

21 September 2012

Select Committee on the Partial Defence of Provocation

Legislative Council

Parliament House

Macquarie Street

Sydney NSW 2000

Re: Select Committee on the Partial Defence of Provocation – questions on notice and supplementary questions

The NSW Domestic Violence Committee again thanks the Select Committee for the opportunity to provide evidence on the important issue of the partial defence of provocation.

We have no corrections to make to the uncorrected proof of evidence we gave to the committee on 28 August 2012.

We have enclosed our responses to the questions on notice arising from the evidence, and the supplementary questions. We have also addressed some additional matters arising from the transcript.

We take the opportunity to reiterate our recommendation that the law of homicide should be the subject of a detailed and comprehensive review by the NSW Law Reform Commission. The terms of reference for the present Legislative Council inquiry, the questions posed in evidence and on notice, and the conflicting opinions presented in submissions and evidence before the Committee emphasise the complexity of this area of law and hence the need for a holistic and comprehensive approach to reform in this area.

Please do not hesitate to contact me if you require further information or have any questions about my comments or suggestions.

Yours faithfully

Betty Green

Chair, NSW Domestic Violence Committee Coalition

Questions on notice arising from oral evidence 28 August 2012

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The Hon Trevor Khan asked a question regarding the differences between the recommendations made by the VLRC and the subsequent legislation passed by the Victorian Government.

The VLRC recommended that the partial defence of excessive self-defence be reintroduced in Victoria. The Government did not adopt this recommendation, instead introducing a new partial defence of defensive homicide. The reasons for this approach are discussed briefly in Department of Justice (Victoria), *Defensive Homicide: Review of the Offence of Defensive Homicide: Discussion Paper* (August 2010), [73]-[76].

The NSW Domestic Violence Coalition has no further comment to make in this regard.

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The Hon Trevor Khan asked whether the Domestic Violence Coalition for its view of the recommendations made by Mr Graeme Coss in his submission regarding amendments to self-defence and social framework evidence.

We agree with Mr Coss's argument about the need to strengthen self-defence and that the inclusion of social framework evidence will assist in this regard. Indeed this is a key component of our own submission and we refer the Committee back to our detailed discussion on self-defence and social framework evidence.

In regard to Mr Coss's redrafting of the social framework evidence provision. We agree with his draft approach (which basically takes account of the terminology used in NSW) although note that he has specifically drafted it as only being relevant to self-defence – depending upon what the Committee recommends, social framework evidence would be relevant beyond this defence and would necessarily include any partial defences.

We agree with Mr Coss that any legislative change in this area should be subject to monitoring and review – as we recommended in our submission.

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The Hon Adam Searle asked whether it would be useful to have the issue of reasonableness included as a feature of the partial defence of provocation (as it is in self-defence).

It is difficult to respond to this without further details about how such a provision might be drafted. It is however worth noting two points on this issue:

1. Provocation already incorporates subjective and objective elements. In this context it is unclear how the insertion of a reasonableness requirement would operate or move beyond the current objective element, particularly given questions about how reasonableness can possibly sit side-by-side with the notion of 'loss of control'.

2. There has been considerable criticism of the way in which, historically, it has been difficult to have some women's actions in killing violent men deemed as 'reasonable'. This has often been because of the circumstances, way and method in which some women kill given the often significant size and strength differences – that is, questions of immediacy/ delay between the threat and the act causing the killing, the proportionality of the act to the threat, and whether there were other ways to deal with the threat (here the dominant theme of 'why didn't she leave?').¹ While many of these factors have been addressed in legislation and case law, there are still concerns that when seen together they effectively mean that it can be difficult to evaluate some women's acts as 'reasonable'.

In this regard, we note and support, the VLRC conclusion and recommendation that the inclusion of social framework evidence will assist in providing much needed context to what evidence is relevant in any assessment of reasonableness.

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Mr David Shoebridge sought to ask a question about the reasons why women are subject to murder rather than manslaughter charge. 'Is part of your recommendation looking at encouraging the prosecution to charge for manslaughter and allow self-defence to be run?

