in this particular case, took the view that this was a proper case for a life sentence.”⁶⁰

As a result, it was found that the gravity of the offence, along with community standards and public pressure outweighed the reasons being presented in the application for special leave for appeal, and for those reasons, special leave was refused.

It is apparent that the High Court is reluctant to enter into the sentencing domain perhaps following the experience of the *Veen* cases, and has been insistent that even in the case of "natural life" sentences the jurisdiction of that court will not be enlivened by "mere excessiveness of sentence" but there must be demonstrated "some gross violation of sentencing principles"⁶¹ (*Garforth v The Queen*, unreported, High Court of Australia, Application for special leave to appeal, 7 December 1994 per Dawson J at 7).

7.7 Prison Conditions

Baker has been serving a life sentence with no release date since October 1992. Despite him never posing a threat either to escape or to the safety of other prisoners, Baker is still forcibly medicated and has been transferred to a number of institutions for treatment and detention. From 1997 to 2004 he was held at Lithgow in **segregated** custody⁶². He was admitted to "D Ward" at the Long Bay Prison Hospital Complex on at least 2 occasions in 1997 and 2004, he was transferred to the Mental Health Screening Unit at the Silver water Correctional Complex then the New Prison Hospital at the Long Bay Correctional Complex in 2011. Malcolm has been mainly managed at Goulburn's High Risk Management Correctional Centre, which his treating doctor, Dr. O'Dea, described as an "unsuitable environment" for treating and managing Malcolm.

He has expressed concerns about leaving segregation due to abuse from other prisoners. A report on the 24th Sept 2003 by a prison guard, C.L. Jackson, records the abuse Baker was receiving.

⁵⁹ *ibid.*

⁶⁰ *ibid.*

⁶¹ Anderson, J, Research in Progress- The Judicial System, Sentencing for 'Life' in NSW

⁶² Phone call from Malcolm 29/03/2012

Baker has described the abuse ranging from threats to garbage and faeces being left outside his door. This type of abuse from other prisoners has allegedly resulted in three prisoners committing suicide, Jason O'Donald, 21, Cambel Parsons, 23, and Andrew Collis, 29. Baker was also hospitalized in 2010 from a physical attack from another prisoner, allegedly, Toki, in which 3 ribs were broken. At 64 years old, an attack of this kind can have long lasting affects.

Other physical signs of Malcolm aging is evident in his knee reportedly giving way on 27 September 2011. This was reported by his nurses to have happened before. It left him with a mild limp and he requested his knee to be stitched up. There have also been several records from nurses of Malcolm having ongoing sores in his nasal passage. These signs provide evidence of Malcolm's aging and that he requires care provided for older inmates.

Keeping Baker in segregation for over a decade has perpetuated his fears of abuse from other prisoners. He is currently being held in a compound, which has three cells in it. He has his own kitchen and backyard, but he will not use facilities provided for exercise due to his fear of other prisoners and prefers to stay isolated. He remains in his cell most the day. The only contact he makes is with his neighbours by talking around the wall of their backyards.

However, Baker acknowledges that he can't stay in segregation for the rest of his life and has been considering other options. Baker can cope with socialising with others when there is no pressure. Therefore he is hopeful in being placed with elderly prisoners, as they pose no threat and create no pressure for him. He has been thinking and planning for the future and is eager to work. He plans to save money for his family, particularly his grandchildren. Allowing this will provide him with goals for the future something to dedicate his time to. It will also make him more comfortable with socialising with others once again.

Malcolm's previous work records show his behaviour as good and that he managed the work well. Before he was incarcerated, Malcolm had maintained steady jobs panel-beating and renting out caravans he owned in Terrigal to couples. This shows he is capable of socialising and working well with others.

7.8 Detention in Goulburn's High Risk Management Correctional Centre

Malcolm has been serving a life sentence with no release date since October 1992. Malcolm has a long-standing history of suffering a severe chronic treatment resistant schizo-affective disorder. However, Malcolm is not a violent or aggressive man, as has been stated many times by his treating doctors and nurses. He is a very pleasant and cooperative man who only becomes irritable and pressured when he is asked about his mental illness.

Baker has been transferred to a number of institutions for treatment and detention. From 1997 to 2004 he was held at both Goulburn and Lithgow Correctional Centres in segregated custody⁶³. He was admitted to "D Ward" at the Long Bay Prison Hospital Complex on at least 2 occasions during this period. In November 2001, 2 months after the opening of the new High Risk Management Unit in Goulburn (HRMU), DCS recommended Malcolm's placement there. In 2006, Malcolm was confirmed as a High Risk Security Inmate, a requirement for placement in the HRMU. From this date, he was held in ankle cuffs. And in September 2009, Malcolm was transferred to the HRMU.

