

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

**Organisation:** Victims Advisory Board  
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# victims advisory board

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

Dear Ms Viaggio

## **Inquiry into the partial defence of provocation**

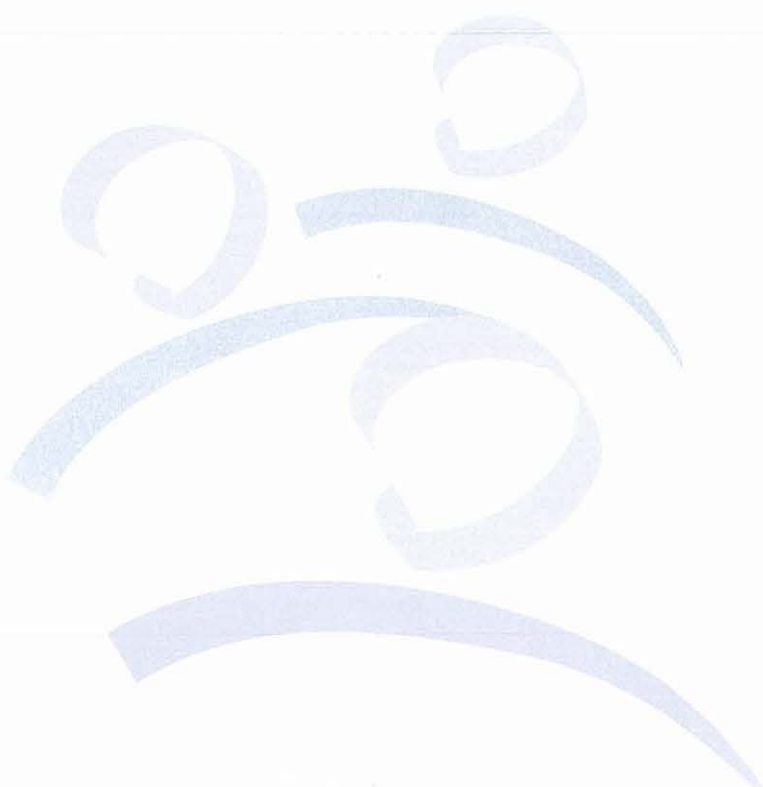
I refer to the Select Committee's request seeking the Board's comments on the in relation to the Inquiry into the partial defence of provocation.

Three Board members' organisations have made individual submissions to the Select Committee however the enclosed submission canvasses some of the Board members' views.

I thank you for the opportunity to comment on the Legislative Council Select Committee's Inquiry into the Partial Defence of Provocation.

Yours faithfully

Brendan Thomas  
**Chair**



**SUBMISSIONS TO THE LEGISLATIVE COUNCIL SELECT COMMITTEE  
ON BEHALF OF THE VICTIMS ADVISORY BOARD**

The Victims Advisory Board (the Board) is grateful for the opportunity to comment on the Legislative Council Select Committee's inquiry into the Partial Defence of Provocation. According to the Inquiry's Terms of Reference, the Select Committee is to inquire into and report on:

- a) the retention of the partial defence of provocation including:
  - i) abolishing the defence,
  - ii) amending the elements of the defence in light of proposals in other jurisdictions,
- b) the adequacy of the defence of self-defence for victims of prolonged domestic and sexual violence, and
- c) any other related matters.

The Board has been unable to reach a consensus view in relation to the Terms of Reference. Various Board member organisations have provided the Select Committee with individual submissions, and it is apparent from those submissions that the various categories of victims of crime have different needs and vulnerabilities. The Board considers that laws intended to ensure that justice is served should operate to recognise those competing needs. Some Board members consider that the balance can be struck by abolishing the partial defence of provocation and amending existing self defence laws. Others argue that other available defences or partial defences to murder would be insufficient to protect the interests of certain victims of long term abuse who commit unlawful homicides, and that abolishing the partial defence of provocation would leave a void in the law that cannot be filled simply by amending other defences.

