

INQUIRY INTO PARTIAL DEFENCE OF PROVOCATION

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Inquiry into the Partial Defence of Provocation

Submission by NSW Domestic Violence Committee Coalition

Executive Summary

We sincerely thank the Select Committee for the opportunity to provide a submission to the Inquiry into the Partial Defence of Provocation. For the purposes of this submission, the DVCC has chosen to focus exclusively on the issues arising from criminal proceedings as a result of killings which occur on a background of domestic violence. We believe this context is largely misunderstood when applying the partial defence of provocation in those killings which are intimate partner homicides.

Our submission is divided into 3 Sections with ***Section 1*** addressing “Killings on a Background of Domestic Violence: A Different Kind of Homicide. ***Section 2*** addresses the Partial Defence of Provocation and ***Section 3*** addresses Self-Defence.

The use and acceptance of the partial defence of provocation is complex and we have approached the subject with some circumspection, primarily due to our concerns that proposed changes would not create unintended consequences to further disadvantage women - as victims of killings or as defendants. The law in general is patriarchal in its assumptions and framework; historically the law has been prescribed by men, based on men’s experiences and men’s interpretation of the world and in men’s interests - it is by its nature inherently biased against women.

New South Wales has a unique opportunity to put in place progressive reform to the law of homicide that better takes account of the circumstances in which women who have experienced prolonged intimate partner violence kill their male partner and to effectively counter the narratives that men have successfully raised when they kill

women when they are merely asserting their equality rights to separate from their partner and/or commence a new sexual relationship.

This is a difficult challenge already attempted in a number of other jurisdictions including Tasmania, Victoria, Western Australia and the United Kingdom. We are in a position where we can learn from these attempts. There is now an extensive body of research associated with the many reviews of the partial defence of provocation.

The position that the NSW Domestic Violence Committee Coalition affirms that a comprehensive review of the defences and partial defences to homicide should be holistic (see Recommendation 2).

We recommend that, due to the scope of the questions to be answered, the Committee should refer this issue to the NSW Law Reform Commission for a comprehensive, holistic review of the law and legal processes and practice. This review would benefit from research undertaken in the course of similar law reform processes in other jurisdictions and from the discourse around it.

Recommendations

Recommendation 1: The “*social framework*” s9AH(3) (a)-(f) *Crimes Act 1958* (Vic) be inserted into New South Wales legislation to ensure the complexity of the history and dynamics of domestic violence experienced by a defendant be included in evidence where the killing of an intimate partner on a background of domestic violence has been indicated.

Recommendation 2: That the NSW Legislative Council Social Justice Committee call on the Attorney General to provide the NSWLRC with a reference to conduct a comprehensive review of the law and legal practice relating to homicide in NSW.

The comprehensive review of the defences and partial defences to homicide should be holistic, that is, in addition to examining the law, it should also examine the role of investigating police and content of briefs of evidence, legal processes and practices of prosecution and defence lawyers, policy and practice in relation to plea bargaining

(including the practice of amending the facts to fit a guilty plea to a lesser charge), the role of the judge in his/her directions to a jury, the potential for admissibility of social framework evidence, sentencing practices and guidelines, judicial education and legal practitioners' education and the availability of services to victims of domestic violence who ultimately kill for self-preservation.

Recommendation 3: That any review of the law relating to homicide and its practice should reflect a substantive approach to equality with a focus on the social reality of homicide. In this way, it should aim to challenge out-dated understandings and narratives about men and women, and intimate partner violence.

Recommendation 4: That law schools introduce into their criminal law curriculum information about family violence, the social reality of homicide, including the different ways in which men and women kill and the way in which negative gender stereotypes have been relied upon in the legal system.

Recommendation 5 (the following recommendations are taken from the VLRC, *Defences to Homicide: Final Report*, rec 35 and 36 and adapted to the NSW context):¹ That bodies which offer continuing professional development and judicial education, including NSW Legal Aid, the NSW Law Society, the Office of the Director of Public Prosecutions, the NSW Bar and the Judicial Commission of NSW, should include sessions on family violence.

“Professional legal education sessions on family violence should aim to assist judges and lawyers practising in criminal law to understanding the nature of family violence and could include discussion of issues such as:

- common myths and misconceptions about family violence;
- the nature and dynamics of abusive relationships
- the social context in which family violence occurs; barriers to disclosure of abuse and seeking the assistance of police and other service agencies, including the additional barriers faced by persons who re Indigenous, from culturally and linguistically diverse background, who live in a rural or remote

¹ Ibid, 202.

area, who are in a same-sex relationship, who have a disability and/or have a child with a disability;

- the emotional, psychological and social impact of family violence;
- the relationship between family violence and other offences, including murder and manslaughter;
- how expert evidence about family violence may assist in supporting a plea of self defence or duress
- the use of expert reports on family violence in sentencing”

Recommendation 6: That any change to the law relating to homicide in NSW designed to address the gendered nature of the partial defence of provocation, any proposed new partial defences, and any other measures designed to assist the law to better respond to women who kill in the context of intimate partner violence be reviewed five years from its commencement.

Recommendation 7: That, while the DVCC ultimately recommends that there be a comprehensive review of the law of homicide conducted by NSWLRC, we consider that there are a number of amendments that can be made to the partial defence of provocation to address the gendered narrative raised by men and to better suit the circumstances of women who may not satisfy self defence to excessive self defence; the partial defence of provocation should not be available:

- in circumstances where one of the parties to the relationship seeks to end or change the nature of the relationship
- in circumstances involving a non-violent sexual advance.

Recommendation 8: That, in cases where the defence of self-defence is not available and provocation is to be relied on, provocation should specifically be available in the context where the offender fears further violence against themselves or another person in the context of a history of intimate partner violence.

Recommendation 9: The DVCC recommends that in reviewing practices of both defence and prosecution lawyers, research should be conducted into:

- 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 an indictment of murder rather than manslaughter in cases where evidence of mitigating circumstances is not in dispute.

Recommendation 10: That, within a comprehensive review, consideration be given to the notion of reversing the onus of proof so that the defence has to demonstrate the elements of provocation, rather than the prosecutorial onus to prove that they were not present.

LEGISLATIVE COUNCIL COMMITTEE INQUIRY INTO THE PARTIAL DEFENCE OF PROVOCATION

Submission prepared by Betty Green and Dr Jane Wangmann, with a contribution on self-defence by Women's Legal Services NSW, on behalf of the NSW Domestic Violence Committee Coalition

This submission is concerned to contextualise the problems encountered in the legal process in cases of homicide committed on a background of domestic violence. In Section 1, the submission provides background information and argument for special consideration of such cases. This argument is based on extensive research.

Section 2 addresses the use of provocation as a partial defence to the charge of murder and whether it should be retained, abolished or amended; Section 3 provides further discussion around the use of self-defence as a full defence to a charge of murder for homicide committed on a background of domestic violence.

SECTION 1

Killings on a background of domestic violence: a different kind of homicide

Background

The NSW Domestic Violence Committee Coalition (DVCC) was founded in March 2006 in response to a high number of domestic violence deaths of women at the beginning of that year and the perceived lack of focus on the seriousness of domestic violence in NSW. The DVCC's work is aimed at generating appropriate service delivery, policy responses and prevention initiatives for women and children who have experienced domestic violence.

The DVCC's membership represents a wide range of groups and individuals, including Local Domestic Violence Committees, domestic violence services, sexual assault services, accommodation services, family support services, women's legal services and community legal centres, Women's Domestic Violence Court Advocacy Services, academics, other concerned individuals working in the field, as well as women who have themselves experienced intimate partner violence.

Definitions

The DVCC recognises that domestic violence is gendered in nature and supports the inclusive definition used in the Partnerships Against Domestic Violence Statement of Principles that was agreed by the Australian Heads of Government at the 1997 National Domestic Violence Summit states:

Domestic violence is an abuse of power perpetrated mainly (but not only) by men against women both in relationship and after separation. It occurs when one partner attempts physically or psychologically to dominate and control the other. Domestic violence takes a number of

*forms. The most commonly acknowledged forms are physical and sexual violence, threats and intimidation, emotional and social abuse and economic deprivation.*²

While this definition considers the wide range of behaviours and effects that women could experience, Almeida & Durkin (1999) further names the intentionality and deliberative nature of abusive and violent behaviours in intimate relationships:

“...the patterned and repeated use of coercive and controlling behaviour to limit, direct and shape a partners thoughts, feelings and actions. An array of power and control tactics is used along a continuum in concert with one another” (Almeida & Durkin 1999 p313).³

Domestic violence has been described as serious, prevalent and preventable. It is the leading cause of death, disability and illness in Victorian women aged 15-44 years.⁴

Consequences of domestic violence: why it matters

Over the past 30 years, researchers and academics have documented the physical and psychological impact and consequences of domestic violence on women's lives. When compared with non-abused women, women affected by domestic violence report a higher incidence of depression, are up to three times more likely to be diagnosed with depression than non-abused women and are more likely to use medication for depression and anxiety- tranquillizers, sleeping pills.⁵

Research studies of young women aged 18-23 found early pregnancy was strongly associated with experiences of violence, as was a greater risk of adverse pregnancy outcomes.⁶ Miscarriage, premature delivery and the incidence of still birth were also noted amongst young women who experienced violence from a current or ex-partner. Additional sexual and reproductive health consequences included increased risk of vaginal discharge associated with sexually transmitted diseases, genital herpes and Hepatitis C infections. Compared with women who are free from violence, women who experience partner violence recorded a significantly higher rate of abnormal Pap smears (Taft et al, 2003).

Brain injury is a significant consequence of domestic violence, due particularly to injuries most often reported by women who experience physical assault, such as blows to the head, being violently shaken or hypoxic brain injury resulting from being choked or attempted strangulation.⁷

² Laing, L. (2000). Progress, trends and challenges in Australian responses to domestic violence. *Australian Domestic & Family Violence Clearinghouse, Issues Paper 1*, 1-15.

³ Almeida, R V & Durkin, T. (1999) *The Cultural context Model: Therapy for Couples with Domestic Violence*. *Journal of Marital and Family Therapy*, Vol 25 pp. 313-324

⁴ VicHealth. (2004). *The Health Costs of Violence: Measuring the burden of disease caused by intimate partner violence*.

⁵ Golding, J. M. (1999). "Intimate partner violence as a risk factor for mental disorders: a meta analysis". *Journal of Family Violence*, 14(no. 2), pp99-132.

⁶ Taft, A., Watson, L., & Lee, C. (2003). *Health and Experiences of Violence among Young Australian Women* Canberra, Australia: commissioned by the Office of the Status of Women.

⁷ Valera, E. M., & Berenbaum, H. (2003). Brain Injury in Battered Women. *Journal of Consulting and Clinical Psychology*, 71(No 4), 797-804.

The detrimental impacts on physical health also include an array of other injuries, such as bruises, cuts, black eyes, bone injuries (fractures, dislocations), splenic and liver trauma, partial loss of hearing or vision, burns and knife wounds, injuries to breast, chest and abdomen. Overall, research findings confirm that health impacts are often long-term and the negative consequences of domestic violence persist long after the abuse has stopped.^{8,9}

Intimate Partner Homicide: Dynamics & Defences

The focus of the DVCC submission to the Legislative Council Select Committee Inquiry on The Partial Defence of Provocation will focus on the issues arising from criminal proceedings as a result of killings which occur on a background of domestic violence. This paper will focus particularly on intimate partner homicides (IPH) by current or former partners.

