



New South Wales  
Council for  
Civil Liberties

## NSW Council for Civil Liberties Inc.

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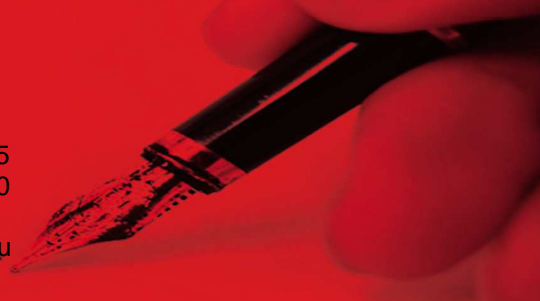
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8 October 2012

Reverend the Hon Fred Nile

Chair

Select Committee on the Partial Defence of Provocation

NSW Legislative Council

Parliament House

Macquarie St

SYDNEY NSW 2000

Dear Reverend Nile,

The NSW Council for Civil Liberties appreciates this opportunity to respond specifically to issues raised with the Council during the inquiry into the partial defence of provocation. In particular, the Council was asked to address issues canvassed in the paper detailing proposed reform options as circulated on 13 September 2012.

At the outset, the NSW Council for Civil Liberties reiterates its opposition to any significant changes to the existing partial defence in the absence of a compelling case to the contrary.

The simplest way to ensure that this occurred would involve referring the matter to the NSW Law Reform Commission for a detailed study. The NSW Council for Civil Liberties views the Commission as the appropriate body to undertake this necessary study, with resources, expertise and capacity for public consultation. The NSW Council for Civil Liberties notes that the NSW Bar Association, the Law Society of NSW and other peak groups have voiced their concern about the lack of research in this important area.

This referral is necessary to avoid those unintended consequences and possible miscarriages of justice otherwise identified in the submissions before the committee – and which have been experienced in other areas, like bail, where Parliament has rushed to reform on the basis of emotive responses rather than objective consideration of evidence and meaningful stakeholder consultation.

The NSW Council for Civil Liberties calls for a cautious approach to reform in an area marked by low recidivism and often involving “one-off” offending towards family members or loved ones.

From one perspective, reform proposals that result in increased convictions for murder are arguments for increasing the jail population and reducing judicial discretion in the most serious offences in the criminal calendar. Murder retains a standard non-parole period of 20 to 25 years – that is, the standard sentence for a mid range offence. The offence of manslaughter captures a gamut of human interactions and allows a judge to craft a sentence that takes into the account fully the subjective features of an accused – up to 25 years in severity.

On the other hand, it could also lead to more lawyers pleading their cases before juries as ‘self defence’ – resulting in more acquittals. This is why reform should be approached constructively and cautiously with those who possess expertise in the area.

The NSW Council for Civil Liberties further notes that the presumption of innocence and the requirement for the prosecution to prove the elements of an offence (including to negative a defence when raised) are principles that lie at the heart of criminal justice system and stand as important safeguards against injustice. The result of tampering with these time honoured protections will increase the likelihood of injustices occurring – and resulting damage to the administration of justice in our state.

The NSW Council for Civil Liberties can see no justification in the present time for restricting the defence of provocation to matters where the provocative conduct seeking to be relied upon by the accused as “violent criminal behaviour” – or to limiting the availability of the partial defence to particular categories of provocative conduct. The full exigencies of human conduct are always difficult to codify. This is particularly so when dealing with the individual circumstances of an offender and/or their victim.

The NSW Council for Civil Liberties has also considered the proposals to reverse the onus of proof and require that the defendant establish, on the balance of probabilities, that they are not liable to conviction for murder. Again, this proposal involves striking at a particular and time honoured protection at the heart of our justice system. The result will see the criminal law reverse centuries of legal protections in place to ensure public confidence in our justice system and fewer innocent people in our prisons. The only clear winners from this proposal, drafted without legal precedent and running against the grain of centuries of English common law tradition, will be appellate lawyers and advocates for abolition of the jury system – along with those who profit from an increased prison population.

The NSW Council for Civil Liberties would oppose limiting the availability of the defence to violent conduct, circumscribing particular categories or to changing procedural or evidentiary rules to effect these changes. Whilst the NSW Council for Civil Liberties would not

specifically oppose legislative provisions to ensure that the partial defence is not available where the alleged provocative conduct related to a non-violent sexual advance – homosexual or otherwise – or a case of infidelity – it is the Council’s strong belief that the existing law provides such protections in its existing form. A properly instructed jury would be very unlikely to afford an accused a partial defence in these circumstances. There is strong precedent to the effect that non-violent circumstances would only be countenanced in the “most extreme and exceptional” of cases.

The NSW Council for Civil Liberties believes that the threshold question for enlivening a provocation defence should remain whether a jury of one’s peers has found, in the circumstances of an individual case, an ordinary person might have reacted as the accused did to such provocative conduct. Attempts to “hamstring” the proper functioning of the jury to particular artificial scenarios will only result in injustices.

In particular, it would fail to anticipate:

- many forms of cruel or inhumane conduct;
- many forms of degrading treatment;
- many types verbal abuse, humiliation, harassment on the basis of gender, sexuality, disability, race, HIV or transgender status.

The NSW Council for Civil Liberties is concerned that efforts to protect vulnerable members of the community through the ‘blunt axe’ of legislative change in this area will result in those unforeseeable and unintended consequences protected only by a properly instructed jury.

Indeed, the proposals would pose great difficulties in properly instructing juries – burdening juries with cumbersome directions. Again, this would increase scope for errors to be made, for injustices to occur, and ultimately for unnecessary appeals and legal costs to be incurred.

The NSW Council for Civil Liberties would oppose any attempt to reverse the onus of proof in criminal cases in substantiating the elements of an offence and in “negating” a defence as raised by an accused. The justification for the proposal appears grounded in the supposed difficulties for the prosecution to prove the state of mind of the accused at the time of the offence.

- These justifications can also be used to equally justify changes in reversing the onus of proof in other areas of the criminal law – including self defence, knowledge, recklessness;
- The proposal would see provocation artificially removed from those elements relating to *mens rea* which would otherwise need to be proved beyond reasonable doubt;
- The proposal would require complex directions and be easily misunderstood by a jury – meaning more costly appeals and a “feast for lawyers”;

- This increased complexity itself would become an easy argument for abolition of the jury system and drive a ballooning jail population in an area of offending for which there are already low rates of recidivism.

Should you have any further issues, please do not hesitate to contact me on 0411 769 769.

Yours sincerely,

Cameron Murphy

President