

## **INQUIRY INTO PARTIAL DEFENCE OF PROVOCATION**

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THE LAW SOCIETY  
OF NEW SOUTH WALES

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LEGISLATIVE  
COUNCIL

27 July 2012

The Director  
Select Committee on the Partial Defence of Provocation  
Parliament House  
Macquarie Street  
SYDNEY NSW 2000

Dear Director,

**Inquiry into the partial defence of provocation**

The Law Society's Criminal Law Committee (Committee) welcomes the opportunity to make a submission to the Select Committee and express its view on the partial defence of provocation.

The Committee supports the retention of the partial defence of provocation as provided in section 23 of the *Crimes Act 1900*.

In its report on partial defences to murder, the New South Wales Law Reform Commission recommended that the partial defence of provocation should be retained.<sup>1</sup> The Committee considers that the Commission's conclusion provides a balanced rationale behind the defence. The Commission concluded as follows:

...there are circumstances in which a person's responsibility for an unlawful killing is reduced as a result of a loss of self-control to an extent which should, in any fair system of punishment, be taken into account when dealing with that person. 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. 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 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. The sentencing judge will then impose a sentence which reflects the jury's finding on the level of culpability involved. This ensures public confidence in the administration of criminal justice, including confidence in sentences imposed, and maintains the proper role of both the judge and the jury.<sup>2</sup>

<sup>1</sup> New South Wales Law Reform Commission, *Partial Defences to Murder: Provocation and Infanticide*, Report 83, October 1997, para 1.15

<sup>2</sup> *Ibid*, para 2.38.

The community is represented by the jury, and the jury, having heard all of the evidence should be able to decrease the level of the person's culpability where there is evidence of provocation. The partial defence of provocation does not excuse the killing with an acquittal, but rather the person is convicted of manslaughter for which the maximum penalty is 25 years imprisonment.

Opponents argue that it is unnecessary to retain the partial defence of provocation because New South Wales has a discretionary sentence for murder and provocation could adequately be taken into account in sentencing. The Committee agrees with the Law Reform Commission that this is not a persuasive argument, and that while the defence of provocation is no longer necessary for the purpose of providing judges with a discretion in sentencing for unlawful homicide, the defence remains extremely important in terms of gaining community acceptance of reduced sentences for manslaughter rather than murder.<sup>3</sup>

The Committee is satisfied with the current test provided in section 23. The Committee does not support the legislative exclusion of specific categories of conduct from amounting to provocation because it would prevent proper consideration of the merits of individual cases.

Some argue that the defence is gender biased in favour of males. However, 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.'<sup>4</sup> The NSW Court of Criminal Appeal has also held that the suddenness of response is not a bar to establishing provocation<sup>5</sup>. Abolishing provocation would be detrimental to women who have killed partners after long periods of domestic violence.

The Committee would appreciate the opportunity to have representatives appear before the Select Committee at the public hearings.

Yours sincerely,

Justin Dowd  
President

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<sup>3</sup> Ibid, para 233.

<sup>4</sup> Judicial Commission of NSW (2006) *Partial defences to murder in NSW South Wales 1990-2004* p31.

<sup>5</sup> *R v Chhayi* (1992) 72 A Crim R 1