

## **INQUIRY INTO PARTIAL DEFENCE OF PROVOCATION**

**Organisation:** NSW Law Reform Commission  
**Name:** The Hon James Wood AO QC  
**Date received:** 8/08/2012

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3 August 2012

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

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8 AUG 2012  
LEGISLATIVE  
COUNCIL

Dear Reverend Nile

I respond, on behalf of the NSW Law Reform Commission, to your invitation to make a submission in relation to the defence of provocation

### Our previous report

The Law Reform Commission last looked at this issue in 1997. At that time, our recommendations included retention, and expansion of the reach, of the limited defence of provocation. That report was not implemented. Since that time there have been a number of developments in the law leading to a range of reforms in other jurisdictions. Moreover, there are likely to have been changes in community attitudes to the availability of the defence of provocation, and to sentencing where provocation is found.

In light of those developments, the Law Reform Commission 1997 report should not be treated as representing our current views. To the contrary, those recommendations would need serious reconsideration and further public consultation and it is unlikely that an expansion of the defence would now be recommended.

### Other work we have undertaken or are undertaking relevant to your inquiry

Other work undertaken by the Law Reform Commission is relevant to your inquiry, and we bring it to your attention so you might take it into account.

First, we have previously reported, jointly with the Australian Law Reform Commission, on Family Violence. Chapter 14 of our joint report covers homicide defences, including provocation. The material in that Chapter may provide useful background for your work. In addition recommendations 14-1 – 14-5 may be relevant. In particular, I highlight recommendations 14-1, and 14-2:

**Recommendation 14-1** State and territory criminal legislation should ensure that defences to homicide accommodate the experiences of family violence victims who kill, recognising the dynamics and features of family violence.

**Recommendation 14-2** State and territory governments should review their defences to homicide relevant to family violence victims who kill. Such reviews should:

- (a) cover defences specific to victims of family violence as well as those of general application that may apply to victims of family violence;
- (b) cover both complete and partial defences;



- (c) be conducted as soon as practicable after the relevant provisions have been in force for five years;
- (d) include investigations of the following matters:
  - (i) how the relevant defences are being used—including in charge negotiations—by whom, and with what results; and
  - (ii) the impact of rules of evidence and sentencing laws and policies on the operation of defences; and
- (e) report publicly on their findings.

Provocation is sometimes raised by victims of family violence, alone or in conjunction with other defences such as self-defence and substantial impairment by abnormality of mind, each of which can have a particular significance for a person who has been subjected to a lengthy history of family violence. Consistent with our earlier recommendations, we would propose that your review should take into account the experiences of those who fall within this group.

The NSW Law Reform Commission is also currently undertaking two references that have relevance for your inquiry:

- Our reference on People with Cognitive and Mental Health Impairments in the Criminal Justice System is currently considering the defence of substantial impairment by abnormality of mind under s 23A of the *Crimes Act 1901*. This defence was discussed in Chapter 4 of our Consultation Paper, *People with cognitive and mental health impairments in the criminal justice system: criminal responsibility and consequences* (CP 6). We have yet to develop recommendations, although we have received submissions (available on our website).
- Our reference on sentencing will consider the principles related to sentencing for offences. The existence of provocation, however defined, is a relevant mitigating feature which courts may take into account under s 21A(3) of the *Crimes (Sentencing Procedure) Act 1999*. We are currently consulting on this reference and have released 12 Question papers. Question paper 3 deals with s 21A. Subject to this consultation process and our discussions with stakeholders, it is likely that we will make recommendations that would affect this section, though at this stage we are not clear on the direction of those recommendations.

We note these reviews for your information and consideration.

## General issues

Over the past 10 years or so there have been a large number of law reform commission reviews of the laws related to homicide, and in particular the role of partial defences including provocation. Law reform bodies, including in particular the Law Commission of England and Wales, have made recommendations, and different jurisdictions have opted to abolish or reform the defence. These developments are well documented in the recent NSW Parliamentary Research Service publication "Provocation and self-defence in intimate partner and sexual advance homicides" and it is not necessary for me to canvas them at length.

I would also point to the excellent work done by the Judicial Commission in this area in its 2006 monograph *Partial Defences to Murder in NSW 1990-2004*. That work provides a good empirical base, though it could be updated with reference to post-2004 cases.

In our view a proper consideration of the law of provocation needs to consider:

- The underlying law of unlawful homicide including the relevance of the distinction between murder and manslaughter, and whether the time has arrived for a restructure of unlawful

homicide into separate categories dependent for example, on nature of the act and mental state with which the fatal act is committed.

- How sentencing is undertaken and how provocation is treated at the sentencing stage – this will be considered closely in our sentencing reference.
- How provocation fits into other partial defences to murder that currently exist or might be considered including: intoxication, excessive self-defence, substantial impairment, the Queensland partial defence in situations of domestic violence (s 304B *Criminal Code* (Qld)), and the Victorian offence of defensive homicide (s 4 *Crimes Act 1958* (Vic)).
- The nature of the cases that may attract the defence including violent confrontation, domestic violence, intimate relationship confrontations, unwarranted sexual advance cases, and whether these cases should attract a partial defence, and if so how it should be framed.
- If retained as a defence, the need for some greater definition of its elements, for example in relation to immediacy of the provocation, third party provocation and acts that may or may not constitute provocation.

This is an issue of considerable public concern and we expect that you will receive a wide range of submissions.

We do not currently have a reference on the law of homicide or partial defences, and we have not undertaken wide ranging research for this submission so our views must be regarded as preliminary only.

Yours sincerely

Hon James Wood AO QC  
Chairperson