The following submission canvases some of the Board members' views. Three member organisations of the Victims Advisory Board have made individual submissions to the Select Committee. These are the *Homicide Victims Support Group*, the *Victims of Crime Assistance League*, and the *Office of the Director of Public Prosecutions*. The Board does not intend to reproduce those views in detail within these submissions, however some of the salient points will be summarised. In addition, board member Mr Ken Marslew AM of *Enough is Enough Anti Violence Movement* also provided a summary of his views and those of victims he has been in contact with. The views of *Victims Services* are also outlined below.

## **1. Background to the Victims Advisory Board**

The Victims Advisory Board was established under the *Victims Rights Act 1996* to:

1. Advise the Attorney General on policies, practices and reforms relating to victims compensation and support services;
2. Consult victims of crime, community victim support groups and government agencies on issues and policies concerning victims of crime; and
3. Promote legislative, administrative or other reforms to meet the needs of victims of crime.

The Board comprises representatives from community and government agencies that deliver services to victims of crime. The Board is comprised of the following members:

- Ms Martha Jabour, Homicide Victims Support Group (Aust) Inc.
- Mr Howard Brown OAM, Victims of Crime Assistance League (VOCAL)
- Mr Ken Marslew AM, Enough is Enough Anti Violence Movement Inc.
- Detective Chief Superintendent Geoff Beresford, NSW Police Force
- Ms Karen Willis, NSW Rape Crisis Centre
- Ms Johanna Pheils, Office of the Director of Public Prosecutions
- Ms Mailin Suchting, NSW Health Department
- Mr Luke Grant, Corrective Services NSW, Department of Attorney General and Justice
- Ms Mandy Young, Victims Services, Department of Attorney General and Justice

## **2. Overview of relevant partial and full defences**

### The partial defence of provocation

The defence of provocation is a partial defence to the crime of murder. It is available where all of the elements to satisfy a conviction for murder are found, and is a partial defence in that, if it is successfully raised, downgrades the conviction to one of manslaughter.

The partial defence is currently found in section 23 of the *Crimes Act 1900*. It is established where the criminal act is the result of a loss of self control by the defendant in circumstances where:

- (a) the loss of self control was induced by the conduct of the deceased towards or affecting the defendant, and



- (b) the **conduct** of the deceased could have **induced a loss of self control** in an ordinary person **to the extent of forming an intention to kill** or inflict grievous bodily harm.

In assessing how the “ordinary person” would react, three tests are used. The first assesses the conduct of the deceased in terms of the gravity of the provocation through the perception of an ordinary person with the personal characteristics of the defendant (for example age, sexual preference, racial background, physical disability). The second assesses the ordinary person’s power to exercise self control in response to that perceived provocation, bearing in mind only the defendant’s age and maturity. The third assesses how the ordinary person would react after losing self control, in comparison to the defendant’s reaction.

#### The defence of self-defence

Self-defence is a full defence to a charge of murder. A defence of self-defence will be successful if the Court is satisfied that the person acted:

- a) with the belief that the act was necessary to defend him or herself or another person or to prevent or terminate the unlawful deprivation of liberty, and
- b) the act was an objectively reasonable response to the circumstances as perceived by the defendant.

#### The partial defence of excessive self-defence

Where a defendant is found to have believed their actions were necessary in defence of themselves or another (or to ensure their own or another’s liberty), but their actions are found to be an excessive response to the circumstances, the partial defence of excessive self-defence can be found. Like the partial defence of provocation, excessive self defence will reduce murder to manslaughter.

### **3. Submissions made by Victims Advisory Board member organisations and agencies**

#### Homicide Victims Support Group (HVSG)

HVSG supports the abolition of the partial defence of provocation. No submissions were made regarding the adequacy or otherwise of the defence of self-defence for victims of prolonged domestic and sexual violence.

