

The Honourable Fred Nile MP

Chair, Select Committee on the Partial Defence of Provocation

Legislative Assembly

New South Wales Parliament

26 September 2012

Dear Reverend Nile,

Re: The Partial Defence of Provocation – Response to Question Taken on Notice

Thank you for the opportunity to appear before the Select Committee on 29 August at the public hearings associated with the inquiry into the partial defence of provocation.

We are writing to you in order to respond to a question we were asked to take on notice during the hearings. We were asked to provide a response to part of the submission made to the Committee by the Office of the Director of Public Prosecutions (ODPP) (Submission No.39).

Specifically, we were asked to address the ten (10) dot points made in that submission in favour of the abolition of the defence of provocation. We have structured our response around these ten (10) dot points. For convenience, we have also extracted the relevant part of the ODPP submission in Appendix A. Please find our response enclosed.

We trust these comments will be of assistance to the Select Committee.

We wish you and the Committee all the best with this inquiry.

Yours sincerely,

A/Professor Thomas Crofts and Dr Arlie Loughnan

Institute of Criminology, Faculty of Law, University of Sydney

Faculty of Law F10, University of Sydney

Sydney NSW 2006

Response to Question Taken on Notice

Legislative Council's Select Committee on the Partial Defence of Provocation

A/Professor Thomas Crofts and Dr Arlie Loughnan

Institute of Criminology, Faculty of Law, University of Sydney

FACULTY OF LAW | NEW LAW BUILDING F10

THE UNIVERSITY OF SYDNEY | NSW | 2006 | AUSTRALIA

Response to Question Taken on Notice

Re: Submission of the Office of the Director of Public Prosecutions (ODPP) (Submission No.39)

- *The defence is illogical in the sense that it requires the defendant to lose control so as to form an intention to kill or inflict grievous bodily harm. It is illogical to require that a person lose self-control and act with intent.*

We accept that it may seem illogical to require a person to lose self-control but act with intent. But it has to be recalled that it is under *circumstances* or *conditions* of provocation that the defendant forms the intent required for murder. Thus, the formation of intent is affected by the loss of self-control. Loss of self-control implicates the defendant's emotional state in the legal inquiry; intent may be thought of as a more straight forwardly cognitive mental process. Viewed in this light, loss of self-control and formation of intent are not incompatible.

- *There is an inherent gender bias in the defence and it is unjust in its application since it has been created to address typically male patterns of aggression. Developments to expand the defence to accommodate women and the battered women's syndrome may be criticised for forcing women to adopt a passive and stereotyped image in order to utilise the defence.*

We acknowledge that the gendered dimensions of the use of provocation represent the most serious of the problems with provocation as it is currently formulated. We acknowledge that the problematic use of the defence arises predominantly in certain types of cases but we note that provocation is not a static defence. As we state in our submission, while the defence stems from a time when male honour was important and thus, it has been argued that the defence perpetuates male forms of behaviour, it is important to take seriously the degree to which the present form of the defence has been adapted – and can be *further* adapted – to take into account criticisms about its gendered past. Traditionally, provocation required a clear provocative incident of sufficient gravity to warrant an immediate reaction; it has now been expanded to accommodate so-called 'slow burn' cases. We note that, in addition to relaxing the conditions that have been thought to mean that the defence worked mainly for stereotypically male patterns of behaviour, examination of the case law shows that changes have also been made to reduce the scope of the defence in the traditional paradigm cases of male behaviour (such as killing an adulterous partner). We submit that these attempts to accommodate diversity of types of responses to provocative conduct represent positive developments in the law, even if it is acknowledged that, as it is currently formulated, provocation remains imperfect.

We specifically address the important issue of the legal construction of the individuals relying on provocation in our submission. By contrast with the position articulated by the ODPP in this point, we hold that the construction of the individual relying on provocation can be seen to be positive. As reflected in the structure of the defence – with the accused compared with an ordinary person – an individual seeking to rely on provocation is constructed as if he or she was making a claim as an ordinary or 'normal' person in extraordinary conditions. By contrast, and reflected in the different structure of the defence, an individual seeking to rely on substantial impairment (or diminished responsibility), for example, is constructed as if he or she was making a claim as an other-than-ordinary or 'abnormal' person. In provocation, the message encoded in the defence is that any ordinary person *could* have reacted in the way that the accused did. We submit that the availability of this defence to men and women is important for gender equality.

- *The defence promotes a culture of blaming the victim. The fact that the deceased is not there to give their side of the story and there are often no independent witnesses to the homicide, leads to criticism that the allegations about provocation have been fabricated or exaggerated by the accused.*

As has been acknowledged by a number of academics and other commentators, this is a serious issue and it may affect homicide trials more broadly, as one of the key witnesses to events is dead. However, it must be recalled that, if a provocation plea is successful, it reflects the fact that the prosecution have not been able to convince the jury, beyond reasonable doubt, that the defendant did not kill under provocation. The absence of evidence from the deceased must be viewed in light of the totality of the evidence raised.

