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

2 October 2012

Reverend The Hon Fred Nile, Chair

Dear Rev Nile

Response to the Options for Reform

Thank you for giving me the opportunity to respond to the Options for Reform.

My submission continues to be that provocation should be abolished.

I will not reiterate my arguments here. Suffice to say that all major law reform investigations into the defence in the last decade have recommended (and secured) abolition. Only Queensland and England felt constrained by the mandatory life penalty, but still recommended (and secured) significant reform. Given that NSW is not fettered by a mandatory penalty – and also has in place a codification of both self-defence and 'excessive' self-defence – I submit it would be both surprising and disappointing if the Select Committee ultimately favoured anything less than abolition. Those foremost reform bodies subjected the defence to even more thorough scrutiny than has been possible by the Select Committee (and I acknowledge the tireless and considerable efforts of this committee). And yet abolition was the result.

If the Select Committee did not choose abolition as its recommendation, then anything less than the most stringent reform would, I submit, be a wasted opportunity. And I submit that stringent reform must be coupled with a reversal of the onus of proof, for the cogent reasons promulgated by the Queensland Law Reform Commission (see below). The provocation defence has long been bastardized by the issue of 'allegation' – D alleges V said or did this and that, but V is no longer alive to challenge the allegation. A reversal of the onus of proof is a key to impeding such allegations.

<u>Reform Option - reversal of onus of proof</u>:

The Queensland Law Reform Commission [QLRC] engaged in a thorough assessment of the pro and con arguments relating to the reversal of the onus of proof.[1]

Some of the arguments raised by the QLRC included:[2]

[1] See Queensland Law Reform Commission, *A Review of the Excuse of Accident and the Defence of Provocation*, Report 64 (2008), pp387-392, 457-461, 491-497.
[2] Ibid at 492-493.

1. 'The prosecution[P] will very often not be in a position to contest the factual detail of the claim as the only other potential witness will have been killed by the defendant[D]. Once P has established, beyond reasonable doubt, all the elements of the offence of murder against D, it is not unreasonable to require D to establish, on the balance of probabilities, the essential facts on which the claim of mitigation is based as normally D will be the only witness with knowledge of all the relevant facts.'
2. 'If the onus of proof is placed on the party who wishes to rely on provocation, it is likely to result in more clearly articulated claims of provocation. ... The more clearly defined a claim of provocation, the fairer it is to all concerned in the trial (including the jury). Generally, the administration of justice will be enhanced if the onus of proof is on the party who wishes to rely on the claim.'
3. 'If the onus of formulating the claim of provocation is placed on the party who wishes to rely on the claim, the trial judge may have a greater capacity to act as a gatekeeper to prevent unmeritorious claims being advanced before juries. ... This capacity is essential if the parameters of provocation are to be redrawn in a way that is more consistent with current community expectations.'
4. 'A strong analogy exists to the partial defence of diminished responsibility [substantial impairment to abnormality of mind in NSW]. A successful claim of [substantial impairment], like provocation, reduces murder to manslaughter. [Substantial impairment], like provocation, need only be considered after the prosecution has proved that the defendant is guilty of murder.'

Perhaps most crucial of all, the QLRD determined that

> 'a reverse persuasive onus on a D claiming the benefit of provocation is not incompatible with a presumption of innocence about murder. Under a reverse persuasive onus, D is not required to prove that he or she is innocent of murder but instead that, because of the circumstances in which the offence was committed, the offence should be reclassified as manslaughter.'[3]

Lastly, the QLRD decided that it was

> 'not unreasonable for society to insist that a D who wishes to claim the benefit of provocation establish, on the balance of probabilities, his or her entitlement to provocation. ... the Commission believes that a transfer of the persuasive onus to D represents a fair balance between the rights of the individual and the wider interests of the community.'[4]

I urge the Select Committee to endorse the logic of the QLRD.

<u>Reform Option 1</u>:

In my Response to a Question on Notice (dated 18 September), I addressed the issue of restricting the provocation defence to 'violent criminal behaviour'. I will not restate my arguments here.

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[3] Ibid at 495.
[4] Ibid at 495-496.

For the reasons detailed both in my Submission and in my Response to the Question on Notice, I caution against adopting the proposals suggested under Option 1 (although not apparently included in Appendix A) which countenance also allowing evidence of eg verbal abuse. Once that is permitted, I argue that the slightest act of violence, eg a slap, might be seen to be the culmination of 'provocative behaviour' sufficient for the operation of the defence. Common law has a rich history of embracing 'cumulative provocation'. For example in the 1977 High Court decision in *Moffa*, the alleged act of throwing the telephone was, when coupled with the other alleged insults, rejections and confessions, sufficient as cumulative provocation.

Appendix A would also need the addition of the reversal of the onus of proof.

Reform Option 2:

Excluding certain types of conduct might at first appear attractive. But I reiterate the caution voiced by the VLRC, that attempting to exclude certain conduct deemed problematic is unlikely to succeed because provocative conduct will be redefined in a way that allows it to fall within the scope of the defence.

And as I argued both in my Submission and in my Response to the Question on Notice, cogent evidence of the failure of the exclusionary model is provided by the English Court of Appeal decision in *Clinton* (2012).

I note that Appendix B - sub-section (5)(b) - is worded as an absolute exclusion. Just such an exclusion did not prevent the Court of Appeal in England from ingeniously side-stepping the legislative stipulation. And if one again thinks of *Ramage*, besides the alleged confession of having a new partner, there was also the alleged insult about being repulsed by sex. It is arguable that Ramage would still be free to plead provocation under Appendix B (given it permits verbal insults).