When considering the relationship of domestic violence and intimate partner homicide, it is sobering to reflect on the following:

- Intimate partner homicide accounts for 1 in 5 homicides committed nationally.¹⁰
- In New South Wales 42% of homicides committed in the period January 2003-June 2008 were intimate partner homicides (n=90).¹¹
- Separation was the critical risk factor in 81% of the cases reviewed (n=72) by the Ontario Domestic Violence Death Review Committee.¹²
- Prior history of domestic violence remains the most important risk factor of intimate partner homicide.¹³

Research indicates that killings involving intimate partners have distinctly different dynamics from other homicides; that women are 9 times more likely to be killed by an intimate partner than by a stranger and that the key factor for intimate partner homicide, whether male or female, is prior domestic violence.¹⁴

The dynamics of domestic violence follow predictable patterns: the violent incident is not a one-off event. Research demonstrates that domestic violence is likely to escalate over time in frequency and severity. It may occur in response to certain triggers, for example, pregnancy or at and following separation.¹⁵

⁸ Fraser, K. (2003). Domestic Violence and Women's Physical Health. *Australian Domestic & Family Violence Clearinghouse, Topic Paper*, 1-15.

⁹ Taft, A. (2003). Promoting Women's Mental Health: The Challenges of Intimate/Domestic Violence Against Women. *Australian Domestic & Family Violence Clearinghouse*, 1-24.

¹⁰ Background Paper: Time for Action: The National Council's plan for Australia to Reduce Violence Against Women & Their Children 2009-2012 (2009) Commonwealth of Australia

¹¹ NSW Domestic Violence Homicide Review Advisory Panel Report (2009)

¹² Ontario Domestic Violence Death Review Committee Annual Report (2008)

¹³ Campbell J, Glass N, Sharps P, Laughon K & Bloom T (2007) *Intimate Partner Homicide: Review and Implications of Research and Policy*, Trauma, Violence & Abuse, Vol 8 No. 3 p246-269

¹⁴ Campbell J, Glass N, Sharps P, Laughon K & Bloom T (2007) *Intimate Partner Homicide: Review and Implications of Research and Policy*, Trauma, Violence & Abuse, Vol 8 No. 3 p246-269

¹⁵ Laing, L 2003, *Domestic violence and family law*, Topic paper, Australian Domestic & Family

It is precisely because of the identifiable patterns and dynamics of domestic violence that has led reputable researchers in the field of domestic violence-related homicide to conclude that domestic violence homicides are the most 'predictable and preventable' of homicides.^{16 17}

Attention and consideration must also be given to the research dealing with the reality of intimate partner homicide, that is, it is predominantly men who kill women; the reasons men kill include revenge, jealousy and honour; and their killing is the culmination of an established history of violence escalating in frequency and severity.¹⁸ These facts challenge the popular myths and misunderstandings media and community may hold on making sense of intimate partner killings. Expressions such as "mind snap", "loss of control" and the killing was "out of the blue" or "without warning" do not correlate with the reality of intimate partner homicides.

Research dealing with intimate partner homicides draws on extensive literature reviews that frequently report a number of contextual risk factors¹⁹ that need to be considered

- A history of violence by the perpetrator against the victim, jealousy, separation and women's attempts to leave the relationship, infidelity, substance abuse, threats and the use of weapons, especially knives and guns.
- Women's attempts to end the relationship are strongly related to intimate partner homicide (Barnard, Vera, & Newman, 1982; Campbell, 1986, 1992; Campbell et al., in press; Daly & Wilson, 1988; Dawson & Gartner, 1992, 1998; Goetting, 1991; Johnson & Hotton, 2003; Wilson et al., 1995). In several countries, from one third to one half of all women killed by partners had left or were trying to leave at the time of the murder. Early stages of estrangement, particularly the first three months, are exceptionally risky (Dawson & Gartner, 1998; Wallace, 1986; Wilson & Daly, 1993).
- Jealousy, sexual refusals and perceived or actual infidelity on the part of women are also implicated (Chimbos, 1978; Daly & Wilson, 1988; Polk, 1994).
- Another correlate of lethal violence is a history of repeat violence and serious injuries by the perpetrator against the victim and persistent alcohol and/or drug abuse of the perpetrator (Campbell et al., in press; Mercy & Saltzman, 1989; Smith, Moracco, & Butts, 1998).

Violence Clearinghouse, Sydney

¹⁶ Jaffe, P (2009) 1st Annual Canadian Conference on the Prevention of Domestic Homicide, London Ontario CA

¹⁷ Websdale, N., Town, M and Byron J (1999) *Domestic Violence Fatality Reviews: from a culture of blame to a Culture of Safety*, Juvenile and Family Court Journal, Spring 1999

¹⁸ Coss, G (2006) *Provocative reforms: A comparative critique*. Criminal Law Journal, Vol 30, No 3, pp138-150

¹⁹ Dobash E R & Dobash RP, Cavanagh, K, Lewis R (2004) *Not an Ordinary Killer Just an Ordinary Guy: When Men Murder an Intimate Woman Partner*. Violence Against women, Vol. 10 No. 6, pp 577-605

- Specific “circumstantial” risk factors include threats with a weapon, threats to kill, and the presence of a gun in the household (Campbell et al (in press); Kellerman, Rivara, & Rushforth, 1993).
- Overkill (a savage lethal attack) and the use of multiple methods have also been identified as more likely in intimate partner homicide than other types of homicide (Campbell, 1992; Crawford & Gartner, 1992; Wolfgang, 1958) (cited in Dobash E R & Dobash RP, Cavanaugh K, Lewis R 2004).

Dobash & Dobash (2004) conducted a three-year extensive research project interviewing men incarcerated for the murder of an intimate partner (n= 106) and found that the killing did not occur as a one-off event, a “brain snap”, “out of the blue” or “out of character” but rather the act is characteristic of a man who engages in continuing to use violence against the female partner he has previously abused.²⁰

Research has consistently found that there are distinct differences between the use of violence by men and women in the context of intimate relationships - men’s violence includes sexual violence, is usually threatening and intimidating and frequently dangerous, is more likely to create fear and anxiety, is linked to acts of coercion and is primarily used to dominate and control. Conversely women’s use of violence is less likely to produce the same dynamics, such as fear and intimidation, but is more likely to be used in response to men’s violence – in self-defence and/or retaliation.²¹

In instances where women kill an intimate partner, it is predominantly a form of self-preservation or protection of children and in response to violence/abuse that has been perpetrated against them.²²

In terms of how the use of violence in intimate relationships is described by the perpetrator, researchers frequently found that men habitually minimise, dismiss or deny the violence used and its effect on female partners.²³ Dobash & Dobash (1998) found in conducting in-depth interviews with men who used violence that men’s accounts of the nature and context of the violence within a violent event, including events where injuries were inflicted, were “sparse and abbreviated” and often started at a point describing “her behaviour”, for example, “she wouldn’t shut up” - in essence, blaming the victim.

More importantly minimising language was used to excuse and or justify the use of violence towards the female partner - “I only ...” and “It was just...”.²⁴ Equally concerning is that men in this study also were less likely to provide details of the sequence of events that preceded the violent event. It should therefore not be surprising that this trait, behaviour and associated language are also frequently found in defences of men who kill an intimate female partner.

²⁰ See 14

²¹ Dobash E, Dobash R, Cavanagh K, Lewis R (1998) *Separate and Intersecting Realities: A comparison of Men’s and Women’s Accounts of Violence Against Women*. Violence Against Women , Vol 4 No 4 pp382-414 Sage

²² Coss, G (2006) *Provocative reforms: A comparative critique*. Criminal Law Journal, Vol 30, No 3, pp138-150

²³ See 20

²⁴ See 20

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.

In the context of intimate partner homicide, the key finding from the literature is clear concerning distinct features of the killings:

- I. When men kill, it is out of feelings of jealousy, ownership and exclusivity, threat of or actual separation, suspicion and/or confession of infidelity, a failure to maintain control are identified as key determinants of violence and killings by men.²⁵
- II. When women kill it is frequently in response to the violence/abuse they have experienced is often in self-defence or retaliation.

The position of the NSW Domestic Violence Committee Coalition regarding the killing of women on a background of domestic violence has always been clear:

*"Women do not die by accident, they don't die because of a mistake, they die because of a culmination of a repeated pattern of violent behaviour," she said. "There is no passion; there is no love in a domestic violence fatality. It is really, really important that we name it for what it is - in most cases it is premeditated, it is anger, it is revenge and it is the ultimate act of control."*²⁶

Prior violence is a pivotal detail in the killing of intimate partners. The statistics and literature clearly indicate:

The killing by men of their women partners occurs without prior violence on the part of the victim. When women kill their male partners, on the other hand, in a large proportion of the cases it is precisely the prior violence of the male that sets the stage for the lethal violence that follows. (Polk 1994 as cited in Coss 2066-7 p57)

Coss (2006-7) goes on to highlight that, contrary to the belief that men who kill are “*acting out of uncontrollable passion*”, a number of researchers argue that careful thinking and planning are key features in a vast majority of killings. In particular stalking, killing post-separation, murder-suicides, family annihilations, lethal retaliation to infidelity, killing after years of sustained physical and verbal assault are hallmarks of killings by males. The circumstances of women who kill is thus described:

“Unlike men, women kill male partners after years of suffering physical violence, after they have exhausted all available sources of

²⁵ Coss G (2006/7) *The Defence of Provocation: An Acrimonious Divorce from Reality*. HeinOnline- 18 Current Issues Criminal Justice 51 2006-2007

²⁶ Green, B (2008) “Shameful Secret of our family murder epidemic” by Ruth Pollard SMH Nov. 24 2008

assistance, when they feel trapped, and because they fear for their own lives.”²⁷

The defence of provocation is extremely problematic in its application to killings on a background of domestic violence precisely because it relies on entrenched societal attitudes, values and beliefs concerning gender, male privilege and propriety over female partners.

Invariably, when the defence of provocation is argued by men who have killed their partners, allegations of having been “insulted, mocked, humiliated or spurned” are made. Some authors refer to this constellation of allegations as an “affront to male honour”.²⁸ This is not far removed from the origin of “provocation” itself which emanates from a bygone time when men carried lethal weapons and acted in accordance with a code of honour which required insult to be responded to by instant retaliation as an act of restoration.

It is useful in this debate concerning the defence of provocation to consider the historical role of the law as it pertains to women and in particular violence against women. Wife-beating is not new and the law has played a significant role in condoning domestic violence.²⁹ Eighteenth century English law allowed husbands to beat their wives: punches and kicks to the back were permitted as long as no marks were left. Historically the law has been prescribed by men, based on men’s experiences and men’s interpretation of the world and in men’s interests. The law is therefore patriarchal in its assumptions and framework.³⁰ The law by its nature is inherently biased against women.

Bias can be seen to operate in a number of different ways in the criminal justice process in New South Wales:

- law-making is the domain of the Parliament, dominated by male members in both Houses
- participation in the legal profession, and particularly at the Criminal Bar, is dominated by men
- defence barristers and Crown Prosecutors are commonly men
- the majority of judges presiding over murder trials and sentencing are men
- while accused persons are tried by a jury of their peers, the composition of juries is left to chance
- juries, asked to consider their decisions based on how they believe the ‘ordinary person’ would behave, seem to consider lethal violence by a woman as outside of the gender role; somehow male violence is more acceptable as gender-appropriate.

