



21 September 2012

Ms Vanessa Viaggio
Principal Council Officer
Parliament House
Sydney NSW 2000

By email: provocationinquiry@parliament.nsw.gov.au

Dear Ms Viaggio,

Inquiry into the partial defence of provocation: corrections to transcript, questions on notice, supplementary questions, response to Options Paper

1. Thank you for the opportunity to appear before the Legislative Council Select Committee on the Partial Defence of Provocation. In this letter we provide some corrections to the transcript, answers to questions on notice and the supplementary questions that you have sent us and some comments regarding the Options Paper dated 14 September 2012.

Corrections to transcript

2. We make the following corrections to the uncorrected proof copy of the transcript that you have forwarded to us:
 - a. Page 9, Helen Rachel Campbell, "Executive Director" should be replaced with "Executive Officer".

Prosecutorial guidelines

3. We refer to paragraphs 13.1, 18.3.2 and 123 of our submission dated 23 August 2012 regarding prosecutorial guidelines.
4. We recommend the NSW Prosecution Guidelines should be reviewed as part of a comprehensive and holistic review undertaken by the NSW Law Reform Commission (NSW LRC) into NSW homicide defences. We note that Recommendation 14.2 of the NSW Law Reform Commission's and Australian Law Reform Commission's *Family Violence - A National Legal Response* calls for a review of defences to homicide 'relevant to family violence victims who kill.' We further note Recommendation 14.2(d) specifically recommends an investigation into how defences are being used, including through charge negotiations and 'the impact of rules of evidence, sentencing laws and policies on the operation of defences.' This includes an examination of prosecutorial guidelines.
5. As outlined in our earlier submission, research undertaken by Sheehy et al in three jurisdictions highlights concerns about the Prosecution charging an accused with murder



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and accepting a plea of manslaughter where defensive elements are present.¹ We also referred to the NSW prosecutorial guidelines and noted it would be helpful to understand how they are working in practice as recommended in the *Family Violence - A National Legal Response* discussed above.

6. We understand that Mr Shoebridge suggested that 'the prosecution, where the killing happened in an intimate relationship, [should] actively consider manslaughter as a viable charge.' We do not support this proposal in all circumstances of homicide in intimate relationships, but rather would like to see this limited to those circumstances in which the accused has been a victim of violence and killed their violent partner. As outlined in our earlier submission we also recommend that the review of prosecutorial guidelines be part of a more comprehensive and holistic review of homicide defences in NSW undertaken by the NSW LRC. We believe the proposal Mr Shoebridge raises should be considered in this wider review which should also consider the reform of prosecutorial guidelines in other jurisdictions.

Juries

7. WLS NSW acknowledges the importance of the jury system and believes matters of murder and manslaughter should continue to be determined by a jury, that is, by the peers of the accused who represent and reflect community values.
8. That juries continue to find in favour of provocation, particularly in matters where there is a history of domestic violence or in the context of sexual infidelity goes to more than the jury itself, though this is an important element. As outlined in our earlier submission, it highlights the gender bias in both the construction and operation of the law.
9. Overcoming this gender bias will not happen through changes to the law alone. There is a strong need for education about domestic and family violence in the general community. In our earlier submission, WLS NSW recommended that education about domestic and family violence occur with the police, law students, legal practitioners and judiciary as well as members of the jury. It is important that this education is ongoing.
10. It also highlights the need for and importance of leadership at the top levels of government, police and in the non-government organisation sector to address violence against women. The recently released report by the NSW Legislative Council Standing Committee on Social Issues, *Domestic violence and trends and issues in NSW*, repeatedly refers to the importance of such leadership.²
11. It further indicates the need for and importance of social framework evidence to help the jury to understand the nature and dynamics of domestic and family violence.
12. WLS NSW submits all the factors discussed above are relevant and that it is not a matter of ensuring a certain percentage of women are on the jury in those kinds of matters.

¹ Elizabeth Sheehy, Julie Stubbs, Julia Tomlie, 'Defences to Homicide for Battered Women: A Comparative Analysis of Laws in Australia, Canada and New Zealand,' (Author's copy) at 26-27. The final version will be published in the Sydney Law Review in 2012.