- *The defence is an anachronism as there is no longer a mandatory sentence for murder, which we understand was the main reason for the development of the defence at common law.*

One of the most important reasons to deal with provocation at the point of conviction is the argument about fair labelling. As we stated in our submission, aside from any issue about sentencing discretion, part of the role of provocation is to reduce (but not erase) the stigma and condemnation attached to offender's behaviour by convicting of the offence of manslaughter rather than murder. The principle of fair labelling requires that distinctions between offences and their proportionate wrongfulness be recognised in the label attached to the offence. Labelling a provoked homicide manslaughter recognises that the defendant does not fall into the category of the most serious of homicides – murder.

- *Further the rationale for the defence is unclear as it seems to be a fusion of justification and excuse. To characterise the defence as justification condones acts of violence which are not acceptable in a modern society as exemplified in the Singh case. An excuse based rationale gives priority to loss of self control which may be criticised by treating hot blooded killers more leniently than cold-blooded killers. Both have committed extremely violent acts. There is no logical reason why people who kill in the heat of passion through anger or fear, provoked by words or other non violent actions should be convicted of manslaughter as opposed to murder. Sentencing can adequately deal with any difference in culpability.*

As we mentioned in our submission, while provocation began its life as a justification – reflecting social norms, then prevailing, about the appropriateness of lethal violence in certain situations – the defence has morphed in recent decades. In the modern Australian context, it is now largely uncontroversial to state that provocation does not operate to justify the action of the person who responds with fatal violence in the sense that a judgment is made that it was right to kill in the circumstances (as is the case with self-defence). Rather, provocation acts (merely) to excuse the behaviour of the provoked person – the behaviour is regarded as wrongful even though it is in some sense regarded as an understandable reaction. The evolution of provocation in this respect reflects changes in attitudes to lethal violence.

In the current era, provocation centres on a 'loss of control' and it is this that (partially) excuses a defendant. It is 'loss of control' that affects the accused culpability for the murder with which he or she is charged. We acknowledge that an excuse-based rationale for provocation that is restricted to killings in anger may now seem to suffer from a problem of illogicality. However, we submit that, when provocation is drafted so as to expressly include fear as a rationale the defence does not suffer from this problem. As reflected in our proposal

for a reformulated defence of provocation – as ‘gross provocation’ – the defence would be available where the accused lost self-control and had ‘a justifiable sense of being seriously wronged’ or feared ‘serious violence towards the defendant or another’, or a combination of both, and where a person of the same age and ‘ordinary temperament’ ‘might have reacted in the same or similar way’. We hold that it important to expressly provide for provocation in circumstances of fear, especially for individuals who have been subject to domestic violence. To us, fear and anger provide a common element, which reflects the rationale for provocation – a concession to human frailty.

- *Further it is a defence based on an unacceptable loss of control, in our view there is a problem in saying that some homicides are more "acceptable" than others.*

The effect of the structure of the law of homicide, which is only minimally disaggregated into murder and manslaughter, is to class unlawful killing into two broad bands of culpability. The effect of the availability of provocation based on a ‘loss of control’ is to move provoked killings from one band to the other. We submit that this is not making it a more ‘acceptable’ homicide; it is labelling it differently, recognising its distinct features. As we stated in our submission, it must be recalled that the offender is still held accountable for the wrong and blamed, albeit with a reduced level of stigma. In this respect, provocation can be contrasted with self-defence, the archetypal justificatory defence, which operates as a full defence, available across the board of criminal offences.

We submit that there may be cases where provocation is appropriately granted and no other defence could or would be applicable or appropriate. As we stated in our submission, it is now well recognised that domestic violence can take many forms, not just physical violence but also psychological and emotional abuse which may include intimidation, harassment, stalking, and economic abuse. Where a person is subjected to such abuse, and kills his or her abuser, provocation may still have an important role to play. In addition to domestic violence cases, there may well be other instances, where, although a violent response is not condoned, it is accepted that an ordinary person could have reacted in a similar way. In our submission, we suggested that the defence be amended in order to exclude the possibility that provocation is pleaded in cases such as those involving intimate partner violence, circumscribing the defence around normatively desirable cases. This idea is reflected in *Option 4: ‘Gross Provocation’ model*, contained in the Options Paper.

- *It is anomalous as it only applies to the offence of murder, in respect of other offences it is a matter to be taken into account on sentence.*

We submit that there is a significant difference – measured in terms of legal history, and the role of the jury, among other matters – between recognising provocation as the basis of a defence and thus letting it go to an individual’s conviction and culpability, and provocation as one ingredient in a complex facts scenario that the judge is assessing at the point of sentencing. The inclusion of provocation as a mitigating factor in sentencing deals with all cases, not just murder, in which provocation is an ingredient of the fact scenario. This reflects developments in the law of sentencing; the historical development of the law of homicide is distinct.