This is an area that has been identified by researchers where professional education for police, legal practitioners and the judiciary may be required as per the recommendations of the VLRC *Defences to Homicide Final Report*. Education has also been identified in research to counter the existing reluctance by defence counsel to argue self defence.²

We reaffirm the view that there needs to be a review of the practices of both defence and prosecution lawyers which incorporates research into the apparent practice of reluctance to run self defence particularly in cases where the woman defendant has endured long term and/or severe domestic violence. We also believe the inclusion of the Social Framework as recommended would provide the court with the full context of the domestic violence and its impact. Our knowledge and analysis of domestic violence are informed by the broad body of evidence from international research. This analysis is critical in understanding the nuances and distinct dynamics of violence and abuse in intimate relationships. In the absence of this understanding, serious misinterpretations and representations can occur as a result of the predominant narratives of male privilege.

Supplementary questions on notice

1(a) In your experience, what currently happens in NSW in terms of this evidence being made available to the court?

¹ VLRC, *Defences to Homicide: Final Report* (VLRC, 2004), [3.12]. See also [3.30]. See also G Coss, Submission to the NSW Inquiry into the Partial Defence of Provocation, Submission No 12, 10-11.

² Stubbs, J & Tolmie J (1994) *Battered Women Syndrome in Australia: A Challenge to Gender Bias in the Law?*. (ed) *Women, Male Violence*, The Institute of Criminology Sydney

We submit that this question is best put to prosecutors and defence lawyers who handle such cases on a daily basis and are therefore better placed to provide a more comprehensive answer about the current legal practice in this area.

1(b) Can your organisation comment on how this has operated to date in Victoria?

We have been advised by colleagues in Victoria's experience is still fairly limited and that more research is required in their context to determine the use of the social framework particularly in those cases where women have killed an abusive partner.

1(c) The Committee has received evidence 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. Do you have any comment in relation to that suggestion?

It is indeed possible that this evidence can already be adduced under the *Evidence Act 1995* (NSW) given the broad approach to relevance. Given this is the case, a good question to ask is whether such evidence is currently being adduced in NSW? And whether it has been adduced in the broad and nuanced manner provided under *Crimes Act 1958* (Vic) s 9AH? That is to say, does the Victorian provision provide additional assistance by actually enumerating the evidence that is relevant in cases involving intimate partner homicide – where this question of 'relevance' is left to the various legal professionals, and in turn their level of understanding of the nature and consequences of intimate partner violence, under the general provision of relevance in NSW.

It is worth noting that although the VLRC was writing before Victoria adopted the Uniform Evidence Act, it was also the case that some of the evidence enabled under the social framework evidence recommendation could already be adduced under the evidence legislation then in operation in that jurisdiction.³ In this context the VLRC took the approach that the specification, and clarification provided by a section such as 9AH removed any issue about whether such evidence would be seen as relevant. In this way it provides a useful and important educative tool to lawyers, judicial officers and jury members that all of this evidence is relevant in cases of intimate partner homicide.

2. In your submission, you recommend (rec 9) that research be undertaken to review the practices of defence and prosecution lawyers to examine issues related to the apparent reluctance of defence lawyers to run self-defence as a complete defence in cases of retaliatory domestic homicide; and the perceived tendency of prosecution lawyers to pursue murder charges rather than manslaughter in cases where evidence of mitigating circumstances is not in dispute. Can you tell us about your experience in relation to the issues this recommendation is designed to address?

We refer the Committee back to our submission in which we provided details about the research that led us to make this recommendation to the Committee. In particular the

³ See for example discussion in VLRC, above n1 at [4.29].

forthcoming article by Elizabeth Sheehy, Julie Stubbs and Julia Tolmie, 'Defences to Homicide for Battered Women: A Comparative Analysis of Laws in Australia, Canada and New Zealand' (2012 forthcoming) *Sydney Law Review*. See also Rebecca Bradfield, *The Treatment of Women who Kill their Violent Partners Within the Australian Criminal Justice System* (PhD thesis, University of Tasmania, 2002).

Additional matters arising from the transcript

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Mr David Shoebridge asked whether it would be useful to restrict the availability of the partial defence of provocation to cases in which the provocative conduct was unlawful or criminal conduct.

The DVCC would need to see how such a provision as that raised by Mr Shoebridge could be drafted. As we mentioned in evidence we have concerns that this proposed amendment sounds more like self-defence than a partial defence resulting in a manslaughter conviction. Furthermore we have concerns that the wide range of acts and behaviours that some women experience as part of intimate partner violence may well not fall within the category of 'unlawful or criminal conduct'. As a result it may be possible that some women who killed in the context of their own victimisation may fall through the gap of self-defence and a provision drafted in the manner suggested.