² NSW Legislative Council Standing Committee on Social Issues, *Domestic violence and trends and issues in NSW*, Report 46, August 2012 at xxi (21), xxvi (26), xxxiii (33), 4.57 – 4.59, 4.66- 4.69, 7.62-7.75, Recommendation 10, 11, 12, 23, 38, accessed on 12 September 2012 at: http://www.parliament.nsw.gov.au/prod/parliament/committee.nsf/0/2340ACAD17F1E8C4CA257A6700149EFD?open&refnavid=CO4_1

Reversal of onus of proof

13. In Queensland, the onus of proof is reversed such that an accused relying on the partial defence of provocation, must prove on the balance of probabilities that they were provoked.³
14. We note the significant differences in the defences for homicide in Queensland and in NSW. In Queensland, there is also a separate partial defence of killing for preservation in a domestic relationship for which the onus of proof is upon the prosecution.⁴ We note that prior to the introduction of this partial defence, the issue of whether a reverse onus of proof should also apply to such a defence was explored in a discussion paper prepared for the Attorney-General and Minister for Industrial Relations and that there was 'no substantial support for this idea among the respondents.'⁵
15. We also note that one of the reasons for retaining the partial defence of provocation in Queensland is because a conviction of murder continues to carry a mandatory sentence of life imprisonment. This is not the case in NSW as outlined in our earlier submission. In NSW we recommend a phased approach to abolishing provocation, which includes a holistic and comprehensive review of all defences to homicide including self-defence by the NSW LRC.
16. At this stage, WLS NSW is not persuaded that a reversal of onus of proof with respect to establishing provocation is appropriate. If a reversal of onus of proof is going to be considered, we recommend this be part of a more comprehensive and holistic review of homicide defences in NSW undertaken by the NSW LRC.

Phased approach to abolition of provocation

17. For the reasons outlined in our earlier submission, WLS NSW recommends a phased approach to the abolition of the partial defence of provocation. We object to the use of the phrase 'loss of control', particularly to describe a homicide in circumstances where a coercive and controlling partner kills their intimate partner, be it due to separation or the threat of separation, sexual infidelity or in the context of domestic violence and also in the context of non violent homosexual advance. For the reasons outlined in our earlier submission we believe this to be an inappropriate and incorrect description.
18. While we object to the phrase 'loss of control' we do not propose an immediate alternative wording. Instead, in the short-term, we propose its continuation with exclusions and that the NSW LRC examine the wider issue of homicide defences in NSW as part of a more comprehensive and holistic review.

Provocative conduct: behaviour of a violent and criminal nature

19. WLS NSW has concerns about limiting the defence of provocation to situations where the provocation is in response to conduct of a violent and criminal nature as suggested as an option at the Public Hearing on 28 August 2012.

³ Section 304(7) *Criminal Code 1889 (Qld)*.

⁴ Section 304B *Criminal Code 1889 (Qld)*.

⁵ Geraldine Mackenzie and Eric Colvin, *Homicide in abusive relationships: A report on defences*, Prepared for the Attorney-General and Minister for Industrial Relations, 6 July 2009 at 1.26 accessed on 12 September 2012 at: http://www.justice.qld.gov.au/_data/assets/pdf_file/0018/21618/homicide-in-abusive-relationships-report-on-defences.pdf

20. Firstly, we are concerned that in practice this proposed amendment would largely be an artificial constraint. The unavoidable reality is that in provocation matters, victims are unable to tell their version of the events. The outcome of the case generally relies solely upon the account of the perpetrator. We submit that a violent person who is capable of killing their intimate partner is also capable of fabricating a story alleging that the female first made a threat of a violent and criminal nature. The truth of the matter will be difficult to uncover. We submit that to allow provocation on these terms provides the perpetrator with a strong incentive to blame the victim, besmirching the character and memory of the deceased in order to escape full culpability. This will perpetuate the attitudes ingrained within the legal system regarding gender relations and stereotypes.
21. If evidence of the violent and criminal nature of the provocative conduct is required, we anticipate this would have significant ramifications for women who kill their intimate partners in response to domestic violence. This is because domestic violence and sexual assault often go unreported for a range of reasons, including:
 - the stigma, shame and loss of trust;⁶
 - women may be reluctant to seek help due to social pressures, isolation from social support, economic dependence on the perpetrator and the threat of future attacks;⁷
 - For CALD women there are cultural and community barriers to disclosing such acts of violence;⁸
 - Victims of domestic violence may not know how to access support services, including counselling;
 - Given such crimes are an abuse of power and trust, often form a cycle of abuse, and perpetrators of such crimes frequently blame their victims, it can take some time for a victim to identify that what has happened to them is a crime;⁹
 - Sexual violence 'may diminish survivors' feelings of power, self-determination, coping skills and dignity' and this takes time to rebuild;¹⁰
 - fear or distrust of police, particularly by Indigenous Australians who may distrust police due to experiences of over policing and/or association of police with the legal system that resulted in Indigenous Australia's dispossession of land, loss of cultural, removal of children from their families and Indigenous deaths in custody.¹¹

