REDFERN LEGAL CENTRE AND SYDNEY WOMEN'S DOMESTIC VIOLENCE COURT ADVOCACY SERVICE

Provocation Inquiry – Questions on Notice

Question 1:
Police are charging women with murder even though they can see on the facts there is a perfectly valid case of provocation. That means the women are entering a plea on manslaughter on the basis of provocation to avoid a sentence of murder whereas if they were charged with manslaughter under the current laws they could run their self-defence argument without the risk of having a conviction for murder. Do you have any views about overcharging? (David Shoebridge)

I am not familiar with over-charging in homicide cases, however over-charging seems to be a common practice in local court domestic violence related charge matters. From my observation in local court domestic violence related assault matters, having charged a defendant with a higher offence, police are often willing to accept a guilty plea to a lesser offence.

Question 2:
The Bar Association gave the Inquiry some figures that showed more than half the people accessing the defence of provocation were women, which did not accord with the media reporting of provocation, which reports the violence by men. Could you look at the figures provided by the Bar Association and comment? (David Shoebridge)

My reading of the Bar Association submission is slightly different. The submission quotes a New South Law Reform Commission Report[1] that states a far greater number of sentenced male offenders accessed the defence of provocation during the period covered by the study as opposed to sentenced female offenders (47 men as opposed to 9 women). However, women were far more successful in raising provocation according to the study, with 5 of the 9 women who relied on provocation convicted of manslaughter, but only 5 of the 47 men successful in raising provocation.

The Bar Association submission report reads as follows:

> The New South Wales Law Reform Commission Report no. 83 Partial Defences to Murder referred to a study of the killing of sexual partners amongst sentenced homicide offenders in New South Wales between 1990 and 1993. The study showed that 47 sentenced male offenders in that period killed their sexual partners. Of those, only 5 successfully raised the

[1] NSW Law Reform Commission (1997) Partial Defences to Murder – Provocation and Infanticide, Report no. 83.

> defence of provocation. On the other hand, there were nine sentenced female offenders who killed their sexual partners. Eight of them had killed in response to physical abuse or threat immediately prior to the killing. All 9 women were convicted of manslaughter, of whom 5 relied on the defence of provocation.

The Bar Association report also refers to a Judicial Commission of New Wales Report, Partial Defences to Murder in New South Wales 1990 – 2004, and I note this report refers to gender characteristics at page 9:

> Out of the 156 offenders who claimed a partial defence, 119 (76%) were male and 37 (24%) were female.

Regarding the New South Wales Law Reform Commission Report no 83 from 1997, quoted in the submission by the Bar Association, it is worth noting that the Hon James Wood states the following in the New South Wales Law Reform Commission's submission to the current Inquiry:

> 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.
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> In light of these 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.[2]

Question 3:
Some witnesses have raised concerns about the outcomes in Victoria [since the 2005 amendments to the law]. Is there something we need to add to the law of self-defence if we were to recommend that we abolish the partial defence of provocation? (Helen Westwood)

On my reading, one of the main problems with reviewing the offence of defensive homicide in Victoria has been the lack of available evidence to show whether or not the laws are working in the way they were intended.

[2] Submission no 11.

A 2010 report[3] said at that point there had been no female defendants with matters proceeding to trial under the new laws in relation to domestic homicide. However, despite not being tested in a full trial, the report said the reforms have been relevant in cases where women kill in response to long-term family violence. One case that referred to the family violence reforms introduced by the *Crimes (Homicide) Act* 2005 involved a teenage girl from regional Victoria who killed her step-father in March 2008 after four years of relentless sexual abuse. Rather than proceed to trial, the Director of Public Prosecutions discontinued the prosecution of the case on the basis that no jury would find the young woman guilty of an offence given the circumstances and the volume of evidence supporting her sworn testimony that she acted in self-defence.

A second case involved a 57 year old woman, who killed her husband in response to an immediate, violent attack, but also in the context of long-term family violence. During the three-day committal hearing, evidence was submitted in respect of the history of family violence that the accused was subjected to by her husband. The Magistrate concluded that the evidence 'overwhelmingly' supported a history of family violence. In support of the accused's claim to self-defence, and with respect to the reforms introduced by the *Crimes (Homicide) Act 2005*, defence counsel said in his closing submissions:

> The provisions in the (Crimes) Act make it plain a wife is entitled to defend herself, even if she's responding to harm that's not immediate...in the context of family violence, the accused is not required to wait until an attack is in progress, as long as the accused believes it necessary to protect themselves or a family member.

The Magistrate discharged the accused stating she was not satisfied that there was sufficient evidence to negate the issue of self-defence. The Magistrate also said that she was not satisfied there was sufficient evidence for a jury to convict the accused of murder or of the lesser charges of defensive homicide or manslaughter.

These two cases indicate that the *Crimes (Homicide) Act 2005* has introduced significant improvements to the criminal justice system in dealing with situations in which a woman kills in response to long-term family violence.

Other concerns regarding the lack of evidence to show whether the 2005 reforms are working have been expressed about the use of the reforms in plea-bargaining, and the lack of transparency of same. Commentators say that the private nature of plea-bargaining has made it difficult to understand how or why prosecution decisions are made, or to examine in any significant way whether the offence is working effectively

[3] Victoria Department of Justice, Defensive Homicide – Review of the offence of defensive homicide, August 2010.

and as intended.[4] From 1 November 2005 to 26 July 2012, 16 of the 22 convictions of defensive homicide in Victoria have involved a guilty plea, therefore in almost three-quarters of defensive homicide convictions, the decision to enter and accept a guilty plea has been made by the prosecution and the accused only. An analysis conducted by Asher Flynn and Kate Fitz-Gibbon found:

> While the pragmatic, emotion-based and financial benefits of obtaining a guilty plea are well established, the use of plea bargaining to resolve defensive homicide cases raises concern because it limits the ability to effectively evaluate the practical application of this new offence, including its impact on gender bias in the operation of homicide law. This inability is primarily due to the hidden nature of plea bargaining in Victoria, which arises from the fact that the process is not recognised in, or controlled by, any statute. Additionally, no administrative data is kept outlining when or why a plea bargain has been made, which serves to further limit current understandings of the operation of defensive homicide. In particular, this absence of transparency hinders understanding of how decisions are being made in relation to what constitutes defensive homicide, and why the circumstances surrounding these cases allow for them to be categorised by the Crown as a less serious form of homicide.[5]

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[4] See Asher Flynn and Kate Fitz-Gibbon, Plea Bargaining and Defensive Homicide: A Discussion, Monash University Press Release, 27 July 2012.
[5] Asher Flynn and Kate Fitz-Gibbon, 'Bargaining with Defensive Homicide – Examining Victoria's Secretive Plea Bargaining System Post Law Reform', Melbourne University Law Review, Volume 35, June 2012.