provocationinquiry - RE: Provocation Inquiry - Amended Options Paper

From: "McKenzie, John"
To: provocationinquiry <provocationinquiry@parliament.nsw.gov.au>
Date: 19/10/2012 1:53 PM
Subject: RE: Provocation Inquiry - Amended Options Paper

Dear Ms Race,

My perusal of the transcript of my evidence before the Inquiry does not show any questions on notice highlighted within that transcript, so I will respond only to the supplementary questions:

1] We do not have particular concerns about the operation of the partial defence of provocation in relation to Aboriginal people as it currently stands. We do have concerns about the operation of self-defence in accordance with my comments in my transcript of evidence that detail the obstacles faced by an Aboriginal accused in giving evidence on their own behalf, a course of action that is usually required to establish self-defence. These concerns apply to the overall working of the criminal justice system.

2] As stated in our response to the options paper yesterday, we believe that an adoption of the "Wood" model would be best, as it would clarify the law, whilst not imposing a rigid set of behavioural guidelines which will always cause problems down the track, as individual cases raise scenarios that cannot be contemplated in advance.

3] For the same reasons we state in 1] above, we do not believe that the defence of self-defence operates sufficiently for Aboriginal victims of abuse and sexual assault.

4] We share the concerns of Warringa Baiya regarding the desperate situation of many Aboriginal women and would support any proposal that will deliver better justice for them. As stated in my oral evidence, we are concerned at the likely racially based backlash to a provision that sets special criteria and considerations for Aboriginal women only. We foresee, amongst other issues, that there would be argument in some cases as to whether an accused is "really Aboriginal" or is only seeking to take refuge in the additional protection afforded Aboriginal women.

4a] That such social framework evidence is able to be adduced under the rules of evidence may well be the case. In relevant cases we present and rely on such evidence in order to support our argument that Provocation (as it is currently configured) is applicable. Whether it is accepted by usually all non-Aboriginal juries is another question entirely.

5] The New England case was resolved before the jury were sent to consider their verdict as the Crown Prosecutor decided to accept our offer of pleading to guilty to manslaughter (which we had made before the trial started), on the basis of provocation, part way through the trial. This raises an important point, that any statistics on the use of the Provocation partial defence by women should include all those cases in which a woman was initially charged with murder and subsequently a plea of guilty to manslaughter was accepted by the Crown. To base decisions only on those cases that proceed to jury verdict is dangerous.

I trust these responses will be of assistance.

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