²⁷ Wilson, M I & Daly, M (1992) *Who Kills Whom in Spouse Killings? On the Exceptional Sex Ratio of Spousal Homicides in the United States*. *Criminology*, Vol 3, No 2, pp 189-215

²⁸ See 24

²⁹ Barata, P & Senn Y C (2003) *When Two Fields Collide: An Examination of the Assumptions of Social Science Research and Law within the Domain of Domestic Violence*. *Trauma, Violence & Abuse*, Vol 4 No 1 pp 3-21

³⁰ See 27

The practice and context of the law as it responds to violence against women appear to be in direct opposition to the stated societal goals and Government commitment to eliminating violence against women. From a policy and social perspective, violence against women (domestic violence or sexual assault) is largely understood to be gendered in nature, a violation of human rights and not a private matter. Australia is a signatory to international instruments such as the Convention for the Elimination of Discrimination Against Women (CEDAW) and has recently signed the Optional Protocol. As professionals, we have spent the best part of over 30 years promoting an understanding and recognition of the social harm of domestic violence, as well as an understanding of the physical and mental health costs of domestic violence. The cost of domestic violence to the Australian economy has also been documented. Along with all this, we have worked towards establishing best practice policy and service delivery responses to women and children experiencing domestic violence where:

- the safety of women and children is paramount, and
- perpetrators of violence are to be held to account.

Successive Governments, at both State and Federal levels, have committed millions of dollars in direct service provision, criminal justice and policing responses and in funding community education campaigns to inform and raise awareness – and, importantly, to challenge attitudes that support domestic violence.

It is unfortunate and disappointing that at worst prejudice and at least ignorance or a lack of understanding of the realities of domestic violence and women's experiences of domestic violence seem to continue to inform deliberations and decisions of the criminal justice processes. This is particularly evident where the character and conduct of the deceased woman victim are spruiked as *exculpatory* factors for the male partner accused of her killing. The precipitating factors to the killing may in fact be merely the breakdown of the relationship, impending separation, perceived or actual infidelity. The prior history of violence by the accused is invisible; the dynamics of the abuse and escalation in frequency and/or severity is not generally introduced as evidence, nor is help-seeking by the victim, including engagement with services to assist her to live free of violence.

The DVCC is of the view that, where intimate partner homicide is involved, there needs to be a different, enlightened approach which reflects an understanding of the nature, dynamics and effects of domestic violence, whether the victim is the female partner of a male accused or the male partner of a female accused. We believe that women and children have a basic human right to live safely and free of violence and abuse. We would like to see this human right respected and enshrined in law, no longer mere political rhetoric. It seems the law in relation to provocation currently gives licence to violent men to kill their partners as their ultimate act of power and control over them, with impunity.

It is for this reason that the NSW Domestic Violence Committee Coalition strongly recommends that a similar reform as introduced into the Victorian law relating to the defence of self-defence:

See s9AH(3) (a)-(f) Crimes Act 1958 (Vic)

Evidence about the history of the relationship and violence within the relationship should include the:

- *Cumulative effect, including the psychological effects of the violence on the person;*
- *Social, cultural and economic factors that impact upon the person;*
- *General nature and dynamics of the relationship affected by domestic violence, which would include the possible consequences of separation;*
- *Psychological effect of violence on people in such relationships; and*
- *Social or economic factors that impact on people in such relationships*

This is known in Victoria as the *social framework*. It requires the court to consider the issues when a killing occurs on a background of domestic violence.

Recommendation 1: That the “social framework” s9AH(3) (a)-(f) Crimes Act 1958 (Vic) be inserted into New South Wales legislation to ensure the complexity of the history and dynamics of domestic violence experienced by a defendant be included in evidence where the killing of an intimate partner on a background of domestic violence has been indicated.

SECTION 2

The partial defence of provocation³¹

In this part of the submission the DVCC addresses the partial defence of provocation – whether it should be retained, abolished or amended.

In summary, while the DVCC tends to the view that provocation should not be available in the light of recent cases (such as *Singh*), the DVCC submits that a range of critical matters and concerns need to be addressed **before** the partial defence of provocation would be abolished. We need to ensure that any changes (whether in the form of abolition, amendment or new partial defences), do not merely replicate ‘provocation’ under a different name, where the same negative gendered stereotypes are merely transferred to a different partial defence, or a different stage in the legal process.³² We need to ensure that any changes made to partial defences do not serve to further disadvantage women who kill in the context of intimate partner violence, particularly those who are unable to satisfy the legal requirements of self-defence.³³

In this context the DVCC emphasises that the most important focus of this Inquiry should be on how to ensure that self-defence is more responsive to the situation and circumstances of women who kill their partner on a background of intimate partner violence, given that for many women this is the more appropriate (complete) defence. At the same time, the DVCC recognises that self-defence does not necessarily fit all the circumstances in which victims of intimate partner violence may kill their partner.³⁴ Therefore attention needs to be paid to the definition and operation of *all* partial defences in NSW – hence the DVCC’s caution at this stage about recommending abolition of provocation in the current legal practice environment.

In exploring the partial defence of provocation, the DVCC has three main concerns:

- (1) the use of this defence by men in the context of infidelity (perceived or actual) and/or separation;
- (2) the way in which criminal trials, where men seek to rely on this defence in the context of infidelity and/or separation, invariably become a trial about the victim – shifting blame on the victim’s behaviour (rather than on the person who

³¹ NSW DVCC acknowledges and thanks Jane Wangmann in the preparation of this section of the submission

³² As will be discussed later in this submission – this appears to be the situation in Victoria, where despite progressive reform which saw provocation abolished in November 2005, and the introduction of a new partial defence of defensive homicide the same negative gendered stereotypes have merely been transferred to this new partial defence: see Danielle Tyson, ‘Victoria’s New Homicide Laws: Provocative reforms or More Stories of Women “Asking for it”?’ (2011) 23 *Current Issues in Criminal Justice* 203.

³³ See discussion in Julia Tolmie, ‘Is the Partial Defence an Endangered Defence? Recent Proposals to Abolish Provocation’ [2005] *New Zealand Law Review* 25.

³⁴ *Ibid.*

committed the act of killing) and effectively using the trial as a vehicle to defame her,³⁵ and

- (3) The difficulties women, who kill in the context of prolonged intimate partner violence, face in satisfying this partial defence (where self-defence may not be available to them).

Need for a comprehensive and holistic review of the law, and legal practice, relating to homicide

The DVCC submits that it is not possible to adequately address the problems surrounding the partial defence of provocation in the absence of a detailed, holistic examination of all defences to murder (complete and partial), plea bargaining around these defences, the role of prosecution and defence counsel, the role of the judge and jury, and the complex issue of sentencing.

While we recognise that a law reform exercise of this kind will necessarily be of long duration (as is evidenced by the work of the Victorian Law Reform Commission, WA Law Reform Commission, and UK Law Commission), the DVCC is of the view that this approach is required given the complex issues that arise when considering the interplay of gender, intimate partner violence and homicide. As Carolyn Ramsey has argued:

One of the chief contributions of the reforms in Victoria and Western Australia was the insight that homicide defences ought to be revamped in a comprehensive manner – the reform package, rather than a surgical strike.³⁶

The need for a more comprehensive and holistic approach is further confirmed through the experience of other jurisdictions where change has been made, however, the desired result has not eventuated. In a detailed examination of the outcomes of law reform in Victoria and the UK (including an examination of the approach to provocation in NSW), Kate Fitz-Gibbon has found that:

...while reforms to the law of homicide, in particular the partial defence of provocation, are implemented, with specific goals for minimising gender bias in the law's operation, there are often unintended consequences of the reform which need to be acknowledged.³⁷

This confirms that any law reform process is complex and requires attention not only to legislative change but also to matters that go to implementation and practice (see below).

³⁵ This defamation of the victim was particularly highlighted in the criticisms and outrage that followed the *Ramage* case in Victoria (*R v Ramage* [2004] VSC 508) which is seen as motivating the Victorian government to implement the recommendations of the VLRC report. For a discussion of this response to *Ramage* see Kate Fitz-Gibbon, *The Aftermath of Provocation: Homicide Law Reform in Victoria, New South Wales and England* (PhD Thesis, Monash University, 2012) 12-13. See also discussion in Jenny Morgan, 'Provocation Law and Facts: Dead Women Tell no Tales, Tales are Told about Them' (1997) 21 *Melbourne University Law Review* 237.

³⁶ Carolyn Ramsey, 'Provoking Change: Comparative Insights on Feminist Homicide Law Reform' (2010) 100 *Journal of Criminal Law and Criminology* 33, 100.

³⁷ Fitz-Gibbon, above n35, 144. See also Tyson, above n32.

NSW has an opportunity to put in place progressive reform to the law of homicide that better takes account of the circumstances in which women who have experienced prolonged intimate partner violence kill their male partner, and to effectively counter the narratives that men have successfully raised when they kill women who are merely asserting their equality rights to separate from their partner and/or commence a new sexual relationship. This is a difficult challenge that we have seen attempted in Tasmania, Victoria, Western Australia, New Zealand and the United Kingdom – there is much we can learn from these attempts.

The DVCC therefore recommends that there should be a more detailed and comprehensive reference made to the NSW Law Reform Commission (NSWLRC) to examine these issues. This does not mean that there are not important and significant changes that the Committee can recommend following its current inquiry (outlined in this submission) but rather that this should be seen as the initial steps in a comprehensive and holistic process. Indeed, starting with these recommendations the NSWLRC will be in a position to monitor whether these changes have achieved their aims.

Recommendation 2: That the NSW Legislative Council Social Justice Committee call on the Attorney General to provide the NSWLRC with a reference to conduct a comprehensive and holistic review of the law and legal practice relating to homicide in NSW.

The importance of a framework of equality

As noted in the *Briefing Paper* – and the extensive scholarship in this field – the defence of provocation well illustrates the gendered construction and implementation of the law.³⁸ The law in this area, as with self-defence, has been conceived and structured around the ways in which men kill and the ways in which some men respond to various acts that have long been accepted by the law as ‘provocative’.

While there have been changes to the law relating to provocation in NSW to better take account of the ways in which women may kill their violent partner (for example, removing the immediacy requirement for the provocative act and the response, allowing for the provocative act to be cumulative in nature³⁹), it still remains a defence that better fits with, and **excuses**, the behaviour of men than that of women. Similarly self-defence remains a difficult defence for women to mobilise effectively when they have used lethal violence in the context of their own victimisation.

³⁸ See, for example, discussion in the Victorian Law Reform Commission, *Defences to Homicide: Final Report* (2004) [2.18]-[2.25]; Ramsay, above n36; Graeme Coss, ‘The Defence of Provocation: An Acrimonious Divorce from Reality’ (2006) 18 *Current Issues in Criminal Justice* 51; Elizabeth Sheehy, Julie Stubbs & Julia Tolmie ‘Defences to Homicide for Battered Women: A Comparative Analysis of Laws in Australia, Canada and New Zealand’ (forthcoming) *Sydney Law Review*; Rebecca Bradfield, *The Treatment of Women Who Kill Their Violent Male Partners Within the Australian Criminal Justice System* (PhD thesis, University of Tasmania, 2002); Fitz-Gibbon, above n35; Tyson, above n32, 207

³⁹ See for example *R v Chhay* (1994) 72 A Crim R 1.