⁶ A. Howard, S. Rigor, R. Campbell, S. Wasco, 'Counselling services for battered women: a comparison of outcomes for physical and sexual assault survivors', *Journal of Interpersonal Violence*, July 2003, Vol 18(7) at 719-720, 729-730; Natalie Taylor & Judy Putt, 'Adult sexual violence in Indigenous and culturally and linguistically diverse communities in Australia,' *Trends and Issues in crime and criminal justice*, Australian Institute of Criminology, September 2007 at 3 accessed on 13 September 2012 at:

<http://www.aic.gov.au/documents/1/D/F/{1DF7DB51-E301-4666-BEB2-78763EE00B71}tandi345.pdf>

⁷ Mahoney cited in Howard et al, 'Counselling services for battered women,' at 719, Note 6; D. Lievore, *No longer silent: A study of women's help-seeking decisions and service responses to sexual assault, A report prepared by the Australian Institute of Criminology for the Australian Government's Office for Women*, 2005 at 9, 36 accessed on 13 September 2012 at: <http://www.aic.gov.au/publications/previous%20series/other/61-80/no%20longer%20silent.aspx>

⁸ Maria Dimopoulos, 'Implementing Legal Empowerment Strategies to Prevent Domestic Violence in New and Emerging Communities,' *Issues Paper 20*, Australian Domestic and Family Violence Clearinghouse, November 2010 at 14, accessed on 13 September 2012 at: http://www.adfvc.unsw.edu.au/PDF%20files/IssuesPaper_20.pdf; Natalie Taylor & Judy Putt, 'Adult sexual violence in Indigenous and culturally and linguistically diverse communities in Australia,' Note 6 at 3; Jenny Mouzos & Toni Makkai 'Women's experiences of male violence: findings from the Australian component of the International Violence Against Women Survey (IVAWS)' *Research and Public Policy Series 56*, Australian Institute of Criminology, Canberra, 2004 at 31-32;

⁹ Koss & Harvey and Harned cited in Lievore, *No longer Silent*, Note 7 at 10-11, 30-32;

¹⁰ Howard et al, 'Counselling services for battered women,' Note 6 at 720.

¹¹ Mathew Willis 'Non-disclosure of violence in Australian Indigenous communities' *Trends & issues in crime and criminal justice no.405* Australian Institute of Criminology, January 2011 at 3 accessed on 13 September 2012 at: <http://www.aic.gov.au/publications/current%20series/tandi/401-420/tandi405.aspx>

