NSW GOVERNMENT | Attorney General & Justice

Level 14, 10 Spring Street, Sydney NSW 2000
GPO Box 6, Sydney NSW 2001 | DX 1227 Sydney
Tel 02 8061 9222 | Fax 02 8061 9370
www.lawlink.nsw.gov.au

Reverend the Hon. Fred Nile, MLC
Chair
Legislative Council Select Committee on the Partial Defence of Provocation
Parliament House
Macquarie Street
Sydney NSW 2000

Our Ref: 12/003114

Dear Sir,

Thank you for your letter of 3 September 2012, enclosing a transcript of my evidence to the Select Committee on the Partial Defence of Provocation on Wednesday, 29 August 2012, and two supplementary questions on notice.

I have reviewed the transcript and have noted one inaccuracy. I attach the relevant page with the inaccuracy corrected.

While giving evidence I requested that four questions be taken on notice. My answers to those questions and the Committee's two supplementary questions follow.

Questions on notice

Question one (transcript page 12): Consideration of the difficulty in rebutting evidence of provocation where the principal witness is unavailable

In March 1993 the NSW Law Reform Commission (NSWLRC) was asked to review the partial defence of provocation. In 1997 the NSWLRC reported, noting that the requirement of a temporal loss of self-control remained the greatest difficulty for women attempting to rely upon this defence and that this could not be addressed unless the provision was "changed beyond recognition"[1].

The Commission recommended retaining the defence in an amended form, reformulated so as to apply both a subjective and objective, community standards, test, as "...the accused, taking into account all of his or her characteristics and circumstances, should be excused for having so far lost self-control as to have

[1] NSW Law Reform Commission, *Partial Defences to Murder: Provocation and Infanticide*, Report 83, October 1997, page 89.

formed the intent to kill or inflict grievous bodily harm...as to warrant the reduction from murder to manslaughter"[2]. This recommendation was not implemented.

In recommending against narrowing the defence so as to allow its use by victims of domestic violence only, the NSWLRC reasoned that the abolition of unsworn dock statements reduced the likelihood of tenuous claims of provocation and that existing evidentiary provisions should allow the admission of evidence of previous domestic violence which would assist the prosecution in negativing unwarranted claims of provocation.[3]

The Committee also considered that, should the legislative test recommended be introduced, the jury would have the final task of considering in each case whether the conduct of the accused met with contemporary standards of behaviour.[4]

The Commission did not specifically consider the application of non-violent homosexual advance defence (HAD) but applied the same considerations to those situations[5].

The Commission did not specifically address, in either case, situations where the accused chose not to give evidence or the difficulty faced negativing a claim of provocation beyond reasonable doubt in the absence of information and evidence from the victim.

Question two (transcript page 12): Consideration of the attitude of groups such as the Bar Association and Law Society to amendments such as, for example, limiting evidence relating to the character of complainants in sexual assault trials

A review of the NSW Law Reform Commission's report *Questioning of complainants by unrepresented accused in sexual assault trials*[6] indicates that:

- The Legal Aid Commission, Public Defenders and Law Society argued against a prohibition on the cross-examination of alleged victims of sexual assault by accused, arguing there should be greater judicial control of questioning instead[7].
- Public Defenders opposed prohibiting cross-examination by an accused arguing this would undermine the rights of the accused and the fairness of the trial process[8].

A review of the Criminal Justice Sexual Offences Taskforce report, *Responding to sexual assault: the way forward*[9], indicates that the Bar Association, Law Society and

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[2] Ibid, page 76.
[3] Ibid, page 70
[4] Ibid
[5] Ibid, page 71
[6] Report 101, 2003 (http://www.lawlink.nsw.gov.au/lrc.nsf/pages/ip22toc)
[7] Ibid, Chapter 3, 3.38
[8] Ibid, 3.39
[9] December 2005
(http://www.lpclrd.lawlink.nsw.gov.au/agdbasev7wr/lpclrd/documents/pdf/cjsot_report.pdf)

Public Defenders were of the view that section 293 of the *Criminal Procedure Act 1986* operated unfairly against accused persons.

Question three (transcript page 15): Responses to the imprisonment of Aboriginal women experiencing domestic violence and the incidence of violence and imprisonment in the Aboriginal community generally

Following from the strategic review of the Domestic Violence Intervention Court Model in 2011, the Attorney General's Division of the Department of Justice and Attorney General is working in partnership with NSW Police Force, Legal Aid NSW, the Department of Family and Community Services, the Office of the Chief Magistrate and the NSW Judicial Commission to develop a Domestic Violence Justice Strategy (DVJS) for NSW.

