

## INQUIRY INTO PARTIAL DEFENCE OF PROVOCATION

**Organisation:** The Public Defenders  
**Name:** Mr Mark Ierace SC  
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10 August 2012

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

By email

Dear Rachel,

## **Inquiry into the Partial Defence of Provocation**

I refer to our letter dated 29 June in which you invited the Public Defenders to make a submission to the Select Committee in respect of the partial defence of Provocation ("Provocation").

I am aware of the contents of the NSW Bar Association's submission on this matter, and I do not think that I can usefully add to the arguments expressed therein in favour of the retention of Provocation, other than to make some short observations.

A simple abolition would inevitably occasion regular instances of what would be widely regarded as gross injustices; persons being convicted of murder and sentenced accordingly, where the circumstances revealed a strong basis for the crime to be re-cast in a less serious form than murder, with a broad sentencing range.

The Bar Association submission highlights the plight of women who have been brutalised over lengthy periods by their spouses, directly contributing to their loss of control so as to inflict a wound that proved fatal, and in circumstances where the complete defence of self-defence was not accepted. This situation, where the degree of criminality has generally been regarded as significantly lessened and the relationship history to be a proper basis for mercy, has sometimes been referred to previously as "Battered Wife's Syndrome" and would be without a statutory crime that properly reflected these features (manslaughter), if Provocation is removed. On occasion some such offences have warranted a sentence of a good behaviour bond, without a hint of public disapproval at this result.

It is noteworthy that the defence is not often raised, and when it is, more often than not it is unsuccessful. A recent study by the NSW Judicial Commission recorded that in NSW between 1 January 1990 and 21 September 2004, 897 offenders were convicted of either murder or manslaughter. Of these, only 65 were sentenced on the basis of manslaughter/Provocation, including 10 who were sentenced on the basis of Provocation and either Diminished Responsibility or Substantial Impairment.

Of the 65 who were convicted of manslaughter/Provocation, 32 pleaded guilty on that basis, and their plea was accepted by the Crown so that they went straight to sentence. Over the fourteen years of the study there were 83 offenders whose plea to Provocation was not accepted by the Crown, and so went to trial by jury. Only 33 (40%) were successful,<sup>1</sup> suggesting that juries are careful to scrutinise the accused's evidence and to apply current community standards through the "ordinary person" test. The defence has an evidentiary burden if it seeks to rely on Provocation and, since the abolition of the dock statement, the jury generally has the benefit of observing the accused being cross-examined by the Prosecutor on their oath.

We wish the Select Committee well in its endeavours, and are happy to assist with oral submissions and questioning.

Yours sincerely,

Mark Ierace SC  
Senior Public Defender

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<sup>1</sup> *Partial Defences to Murder in NSW 1990-2004* Indyk, S; Donnelly, H; Keane, J; Judicial Commission <http://www.judcom.nsw.gov.au/publications/research-monographs-1/monograph28/mono28.html>