- previous negative interactions with the police;
 - people in rural, regional or remote areas where the perpetrator of the crime is related to or friendly with police;
 - people with outstanding warrants;
22. Behaviour of a 'violent and criminal nature' also seems to imply that there must be physical violence involved. An exclusive focus on physical violence ignores the diverse and complex nature of domestic violence. Domestic violence is not limited to acts of physical violence, and includes emotional, psychological and financial abuse, harassment, intimidation, damage to property and isolating the victim from their family and friends.
23. Further, during WLS NSW's giving of evidence at the public hearing on 28 August 2012 it was unclear what relationship would be required between the timing of the 'violent and criminal' conduct and the perpetrator's response. Women who kill their violent partners are more likely to kill in a non-confrontational context such as when their partner is sleeping. As outlined in our earlier submission, this is in part due to the disparity in physical strength and stature¹² and due to their fears for their own safety. Additionally, the trigger for the killing may be in response to a verbal threat or a gesture which of itself, to the reasonable person, would seem innocuous but in the context of the dynamics of the relationship and domestic violence and based on previous experience is a signal/warning of future harm. It would seem unlikely that this would meet the 'violent and criminal behaviour' threshold to make out the partial defence of provocation.
24. Additional information about this proposal was provided in an Options Paper dated 14 September 2012 and described as Option 1. Option 1 in the paper states "the violent criminal behaviour be an element of the provocation, and need not occur immediately prior to the incident resulting in the death of the deceased." Option 1 also states "the model proposes that the act resulting in death may be triggered by some other conduct, including, for example, insults or verbal abuse, which could be considered in the context of prior criminal assaults upon the accused." WLS NSW submits that it is not clear what is meant by 'prior criminal assaults', that is, whether or not this requires a report to police, a conviction or is defined in some other way? WLS NSW submits that the restriction of provocative conduct to violent and criminal behaviour creates another level of unnecessary complexity and for the reasons outlined above we are not persuaded this is an appropriate solution.
25. We further refer to Appendix A which is a variation of Option 1 and includes 'acts which constitute domestic or family violence' as well as 'violent criminal acts'. Further information about this option is required, including how 'domestic or family violence' would be defined. We also refer to recommendations 5.1 – 5.5 and 6.1 in the NSW Law Reform Commission's and Australian Law Reform Commission's *Family Violence - A National Legal Response* which are relevant to this issue and should be implemented. Further examination of this proposal should take place in a comprehensive and holistic review of all homicide defences which should be undertaken by the NSW LRC.

Other options

26. WLS NSW welcomes the discussion of different options for the reform of the law of provocation. However, we are concerned by the limited time frame in which to consider these options, that the Options Paper is not currently published on the Committee's

¹² See Rebecca Bradfield, *The treatment of women who kill their violent intimate partners within the Australian criminal justice system*, PhD Thesis, University of Tasmania, 2002 (Bradfield, thesis) at 205.

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website thus limiting input and that reform to the law of provocation is being considered in isolation and not in the context of all homicide defences, including self-defence.

27. We also note there is no discussion of the option of provocation as a mitigating factor in sentencing. We refer to paragraphs 93 – 95 of our earlier submission dated 23 August 2012. As previously stated, WLS NSW has not formed a position on sentencing. However, we believe sentencing should be considered as part of a more comprehensive, holistic review of NSW homicide defences. This is why we have proposed a phased approach: to immediately address some elements of provocation through exclusions; ensure the admissibility of social framework evidence regarding family violence in the context of a defence to homicide; ensure ongoing education of police, law students, legal practitioners, the judiciary and the wider community about the general nature and dynamics of relationships affected by family violence, while a more comprehensive and holistic review of all homicide defences is undertaken by the NSW LRC.
28. We have concerns about Option 3 which would remove the ordinary person test. We believe that to be able to consider, for example, the gender and race of an accused would be used to excuse violence and perpetuate attitudes regarding gender relations and stereotypes.
29. We refer to Option 4 the 'gross provocation' model and to paragraphs 69-72 of our earlier submission dated 23 August 2012. We do not support the continued use of the phrase 'loss of control' in the law of provocation in the long-term as is included in the UK model. We do not believe this is necessary in situations of 'fear[ing] serious violence towards the defendant or another'.
30. We refer to the variation of Option 4 presented in Appendix C. We are concerned that this option would allow for occasions in which ending or changing a relationship or a non-violent sexual advance would amount to provocation. While we note this is limited to 'circumstances of a most extreme and exceptional character', this is undefined. We are also concerned that exceptions in these circumstances send a message of condoning violence against women and homosexuals which legitimises discrimination and vilification. For the reasons outlined in our earlier submission dated 23 August 2012 we call for the abolition of provocation in such circumstances. We also refer to our comments above that we are not persuaded by a proposal of a reversal of onus of proof.
31. In conclusion, due to the complexity of the issues which is confirmed by the conflicting views raised in submissions and hearings, we submit some reform of the law of provocation could and should occur in the short-term by way of exclusions in particular circumstances as outlined in our earlier submission. However, there is also a strong need for a comprehensive and holistic review of all homicide defences, including self-defence which we believe should be undertaken by the NSW LRC.

If you would like to discuss any aspect of this submission, please contact me on 02 8745 6900.

Yours sincerely,

Liz Snell
Law Reform and Policy Co-ordinator