7.9 Detention in Long Bay Prison Hospital

Malcolm was moved between Goulburn Correctional Centre and Long Bay Prison Hospital on 5 separate occasions within 20 years. The allowed limit for holding a prisoner at Long Bay Prison Hospital is 7 days pursuant to s100A of repealed Mental Health Act 1990 and s55(1) of

⁶³ Phone call from Malcolm 29/03/2012

the Mental Health (Forensic Provisions) Act 1990. The first admission of Malcolm into Long Bay lasting more than 7 days was on 26 April 2004. Pursuant to Section 97(1) of the repealed Mental Health Act 2007 (the Act), on this day Malcolm was admitted to Long Bay Prison Hospital by Dr. Greg Stewart (Judge) as a mentally ill inmate. Four days later, pursuant to Section 100(A)(1) of the Act, an order was made to hold Malcolm in Long Bay for more than 7 days due his mental illness and lack of available appropriate care in prison. He was transferred back to Goulburn on 10 June 2005 under s100A(2) of the Act, that he was not mentally ill and appropriate care could be provided in prison. Malcolm was transferred back to Long Bay 6 months later by Dr Karen Lines (29 December 2005) pursuant to s98 of the Act, that Malcolm was in fact mentally ill. A judgment made 6 days later under s100A(1) of the Act ensured Malcolm was held at Long Bay past the required 7 day limit. Two weeks later (13 February 2006), Malcolm was transferred back to Goulburn under s100A(2) because he was not deemed mentally ill and appropriate care could be provided in prison. The most recent transfer was on 31 January 2011 under the Mental Health (Forensic Provisions) Act s55(1) due to Malcolm being deemed a mentally ill person.

7.10 Mental Health Issues

Malcolm is not a violent or aggressive man, as has been stated many times by his treating doctors and nurses. He is a very pleasant and cooperative man who only becomes irritable and pressured when he is asked about his mental illness. Currently Malcolm is reported as spending the majority of his day in his cell. This is supported in records from his assigned nurses. They describe Malcolm as being compliant with the wards routine with his mood remaining stable, having nil complaints/issues and nil distress observed, "*Malcolm is reactive and at ease but does not leave cell.*"

Justice Action has been in contact with Malcolm consistently over the last 10 years. During phone calls and evident in letters, Malcolm focuses on unusual thoughts but at all times is lucid and responsive. Malcolm is adamant he feels mentally stable and we have no reason to believe otherwise.

However, a psychiatric report made on the 8th February 2012 by forensic psychiatrist Dr. O'Dea states that Malcolm Baker has been diagnosed with having severe chronic treatment resistant schizoaffective disorder, which "remains under poor control with limited response to treatment to date". This diagnosis is defined as "a mental condition that causes both a loss of contact with reality (psychosis) and mood problems"⁶⁴. It is a combination of a mood disorder and schizophrenia.

According to the February 2012 psychiatric report, Malcolm is being given three different medications, Paliperidone Depot fortnightly, plus Coversyl and Atorvastatin. In mid 2011, Malcolm made a complaint to the NSW Ombudsman about Justice Health in which he disagreed with his supposed mental health problems and believed he is being given too much medication. Malcolm disagreed with the need of medication and wanted to question his diagnosis and management plan. The Ombudsman advised Malcolm that his mental health problems and medication would be reviewed in a hearing dated 9 June 2011.

At the June review hearing Mr Baker was placed on a Community Treatment Order and was transferred from the forensic hospital to the HRMCC. The purpose of a CTO is to allow people, who might otherwise be detained in a mental health facility, to live in the community and get the treatment, care and support they need in a less restrictive setting⁶⁵. For Mr Baker, this apparent

⁶⁴ U.S National Library of Medicine, 2012, 'Schizoaffective disorder', accessed at <<http://www.ncbi.nlm.nih.gov/pubmedhealth/PMH0001927/>>

⁶⁵ Mental Health Review Tribunal, 'Community Treatment Order Info Sheet', accessed at

'community, less restrictive setting' is the HRMCC, a maximum-security prison. In contradiction of Dr O'Dea's suggestions, Mr Baker is receiving treatment in the HRMCC instead of the forensic hospital.

Since returning to HRMCC in August 2011 Malcolm has been compliant with prescribed medication regime. However, there has been no significant change in his mental state, "he has remained acutely psychotic with an elevated and angry affect, marked disorder in the form and content of his thinking with ongoing delusional beliefs, and evident ongoing stress". Dr O'Dea argued in the February 2012 psychiatric report that that the HRMU is an inappropriate environment for someone with a psychiatric illness.

The psychiatric report states that Mr. Baker continues to have regular contact with his allocated counselling support officer (CSO) and psychologist as part of his HRMCC Case Management plan. Mr. Baker continues to be compliant with his unit's routine which is supported by his progression to Behaviour Management Level 3.1 on 1 November 2011.

8.0 Appendix

8.1 The potential defence of provocation

The possibility that Malcolm Baker may have been able to rely on the partial defence of provocation must be contextualised in the history of provocation. Provocation had traditionally operated as an intensely gender biased offence, however amendments in 1982 sought to broaden its availability to women who killed these violent men.⁶⁶ This was a move away from provocation's traditional rationale, which had favored a mitigation of culpability based on human, specifically male, frailty.