HVSG noted the difficulty for loved ones of homicide victims to accept that, despite the elements for a conviction of murder being established, the partial defence of provocation allows a charge of murder to be downgraded to one of manslaughter. Other jurisdictions in Australia have abolished the partial defence, partly on the basis that the defence is a concession given to someone who has formed an intention to kill, and carries out that intention.

Examples of perceived inadequate sentences in relation to the brutality and violence of the crimes were cited as a further justification for abolishing the defence. Despite judicial comments on the gravity of offences, sentencing Courts have nevertheless handed down sentences that have, according to community expectations, not appropriately punished the offender. The maximum sentence for manslaughter is 25 years. HVSG cited numerous examples in which manslaughter convictions following a finding of provocation resulted in head sentences of less than ten years and non-parole periods of six years.

A further reason for abolishing the defence put forward by HSVG was that the *Crimes (Sentencing Procedure) Act 1999* already provides for the consideration of matters relating to provocation when sentencing an offender. Restricting provocation to a consideration during sentencing would assist with the securing of a murder conviction, which as stated is of significance for victims' families, while recognising provocation as a factor mitigating against an offender's culpability. There is currently no reason why provocation in murder cases should remain as both a partial defence and a factor in mitigation during sentencing as the law has moved away from mandatory life imprisonment or the death sentence when an offender is convicted of murder.

Finally, HVSG submitted that in truly provocative circumstances, other partial defences such as excessive self defence or substantial impairment by abnormality of the mind would be available.

Other problems with the existing partial defence of provocation highlighted by HSVG included:

- The complexity of the legal test, in combination with the fact that juries are charged with the task of applying the test to the case and the evidence they have heard; and
- The onus of proof resting with the Crown, requiring the Crown to prove beyond reasonable doubt that the defendant was not provoked. HVSG argued that the rationale for transferring the onus of proof from the defence to the prosecution was to



assist accused persons who were victims of domestic violence. However, the amendment was not restricted in effect to only victims of domestic violence.

While HVSG supported the abolition of the partial defence of provocation, in the alternative HVSG submitted that if the defence is retained, the onus of proof should be reversed and the defence should only be available in specific and serious circumstances and not those that involve "insulting words or gestures."

#### Victims of Crime Assistance League (VOCAL)

VOCAL submitted that the defence should be retained, albeit within a more refined process.

VOCAL queried the accuracy of a response to the public outcry over the perceived inadequacy of a sentence that, rather than investigating the principles of prosecutions and sentencing, investigates instead the legitimacy of the defence that was ultimately accepted by the jury.

It was submitted that the law must recognise that victims of prolonged Domestic Violence and Sexual Abuse who are ultimately driven to kill their abuser should be entitled to some concessions. There have been such cases in the past which, without the existence of the partial defence, would have resulted in a conviction for murder, carrying with it a standard non-parole period of twenty years. In such cases, relying on other defences or partial defences have proven problematic and unsuccessful.

Arguments suggesting that the defence should be abolished in light of provocation being a factor for consideration during sentencing fail to appreciate the significance of the standard non-parole period of twenty years, and maximum term of life imprisonment, that exists for murder, as compared to the maximum penalty of twenty years imprisonment for manslaughter.

VOCAL also considered the complexity of the test that juries had to apply problematic, and suggested that the defence should remain but the determination as to whether the facts were supportive of the requirements of the defence should be left to the Judge alone.

Finally, VOCAL recommended that before any decision is made to amend the legislation, the Law Reform Commission should be tasked to review their 1997 report and provide a detailed updated report as to the best method for resolving the inconsistent approach to provocation.

The majority view within the ODPP is that the partial defence should be abolished, for the following reasons:

- The partial defence is out of step with community expectations of what is acceptable behaviour, particularly in relation to violent responses to perceived provocation.
- The defence is illogical in that requires an accused to have lost control yet also act with a specific intent to kill.
- They submitted that the partial defence carries an inherent gender bias "since it has been created to address typically male patterns of aggression."
- It promotes a culture of victim blaming in circumstances where the homicide victim's version of events and history cannot be heard.
- The partial defence developed to mitigate against the harshness of mandatory sentencing for murder, yet the partial defence remained despite the mandatory sentences being abolished.
- It excuses killings committed in the heat of passion when logically there is no reason why such murders should not be treated the same as murders in cold blood. If there is some difference in culpability then that can be dealt with during sentencing, as provocation would be in non-homicide cases.