In summary our views accord with the recommendations of the Victorian Law Reform Commission namely;

- *The differences in degrees of culpability for intentional killing should be dealt with on sentence. This approach allows greater flexibility for the court to take provocation into account when it is appropriate to do so, and to ignore it when it is not.*

While we acknowledge that there is some benefit in allowing the moral fine-tuning of culpability issues at sentence, we do not believe that provocation should be dealt in sentencing. In short, in homicide, provocation is too important an issue not to be before the court and the jury in determination of liability. As we stated in our submission, leaving decisions about issues of culpability with the jury permits community input into the trial and conviction process and helps to foster community confidence in the justice system. This in turn contributes to public perceptions about the legitimacy of criminal law and procedure. The jury is also likely to have a broader range of experience than a judge and can draw on this experience to reach a decision. On this basis, the controversy surrounding provocation is precisely a reason to keep it in the hands of the jury rather than to leave it to the judge at sentencing.

Further, as we stated in our submission, criminal law has a symbolic role and conveys/encodes cultural messages. Abolishing the provocation defence but allowing its consideration at sentencing (for mitigation) would then send the message that modern Australian society does not condone killing in anger. Such a message can, however, be sent even more unequivocally by expressly barring words alone, anything said or done which entails the ending or changing of a domestic relationship and non-violent sexual advances from the realms of provocation rather than abolishing the whole of provocation. This idea is reflected in *Option 4: 'Gross Provocation' model*, contained in the Options Paper.

- *The only circumstances that should justify a person being completely excused from criminal responsibility for murder, are*

- (1) where a person has killed out of necessity in self protection or to protect the life of another person, provided his or her actions were not unreasonable in the circumstances;*
- (2) or a person has or is suffering from a mental impairment at the time of killing; and*
- (3) where the person's actions were not voluntary.*

We agree. A key part of the case for the retention of provocation (albeit in an amended form) is its status as a partial defence, reducing murder to manslaughter. None of the proposed models outlined in the Options Paper entail amending provocation to make it a full defence.

- *The criteria for particular defences to homicide should be readily understandable by juries.*

We agree. As we will indicate in our response to the Options Paper, we support *Option 4: 'Gross Provocation' model*, and we believe that this model for a reformulated defence of provocation will be readily understandable by juries, and that it will be possible to generate clear and relatively straightforward model jury directions for use by judges.

Final Point of Note:

In conclusion, we note that each of the cases referred to in the table of cases included as part of the ODPP submission involve provocation in the context of a domestic relationship. Under our proposed reformulation of the defence, provocation would not be available in such circumstances. We note that *Option 4: 'Gross Provocation' model*, contained in the Options Paper, also adopts this approach.

Appendix A

SUBMISSION OF THE OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS (NSW) NSW Legislative Council Select Committee on the partial defence of Provocation

(Extracts)

The main arguments we advance in support of abolition are as follows;

- The defence is illogical in the sense that it requires the defendant to lose control so as to form an intention to kill or inflict grievous bodily harm. It is illogical to require that a person lose self-control and act with intent.
- There is an inherent gender bias in the defence and it is unjust in its application since it has been created to address typically male patterns of aggression. Developments to expand the defence to accommodate women and the battered women's syndrome may be criticised for forcing women to adopt a passive and stereotyped image in order to utilise the defence.
- The defence promotes a culture of blaming the victim. The fact that the deceased is not there to give their side of the story and there are often no independent witnesses to the homicide, leads to criticism that the allegations about provocation have been fabricated or exaggerated by the accused.
- The defence is an anachronism as there is no longer a mandatory sentence for murder, which we understand was the main reason for the development of the defence at common law.
- Further the rationale for the defence is unclear as it seems to be a fusion of justification and excuse. To characterise the defence as justification condones acts of violence which are not acceptable in a modern society as exemplified in the *Singh* case. An excuse based rationale gives priority to loss of self control which may be criticised by treating hot blooded killers more leniently than cold -blooded killers. Both have committed extremely violent acts. There is no logical reason why people who kill in the heat of passion through anger or fear, provoked by words or other non violent actions should be convicted of manslaughter as opposed to murder. Sentencing can adequately deal with any difference in culpability.
- Further it is a defence based on an unacceptable loss of control, in our view there is a problem in saying that some homicides are more "acceptable" than others.
- It is anomalous as it only applies to the offence of murder, in respect of other offences it is a matter to be taken into account on sentence.

In summary our views accord with the recommendations of the Victorian Law Reform Commission namely;

- The differences in degrees of culpability for intentional killing should be dealt with on sentence. This approach allows greater flexibility for the court to take provocation into account when it is appropriate to do so, and to ignore it when it is not.

- The only circumstances that should justify a person being completely excused from criminal responsibility for murder, are

- (1) where a person has killed out of necessity in self protection or to protect the life of another person, provided his or her actions were not unreasonable in the circumstances;
- (2) or a person has or is suffering from a mental impairment at the time of killing; and
- (3) where the person's actions were not voluntary.

- The criteria for particular defences to homicide should be readily understandable by juries.