Professor Jenny Morgan has emphasised that we need to look at the context in which people kill (*people's lived lives*), rather than focusing on the legal categories in order to generate 'the law reform we need and want'.⁴⁰ Such a focus enables us to unpack and explore the different circumstances in which men and women kill. As Morgan argues:

...it may be more useful for both women and men who are subject to the laws of homicide if law reform initiatives start from the social problems that require addressing, rather than the legal categories traditionally used to address them. I argue that if our examination of defences to homicide is driven by an understanding of the contexts in which killings occur, rather than the legal categories that have traditionally been used to respond to such killings, we may be more likely to consider fully the sorts of situations that should be subject to partial or complete defences. That is, we are more likely to reconsider both whether we want to encompass all the circumstances currently included as raising justifications or excuses to murder, and whether there are other common circumstances which should be included in any defences.⁴¹

If we take this wider focus it becomes clearer the way in which some men have relied on provocation narratives which are highly gendered and, in turn, have been questioned by scholars and law reformers about whether such 'excuses' should continue to be accepted. Such narratives have tended to subordinate women's claims to equality and choice. At the same time, scholars and law reformers have pointed to the difficulties faced by women who use lethal violence in the context of their own victimisation in having their narratives valued by the legal system as justifiable (where intimate partner violence may be seen as the much more common circumstance). Such a wider view that focuses on the reality of how homicides take place, enables a focus on equality – how do we want the law of homicide to operate, what actions should be seen as justifiable, and so on.

Recommendation 3: That any review of the law relating to homicide and its practice should reflect a substantive approach to equality with a focus on the social reality of homicide. In this way, it should aim to challenge out-dated understandings and narratives about men and women, and intimate partner violence.

Legislative change only achieves so much (and often not much at all)

The experiences of law reform in Victoria and the UK relating to homicide, and the partial defence of provocation in particular, demonstrate that law reform alone – no matter how progressive or well-developed – is often not enough. This is what has been referred to as the 'implementation problem' or 'implementation gap' – that is, the gap between the law as written and its practice⁴² - a gap that has often dogged

⁴⁰ Jenny Morgan, *Who Kills Whom and Why: Looking Beyond Legal Categories*, Research Paper prepared for the Victorian Law Reform Commission (VLRC, 2002), 1

⁴¹ Morgan, above n40, 2.

⁴² See Carol Smart, 'Feminism and Law: Some Problems of Analysis and Strategy' (1986) 14 *International Journal of the Sociology of Law* 109; Carol Smart, *Feminism and the Power of Law* (1989); Margaret Thornton, 'Feminism and the Contradictions of Law Reform' (1991) 19 *International Journal of the Sociology of Law* 453; Rosemary Hunter, *Domestic Violence Law reform and Women's Experience in Court: The Implementation of Feminist Reforms in Civil Proceedings*

reforms based on feminist insights particularly in the context of legal responses to violence against women. This focus on implementation and practice emphasises the need to not only address the text of the law but the legal culture in which the law finds its expression or application.⁴³

Danielle Tyson has raised questions about the way in which the new provision of defensive homicide has been used by men using similar gendered narratives as those that were mobilised in provocation cases (see discussion of *R v Middendorp* [2010] VSC 202).⁴⁴

In England, despite the *Coroners and Justice Act 2009* (UK) stating that the new ‘loss of control’ partial defence may not be relied on in cases where the ‘thing done or said [that caused the loss of control] constituted sexual infidelity’, a recent case *R v Clinton (Jon-Jacques)* [2012] EWCA Crim 2 held that such a defence was allowable where it was not the only ‘trigger’ being considered;⁴⁵ that, in order to provide context to the deceased’s words that the offender ‘didn’t have the balls to do it [commit suicide]’, the deceased’s sexual infidelity should be considered as part of the provocative behaviour. As Neil Cobb explains, this approach is troubling on a number of fronts: first, it ‘dilutes the impact’ of the legislation; and second, it equates the deceased words as ones which must be seen as ‘extremely grave’ and sufficient to cause a person to lose control and kill.⁴⁶

This behaviour seems completely insignificant as a basis for killing, and entirely at odds with the limited kind of behaviour envisaged by Law Commission and government as grounds for the defence.⁴⁷

In her interviews with policy staff, legal counsel and judges in the UK, Kate-FitzGibbon found that most were of the view that ‘the new partial defence would merely act as a rebranding of the provocation defence, rather than a significant change in practice’.⁴⁸

The DVCC therefore emphasises that the Committee must focus attention on the critical problem of implementation rather than simply taking the approach that legislative change alone will provide the solution. Experience from other jurisdictions demonstrates that legal practice based on negative gendered stereotypes is deeply entrenched and requires far more than efforts that tinker at the edges of ‘reform’. This problem of implementation suggests that the gendered narratives that hold sway within the legal system find their strength and resilience not merely in the legislative

(Cambria Press, 2008); Ruth Busch, Neville Robertson & Hilary Lapsley, ‘The Gap: Battered Women’s Experience of the Justice System in New Zealand’ (1995) 8 *Canadian Journal of Women and the Law* 190.

⁴³ Tyson, above n32, 218

⁴⁴ Tyson, above n32.

⁴⁵ This decision, unsurprisingly, has been subject to some critique: Neil Cobb, ‘R v Clinton: Loss of Control and Sexual Infidelity (20 January 2012) available at <http://inherentlyhuman.wordpress.com/2012/01/20/r-v-clinton-loss-of-control-and-sexual-infidelity/> (accessed 9 August 2012).

⁴⁶ Ibid.

⁴⁷ Ibid.

⁴⁸ Fitz-Gibbon, above n35, 166.

provisions but in the way in which defence counsel, prosecutors, judges and jury members approach their task, what they see as acceptable and justifiable acts and by whom.

In order to counter the dominant myths about men, women, intimate relationships and intimate partner violence, it is submitted that a key strand of the recommendations to be made by the Committee must focus on training and education of all players within the legal system to better understand the nature and dynamics of intimate partner violence. Without such training and knowledge:

...practitioners and judges may be in danger of relying on the same myths and misconceptions about family violence as the broader community, and so may fail to recognise the relevance and importance of evidence that if necessary if the actions of the accused are to be understood.⁴⁹

Here the Victorian Law Reform Commission (VLRC) were discussing the actions of the women who kill their violent partner. The same can also be said for being able to unpack the gendered way in which the provocation defence supports the actions of men who seek to continue their control of their female partner when she asserts her independence.

Such education and training must be broad in scope:

- addressing community attitudes about intimate partner violence and the circumstances in which men and women may kill, not only to enhance general community understandings but also in recognition that it is from the community that the jury is drawn;
- in law schools;
- targeted and specialised ongoing training for legal professionals working in this area – as prosecutors and defence counsel. Here it would be of assistance if a guide could be developed for legal practitioners about representing victims of intimate partner violence who have been charged with murder or manslaughter;
- for judicial officers, including education about how they provide directions to the jury in these cases and what considerations should be taken into account in sentencing (this is particularly important if provocation moves to sentencing).

⁴⁹ VLRC, above n38, [4.164].

Recommendation 4: That law schools introduce into their criminal law curriculum information about family violence, the social reality of homicide, including the different ways in which men and women kill and the way in which negative gendered stereotypes have been relied upon in the legal system.

Recommendation 5 (the following recommendations are taken from the VLRC, *Defences to Homicide: Final Report*, rec 35 and 36 and adapted to the NSW context):⁵⁰ **That bodies which offer continuing professional development of judicial education, including NSW Legal Aid, the NSW Law Society, the Office of the Director of Public Prosecutions, the NSW Bar and the Judicial Commission of NSW, should include sessions on family violence.**

“Professional legal education sessions on family violence should aim to assist judges and lawyers practising in criminal law to understanding the nature of family violence and could include discussion of issues such as:

- common myths and misconceptions about family violence;
- the nature and dynamics of abusive relationships;
- the social context in which family violence occurs;
- barriers to disclosure of abuse and seeking the assistance of police and other service agencies, including the additional barriers faced by persons who are Indigenous, from a culturally and linguistically diverse background, who live in a rural or remote area, who are in a same-sex relationship, who have a disability and/or have a child with a disability;
- the emotional, psychological and social impact of family violence;
- the relationship between family violence and other offences, including murder and manslaughter;
- how expert evidence about family violence may assist in supporting a plea of self-defence or duress;
- the use of expert reports on family violence in sentencing.”

The fact that legislative reform may not achieve its desired result also necessitates a process of constant review and evaluation. The DVCC therefore recommends that whatever law reform is initiated in NSW in this complex area includes a process of review as was recommended by the VLRC following its recommendation to insert a new partial defence, defensive homicide, in Victoria.⁵¹

⁵⁰ Ibid, 202.

⁵¹ VLRC, above n38, recommendation 10 which provided:

A review of the operation of excessive self-defence should be carried out by the Department of Justice after the provision has been in force for a period of five years. The review should include investigation of how the defence is being used, in what circumstances, by whom and with what outcome.

Recommendation 6: That any change to the law relating to homicide in NSW designed to address the gendered nature of the partial defence of provocation, any proposed new partial defences, and any other measures designed to assist the law to better respond to women who kill in the context of intimate partner violence be reviewed five years after its commencement.

The law relating to provocation in NSW

In NSW the partial defence of provocation is provided in *Crimes Act 1900* (NSW), section 23.

The *Briefing Paper* provided by the NSW Legislative Council Select Committee on the Partial Defence of Provocation (2012) sets out the law relating to provocation in NSW. The DVCC therefore does not repeat this information in this submission. It is worth noting, however, that over the years there has been a number of legislative amendments and case law which has been designed to, or seen to, assist women who kill in the context of prolonged intimate partner violence.

For example, key changes were made to NSW homicide laws in 1982.⁵² These amendments saw the removal of a mandatory life sentence for murder, the removal of a requirement for immediacy in the context of provocation and a recognition that it is not necessary that the act causing death was proportionate to the provocation. These amendments were made following various reports and public protests regarding the treatment of women who had been convicted of murdering their violent partner.⁵³

In addition, the case law in this area has also developed to recognise that the act or words of the deceased need not be a discrete incident but rather may be a series of events that together amount to provocation (that is, cumulative).⁵⁴

The most detailed information about the use of this defence in NSW is provided in a 2006 report by the Judicial Commission of NSW which examined the use of all partial defences over the period 1990-2004.⁵⁵ This report found that during this time:

75 offenders were convicted of manslaughter on the basis of ... provocation.... [while] 40 offenders unsuccessfully raised provocation at trial and were subsequently convicted of murder.⁵⁶

⁵² *Crimes (Homicide) Amendment Act 1982* (NSW).

⁵³ These changes followed the public protests following the murder conviction of Victoria Roberts and her son Bruce for killing Eric Roberts in 1976. This resulted in the NSW Government releasing Victoria and her son in 1981 on licence: NSW, *Parliamentary Debates*, Legislative Assembly, 11 March 1982, 2484 (Frank Walker, Attorney General). There was another high profile case in 1981 involving Georgia Hill who was initially convicted of murder, but was successful on the basis of provocation before the Court of Criminal Appeal – and thus was interpreted by the Government as an example of the legal system starting to take a more expansive approach to provocation: NSW, *Parliamentary Debates*, Legislative Assembly, 11 March 1982, 2486 (Frank Walker, Attorney General). In 1981 the NSW Government also established a task force to report on a range of matters concerning domestic violence and legal, policy and other responses which recommended key changes to the law in this area: NSW Task Force on Domestic Violence, *Report of the New South Wales Task Force on Domestic Violence to the Honourable N K Wran QC, MP, Premier of NSW*, 1981.

