The Honourable Rev Fred Nile MP

Chair, Select Committee on the Partial Defence of Provocation

Legislative Assembly

New South Wales Parliament

4 October 2012

Dear Reverend Nile,

Re: The Partial Defence of Provocation – Response to Options Paper

We are writing to you in order to respond to the Options Paper issued on the partial defence of provocation.

In brief, we support reform Option 4, the 'Gross Provocation' model, although we do not support subclause (7) of the proposed model, which provides that the defendant will bear the burden of proving provocation, to the balance of probabilities standard, in a murder trial.

Again, 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

Comment on reform options proposed by the Select Committee on the Partial Defence of Provocation

Associate Professor Thomas Crofts and Dr Arlie Loughnan

1. Overview

We do not support the abolition of provocation (**Abolish provocation**). We believe that there is a place for a reformed defence of provocation in contemporary Australian society. While we support the retention of provocation we believe that it is in need of amendment to address problematic aspects of the defence (**Retain provocation without amendment**). We support the retention of provocation with amendments (**Retain provocation with amendments**). We do not support the reversal of the burden of proving provocation as part of the reform of the defence.

2. Assessment of each Option outlined in the Options Paper

Option 1 – 'Positive Restriction' Model

We do not support reform Option 1. This would restrict the availability of the defence of provocation to a very limited set of cases and we believe that this would represent an overly strict reform of provocation. Indeed, we believe it over-corrects for the problems with the existing formulation of the defence. In addition, in this reform option, there may be difficulties determining the meaning of a violent criminal act – is this to be limited to physical violence?; or is a threat of violence sufficient? This part of the formulation of provocation may also overlap with the defence of self-defence and thus cause confusion. At the same time, with the reference to the domestic context, the availability of the defence extends seemingly to any cases of family or domestic violence (although the requirement in s23(2)(b) would reduce the potentially wide scope of this aspect of the defence).

Option 2 – 'Exclusionary conduct' Model

We do not support reform Option 2. While there are merits in expressly excluding certain conduct from the reach of the defence of provocation, this amendment alone would not

remedy other problems associated with the ordinary person test which currently forms part of the defence.

Option 3 – Wood Model

We do not support reform Option 3. While removing the ordinary person test would eliminate the problems associated with this part of the defence, replacing it with the proposed s23(2)(b) (per Appendix B) could introduce further problems. The test contained in the proposed s23(2) is relatively vague and asks whether a person deserves a reduction in liability based on what the accused did. This formulation could unfortunately strengthen the perception that the defence is victim-blaming by focussing attention firmly on whether the conduct of the deceased was such that the accused deserves mitigation – rather than focussing attention on the reaction of the accused and whether a person of ordinary temperament might have so reacted (as in proposal Option 4). This victim-blaming dimension of provocation is perceived as a problem with the current provocation defence and it would be unwise to risk replicating the very same problem in a reformulated defence.

Option 4 – 'Gross Provocation' Model

We support Option 4. This model is the closest to that proposed in our submission to the Committee (Submission 29). In brief, we advocated the retention of the partial defence of provocation but, reflecting serious problems with the defence as it is currently formulated, we recommended amendments to the current law, along the lines of law reform proposals made elsewhere, to expressly exclude (a) words alone; (b) things done or said to end or change a domestic relationship and (c) non-violent sexual advance as potential triggers for the 'loss of control' required by the defence.

However, while we support reform Option 4, we do not support the specific provision contained in subclause (7), a reversal of the burden of proof such that the defendant bears the onus of proving provocation when on trial for murder.

3. Detailed Discussion on Option 4 (referencing Appendix C)

Proposed s23(2),(3) and (4):

We believe that the proposed s23(2) has four main advantages. First, the defence is restricted to 'gross provocation', which appropriately limits the scope of the defence. Second, the

defence retains an objective test but refers to a person of 'ordinary temperament', which is something a jury is likely to grasp readily. Third, s23(3) clarifies what matters may be taken into account to determine whether a person of ordinary temperament might have so reacted. Fourth, s23(4) clarifies the situations in which it is considered that the defence of provocation should not be available. It may be preferable to replace the final sentence of the proposed s23(2) with 'in the circumstances of the defendant might reasonably *have formed an intention to kill, or to inflict grievous bodily harm upon, the deceased*' (change emphasised). This formulation would make clear that the issue in provocation is whether a person of ordinary temperament may form such an intention not whether they would actually kill or do GBH.

Proposed s23(6):

We believe that the proposed s23(6) is an important amendment to make clear that the defence does not automatically need to be left to the jury. Part of the criticism of the law of provocation in England and Wales was that as a result of reform in 1957 the defence had to go to the jury whenever there was evidence that a person had been provoked whether or not it was likely that the defence would succeed. Such a position increases the likelihood that undeserving cases are raised and left to the jury, wasting the court's time and allowing the possibility that undeserving claims succeed. Furthermore, it may not be in the interest of a defendant to have this defence raised because it may side-track the jury into considering this defence rather than a claim for a full acquittal.[1]

Proposed s23(7):

We do not support the reversal of the burden of proof as proposed in s23(7). As noted in *Woolmington v DPP* [1935] AC 462 the 'golden thread' running through criminal law is that the prosecution has the duty of establishing liability (subject to the exception of insanity and to certain statutory exceptions, including diminished responsibility/substantial impairment). This principle is internationally recognised as one of the most fundamental features of the criminal process. It can be found for example in Article 11(1) *Universal Declaration of Human Rights*; Article 6(2) *European Convention on Human Rights*; and s11(d) *Canadian Charter of Rights and Freedoms*. We note that there is a worrying tendency in recent times to reverse the burden of proof, which erodes this fundamental principle. We consider that

[1] See English Law Commission, *Murder, Manslaughter and Infanticide*, Law Com no 304, 2006, 5.15-5.16.

reversing the burden on the defence of provocation could set a dangerous precedent and should be avoided.

There are important reasons for retaining the burden on the prosecution to prove all elements of serious offences and disprove all defences raised to such offences. A major reason is the significant power and resource imbalance between the state and an individual defendant. As Professor Paul Roberts notes:

> 'the prosecution has access to investigative resources which are vastly superior to those available to most defendants in criminal cases. From the high-tech world of DNA profiling to labour-intensive house to house inquiries, the prosecution is considerably better placed to amass evidence of guilt than is a defendant trying to establish her innocence. And as Lord Griffiths noted in Hunt, the defendant's difficulties are compounded by her restricted access to physical evidence.'[2]

It should also be noted that reversing the burden of proof makes the defence more difficult to establish for all defendants including those who are considered worthy of the defence and who may already face difficulties accessing the defence (for example a person who responds in the face of sustained emotional abuse).

Murder is one of the most serious offences carrying a severe sentence and high degree of stigma and condemnation, as such it is particularly important that there is no reversal of the burden of proof in relation to this offence or any defences to this offence. As a matter of principle there are objections to reversing the burden and as a matter of practicality if all other elements of the defence are amended to tighten up the defence (eg., the defence can only be raised when there is gross provocation, it is excluded in certain cases and there is no obligation for the defence to be put to the jury) there is no need to reverse the burden of proof.

[2] Paul Roberts, 'Taking the burden of proof seriously' [1995] *Criminal Law Review* 783, 787 [reference omitted]. This article gives a clear outline of other reasons against reversing the burden of proof.