If the defence is ultimately amended, the ODPP stressed the importance of it retaining the flexibility to encompass the experiences of women in domestic violence situations, although their preference in such cases would be that those women should be entitled to rely on the defence of self defence.

The ODPP was in favour of ensuring the defence of self defence accommodates victims of prolonged domestic and sexual violence. Numerous problems with the existing defence were highlighted. For example, women who retaliate against abusive male partners are often required to find moments where their partner's guard is down, given the imbalance in physical strength. This will often mean that there is no immediate connection between the threat from which they are defending themselves, and their actions. In these situations it can also be difficult to convince a jury that the response was proportional to the perceived threat, as required to establish the defence of self-defence. Any reforms to the law should concentrate on taking account of women's experiences of violence.



## Enough is Enough Anti Violence Movement (Enough is Enough)

Mr Ken Marslew of Enough is Enough advised that he is supportive of the partial defence being retained in substantially the same form as it is now, particularly as it provides mitigation for homicides where the accused suffers from battered wife syndrome. Victims of crime with whom Mr Marslew has consulted have indicated that they do not wish the partial defence to be abolished completely. Mr Marslew considers that it is not the law of the partial defence, but rather the application of the law by the judicial officers that needs review.

## Victims Services

Victims Services is of the view that further and more extensive inquiry must be undertaken in order to properly determine the impetus, utility and actual effect of any changes. As a general proposition, Victims Services opposes the use of violence in any circumstance. However, in the course of its work, Victim Services comes into contact with loved ones of deceased victims, as well as victims of prolonged domestic and sexual abuse who commit crimes in the context of a highly dysfunctional and violent environment. The needs of each set of victims are, with reference to this inquiry, directly opposed, and it is hoped that any recommendation made by the Select Committee recognises and balances these opposing needs.

This inquiry was established in the wake of public dissatisfaction with the conviction and sentence imposed on a man who conducted a brutal homicide on his wife. He was convicted of manslaughter following the jury's acceptance of the partial defence of provocation. What is apparent from the submissions of other Board members is that the dissatisfaction with cases in which the partial defence of provocation was successfully raised stems from three main issues.

The first issue is that, where an unlawful homicide has taken place and the defendant had, at the time of carrying out the homicide, an intention to kill, it is difficult to accept such a crime to be anything but murder. Securing a conviction for murder holds significant importance for loved ones of deceased victims. It is the fundamental way in which the legal system recognises and labels the nature of the offence committed.

The second area of dissatisfaction stems from the community's condemnation of the deliberate taking of human life, for whatever reason. At a basic level the community in the present social climate rightly finds it difficult to accept that there can be any excuse for

intentional killing, particularly in a situation where one's life is not at risk and thus one is not acting in self defence.

The third area of dissatisfaction is with the relatively light sentences subsequent to a conviction of manslaughter rather than murder. It is not uncommon for a deceased victim's loved ones to speak of justice being served through the appropriate punishment of the offender.

There is much to be said for arguments that any deliberate act causing the death of another, carried out with a homicidal intent, should be labelled as murder and not be excusable under the legal system. However, provocation is not an anomaly in this regard. Arguments suggesting that any unlawful killing in connection with an intention to kill should lead to convictions for murder, and that laws that allow otherwise are illogical, neglect to recognise that excessive self defence can be a successful partial defence even if an intention to kill is found. Yet self defence, even if excessive, is less contentious than the partial defence of provocation if and when it results in a downgrading of a charge of murder to manslaughter. If the community and legislature wish to state that all unlawful killings in which an offender possesses an intention to kill is murder, then this would warrant consideration as to whether the partial defence of excessive self defence should be abolished or confined to where intention to kill is not found. Long term victims of intimate partner abuse who, through fear for their lives and seeing no other means of escaping, kill their abusers would conceivably be disadvantaged by such a change.

