INQUIRY INTO PARTIAL DEFENCE OF PROVOCATION

Organisation: Hawkesbury Nepean Community Legal Centre
Name: Ms Kellie McDonald
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Select Committee on the Partial Defence of Provocation
Parliament House
Macquarie Street
Sydney NSW 2000

Dear Committee,

RE: Inquiry into the partial defence of provocation – options paper

The Hawkesbury Nepean Community Legal Centre (HNCLC) welcomes this opportunity to provide a further submission on the inquiry into the partial defence of provocation.

Hawkesbury Nepean Community Legal Centre

HNCLC, located in Windsor NSW, is a non-government community-based legal service providing free legal information, advice and casework to people living in the Hawkesbury, Riverstone, Nepean and Hills areas and is one of thirty community legal centres (CLCs) in NSW.

CLCs are actively involved in human rights by:

- having a human rights focus;
- working within human rights frameworks;
- advocating for human rights on behalf of our clients and communities of interest;
- informing, advising and representing individuals and groups where human rights are at issue;
- educating individuals, groups and communities of interest about human rights and related legal and societal processes; and
- undertaking law reform activities to improve human rights protections and processes.

Our Services

HNCLC has 3 services - a legal service, a women’s domestic violence court advocacy service and an Aboriginal legal access program.

1. Legal Service

The Legal Service provides free legal services to people living in the Hawkesbury, Hills and Nepean areas. We provide legal advice and representation on a broad range of legal issues and in particular, target our casework services to those clients who are the most economically and socially disadvantaged in our community.

Our client base consists of Aboriginal and Torres Strait Islander people, people from culturally and linguistically diverse backgrounds, women, prisoners, young people and
other people who, because of mental illness, disability or social or economical disadvantage, find it difficult to access legal services.

In addition to advice and casework, the Legal Service also provides community legal education and advocates for reform to laws and practices which negatively impact upon our clients.

2. North West Sydney Women’s Domestic Violence Court Advocacy Service

HNCLC has been the auspice of a Women’s Domestic Violence Court Advocacy Service (WDVCAS) since 1995. The service provides a holistic support, referral and legal advocacy service for women experiencing domestic violence and who are applying for Apprehended Domestic Violence Orders at Windsor Court and Blacktown Court.

3. Aboriginal Legal Access Program

HNCLC has provided an Aboriginal Legal Access Program (ALAP) for more than ten years. The program is involved in a variety of groups and committees advocating for increased access and participation to legal and community services for Aboriginal families and individuals in the Hawkesbury. The ALAP also provides outreach services at locations South Windsor and Riverstone.

While providing legal services to individuals, the descriptions above also illustrate that we work beyond the individual. Our centre undertakes community development, community legal education and law reform projects that are based on client need, are preventative in outcome, and that develop the skills of individual clients and strengthen our communities.

We make the following submissions from an international human rights perspective, which recognises the rights of women and same-sex attracted people to live free from violence and discrimination.

Yours sincerely,
Hawkesbury Nepean Community Legal Centre

Kellie McDonald
Solicitor
FURTHER SUBMISSION ON THE PARTIAL DEFENCE OF PROVOCATION: OPTIONS PAPER

Executive summary

We make this further submission in addition to our Submission on the partial defence of provocation (Submission No. 44).

We submit that the current partial defence of provocation serves to perpetuate and entrench violence against women and gay men.

We submit that the current partial defence of provocation should be amended to reflect the 'exclusionary conduct' model (Option 2) proposed in the Select Committee on the Partial Defence of Provocation: Consultation on reform options paper.

Recommendations

- **Recommendation 1**: We submit that the NSW Government should amend the partial defence of provocation to prevent an accused from raising the defence in relation to an allegation of infidelity, or the end or threat to end a domestic relationship, or a non-violent sexual advance.

- **Recommendation 2**: We submit that the NSW Government should commission the NSW Law Reform Commission to do a comprehensive review of all homicide defences.

