

OUR REFERENCE

DIRECTOR'S CHAMBERS



YOUR REFERENCE

DATE

4 October 2012

Select Committee on the Partial Defence of Provocation
Legislative Council of NSW
Parliament House
Macquarie Street
Sydney NSW 2000

Inquiry into the partial defence of provocation

Supplementary submission commenting on the Option Paper

I refer your email dated 14 September 2012 from Ms Vanessa Viaggio, Principal Council Officer. I welcome the opportunity to make a supplementary submission commenting on the reform options contained in the Select Committee's Options Paper.

My preferred position remains that the partial defence of provocation should be abolished.

It is my view that none of the other options suggested address the desired objectives of simplifying the test to be applied and narrowing the defence in an equitable way that addresses concerns about community standards.

If it is determined that a provocation defence should remain available in New South Wales then my view is that:

1. the defence should largely retain its current form with certain conduct expressly excluded, as suggested in option 2. The excluded conduct should include conduct of the deceased that constituted sexual infidelity or a threat to end or change the nature of a relationship and conduct of the deceased consisting of non-violent sexual advances;
2. the onus should be on the accused to prove on the balance of probabilities that the act or omission causing death was done or omitted under provocation; and
3. the Section should be amended to add provision proposed by the Honourable James Wood AO QC in relation to disregarding self-induced intoxication. This would make the test consistent with the policy behind Part 11A of the Crimes Act.

My reason for this preference is that narrowing the scope of the defence by providing for exclusionary conduct, will address the problems raised by the *Singh* case but at the same time will preserve the substance of existing law on the defence and hence be less disruptive to the case law and consequently the running of murder trials. It would also mean that it would be relatively straightforward in the future to amend the provision to include further types of exclusionary conduct should the need arise.

In respect of the other options proposed:

The rationale behind "positive restriction" model is flawed in my view on the basis that it promotes the concept that violent criminal conduct can be met with reprisal by violent criminal conduct.

The "gross provocation model" seeks to narrow the scope of the defence, but would introduce added complexity in my view by introducing new concepts of "extreme and exceptional circumstances" that a jury would have to interpret and apply. The model seems to retain the possibility that infidelity may in extreme and exceptional circumstances be provocation.

The "Wood model" substitutes the ordinary person test in a way that leaves the jury to consider ultimately whether the circumstances "warrant [the accused's] liability being reduced to manslaughter". Rather than redrafting the section in this way in my view a more effective way of altering the test would be to change the test at section 23 (2)(b) from "could" to "would", but otherwise retain the current wording of the section. This would retain a test that imported a question of community standards, but create a real rather than speculative question for the jury to answer. Otherwise, as noted above I would support the amendments suggested by the Honourable James Wood AO QC.

Yours faithfully

Lloyd Babb SC
Director of Public Prosecutions