As such, Victims Services has concerns with abolishing the partial defence of provocation without further inquiry into the range of situations in which it has been used. In its current form the partial defence of provocation may well lead to injustice in some applications, yet there are some instances in which it can and has yielded results that the community would support, were equal attention afforded to such cases. Certainly, if the partial defence is abolished, then Victims Services supports amending self defence laws to cover circumstances in which both male and female victims of prolonged abuse who kill can have their experiences properly considered in assessing their culpability during trial or sentencing.

Many of the arguments supporting the abolition of the partial defence either confuse or otherwise associate the issue of the defence itself with the issues surrounding sentencing. Victims Services recognises that sentencing is a complex balancing act performed by the Court. The agency similarly recognises that those outside of the Court do not always



appreciate the factors and reasons that come to bear on the exercise of the Court's discretion to impose sentences up to the maximum set by legislation.

Sentencing principles are reflective of often competing priorities: the discretion available to the Court in sentencing convicted offenders should reflect the vast gamut of circumstances within which crimes are committed, and also recognise that the deprivation of liberty is a serious matter. Sentencing discretion should also convey the message that the law and Courts wish to protect the sanctity of human life, yet understand that punishment of an offender is only one of many aspects to achieving justice. This is why statistics and sentence length figures alone, without a complete analysis of circumstances and sentencing reasons, are misleading in terms of whether the partial defence of provocation has resulted in injustice.

Consideration could be given to affixing a Standard Non-Parole Period (SNPP) for manslaughter when found as a result of the partial defence of provocation. That SNPP could be higher than what has, on average, been handed down in the past for such convictions. While more recent decisions on sentencing principles and SNPPs have refined the law on what guidance judicial officers are to take from SNPPs, it is still clear that SNPPs operate as guideposts to discretionary sentencing. A SNPP, as an indicator for an appropriate sentence for an offence "in the middle of the range" of objective seriousness, would allow the retention of judicial discretion while, whether directly or otherwise, signposting to the judiciary the community's expectation that where murder is downgraded to manslaughter by way of provocation, the punishment should be one that fits the gravity of a crime in which an intention to kill was formed (subsequent to a loss of self control due to provocation) and an unlawful homicide was carried out. Similar inquiry might be made into sentencing in excessive self defence cases where intention is also found. Of course, it is conceded that reviewing sentencing practices does not address the issue regarding the value for families and friends of homicide victims of securing murder convictions against offenders, but it is a logical starting point to addressing the issues.

Finally, Victims Services supports calls for simplification of any tests to be applied by a jury, and further considers that the onus of proof when a defence is raised should lie with the defendant rather than fall to the prosecution to negate beyond reasonable doubt.



#### **4. Conclusion**

The Victims Advisory Board is comprised of organisations representing victims of violent crime. Such victims include families and friends of homicide victims; men, women or children who have lived in and escaped from violent domestic situations; or those who have in any way been affected by violence. Some of these groups of victims presently have, or have had competing needs requiring protection under the law. Such divergence highlights the need for identification of the real issues at hand, and thorough analysis of these issues and the impact of any proposed change.

While the Board has been unable to reach a consensus view it is generally agreed that any change to the law on the partial defence of provocation should occur only in tandem with legislative change aimed at recognising the contexts of long standing victims of abuse. These contexts should be recognised whether they be victims of homicide whose histories are presently unable to be heard during the Court process, or victims who commit homicides, whose present reliance on the partial defence of provocation is at the mercy of juries applying complicated and confusing legal tests and whose situations do not presently fall within any other existing defence.

The Victims Advisory Board thanks the Select Committee for the opportunity to submit its views.