⁵⁴ See *Moffa v the Queen* (1977) 138 CLR 601. While this is a case that in fact demonstrates the way in which provocation has successfully been deployed by men in the context of allegations of infidelity – the nature of the decision and the recognition of cumulative conduct is also seen as potentially a useful tool for women who kill in the context of domestic violence.

⁵⁵ Sam Indyk, Hugh Donnelly and Jason Keane, *Partial Defences to Murder in New South Wales 1990-2004* (Judicial Commission of NSW, 2006).

In 11 of the 75 successful cases (14.66%) the provocative conduct was ‘infidelity or the breakdown of an intimate relationship’.⁵⁷ In all of these cases the offender was male. In seven cases the victim was male (being the person alleged to be having a sexual relationship with the offender’s partner) and in the remaining four cases the victim was the offender’s intimate partner (in two cases female, in two cases male).⁵⁸

In 13 of the 75 successful cases (17.33%) the offender ‘relied upon provocation in the context of violence committed by the victim against the offender in a domestic violence setting’. Ten of these cases involved a woman killing her violent male partner. The Judicial Commission notes that half of these decisions involving women took place before it was recognised that the provocative behaviour might be cumulative⁵⁹ and the remaining half after that time – ‘indicating that there has been no increase in the number of women successfully claiming the defence [following that recognition]’.⁶⁰

More recent research by Kate-Fitzgibbon which examined ‘all [15 successful] convictions of provocation manslaughter’ over the period January 2005 – December 2010⁶¹ found that

...of the 15 successful cases of provocation manslaughter, five were accepted where the provoking conduct was a non-violent confrontation, often a verbal insult targeted by the victim at the defendant, in the period immediately prior to the killing. In three of these cases the victim was a current or estranged female intimate partner of the male defendant. Furthermore, in two of these cases – ... *Regina v Stevens* [2008] NSWSC 1370 ...and *R v Hamoui* [No 4] [2005] NSWSC 279 ... - the non-violent confrontation arose from the defendant’s allegation of the victim’s infidelity.⁶²

Concerns with the current approach in NSW

There are a number of concerns that are evident in the current definition of, and approach to, provocation in NSW. These have been explored in detail in the literature. The DVCC mentions four aspects of the test briefly in this section in brief, before moving to consider in more detail the use of provocation by men in the context of infidelity and/or separation. The DVCC does not, at this stage, express any view about the manner in which the following four components of provocation may be amended in a law reform process, reiterating the DVCC’s view that this should be the subject of a more extensive review process (see recommendation above).

⁵⁶ Ibid, 36.

⁵⁷ Ibid, 42

⁵⁸ Ibid, 42

⁵⁹ *R v Chhay* (1994) 72 A Crim R 1.

⁶⁰ Indyk, above n55, 42.

⁶¹ Seven by plea, seven by trial, one not specified in Fitz-Gibbons research because of the involvement of multiple offenders: Fitz-Gibbon, above n35, 160.

⁶² Fitz-Gibbon, above n35, 159.

- *The ordinary person test.* A number of commentators have raised questions about the nature of this test.⁶³ This has perhaps been put most succinctly by Graeme Coss:

Ordinary people, when affronted, do not resort to lethal violence ... it is clear the ordinary person does not kill. Only the most extraordinary person does.⁶⁴

It is worth noting here that in its 1997 review of provocation, while the NSWLRC did not recommend abolishing provocation, it did recommend removing the *ordinary person* test on the basis that, for many women who have experienced prolonged intimate partner violence, it can be difficult to fit within the notion of when an ordinary person may lose self-control. This recommendation was not acted upon.⁶⁵

- *Loss of control.* A number of commentators have noted that ‘loss of control’ does not adequately capture the way in which women may use lethal violence in the context of their own victimisation. As the VLRC explains:

A sudden violent loss of self-control in response to a particular triggering act is seen to be the archetypal male response to provocative conduct. Despite changes that have been made over time, this test remains very difficult for women to use.⁶⁶

In the context of men’s use of ‘loss of control’, Graeme Coss asks why the law privileges ‘loss of control’ in the context of lethal violence and challenges the common usage by men in this context where it is not so much loss of control but rather that these men ‘have lost control of their women’.⁶⁷

- *Whether words alone can be sufficient as provocation.* A number of the recent successful cases in NSW have concerned men claiming that various non-violent verbal confrontations were sufficient as provocation.⁶⁸ While the case law indicates that, in order to satisfy provocation on the basis of words alone involves a ‘high threshold’⁶⁹ and ‘(the) need to be of a sufficient[ly] violent, offensive, or otherwise aggravating character, ...mere words of abuse or insult would not normally qualify’,⁷⁰ it is obvious that difficulties arise in homicide cases – where the deceased has no opportunity to present their side of the story, and indeed the defence appears to go to great efforts to ensure that such words are seen to meet the threshold.⁷¹
- *Provocation necessarily focuses on the behaviour and character of the deceased.* By its very nature the defence of provocation turns attention from the act that

⁶³ See discussion in Fitz-Gibbon, above n35, 22-23.

⁶⁴ Graeme Coss, ‘Provocative Reforms: A Comparative Critique’ (2006) 30 *Criminal Law Journal* 138, 142.

⁶⁵ New South Wales Law Reform Commission, *Partial Defences to Murder: Provocation and Infanticide* (1997) [2.144]

⁶⁶ VLRC, above n38, [2.19].

⁶⁷ Coss, above n38, 52.

⁶⁸ See above n62 and supra text.

⁶⁹ Indyk et al, above n55, 34.

⁷⁰ Woods CJ at CL in *R v Lees* [1999] NSWCCA 301 [37] as quoted in Indyk et al, above n55, 34.

⁷¹ See discussion in Morgan, above n35.

caused the killing to the behaviour (words or acts) said to have been provocative. In practice, in cases involving men who have killed their partners because of infidelity or separation, this has invariably entailed what has been described in the literature as character assassination or defamation.⁷²

The use of provocation by men in the context of infidelity and/or separation

Reform to the law relating to provocation has frequently been motivated by community outrage at the successful use of this partial defence by men who have claimed that they were ‘provoked’ by the discovery of their female partner’s infidelity (what is perhaps better described as sexual jealousy – where infidelity arguably serves to obscure the controlling nature of the act perpetrated by the offender) or that she has made negative comments about his sexual performance and/or that she has made the decision to leave him. This was particularly the case in Victoria, where, although the VLRC had finished its report, the quick action of the Government on the Report’s recommendations was largely seen as a response to the community outrage following the decision in *R v Ramage* [2004] VSC 508. It is worth noting here that when the then Victorian Attorney General Rob Hulls announced the reforms to homicide he:

...described provocation as an ‘outrageous, outdated’ defence, and announced that ‘gone are the days when prehistoric assumptions about honour and violence – about male and female behaviour – should be allowed to hold traction in our legal system.’⁷³

Similarly the current inquiry in NSW appears to have centred on community outrage following the decision in *R v Singh* [2012] NSWSC 637. Since the Committee commenced its inquiry there has been another case which has caused similar concern (*R v Won* [2012] NSWSC 855).

These recent cases stand in contrast to the view expressed in the 2006 report by the Judicial Commission of NSW who then stated that the use of this partial defence in NSW on the basis of infidelity and/or separation was less likely, indeed the Commission stated that:

Since at least 1990, there have been no New South Wales cases similar to the Victorian case of *Ramage*, which led to the abolition of provocation in that State.⁷⁴

However as noted above, in a more recent examination of successful provocation cases in NSW, Fitz-Gibbon suggests that NSW cannot be confident that the NSW criminal law recognises such a movement away from what is seen as legitimate provocation.⁷⁵

⁷² See above n35. See also Coss above n38.

⁷³ Quoted and discussed in Fitz-Gibbon, above n35, 41. It is interesting to note that this echoes a much earlier Federal Court case in which the court stated: ‘In Australia in the 1990s it would be entirely out of line with that standard if the mere telling of a partner that a relationship is over, whether or not accompanied by an admission of infidelity, were taken as potentially sufficient to induce an ordinary person to so lose control as to deliberately or recklessly inflict fatal violence on the other’: *Arrowsmith v The Queen* (1994) 55 FCR 130 at [14]-[15] quoted in Indyk et al, above n55, 41.

⁷⁴ Indyk et al, above n55, 10.

⁷⁵ See above n62 and supra text.

The DVCC expresses particular concern about the use of provocation in these circumstances as it serves to legitimise men's anger at actions by women, where women are merely asserting their rights as individuals. Such arguments further entrench acceptable ideas about men and their control over their female partners and provide a legal excuse for killings that take place at a time (separation) that has been extensively found in the domestic violence literature to be one of the most dangerous times for women.⁷⁶ Furthermore such narratives serve to blame women for their own deaths (as mentioned above), where much of the defence centres on the character of the deceased rather than on what the offender did.

In this context it should be noted that the criminal law serves an important function in communicating with the community what is, and is not, acceptable behaviour. Continuing to accept provocation on this basis sends a troubling message to the community that it is acceptable (and indeed legally understandable) that a man might 'lose control' to the extent that he kills his female partner (or her new sexual partner).⁷⁷

Options for curtailing the use of provocation in certain circumstances

Instead of abolishing provocation, or recommending its abolition, some jurisdictions and commentators have instead adopted an approach to prevent its use in particular circumstances.⁷⁸ In the following, the DVCC canvasses some of the approaches that have been adopted in other jurisdictions. Finally, the DVCC recommends that the Committee consider curtailing the use of provocation in two key circumstances. This is presented as a first stage approach in the process of a more comprehensive review that the DVCC has recommended be conducted by the NSWLRC.

- In the Northern Territory⁷⁹ and the Australian Capital Territory,⁸⁰ it is not possible to rely on provocation on the basis of a non-violent sexual advance (on its own).⁸¹
- Queensland seeks to limit the use of provocation where there is or has been an intimate relationship between the offender and the victim. Section 304 of the *Criminal Code*(Qld) provides:

- (1) When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation, and before there is time for the person's passion to cool, the person is guilty of manslaughter only.

⁷⁶ See Martha Mahoney, 'Legal Images of Battered Women: Redefining the Issue of Separation' (1991) 90 *Michigan Law Review* 1; Judith Buckingham, 'Romantic and "Real Life" Relationships in Criminal Law: Reconstructing Red flags for Lethality/Dangerousness' (2010) 1 *New Zealand Law Review* 93; Morgan, above n40, 41-43; Coss, above n38, 59-61.

⁷⁷ See for example discussion of the purpose of the criminal law and the message that can be sent via a murder rather a manslaughter conviction for men who kill in this context: Ramsay, above n36, 81-82.

⁷⁸ Eg see Julia Tolmie, 'Is the Partial Defence an Endangered Defence? Recent Proposals to Abolish Provocation' (2005) 25 *New Zealand Law Review* 25.

⁷⁹ *Criminal Code* (NT) s158(5).