The DVJS is an operational framework that outlines the strategies and standards that justice agencies in NSW will adopt to improve the criminal justice system's response to domestic violence, to make victims safer, hold perpetrators accountable and prevent domestic violence from reoccurring.

The DVJS has a clear focus on the outcomes to be achieved for victims and offenders through the criminal justice system. These outcomes are that:

- Victims' safety is secured immediately and the risk of further violence is reduced
- Victims have confidence in the justice system and are empowered to participate
- Victims have the support they need
- The court process for domestic violence matters is efficient, fair and accessible
- Abusive behaviour is stopped and perpetrators are held to account
- Perpetrators change their behaviour and re-offending is reduced or eliminated.
- The strategy sets clear standards to which agencies are accountable, with an explicit commitment to ensuring that each standard will apply to all victims and offenders in NSW, including Aboriginal victims and defendants.

In implementing the DVJS, partner agencies will develop strategies to ensure outcomes for Aboriginal victims and defendants are improved, and are consistent with outcomes for their peers.

Aboriginal Community Justice Groups

Through its Aboriginal Services Division DAGJ has established a statewide network of 20 Aboriginal Community Justice Groups. The Groups meet monthly to examine specific law and justice issues affecting Aboriginal people in their local communities, including domestic and family violence. These groups have approximately 600 Aboriginal members in total.
In addition to the monthly localised meetings, DAGJ also facilitates:

- quarterly consultations with each Group

- biennial Aboriginal Justice Forums involving representatives from each Group.

Circle Sentencing

Circle Sentencing is an alternative sentencing court for adult Aboriginal offenders who plead guilty or are found guilty in the Local Court.

Circle Sentencing is currently available in 12 locations: Armidale, Blacktown, Bourke, Brewarrina, Dubbo, Kempsey, Lismore, Moree, Nambucca Valley, Mt Druitt, Nowra and Walgett. To date, there have been more than 700 defendants who have come before the Circle Sentencing Court in NSW. Circle Sentencing targets mid –ranged offenders who are likely to serve a relevant sentence being; any sentence of imprisonment, suspended sentence, periodic detention, CSO, or good behaviour bonds, and utilises the local Aboriginal Community of which the offender is a part to develop an intervention plan that will address the causes of their conduct. The program has significant support within the Aboriginal community and the judiciary.

Safe Aboriginal Youth Program

The SAY Program was previously known as the Community Patrols Program. There are nine patrols currently in operation in NSW, in both urban and rural locations: Armidale, Ballina, Bourke, Dareton, Dubbo, La Perouse, Nowra, Taree and Wilcannia. The program is a community-based service that operates a safe transport and outreach service for young people who are on the streets late at night. The program aims to reduce the risk of young people becoming victims of crime or persons of interest in relation to crime by transporting them to a safe home or a safe activity or referring them to a support service.

Aboriginal Client Service Specialists

There are 18 Aboriginal Client Service Specialists (ACSS) positions across the state. ACSS Officers focus on supporting clients in court to instil confidence within Aboriginal communities in accessing the legal system and delivering education and information in the community.

Question four (transcript page 17): Analysis of jury composition and any intended review of pending changes

The *Jury Amendment Act 2010*, once commenced, will effect various changes to juror eligibility. These changes have not yet commenced. There is no provision for a statutory review of these changes. No formal review of these changes is planned, however the Department of Attorney General and Justice maintains a watching brief on this area of the Attorney General's portfolio.

Supplementary questions on notice

Question one: The Committee has received evidence (see Submissions 16, 31, 37) that NSW should consider introducing provisions similar to those introduced in Victoria (section 9AH Crimes Act 1958 (Vic)) to allow 'social framework evidence' to be adduced in homicides occurring in the context of

domestic violence. The Committee has received evidence (see transcript of evidence, Ms Dina Yehia SC, Public Defender, 28 August 2012, p 75; transcript of evidence, Mr Stephen Odgers SC, NSW Bar Association, 29 August 2012, p 42) that the type of social framework evidence which section 9AH was designed to allow into evidence would under uniform evidence law which applies in NSW, be likely to be able to be adduced. Can you comment on whether current evidentiary provisions are adequate to enable such evidence to be adduced?

