



THE LAW SOCIETY
OF NEW SOUTH WALES

20 September 2012

Ms Vanessa Viaggio
Principal Council Officer
Select Committee on the Partial Defence of Provocation
Parliament House
Macquarie Street
SYDNEY NSW 2000

Inquiry into the partial defence of provocation

The Law Society appreciated the opportunity to appear before the Select Committee on the Partial Defence of Provocation on 29 August 2012.

Please find attached the responses to the supplementary questions and the questions taken on notice.

I trust these comments will be of assistance to the Select Committee.

Yours sincerely,

Justin Dowd
President

Supplementary questions

1. You state in your submission that you support the view put by the NSW Law Reform Commission in 1997 that "where a person's mental state is significantly impaired by reason of a loss of self control, it is appropriate that that person not be treated as a 'murderer'". The Victorian Law Reform Commission, the Model Criminal Code Officers Committee, and some submissions to this Inquiry argue that the partial defence of provocation inappropriately privileges a loss of self control as a reason for reducing an offenders culpability, while other factors that may be equally or more important in assessing the blameworthiness of a person who intentionally kills, are considered during sentencing and do not absolve a person of liability for murder. A commonly cited example is where a person intentionally kills a terminally ill spouse, out of compassion. Can you explain why killing as a result of a loss of self control should, as opposed to other factors, be able to form the basis of a partial defence?

The Criminal Law Committee is of the view that the defence of provocation does not condone that person's actions, but recognises that this is a case which does not fall within the worst category of unlawful killing and should be viewed by the law with a degree of compassion. The question of whether a person's culpability for an unlawful killing is so significantly reduced because of a loss of self-control is an issue which should be decided by a jury, as representatives of the community, and reflected in a conviction for murder or for manslaughter.

This rationale may be just as applicable to a person who intentionally kills a terminally ill spouse; however, the Committee does not have a policy position on euthanasia.

2. The NSW Council for Civil Liberties argues in its submission (Sub 32, p 5) that abolishing provocation will see more defence lawyers plead their cases as self defence and that the result could see more acquittals and other unintended outcomes. Can you comment on that suggestion?

The Criminal Law Committee is unaware of any empirical data to support the argument put forward by the Council for Civil Liberties.

Amendments to the legislation in 1982 removed the temporal nexus requirement between the provocative act and the killing and 'paved the way for acceptance of cumulative provocation over a long period of time, often in the cases of domestic violence or family violence against women.'¹ The NSW Court of Criminal Appeal has also held that the suddenness of response is not a bar to establishing provocation².

The Committee is very concerned that abolishing provocation would be detrimental to women who have killed partners after long periods of domestic violence in a manner which cannot be characterised as self defence.

Self defence is a complete defence to murder and would inevitably have been raised by the defence (as well as the partial defences of excessive self defence and provocation) if relevant. Bearing in mind the additional partial defence of excessive self defence, it is difficult to determine whether the abolition of the partial defence of provocation would result in more or less acquittals in trials where these defences are relevant.

¹ Judicial Commission of NSW (2006) *Partial defences to murder in NSW South Wales 1990-2004* p31.

² *R v Chhayi* (1992) 72 A Crim R 1

Questions taken on notice

1. Section 9AH of the Victorian Crimes Act – social framework evidence about domestic violence is able to be given in criminal trials (p22 of the transcript)

The Committee does not support abolishing the partial defence of provocation and replacing it with a provision similar to section 9AH of the *Victorian Crimes Act*.

The Committee's understanding is that, depending on the circumstances of the case, family violence evidence may well be admissible under current evidence law.

2. Position on the 'ordinary person test' (p28 of the transcript)

The Committee will address this question in its response to the Options Paper.

3. Excluding from provocation non-violent sexual advances (p30 of the transcript)

The Committee will address this question in its response to the Options Paper.