⁸⁰ *Crimes Act 1900* (ACT) s 13(3).

⁸¹ A recommendation to this effect was made by a working party on homosexual advances in 1998 but not acted on by the NSW Government.

....
(3) Also, subsection (1) does not apply, other than in circumstances of a most extreme and exceptional character, if—

- (a) a domestic relationship exists between 2 persons; and
- (b) one person unlawfully kills the other person (the deceased); and
- (c) the sudden provocation is based on anything done by the deceased or anything the person believes the deceased has done—
 - (i) to end the relationship; or
 - (ii) to change the nature of the relationship; or
 - (ii) to indicate in any way that the relationship may, should or will end, or that there may, should or will be a change to the nature of the relationship.

....

(5) Subsection (3)(c)(i) applies even if the relationship has ended before the sudden provocation and killing happens.

(6) For proof of circumstances of a most extreme and exceptional character mentioned in subsection (2) or (3) regard may be had to any history of violence that is relevant in all the circumstances.

Queensland has also sought to make it clear in its legislation that provocation on the basis of ‘words alone’ does not apply unless the ‘circumstances (are) of a most extreme and exceptional character’.⁸²

Furthermore Queensland has reversed the onus of proof; that is to say, in Queensland it is for the defence to prove that they should be convicted of manslaughter on the basis of provocation.⁸³ By comparison in NSW, the ‘onus is on the prosecution to prove beyond reasonable doubt that the killing of the victim was not done under provocation’.⁸⁴ This reversal has been praised by some commentators given that the victim in provocation cases is unable to give evidence.⁸⁵

- In the United Kingdom following the report of the Law Commission,⁸⁶ the Government introduced the *Coroners and Justice Act 2009* (UK). This Act implemented a number of changes in the area of homicide and partial defences, However it did not replicate in full the Law Commission’s recommendations and this has served to be a continuing point of criticism.⁸⁷ Perhaps most critically, while the Law Commission recommended retaining provocation with a range of limits and directive provisions,⁸⁸ it specifically recommended the removal of ‘loss

⁸² *Criminal Code* (Qld) s 304(2). Again reference may be had to ‘any history of violence that is relevant in all the circumstances’ in determining whether ‘words alone’ may meet this threshold: s 304(6).

⁸³ *Criminal Code* (Qld) s 304(7).

⁸⁴ Indyk et al, above n55, 6. See *Crimes Act 1900* (NSW) s 23(4).

⁸⁵ Fitz-gibbon, above n35, 36 citing A Hemming, ‘Provocation: A Totally Flawed Defence that has no Place in Australian Criminal Law Irrespective of Sentencing Regime’ (2010) 14 *University of Western Sydney Law Review* 1, 42.

⁸⁶ Law Commission (UK), *Murder, Manslaughter and Infanticide: Project 6 of the Ninth Programme of Law Reform: Homicide* (2006).

⁸⁷ Anna Carline, ‘Reforming Provocation: Perspectives from the Law Commission and the Government’ [2009] 2 *Web Journal of Current Legal Issues*. Available at <http://webjcli.ncl.ac.uk/2009/issue2/carline2.html> (accessed 14 August 2012).

⁸⁸ Law Commission, above n86, [5.11].

of control' stating that this concept had 'been widely criticised as privileging men's typical reactions to provocation over women's typical reactions'.⁸⁹ So while the *Coroners and Justice Act 2009* (UK) has acted on some of the suggestions made by the Commission, it may be suggested that its approach has centralised the focus of 'loss of control' which may counter some of the more progressive elements of the reforms.

Sections 54, 55 of the *Coroners and Justice Act 2009* (UK) read as follows:

54 (1) Where a person ("D") kills or is a party to the killing of another ("V"), D is not to be convicted of murder if—

- (a) D's acts and omissions in doing or being a party to the killing resulted from D's loss of self-control,
- (b) the loss of self-control had a qualifying trigger, and
- (c) a person of D's sex and age, with a normal degree of tolerance and self-restraint and in the circumstances of D, might have reacted in the same or in a similar way to D.

(2) For the purposes of subsection (1)(a), it does not matter whether or not the loss of control was sudden.

...

55 Meaning of "qualifying trigger"

...

(2) A loss of self-control had a qualifying trigger if subsection (3), (4) or (5) applies.

(3) This subsection applies if D's loss of self-control was attributable to D's fear of serious violence from V against D or another identified person.

(4) This subsection applies if D's loss of self-control was attributable to a thing or things done or said (or both) which—

- (a) constituted circumstances of an extremely grave character, and
- (b) caused D to have a justifiable sense of being seriously wronged.

(5) This subsection applies if D's loss of self-control was attributable to a combination of the matters mentioned in subsections (3) and (4).

(6) In determining whether a loss of self-control had a qualifying trigger—

- (a) D's fear of serious violence is to be disregarded to the extent that it was caused by a thing which D incited to be done or said for the purpose of providing an excuse to use violence;
- (b) a sense of being seriously wronged by a thing done or said is not justifiable if D incited the thing to be done or said for the purpose of providing an excuse to use violence;
- (c) the fact that a thing done or said constituted sexual infidelity is to be disregarded.

(7) In this section references to "D" and "V" are to be construed in accordance with section 54.

Given the recency of the changes in England and Wales, there is neither much case law nor commentary that reflects on its actual practice.

⁸⁹ Ibid, [5.18].

The small amount of commentary that is available suggests both positive and negative outcomes of the reform. For example, Susan Edwards notes the benefit that should flow to women victims of violence through the inclusion of ‘fear’ as a potential trigger to loss of self-control (but this is qualified by the requirement for ‘serious violence’). However Edwards is ultimately of the view that:

...habituated gendered thinking will continue to impress on the construction of what is a ‘qualifying trigger’, on what behaviour is deemed a ‘loss of self-control’, on what is fear, on what is ‘serious violence’, on the nature of the circumstances considered to meet the threshold of ‘justifiable sense of being seriously wronged’ and on the requirement of ‘tolerance and self-restraint’ [inserted as characteristics of the reasonable person], such as the fearful woman facing or anticipating abuse she may still find herself outwith the reach of law’s protection.⁹⁰

Certainly the recent case of *R v Clinton (Jon-Jacques)* [2012] EWCA Crim 2 (mentioned above) emphasises that reform by legislation alone is not sufficient. This case raises concern not only about the prevailing legal culture, but also the way that the law reform initiated in England may have added complexity rather than clarity. Indeed many of the English legal professionals interviewed in the study by Kate Fitz-Gibbon were of the view that the new ‘loss of control’ defence was merely provocation ‘rebranded’.⁹¹

Many of these attempts to both limit (for example, in the context of infidelity, separation, non-violent advances) and expand (for example, in the context of fear of violence) the use of provocation are useful models for the Committee to consider. The DVCC agrees that provocation should be unavailable:

- in the context which curtails women’s full enjoyment of the rights to choose with whom to form a relationship and whether they stay in that relationship. As Julia Tolmie, has stated:

The defence should be unavailable in circumstances where the act of the victim is provocative because it challenges the power and control that the offender believes he is justified in exercising over another person. This includes behaviours that women, as independent and autonomous actors, are entitled to do, such as leaving their relationship with the offender, partnering or re-partnering, making access arrangements in relation to their children, or reporting acts of violence against them to the police.⁹²

In this context the DVCC tends to prefer the approach taken in Queensland rather than that adopted in England. This is due to the fact that Queensland appears to have adopted a more expansive approach to the circumstances where women’s behaviour has been accepted as provocative, whereas the English approach has more narrowly centred on sexual infidelity.

⁹⁰ Susan Edwards, ‘Loss of Self-Control: When his Anger is Worth more than her Fear’ in Alan Reed and Michael Bohlander (eds), *Loss of Control and Diminished Responsibility: Domestic, Comparative and International Perspectives* (Ashgate, 2011) 79. See also other criticism of the new provision in Neil Cobb and Anna Gausden, ‘Feminism, ‘Typical’ Women and Losing Control’ in Alan Reed and Michael Bohlander (eds), *Loss of Control and Diminished Responsibility: Domestic, Comparative and International Perspectives* (Ashgate, 2011).

⁹¹ Fitz-Gibbon, above n35, 166.

⁹² Tolmie, above n33, 48.

- in the context of non-violent sexual advances (what is sometimes referred to as the homosexual advance defence);

The DVCC also recommends that the Committee consider inserting specific reference to a fear of violence as a possible ground for provocation. In this context the DVCC recommends that this be considered as fear of violence in the context of a history of intimate partner violence, rather than the more narrow approach of fear of ‘serious violence’ adopted in England.

Recommendation 7: That, while the DVCC ultimately recommends that there be a comprehensive review of the law of homicide conducted by the NSWLRC, we consider that there are a number of amendments that can be made to the partial defence of provocation to address the gendered narrative raised by men and to better suit the circumstances of women who may not satisfy self defence or excessive self-defence; these are that provocation should not be available:

- in circumstances where one of the parties to the relationship seeks to end or change the nature of the relationship;
- in circumstances involving a non-violent sexual advance.

Recommendation 8: That, where the defence of self-defence is not available and provocation is to be relied on, provocation should specifically be available in the context where the offender fears further violence against themselves or another persons in the context of a history of intimate partner violence.

The possibility of other partial defences

When abolishing provocation, a number of jurisdictions have introduced new partial defences. For example, Victoria introduced the new partial defence of ‘defensive homicide’ and Queensland introduced a specific defence for people who kill in the context of intimate partner violence (‘killing in an abusive domestic relationship’).⁹³

The DVCC notes the availability of these alternative partial defences, however, the DVCC makes no comment about whether such approaches should be adopted in NSW. Such alternatives require much more considered analysis and interpretation than is currently afforded in the timeframe for submissions to this inquiry. In this context, the DVCC notes concern that partial defences, such as that available in Queensland, may be seen as the ‘battered women’s defence’,⁹⁴ when really the more

⁹³ *Criminal Code (Qld) s 304B*. This provision was inserted by the *Criminal Code (Abusive Domestic Relationship Defence and Another Matter) Amendment Act 2010 (Qld)*.

⁹⁴ This view was also expressed in the context of the insertion of ‘defensive homicide’ in Victoria, see comment made by a policy officer in Victoria in Fitz-Gibbon, above n35, 133.

appropriate defence is the complete defence of self-defence. The DVCC is of the view that a more comprehensive and holistic approach is required to the reform of the law relating to homicide in NSW that is able to consider more thoroughly the range of partial defences that might be available (see recommendation above).

SECTION 3

Self-defence⁹⁵

Women who kill their violent intimate partners

“When women kill it is mostly as a form of self-preservation (or protection of children) in response to violence inflicted upon them,”⁹⁶ This is reflected in Wallace’s study of NSW Police homicide files from 1968 – 1981, in which she found 70% of women who killed their husbands did so in a context of violence perpetrated by the husbands.⁹⁷

Similarly, Bradfield conducted research about women in Australia who killed their male intimate partners over the period from 1980-2000. She identified 76 cases. Of these, there was a history of physical violence in 65 cases (86%).

Bradfield’s study found that of the women who killed their violent intimate partners, the defence of self-defence was left for consideration by the jury at trial in 21 of 65 cases. Of the 21 women, 9 were acquitted on the grounds of self-defence,⁹⁸ 11 were convicted of manslaughter and 1 was convicted of murder.⁹⁹ The question should be asked why didn’t more of these defendants raise the defence of self-defence?

