

NSW Legislative Council Select Committee on the Partial Defence of Provocation
NSW Parliament
Macquarie Street
Sydney NSW 2000

Dear Reverend Mr Nile and other Committee members

Re: Reform Options for the Partial Defence of Provocation

The NSW Domestic Violence Committee Coalition welcomes the opportunity to provide comment on various options for reform of the partial defence of provocation that have been raised before the NSW Legislative Council's current inquiry.

Before addressing the options raised in the consultation paper, Consultation on reform options (dated 14 September 2012), the Coalition reiterates its main concern about dealing with the defence of provocation in isolation from other aspects of the law relating to homicide (murder, self-defence, and the other partial defences currently operating in NSW, as well as alternative partial defences that operate in other jurisdictions). The Coalition submits that reform in this area is complex and requires a holistic and thorough examination of the law relating to homicide, from charging through to sentencing. Law reform exercises on this issue in other jurisdictions inform us that such a holistic process is critical and that there are potential downsides of even the best-intentioned reforms.

We also express concern about the time frame for this inquiry to consider such a complex area of law. This tight time frame has an impact on the ability of various organisations and groups, including ours, to devote the time and research needed to provide a more thorough response.

Our comments on the options raised in the consultation paper of 14 September 2012 are predicated on the following positions (addressed in our earlier submission):

- (1) That there must also be reform to the law of self-defence to enable it to be better used by women who kill in the context of intimate partner violence;
- (2) That social framework evidence must be specifically included in legislation as relevant to full and partial defences;
- (3) That any law reform must be accompanied by a commitment to further and continuing education of lawyers, judicial officers and the community more generally concerning the nature of domestic violence and the differing contexts in which men and women kill their intimate partners; and
- (4) That any legislative reform must be comprehensively reviewed within five years after implementation.

In the attached document the NSW Domestic Violence Committee Coalition provides comment on the options raised in the Consultation paper.

Please do not hesitate to contact me if you require any further information.

Yours sincerely

Betty Green

Chair, NSW Domestic Violence Committee Coalition

8 October 2012

Abolish provocation

The NSW Domestic Violence Committee Coalition submits that provocation should not be abolished at this stage. We refer the Committee to our submission for the detailed reasoning behind this position.

It should be noted that this position is not taken because we agree with the way in which provocation currently operates (we share the concerns and outrage regarding the recent cases of *Singh* and *Won* in NSW), rather that we have concerns about the way in which simply abolishing it may operate for women who kill in the context of intimate partner violence but may not, for a range of reasons, be able to avail themselves of the defence of self-defence. Furthermore, we note that simply abolishing provocation does not on its own address the gendered narratives that men have been able to successfully raise whether in provocation or in the new defensive homicide option in Victoria (see *Middendorp*). These two factors emphasise a need for a cautious approach that is staged and subject to rigorous review and evaluation.

Retain provocation without amendment

The NSW Domestic Violence Committee Coalition does not support the retention of provocation without amendment.

The NSW Domestic Violence Committee Coalition submits that there are useful amendments that can be made to provocation. We make these suggestions in the context that ultimately any amendments that are made at this stage are then part of a more thorough review of the law relating to homicide by the NSW Law Reform Commission.

Conduct-based reforms

(a) Option 1: 'Positive restriction' model – violent criminal conduct/ family violence

While the NSW Domestic Violence Committee Coalition sees the attraction in this proposed model, we are not in favour of it for three reasons:

- (1) It is not clear how such a partial defence would differ from self-defence (or excessive-self-defence); hence may mean that women who kill in the context of intimate partner violence are still persuaded to plead to this partial defence, rather than pursuing self-defence;
- (2) Many women experience intimate partner violence that would not fall within the term, 'violent criminal conduct', or indeed the current definition of 'domestic violence' under NSW legislation. As a result, it may be possible that some women who kill in the context of their own victimisation may fall through the gap of self-defence *as well as* a provision drafted in the manner suggested.
- (3) The inclusion of family violence also makes the operation of the proposed approach unclear; the current definition of domestic violence in NSW relies on two aspects, a relationship context and an act/behaviour – this arguably will be able to be used by men in contexts such as *Middendorp* (as pointed out by Dr Fitz-Gibbon's evidence on Tuesday 28 August 2012, p. 41).

