

31 August 2012

Reverend the Hon F Nile MLC  
Chair  
Select Committee on the Partial Defence of Provocation  
Parliament House  
Macquarie Street  
SYDNEY NSW 2000

Dear Reverend Nile

Further to my appearance before the committee last Wednesday, I thought it might be helpful for me to provide a draft of a possible amendment of the *Crimes Act 1900* (NSW), that would reflect the possible reformulation of provocation that I discussed with the Committee.

Can I emphase that the onus that would rest on the defence would be on a balance of probabilities, a lesser onus than that resting on the prosecution.

Yours faithfully

James Wood

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### 23 Trial for murder—provocation

- (1) Where, on the trial of a person for murder, it appears that the act or omission causing death was an act done or omitted under provocation and, but for this subsection and the provocation, the jury would have found the accused guilty of murder, the jury shall acquit the accused of murder and find the accused guilty of manslaughter.
- (2) For the purposes of subsection (1), an act or omission causing death is an act done or omitted under provocation where:
  - (a) the act or omission is the result of a loss of self-control on the part of the accused that was induced by any conduct of the deceased (including grossly insulting words or gestures) towards or affecting the accused, and
  - (b) that conduct of the deceased was such **that taking into account all of the characteristics of the accused and the circumstances in which the provocation occurred, including the history of the relationship between the accused and the deceased and the manner in which the provocation came to the attention of the accused, was such as to warrant his or her liability being reduced to manslaughter.**

whether that conduct of the deceased occurred immediately before the act or omission causing death or at any previous time.

- (3) For the purpose of determining whether an act or omission causing death was an act done or omitted under provocation as provided by subsection (2), there is no rule of law that provocation is negated if:
  - (a) there was not a reasonable proportion between the act or omission causing death and the conduct of the deceased that induced the act or omission,
  - (b) the act or omission causing death was not an act done or omitted suddenly, or
  - (c) the act or omission causing death was an act done or omitted with any intent to take life or inflict grievous bodily harm.
- (4) **Where a person is intoxicated at the time of the act or omission causing death, and the intoxication is self-induced, loss of self-control caused by that intoxication or resulting from a mistaken belief occasioned by that intoxication is to be disregarded.**

**"Self-induced intoxication" in this subsection has the same meaning as it does in s 428A (of the Crimes Act 1900).**

- (5) For the purpose of subsection (1), a person does not commit an act or omission causing death under provocation if:
  - (a) **that person provoked the deceased with a premeditated intention to kill or to inflict grievous bodily harm or with foresight of the likelihood of**

killing the deceased in response to the expected retaliation of the deceased.

(b) the conduct of the deceased constituted sexual infidelity or a threat to end a domestic relationship with that person.

(6) Where, on the trial of a person for murder, there is any evidence that the act causing death was an act done or omitted under provocation as provided by subsection (2), the onus is on the **accused** to prove **on a balance of probability** that the act or omission causing death was not an act done or omitted under provocation.

(7) This section does not exclude or limit any defence to a charge of murder.