- **Recommendation 3**: We submit that victims of domestic violence who are being prosecuted for killing their violent partners should be able to introduce and rely on expert evidence, which goes to explaining the nature and dynamics of domestic violence.

- **Recommendation 4**: We submit that programs should be developed to educate the police, prosecutors and members of the judiciary about the dynamics and nature of domestic violence.

The current partial defence of provocation

We oppose the retention of the partial defence of provocation in its current form.

We submit that the partial defence of provocation has been operating to allow some men who murder in situations of jealousy, a need for control and homophobia to be convicted of the lesser offence of manslaughter, thus perpetuating and entrenching violence against women and gay men.

**Recommendation 1: Amend to reflect the 'exclusionary conduct' model**

We submit that until such time as the partial defence of provocation is subject to a comprehensive review, the defence should be amended to reduce the scope of the defence being available to those who kill in response to:

- an allegation of infidelity; or
- the end or threat to end a domestic relationship; or
- a non-violent sexual advance.
We submit that reducing the scope of the defence will limit men being able to rely on the
defence when they kill out of jealousy, control and homophobia.

We support a model that excludes conduct, rather than proscribing conduct, as is
proposed in the 'positive restrictive' model, because we submit that the 'positive
restrictive' model is too restrictive. We submit that there may be acts other than violent
criminal acts and domestic or family violence committed by the deceased, which may
have provoked the accused to kill the deceased and may warrant finding the accused less
culpable.

We oppose the removal of the 'ordinary person' test that is proposed in the 'Wood' model.
While we acknowledge that the ordinary person test can be problematic, we submit the
partial defence of provocation needs a subjective and objective test in order to assess of
the reasonableness of the accused actions.

We also oppose the proposal made in the 'Wood' model to reverse the onus of proof,
requiring the accused to establish provocation on the balance of probabilities. We
acknowledge that it is often difficult for the prosecution to disprove the proposition that the
deceased provoked the accused. However, we submit that to reverse the onus of proof to
the accused would undermine one of the core principles of the criminal justice system,
which requires the prosecution bear the burden of proving its case beyond reasonable
doubt.

We also oppose any model, such as the 'Wood' model, which allows the defence to
continue to be used in response non-violent sexual advances, which we believe would
continue to perpetuate and entrench against gay men.

We do not support the 'Gross provocation' model. We submit that this model reflects the
very early models of provocation law, which were developed to find men less culpable for
killing in circumstances where they were protecting their honour or challenges made to
their masculinity.

We submit that a model of provocation which allows an accused to assert the partial
defence of provocation when they have killed as a result of 'being seriously wronged', may
allow men to use the partial defence where they have killed in response to a perception
that their masculinity was challenged or under attack by the deceased.

We submit that to enable the partial defence of provocation to be used in this way
subverts the policy intention of the partial defence.

Further recommendations

Recommendation 2: Comprehensive review of all homicidal defences

We submit that the NSW Government should commission the NSW Law Reform
Commission to do a comprehensive review of all full and partial defences to homicide.

We submit that comprehensive review should be carried out in a similar manner and
contain similar terms of reference to the review of homicide defences that was carried out
by the VLRC between 2001 and 2004.
Recommendation 3: Use of social framework evidence

We submit that victims of domestic violence who are be prosecuted for killing their violent partners should be able to introduce and rely on expert social framework evidence which explains the nature and dynamics of domestic violence.

We submit that this evidence would assist juries understand why victims of domestic violence kill and the circumstances in which they kill their violent partners.

Recommendation 4: Education of prosecutors and members of the judiciary

We submit that programs should be developed to educate police, prosecutors and members of the judiciary about the dynamics and nature of domestic violence.

We submit that such programs would assist police, prosecutors and members of the judiciary understand why victims of domestic violence kill, and the circumstances in which they kill, their violent partners.