This concern is also reflected in a recent examination of reported NSW cases of murder between 2002 and 2012 in which the defence of provocation was raised in an intimate partner context.¹⁰⁰ Of the 19 cases identified, 9 involved a woman killing her male intimate partner. In eight of these cases a history of violence perpetrated by the victim against the defendant was alleged. In the ninth case, the victim had sexually assaulted the defendant’s 9-year-old niece.

⁹⁵ NSW DVCC acknowledges and thanks Women's Legal Services NSW for their substantial contribution to this section."

⁹⁶ Coss cites research by Dobash and Dobash, Polk and Wilson and Daly in Graeme Coss, “Provocative reforms: A comparative critique,” *Criminal Law Journal*, Vol 30, 2006 at 139 and footnotes 7-9.

⁹⁷ A Wallace, *Homicide: The Social Reality*, NSW Bureau of Crime Statistics and Research, Sydney, 1986 at 110 (123) accessed on 2 August 2012.

⁹⁸ Including two from NSW: *Hickey*, unreported, SC NSW 14 Apr 1992; *Terare*, unreported, SC NSW, 20 Apr 1995

⁹⁹ 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 194.

¹⁰⁰ We thank Ashurst for undertaking this research. A summary of the cases is provided in the response by Women’s Legal Services NSW to the Inquiry into the partial defence of provocation.

Eight out of the 9 cases involved an immediate response to the violence. All of the cases involved weapons.

In two cases, the defendants initially pleaded not guilty and later changed their pleas to guilty of manslaughter - on the grounds of provocation¹⁰¹ and substantial impairment¹⁰² of mind respectively. In a further two cases, a plea of guilty of manslaughter on the grounds of excessive self-defence was accepted.¹⁰³ In two other cases, a plea of guilty of manslaughter on the grounds of provocation was accepted by the Crown.¹⁰⁴ In one case, a plea of guilty of an unlawful and dangerous act was accepted by the Crown.¹⁰⁵ In another case a plea of guilty of manslaughter was not accepted by the Crown and a verdict of a conviction for manslaughter was made on the grounds of unlawful and dangerous act.¹⁰⁶ In one case, the defendant was convicted of murder.¹⁰⁷ Further examination is required to try to determine why self-defence was not raised in more of these cases.

In the matter of *R v Trevenna*, there was a history of violence perpetrated by the victim against the defendant. On the night of the killing, the victim accused his wife of sexual infidelity and threatened to kill her. He grabbed her by the throat, saying, "I'll kill you, bitch," several times. He got a cricket bat, held it towards her and said he would "smash [her] face in so no one will know [her]" and told her she would never see her son again. The defendant reached for a shotgun that she knew was under the bed and shot the victim once. The defendant pleaded guilty to manslaughter on the grounds of excessive self-defence. During sentencing Justice Buddin commented that a jury may have acquitted her on the grounds of self-defence.¹⁰⁸ As Sheehy et al note,¹⁰⁹ similar comments were made in *R v Kennedy*¹¹⁰ and *R v Yeoman*.¹¹¹ Again, this raises the question – what are the barriers to victims of violence who kill their violent partners raising self-defence as a complete defence? This is discussed below.

¹⁰¹ *R v Russell* [2006] NSWSC 722

¹⁰² *R v Weatherall* [2006] NSWSC 486

¹⁰³ *R v Scott* [2003] NSWSC 627; *R v Trevenna* [2003] NSWSC 463

¹⁰⁴ *R v Joyce Mary Chant* [2009] NSWSC 593; *R v Ferguson* [2008] NSWSC 761 – we note that both provocation and substantial impairment were raised.

¹⁰⁵ *R v Duncan* [2010] NSWSC 1241

¹⁰⁶ *R v Cavanough* [2007] NSWSC 561

¹⁰⁷ *R v Anderson* [2002] NSWCCA 194

¹⁰⁸ *R v Trevenna* [2003] NSWSC 194 at paragraph 40

¹⁰⁹ Sheehy, 2012 at 26.

¹¹⁰ *R v Kennedy* [2000] NSWSC 109

¹¹¹ *R v Yeoman* [2003] NSWSC 194

The importance of social framework evidence

The purpose of social framework evidence is to provide the context in which to understand the issues in a particular case.¹¹² In cases of domestic and/or family violence, social framework evidence is valuable for explaining the nature and dynamics of relationships affected by domestic violence; the reasons why victims remain in abusive relationships; the cumulative effect of the violence on the victim; why a woman may have to plan to kill in order to protect herself; and the social realities for the woman.

Social framework evidence is important for its potential to dispel myths, for example, regarding why women do not leave violent relationships and why women victims of violence kill either using weapons, such as knives or guns or in non-confrontational contexts, such as when their violent partner is sleeping.

Social framework evidence is relevant to both the subjective and objective aspects of the self-defence requirements and can, for example, explain that from experience a victim of intimate partner violence comes to learn that a look or a word from the perpetrator of violence that seems innocuous can in fact be a significant threat.

Social framework evidence counters the male construction of homicide defences which focuses on discrete incidents. As Bradfield argues, citing Dutton, domestic violence “cannot be understood as a series of isolated incidents detached from the overall pattern of power and control within which the violence is situated.”¹¹³ In situations of domestic violence it is the cumulative effect of the violence which is part of a continuum of violence¹¹⁴ which is significant.

Consideration also needs to be given as to which experts can provide social framework evidence. It may be that instead of or in addition to psychologists and psychiatrists, experienced domestic violence workers and other experts, particularly

¹¹² Julie Stubbs and Julia Tolmie, ‘Falling Short of the Challenge? A Comparative Assessment of the Australian Use of Expert Evidence on the Battered Woman Syndrome,’ *Melbourne University Law Review*, Vol 23, 1999 at 711

¹¹³ Rebecca Bradfield, “Understanding the Battered Women who Kill her Violent Partner - The Admissibility of Expert Evidence of Domestic Violence in Australia,” *Psychiatry, Psychology and Law*, Vol 9(2) 2002 at 178.

¹¹⁴ See Dr Lesley Orr, [The Case for a Gendered Analysis of Violence Against Women](#), July 2007 at 15-16 accessed on 4 August 2012.

academics, could give evidence about the impact of domestic violence and the social context in which domestic violence takes place, based on reputable research.

In Victoria, in addition to physical and sexual abuse, s 9AH(4) *Crimes Act 1958 (Vic)* specifies that “family violence” includes psychological abuse such as intimidation, harassment, damage to property, threats and allowing or putting a child at risk of seeing such abuse. Importantly, both a single act¹¹⁵ and a pattern of behaviour that when viewed in isolation may appear trivial¹¹⁶ are included in the definition of violence.

As stated in both Sections 1 and 2, any review of homicide defences must go beyond an examination of the defences alone to consider what additional changes are required.

Recommendation 14.4 of the joint Australian Law Reform and NSW Law Reform Commissions’ *Family Violence – A National Legal Response* calls for a consistent approach to recognising the dynamics of family violence in homicide defences across Australia. Recommendation 14.5 calls for guidance on the use of social framework evidence regarding family violence in the context of a defence to homicide. Section 9AH *Crimes Act 1958 (Vic)* is specifically referred to as an “instructive model.”

Developments in the law of self-defence in NSW and continued barriers to victims of violence using this defence

Gender bias

Many argue that self-defence is a masculine construct designed to address the once-off confrontation between two males of equal strength, for example, a pub brawl, thus the focus on discrete incidents.¹¹⁷

There have been developments in the law of self-defence, including those as a result of concerns raised by advocates with expertise in the area of domestic violence. However, as Sheehy et al note, while Western Australia and Victoria explicitly state in their legislation that it is not necessary to prove the accused was responding to an

¹¹⁵ Section 9AH(5)(a) *Crimes Act 1958 (Vic)*

¹¹⁶ Section 9AH(5)(b) *Crimes Act 1958 (Vic)*

¹¹⁷ VLRC *Final Report* at [3.8]

imminent threat in self-defence. This is not stated in NSW legislation.¹¹⁸

Similarly, as noted in the Briefing Paper by the NSW Parliamentary Research Service, the current self-defence provision does not require the response to be proportionate,¹¹⁹ though if the conduct is “not a reasonable response in the circumstances as the defendant perceives them,”¹²⁰ this is excessive self-defence, a partial rather than a complete defence to murder.¹²¹ Moreover, as Bradfield acknowledges, the issue of proportionality is relevant to whether the response was reasonably necessary.¹²²

As well, as is also noted in the Briefing Paper, “the application of the defence in this context is still problematic because [imminence and proportionality] continue to be significant factors in determining whether the defence has been made out”.¹²³ This is further supported by Sheehy et al.¹²⁴

Moreover, unlike provocation which allows for cumulative effect (“conduct ... occurred immediately before the act or omission causing death or *at any previous time*”¹²⁵), self-defence does not provide for this.

Disparity in physical stature and strength between male and female intimate partners, combined with learning from past experience that hand-to-hand combat is ineffective and a dangerous way for women to respond are two good reasons why women do not immediately respond to the violence of their intimate partners.¹²⁶ However, another barrier to accessing the defence of self-defence is the fact that when women respond

¹¹⁸ 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 3, footnotes 10,11 (author’s copy). The final version will be published in the Sydney Law Review in 2012

¹¹⁹ Lenny Roth and Lynsey Blayden, [Provocation and self-defence in intimate partner and sexual advance homicides](#), Briefing Paper No 5/2012, NSW Parliamentary Research Service, July 2012 at 9 accessed on 4 August 2012.

¹²⁰ Section 421(1)(b) *Crimes Act 1900 (NSW)*

¹²¹ Excessive self-defence through legislative provision in NSW took effect in 2002.

¹²² Bradfield cites *R v Zecevic* (1987) 162 CLR 645 as an example. 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 202. The VLRC also notes that while immediacy, proportionality and necessity were not expressed requirements of self-defence in Victoria they could influence the jury’s decision about whether the accused believed that her actions were necessary and whether this was reasonable in the circumstances. See VLRC *Final Report* at [3.13].

¹²³ NSW Parliamentary Research Service, Briefing Paper at 9

¹²⁴ Sheehy et al, *Defences to Homicide* at 2.

¹²⁵ Section 23(2) *Crimes Act 1900 (NSW)* Emphasis added.

¹²⁶ Bradfield cites the Wallace study to highlight that a man’s fists can potentially be a lethal weapon. See Bradfield thesis at 205.

in a non-confrontational manner, such as attacking their violent partner while he sleeps or using a weapon, such as a knife, this is viewed as calculated and pre-meditated and contrary to the rules of engagement that would be considered reasonable in the traditional self-defence context of a pub brawl.¹²⁷

In addition, when a woman victim of domestic violence fights back with physical violence and has done this on occasion(s) prior to using lethal force, this is often viewed as “mutual violence”.¹²⁸ This is concerning because a label of “mutual violence” does not take into account the use of coercion and control in the relationship and masks the true identity of the primary aggressor. Further research and consideration is required regarding the operation of the defence of self-defence in these circumstances.¹²⁹

Significantly, in 5 of the 8 cases in Bradfield’s study where women successfully raised self-defence, it was in the immediate confrontational context that conforms to the traditional paradigm of self-defence.¹³⁰

As Bradfield notes, “because there are so many wrongs to avenge” it is easy to construct a woman’s killing of their violent partner as revenge or an act of unreasonable anger.¹³¹

This highlights again the role and significance of social framework evidence as discussed above and the importance of education about intimate partner violence for legal practitioners, judiciary and the jury, as mentioned above.

