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LEGISLATIVE  
COUNCIL

Reverend the Honourable Fred Nile  
Chair  
Select Committee on the Partial Defence of Provocation  
Legislative Council  
Parliament House  
Macquarie Street  
Sydney NSW 2000

Dear Reverend Nile

**Select Committee on the Partial Defence of Provocation: Consultation on Reform Options**

The Public Defenders made written submissions to the Select Committee on the Partial Defence of Provocation on 10 August 2012. Evidence was given by Ms Yehia SC on 28 August 2012. Further written submissions were made in response to supplementary questions on 6 September 2012. The following response to the Options Paper should be read in conjunction with previous written submissions and oral evidence given on behalf of the Public Defenders.

The Public Defenders oppose repeal of the partial defence of provocation. We particularly oppose:

- (i) limiting the availability of the partial defence to a particular category or categories of '*violent criminal conduct/family violence*';
- (ii) shifting the onus of proof with respect to provocative conduct and loss of control to the accused;
- (iii) replacing the "*ordinary person*" test with a test expressed in terms of '*the circumstances warrant his or her liability being reduced to manslaughter*';

- (iv) replacing the "*ordinary person*" test with a "reasonable person" or similar test.

**Limiting the defence to a particular category or categories of provocative conduct:**

The Public Defenders accept that the partial defence should not be available in cases where the only suggested provocative conduct was sexual jealousy/infidelity or a non-violent sexual advance.

However, the Public Defenders oppose an amendment that limited the availability of the defence to "*circumstances of serious or violent criminal acts or domestic and family violence*". The 'positive restriction' model would have the unintended consequence of disadvantaging women and vulnerable accused. Under this model, the partial defence would not extend to, for example, such provocative conduct by a person as:

- (i) constant verbal abuse, belittling and humiliation of the accused over the course of a relationship;
- (ii) cruel and persistent non-violent harassment of a person on the basis of gender, sexuality, race, intellectual disability;
- (iii) telling the accused that the person had sexually assaulted the accused's daughter in the past (where, unknown to the accused, this had not in fact occurred);
- (iv) - making deliberately false allegations that the accused had sexually abused children;
- (v) telling the accused that the person had sexual intercourse with children for the purpose of obtaining sexual gratification.

It should be a question for the jury whether, in the particular circumstances of the case, an ordinary person might have reacted as the accused did to such provocative conduct so that, while not excused, the accused should be liable to imprisonment for 25 years rather than life.

### **Shifting the onus of proof**

The Public Defenders strongly oppose an amendment that would shift the onus of proof to an accused with respect to provocative conduct and loss of control. The fundamental precepts of our criminal justice system include the presumption of innocence. A necessary corollary to that fundamental principle is the requirement that the Crown bears the onus of proof.

There are some exceptions to that situation but they are restricted to defences of insanity and diminished responsibility where psychiatric issues arise and expert evidence is necessarily required. However, normally it is for the prosecution to prove the necessary state of mind of an accused and there is no justification for making an exception in respect of the lost self-control element of the provocation partial defence.

In practice the partial defence of provocation will only be left to the jury where there is evidence capable of raising the defence. In the absence of evidence of provocative conduct and loss of control, an accused cannot rely on the partial defence.

### **Replacing the 'ordinary person' test with a test expressed in terms of 'the circumstances warrant his/her liability being reduced to manslaughter'**

The Public Defenders oppose replacing the 'ordinary person' test with what is effectively a similar provision to that found in section 23A of the Crimes Act. Our concern here is that a test expressed in terms of 'circumstances warrant his/her liability being reduced to manslaughter', fails to provide guidance to the jury as to the matters they should take into account.

While the 'ordinary person' test may be deficient in that it does not allow for the personal characteristics and sensitivities to be taken into account by the jury, replacing it with a model that reverses the onus of proof and substitutes a test that is far too open-ended, will not remedy any present deficiencies.

We therefore oppose replacing the 'ordinary person' test with a similar test to that found in s 23A (b).

Furthermore, we oppose replacing the 'ordinary person' test with a 'reasonable person' test. The partial defence of provocation by its very nature refers to circumstances where a person has so far lost control as to have formed an intention to kill or cause grievous bodily harm. To introduce a 'reasonable person' test would be to effectively abolish the partial defence because a 'reasonable person' would not lose control to the requisite degree.

### **Conclusion**

The Public Defenders rely on our previous submissions and evidence given before the Committee on 28 August 2012. We are of the view that the partial defence be retained largely in its current form with an amendment to provide an exclusionary provision where the only provocative conduct relied upon is sexual jealousy/infidelity or non-violent sexual advance.

Yours sincerely

Dina Yehia SC  
Public Defender