The current statute in the *Crimes Act 1900* (NSW) s23⁶⁷ provides that in order for a provocation to be satisfied:

(a) 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, and

(b) That conduct of the deceased was such as could have induced an ordinary person in the position of the accused to have so far lost self-control as to have formed an intent to kill, or to inflict grievous bodily harm upon, the deceased

This is accompanied by a statutory recognition that a lack of immediacy between the provoking act and the response is not necessary in order to rely on the defence. Ostensibly, this operates in Mr. Baker's favour as there was a period of around an hour between Malcolm Baker overhearing a conversation that he believed related to sexual matters and the offences.⁶⁸ As Malcolm Baker's trial took place well after the amendments made to provocation, a number of factors need to be considered in order to raise the possibility of a provocation defence.

Firstly, although the extended time between what may have been the provoking act and the killing is not critical, the common law position is that the "*longer the time that elapses between the allegedly provoking conduct of the deceased and the killing...the harder it may be for an accused*

<http://www.mhrt.nsw.gov.au/mhrt/pdf/CTOInfoSheet.pdf>

⁶⁶ New South Wales Law Reform Commission, *Partial Defences to Murder: Provocation and Infanticide*, Report no 83, 1997, [2.5]

⁶⁷ *Crimes Act 1900* (NSW) s 23

⁶⁸ Newman J, Sentencing Report, *R v Malcolm George Baker*, 6 August 1993, Supreme Court of NSW

to raise the argument of provocation...”, per Gleeson CJ in *R v Chhay*.⁶⁹ Consequently the total timeframe between the provoking event and the last killing was ‘something over one hour’ and may pose difficulties in raising the defence if perceived to be long.

Secondly, serious questions are raised regarding whether the events Mr. Baker alleged to have provoked him could fulfill the evidentiary burden. It is undisputed that Mr. Baker first visited the premises where his ex-partner was unarmed, indicating a lack of premeditation. From Mr. Baker’s version of events, he had heard a conversation relating to sexual matters which caused him to return home, retrieve the weapon and come back to the premises and kill his ex-partner. Both psychiatrists at the trial were of the opinion that “the crimes he committed on the evening were associated with a psychiatric state which manifested itself in a rage in which he committed the crimes”⁷⁰. In *Van der Hock v R*⁷¹ Mason J considered that anger was the primary drive behind losses of control. This may have, albeit briefly, satisfied the requirement of s 23(a). His situation consequently falls into one of the classic provocation situations, which have a long established history of mitigating culpability. However, this version of events would need to be assessed as to whether it satisfies the “threshold test”. It is important to note that only when the trial judge allows the threshold test to be passed would the jury consider the matter of the defence.⁷²

Finally, assuming the alleged provocation passed the threshold test on an evidentiary basis, Mr. Baker may have encountered difficulties convincing the jury that an ‘ordinary person’ in his position would have reacted the same way⁷³. Malcolm Baker killed six people and wounded with intent to murder one other and the most favourable provoking event he could allege was the overhearing of a conversation between his former partner and Christopher Gall. The extent to which this could act to mitigate liability for the all six murders is an untried area of law. However, in the recent case of *R v Singh*⁷⁴, the jury has accepted that Mr. Singh’s conviction could be reduced to manslaughter as he was provoked by his wife’s confession to loving another man and threats to have him deported. This suggests that the defence may have been available to Malcolm Baker as well. However, it is questionable whether the jury will be willing to extend the provocation defence so that the provoking event in Mr. Baker’s circumstances will reduce his culpability in six murders.

There is no evidence that the defence counsel had considered the defence of provocation, nor that it was raised at trial and failed to satisfy the evidentiary burden. As decided in *Parker v The Queen*, regardless of whether the defence counsel has raised the provocation defence, the trial judge must direct the jury to consider the defence of provocation if there is sufficient evidence to satisfy the threshold tests.⁷⁵ Considering the opinions of the trial psychiatrists and Newman J who finds “little difficulty in accepting the proposition that the prisoner was psychiatrically disturbed that evening”⁷⁶, it may be sufficient to conclude that Mr. Baker may at least have had the possibility of a provocation defence notwithstanding the chance of success.

⁶⁹ (1994) 72 A Crim R 1, 13

⁷⁰ Newman J, Sentencing Report, *R v Malcolm George Baker*, 6 August 1993, Supreme Court of NSW

⁷¹ (1986) 161 CLR 158, 176

⁷² New South Wales Law Reform Commission, *Partial Defences to Murder: Provocation and Infanticide*, Report no 83, 1997, [2.11]

⁷³ *Stingel v R* (1990) 171 CLR 312

⁷⁴ [2012] NSWSC 637

⁷⁵ *Parker v The Queen* (1964) 111 CLR 665

⁷⁶ Newman J, Sentencing Report, *R v Malcolm George Baker*, 6 August 1993, Supreme Court of NSW