The *Victorian Crimes (Homicide) Act* 2005 implemented a number of the recommendations of the 2004 Victorian Law Reform Commission's *Defences to Homicide: Final Report* (2004). Section 9AH of the *Crimes Act 1958* (Vic) provides guidance only as to the type of evidence which may be relevant where a history of family violence is alleged.

In 2010 the *Evidence Act 2008* (Vic) commenced. It is essentially uniform with the *Evidence Act 1995* (Cth), the *Evidence Act 1995* (NSW) and the *Evidence Act 2004* (Norfolk Island). The *Evidence Act 2001* (Tas) is also largely uniform with these Acts. These Acts are known as the Uniform Evidence Acts (the UEA).

The Australian Law Reform Commission and NSWLRC recently considered the operation of section 9AH in UEA states and territories in their report *Family Violence – A National Legal Response*. The Commissions recommended[10] that state and territory legislation should provide express guidance as to the potential relevance of family violence in the application of homicide defences, in similar terms to Victoria's section 9AH. They further expressed the view that states and territories should consider similar guidance regarding the potential relevance of such evidence in relation to other offences.

In noting the concerns of some stakeholders that the provision may be used by perpetrators of family violence, the Commissions noted that the provision would not extend or otherwise alter the existing rules governing the admissibility of such evidence.[11]

Question two

The Committee has received a submission from the Australian Law Reform Commission (Sub 23) referring to the work it has undertaken in partnership with the NSW Law Reform Commission on family violence. A number of recommendations in the Commissions' final report are relevant to this inquiry, including Recommendations 14-1 to 14-5 relating to family violence and homicide. Are you able to tell us what the Government is doing to address these recommendations?

The Commissions made a total of 186 recommendations regarding both legal and policy areas relevant to family violence.

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[10] Recommendation 14-5

[11] Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence – A National Legal Response*, ALRC Report 114, NSWLRC Report 128, page 652

33 of those recommendations have now been identified by the Standing Council on Law and Justice (SCLJ) as requiring a national approach and NSW is currently working with all other states and territories and the Commonwealth on finalising an approach to those recommendations. These include the establishment of a national family violence bench book, a national audit of family violence training and best practice and a review of interagency exchange of information and data in family violence matters.

97 recommendations have been identified as requiring discrete state and territory responses, including those relating to homicide and the associated defences.

64 of those recommendations did not require a specific response from NSW, the majority because NSW had already addressed the concern raised through legislative or policy action.

Responses to a number of the remaining recommendations await the completion of the statutory review of the *Crimes (Domestic and Personal Violence) Act 2007*. Comprehensive submissions have been received from numerous stakeholders. A core consideration in that review is the definition of domestic and family violence and responses in order to provide better protection for victims and serve an educative function in the community. This will inevitably impact upon any response to the recommendations relating to homicide defences. Completion of the review is anticipated by the end of this year.

It is noted that the Parliamentary Inquiry into Domestic Violence has recently made numerous additional recommendations raising considerations which potentially impact upon the completion of that review.

Clarification (transcript, page 11)

I would also like to elaborate upon the advice to the Committee that all recommendations of the Homosexual Advance Defence Working Party (HADWP), apart from the abolition of the provocation defence, have been implemented.

The HADWP did not make a recommendation in relation to self-defence following detailed consideration of the protection provided by the then formulation set out in *Zecevic.*[12]

HADWP considered that test sufficient to guard against use of the Homosexual Advance Defence in that context.[13]

I note that in 2002 NSW introduced a legislative provision regarding self-defence which requires that the accused responded to behaviour which he or she honestly, even if unreasonably, believed constituted a threat to himself, herself or another person and that the manner in which he or she responded was proportionate to the threat as perceived (s.418, *Crimes Act 1900*). The partial defence of excessive self-defence was also reintroduced, so that where the accused's response was not

[12] *Zecevic v DPP* (1987) 162 CLR 645 at 661
[13] NSW Attorney Generals' Department, *Final Report of the 'Homosexual Advance Defence' Working Party* , September 1998, 4.1

proportionate to the threat as he or she perceived it he or she will be guilty of the lesser offence of manslaughter (s.421, *Crimes Act 1900*).[14]

I hope the above is of assistance.

Yours faithfully

Penny Musgrave
Director
Criminal Law Review

[14] *Crimes Amendment (Self-Defence) Act 2001* (NSW)