Reform Option 3:

The ordinary person test has long been criticised as too complex and unworkable. Option 3 replaces that test with a reformulation of the test propounded by the NSWLRC in its 1997 reform proposals – essentially the jury must decide whether the verdict should be manslaughter, taking into account all the circumstances of the accused. I do not imagine that the Select Committee needs to be reminded that the 1997 test was subjected to considerable criticism.

I am afraid that I do not see how this test would prevent a Ramage or a Singh – or indeed any jealous and/or controlling male - from being able to rely on the defence, at least on this particular branch of it. Juries found manslaughter for both those defendants with, arguably, a more difficult test to be overcome. I would hope that a reformed test, even if more simply worded, would prove to be an even greater challenge for an accused person – not less of a challenge.

As already noted, Appendix B also attempts to exclude certain conduct (in sub-section (5)(b)). But what is to prevent a Singh or a Ramage from pleading their defence to a sympathetic jury

under this proposal? As the Court of Appeal in England in *Clinton* decided, an alleged confession of adultery can be considered (notwithstanding its express legislative exclusion) if it is one of a number of alleged provocative incidents. Both Singh and Ramage – and countless other defendants pleading the defence – alleged a number of provocative incidents.

I support the inclusion of a clause like sub-section (4) that expressly excludes self-induced intoxication. Having said that, I submit that caution needs to be exercised in the wording of such an exclusion. If D was intoxicated and also faced with a significant provocative incident, one can imagine the difficulty of divorcing the intoxication from the equation.

The reversal of the onus of proof under Appendix B is a positive development, and goes some way to addressing the concerns expressed herein. But my concerns about those specific elements still remain. In short, I submit that restricting provocation to a particular form of conduct – as in Appendix A – is likely to be more successful in constraining the defence than by attempting to exclude certain conduct. And I also submit that replacing the current complex ordinary person test with wording that simplifies but lessens the burden on the accused – reversal of onus notwithstanding – is a development to be avoided.

Reform Option 4:

It should be noted that the gross provocation model was proposed by the Law Commission in England but subsequently disowned by the Ministry of Justice in its own reform proposals that were ultimately adopted by the Government. It should also be noted that the Law Commission, in drafting its gross provocation model, did not feel it warranted a reduction from murder to manslaughter because it was still an intentional killing. The LC instead favoured adopting a 'tiering' of the offence of murder, so that killing under gross provocation resulted in a conviction for 2nd degree murder – the label 'murder' still being the appropriate label.

That aside, I submit that this proposal has two key flaws: it embraces what is potentially self-defence (or excessive self-defence); and it embraces much that has long been problematic in the defence of provocation.

Gross provocation is defined under Appendix C sub-section (2)(a)(ii) as including 'fear of serious violence towards D or another'. But if D responds to a fear of serious violence towards D or another, then that must at least raise the spectre of self-defence – and so arguably the provisions of s418 (or possibly 421) should come into play. Including such a provision in a new defence of provocation has the potential to stymie genuine claims of self-defence. The Law Commission included it because England did not have a codified self-defence or excessive self-defence provision. Given NSW has both, there is no reason for NSW to include it.

Gross provocation is also defined under sub-section (2)(a)(i) as including 'a justifiable sense of being seriously wronged'. Mirroring the LC's proposal, the defence should not apply under sub-section (4)(b) where D acted 'in considered desire for revenge'. As I have argued elsewhere, it is not clear how that is to be distinguished from someone who lethally responds when having 'a justifiable sense of being seriously wronged' – that too sounds like revenge. And arguably, the requirement of having 'a justifiable sense of being seriously wronged' may simply re-create an inundation of victim-blaming, as has always happened under the defence

of provocation. Surely a Ramage and a Singh could argue that they had 'a justifiable sense of being seriously wronged' – and a sympathetic jury may be all too ready to accept that. I fear that such wording may not change anything that was bad in the old provocation defence.

As to the express exclusions, I simply say, 'See above'. I find this proposal especially problematic because it does not contain absolute exclusions. Appendix C sub-section (4) is worded that the defence 'should' not apply – not that it 'does not' apply. So that undermines the superficially absolute exclusions that follow under (4)(a) and (b). As I stated in my Submission and my Response to the Question on Notice, wording that only partially excludes, such as that found in (4)(c) - 'other than in circumstances of a most extreme and exceptional character' - is almost an invitation to defence counsel to ensure that the 'provocative' circumstances faced by their client fit within this clause. James Ramage's counsel would certainly argue – and a sympathetic jury may well approve – that being not merely rejected and scorned, but being told that 'sex with you repulsed me' was indeed a gross provocation of a most extreme and exceptional character.

The reworded ordinary person test under (2)(b) and (3) is, I submit, little improvement on the existing test. Regardless of the words chosen to describe what is required, the crucial factor is that 'might' = 'it is possible' – not 'it is probable'. And the history of the defence reveals that juries are all too ready to endorse what is possible. Because juries will invariably think, 'Well if I'd been in that situation, I might have'. The proposed test might be improved if instead of 'might' it was changed to 'would'.

At least Appendix C is an improvement on the LC's proposal because it reverses the onus of proof.

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In sum, unfortunately I do not feel able to support any of Options 1-4 in the Options Paper, nor Appendices A-C as currently worded. I hope that none will be sanctioned by the Select Committee.

I submit that abolishing the defence of provocation is the sound step to take.

Thank you again for the opportunity to respond to the Options for Reform.

Yours sincerely

Graeme Coss
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