(b) Option 2: 'Exclusionary conduct' model

While the NSW Domestic Violence Committee Coalition is ultimately of the view that the partial defence of homicide should be referred to the NSW Law Reform Commission as part of a comprehensive review of the law relating to homicide, if, in the meantime, the NSW Legislative Council Committee is inclined to make some legislative change, this would be our preferred approach as part of a staged approach to reform that is subject to detailed review and evaluation.

As detailed in our submission, we are of the view that provocation should not be available:

- in circumstances where one of the parties to the relationship seeks to end or change the nature of the relationship; or
- in circumstances involving a non-sexual advance.

The Coalition recognises the difficulties that have been experienced in England and Wales regarding the exclusion of sexual infidelity under the *Coroners and Justice Act 2009*. Again we emphasise the fact that this experience (as well as that in Victoria) tells us that law reform alone is not enough and that it must be accompanied by education and review/evaluation to ensure that any legislative amendment achieves its aim. We also do not recommend that the phrase 'sexual infidelity' is used in any amendment.

(c) Option 3: Wood model

The NSW Domestic Violence Committee Coalition is **not** in favour of this model. This is influenced by the tight time frame in which to make comments on the various options.

We do however refer the Committee to the following issues that are raised by this approach:

- *The inclusion of recognition of the characteristics of the accused*

The Coalition submits that such a change requires much more detailed consultation and discussion. There are strong arguments that can be raised in favour and against such a proposition, therefore we emphasise that caution is required. We note that the inclusion of this approach in the Wood model may allow for greater understanding of the circumstances in which women kill. Here we refer the Committee to the discussion of *R v Smith (Morgan)* [2000] UKHL 49, [2001] 1 AC 146 and *Attorney General for Jersey v Holley* [2005] UKPC 23, [2005] 2 AC 580 in Rosemary Hunter et al (eds) *Feminist Judgments: From Theory to Practice* (Hart Publishing, 2010), pp. 292-307. However, we are of the view that this is a significant change to the law of provocation in NSW and should **not** be adopted at this stage, particularly as we are of the view that the objective standard would be unnecessary where social framework evidence is available. It may also be the case that recognising the characteristics of the accused may have undesirable consequences. We refer the Committee to the submission made by Professor Julie Stubbs on the options paper, dated 4 October 2012.

- *Reference to sexual infidelity*

The Coalition prefers to adopt the Queensland approach which refers to the 'changing nature of a relationship', rather than sexual infidelity. We note that the experience in England and Wales has been preoccupied by what amounts to 'sexual infidelity', rather than the substantive reasons underpinning its exclusion as a ground for provocation.

- *Onus of proof*

In our earlier submission the NSW Domestic Violence Committee Coalition stated that this issue that should be investigated as part of a more comprehensive review of the law relating to homicide. We do not recommend it as an approach to be adopted by the current inquiry. The reasons for this include:

(1) more information is required about how this operates in those jurisdictions where there has been a reversal of the onus of proof;

(2) further information is needed about whether the onus of proof in provocation has been reversed only in combination with other amendments that better take account of homicides in the context intimate partner violence (for example, it is our understanding of the onus of proof was reversed in Queensland at the same time that a new defence, the defence of killing in the context of an abusive relationship, was also introduced);

(3) how this would operate in the context of other defences that may be relied on by the accused at the same time. It is important to note that such a reversal of the onus of proof would also apply to women who are seeking to rely on provocation in the context of their own victimisation.

Combination of conduct and test-based reform options

The NSW Domestic Violence Committee Coalition is not in favour of this model. This is influenced by the tight time frame in which to make comments on the various options.

There are however a number of useful features of this model, some of which reflect on comments raised above in relation to the other options, for example, the drafting of the exclusions provided in subsection (4).

The Coalition raises concern about the following features of the proposed model:

- the inclusion of 'serious' as a qualifier for the fear of violence (here we refer the Committee to the comments made in our submission regarding this phrase in England and Wales);
- the reversal of the onus of proof (see comments in relation to the Wood model above); and
- the removal of the objective standard (see comments in relation to the Wood model above).