

INQUIRY INTO PARTIAL DEFENCE OF PROVOCATION

Name: Mr James Trevallion

Date received: 10/08/2012

RECEIVED

11 AUG 2012

LEGISLATIVE
COUNCIL

JAMES TREVALLION
Barrister-at-Law

Sir Owen Dixon Chambers
14th Floor, 179 Elizabeth Street
SYDNEY NSW 2000
DX 343 SYDNEY

Tel: (02) 9373 7461
Fax: (02) 9373 7422

Liability limited by a Scheme approved under Professional Standards Legislation

9 August 2012

The Hon Rev Fred Nile
Parliament House
Macquarie Street
SYDNEY NSW 2000

Dear Reverend,

**RE: LEGISLATIVE COUNCIL SELECT COMMITTEE AND ITS INQUIRY
INTO THE PARTIAL DEFENCE OF PROVOCATION**

Please accept my submission to the Select Committee dealing with the review of the legal doctrine of provocation¹.

I am a barrister practising almost exclusively in crime in NSW having been admitted to the bar in 1999. I appear in trials both for the defence and as a non-salaried Crown prosecutor.

I have appeared in both trials and appeals where the defence of provocation has been an issue. In respect to the trials, I have been involved in matters where the jury has acquitted an accused who has relied on provocation and others where the jury has found the accused guilty of murder, despite the accused having raised this partial defence.

It is my submission that the partial defence of provocation, as it currently exists in NSW, addresses an important aspect, or area, of the law of homicide. It demonstrates that the law recognises that not all actions are done with the same intention or with a rational mind. It recognises that a person of otherwise sound reasoning and functioning can, in extreme circumstances, act in ways that are extremely out of character, but otherwise understandable and explainable through common human experience.

¹ Although often referred to as a defence or partial defence, technically provocation is not. However that distinction is a legal technical one and for the purposes of these submissions I will refer to provocation as a defence.

Thus the law demonstrates a compassionate understanding of human nature consistent with the community's ethical and moral standards.

It is my experience that it is that common human experience, with those ethical and moral standards that juries do bring to bear in resolving the issue of provocation when it arises. It is, for that reason that the partial defence of provocation is a quintessential jury issue. It is an issue where 12 members of the community can decide whether in fact the accused's reaction to whatever the provocative acts or words were, was the reason for the accused's loss of self control and, whether or not the ordinary person in the place of the accused would have lost his self control in those circumstances. It is submitted that this is a question that is better answered by 12 members of the community, sitting in the jury room and drawing on their common life experience, than by a single judge sitting alone.

Further, it is my experience that juries do understand the direction given to them by a trial judge in respect to the partial defence of provocation. This has been made clear to me by the questions that jurors have asked about provocation in the trials that I have been involved in.

Moreover, I believe that the partial defence of provocation fills an important gap in the range of homicide verdicts available to a jury. In circumstances where a jury might be torn between a complete acquittal or a conviction for murder and where the facts and circumstances would allow for a verdict of manslaughter by way of provocation, the jury being able to return that verdict assists both the defence, the prosecution and the wider general community by ensuring that an appropriate result or outcome is achieved.

For the above reasons I submit that the partial defence of provocation should be retained and should remain an issue to be decided by the jury.

Yours faithfully,

J. TREVALLION