Focus on discrete incidents

Sheehy et al note that the focus on discrete incidents can limit the evidence which is admitted in a murder trial on the basis that it is not considered relevant to the

¹²⁷ Bradfield thesis at 204; VLRC *Final Report* at [3.8].

¹²⁸ Julie Stubbs and Julia Tolmie, ‘Falling Short of the Challenge? A Comparative Assessment of the Australian Use of Expert Evidence on the Battered Woman Syndrome,’ *Melbourne University Law Review*, Vol 23, 1999 at 738. See also *Lock* (1997) 91 A Crim R 356.

¹²⁹ We understand that the NSW Police Force is currently working in partnership with Julie Stubbs and others on a research project about identifying the primary aggressor. See [Submission on behalf of the New South Wales Police Force to the NSW Legislative Council Standing Committee on Social Issues: Inquiry into domestic violence issues and trends in NSW at 19](#), accessed on 12 August 2012. We believe this research could also help inform the operation of the defence of self-defence for victims of violence who may previously have responded with violence.

¹³⁰ Bradfield thesis at 207.

¹³¹ Bradfield thesis at 200.

particular incident which is considered to give rise to the killing.¹³² This highlights again the importance of social framework evidence, as discussed above.

Duty to retreat

Another element that indirectly applies to the defence of self-defence is the duty to retreat. In a contemporary context, Bradfield suggests this would include avoiding a confrontation by leaving, calling the police or seeking some kind of assistance.¹³³ While the duty to retreat is not included in the legislation, Bradfield argues it is relevant to the question of whether the “conduct is a reasonable response in the circumstances as he or she perceives them.”¹³⁴

Juries and judges often do not understand why women simply do not leave a violent relationship. There is a lack of understanding of the conflicting emotions victims of intimate partner violence feel,¹³⁵ the barriers to leaving and a failure to acknowledge that the most dangerous point of a violent relationship is at the point at which the woman leaves.¹³⁶ This lack of understanding again highlights the very strong need and value of social framework evidence and education for legal practitioners, judiciary and others.

Bradfield’s draft self-defence provision

In considering potential reform of the law of self-defence, it is important to consider whether any proposals have been made and what is happening in other jurisdictions. For example, we note that Bradfield proposed a draft self-defence provision in her thesis in 2002. We draw the Committee’s attention to the existence of this draft provision.

We also note that this was 10 years ago and Bradfield may have additional suggestions and amendments to propose to this draft provision. Bradfield and others may be able to provide information on whether this provision has been considered, adapted or adopted in other jurisdictions. What is important is that consideration be

¹³² Elizabeth Sheehy et al, *Defences to Homicide* at 3.

¹³³ Bradfield thesis at 217.

¹³⁴ Section 418(2) *Crimes Act 1900* (NSW)

¹³⁵ See Bradfield thesis at 200

¹³⁶ Wallace’s study of NSW Police homicide files from 1968 – 1981 found that 46% of women killed by their husbands were killed in the context of their having left or on the process of leaving their husband. See: A Wallace, *Homicide: The Social Reality*, NSW Bureau of Crime Statistics and Research, Sydney, 1986 at 112 (125) accessed on 2 August 2012.

given to what should be included in a legislative provision which acknowledges the gender bias of the current defences and seeks to remove barriers to victims of intimate partner violence accessing self-defence where defensive elements are present.

The draft provision, including Bradfield's footnotes, is extracted in full below:¹³⁷

'DRAFT PROVISION'¹³⁸

A person is not criminally responsible for an offence if the conduct constituting the offence is carried out by him or her in self-defence or in defence of another.¹³⁹

Conduct is carried out by a person in self-defence or in defence of another if the person believed that the conduct was necessary to defend himself or herself or another person and his or her conduct was a reasonable response in the circumstances as perceived by him or her.¹⁴⁰

In considering whether a response was reasonable in the circumstances as perceived by a person, that person's personal history, attributes and characteristics are relevant.

For the purpose of determining whether a person was acting in self-defence or defence of another, there is no rule of law that self-defence is negated if –

- (a) the person was responding to a history of personal violence against himself or herself or another rather than a single isolated attack;
- (b) the person has not pursued other options other than the use of force; or
- (c) the person used a weapon against an unarmed person.

¹³⁷ Bradfield thesis at 245-246.

¹³⁸ This draft provision is based on [Rebecca Bradfield's] submission to the Taskforce on Women and the Criminal Code. It is noted that the formulation of self-defence set out by Taskforce on Women and the Criminal Code relies extensively on my recommendations, Taskforce on Women and the Criminal Code, *Task Force on Women and the Criminal Code Report of the Task Force on Domestic Violence to the Queensland Government*, Report, Brisbane: Department of Justice and Attorney-General, 2000 at 163-164.

¹³⁹ This provision is taken from the MCCOC recommendation, see Model Criminal Code Officers Committee of the Standing Committee of the Attorney-General, above n 179 at 66-68.

¹⁴⁰ This provision is taken from the MCCOC recommendation, see *ibid*.

If a person is responding to a history of violence against himself or herself or another person, consideration should be given to the cumulative effect of such violence in assessing whether the force used was reasonable'.¹⁴¹

Self-defence as a partial defence

Excessive self-defence is a partial defence in NSW and in South Australia¹⁴² and Western Australia.¹⁴³ Both Victoria and Queensland have introduced new partial defences with defensive elements: Victoria in the form of defensive homicide¹⁴⁴ and in Queensland in the form of “killing for preservation in an abusive domestic relationship.”¹⁴⁵ While some argue that the existence of partial defences, such as provocation, help prevent victims of intimate partner violence being convicted of murder,¹⁴⁶ others argue that the existence of partial defences, such as provocation and excessive self-defence, impede acquittals on the basis of complete self-defence in appropriate circumstances.

Battered Woman's Syndrome

While it is not a defence in its own right, evidence of ‘Battered Woman’s Syndrome (BWS)’ may be used to explain why women remain in violent relationships and ultimately kill their violent intimate partners. The syndrome focuses on “learned helplessness” as a response to the ongoing cycle of violence.¹⁴⁷ The concept of BWS is problematic and widely criticized: it pathologises the behaviour of women rather than focusing on the actions of the perpetrator of the violence.

As Sheehy et al note “even if the expert gives evidence that the woman’s response was a normal and reasonable response to having lived through her abusive circumstances, the testimony may be understood as explaining why she had an unreasonable but understandable over-reaction to her circumstances.”¹⁴⁸ BWS

¹⁴¹ This provision is taken from the Taskforce on Women and the Criminal Code, however this formulation was based largely on my submission, see Taskforce on Women and the Criminal Code, above at 163-168.

¹⁴² Section 15(2) *Criminal Law Consolidation Act 1935 (SA)*

¹⁴³ Section 248(3) *Criminal Code (WA)*

¹⁴⁴ Section 9AD *Crimes Act 1958 (Vic)*

¹⁴⁵ Section 304B *Criminal Code Qld*,

¹⁴⁶ Helen Brown cited in VLRC, *Issues Paper* at [6.13]

¹⁴⁷ For an explanation of Walker’s theory see Elizabeth Sheehy, Julie Stubbs and Julia Tomlie, “Defending Battered Women on Trial: The Battered Woman Syndrome and its Limitations,” *Criminal Law Journal*, Vol 16, 1992 at 380-382.

¹⁴⁸ Elizabeth Sheehy, et al, *Defences to Homicide* at 2.

evidence “is often interpreted by the Crown, judges and juries as explaining the woman’s subjective state of mind but not the mind of the reasonable person in her position.”¹⁴⁹

The High Court affirmed the use of BWS evidence in *Osland v R*, though Justice Kirby expressed misgivings about the use of BWS evidence. Justice Kirby refers to the Supreme Court of Canada in *R v Malott*:

"It is possible that those women who are unable to fit themselves within the stereotype of a victimized, passive, helpless, dependent, battered woman will not have their claims to self-defence fairly decided. For instance, women who have demonstrated too much strength or initiative, women of colour, women who are professionals, or women who might have fought back against their abusers on previous occasions, should not be penalized for failing to accord with the stereotypical image of the archetypal battered woman."¹⁵⁰

Were there to be a comprehensive review of homicide defences in NSW, there should also be an examination of what evidence is admissible in relation to those defences.

In this review, consideration should also be given to reversing the onus of proof in relation to provocation, that is, the accused person should be required to provide evidence to support his/her defence.

In the interim, the DVCC prefers the requirement of social framework evidence over BWS evidence.

Guilty pleas, continued reliance on the partial defence of provocation and limited reported appeal decisions

In a study of homicide cases involving women who killed their violent intimate partners, Sheehy et al identified 67 cases in Australia from 2000–2010. Eight-five per cent of the women defendants were indicted for murder.¹⁵¹ Sixty-three per cent of cases were resolved by guilty pleas, generally to manslaughter.¹⁵² Nineteen point four (19.4) per cent of cases resulted in no conviction - 11 cases of acquittal on the basis of

¹⁴⁹ Ibid

¹⁵⁰ *R v Malott* (1998) cited in *Osland v R* (1998) 159 ALR 170

¹⁵¹ Sheehy et al, *Defences to Homicide* at 21.

¹⁵² Sheehy et al, *Defences to Homicide* at 22.

self-defence and two matters not proceeding to trial.¹⁵³

Of the matters that proceeded to trial, 6 convictions of manslaughter were made on the grounds of provocation or excessive self-defence.¹⁵⁴ Of those matters in which the Crown accepted a guilty plea to manslaughter, 13 were on the basis of provocation or excessive self-defence, that is, 45% of guilty pleas.¹⁵⁵

Similarly, in Bradfield's research referred to above, women successfully relied on the defence of provocation in 40% of cases.¹⁵⁶

Sheehy et al express concern about the abolition of provocation in some Australian jurisdictions given the reliance on provocation as outlined above and in the "absence of clear empirical evidence that the defence of self-defence is operating effectively ... particularly [in cases] involving non-traditional self-defence scenarios."¹⁵⁷ They also warn an unintended consequence of the abolition of provocation could include a larger number of women defendants who kill their violent intimate partners being convicted of murder and receiving longer sentences.¹⁵⁸

As well, a discount for an early guilty plea, may see more women defendants who kill their violent intimate partners pleading guilty to manslaughter rather than risk running the complete defence of self-defence which could result in a conviction for murder.¹⁵⁹

Sheehy et al cite 9 of 15 NSW cases which resulted in guilty pleas to manslaughter accepted by the Crown on indictments to murder in circumstances in which the defendant claimed she was responding to a physical attack or threat from her intimate partner. Each of these 9 cases "demonstrated strong defensive elements suggesting self-defence may have been successful had the case proceeded to trial."¹⁶⁰ Bradfield raised similar concerns in her research.¹⁶¹

Bradfield highlights the fact that the number of guilty pleas to manslaughter means

¹⁵³ Sheehy et al, *Defences to Homicide* at 21 -22

¹⁵⁴ Sheehy et al, *Defences to Homicide* at 21.

¹⁵⁵ Sheehy et al, *Defences to Homicide* at 21.

¹⁵⁶ Bradfield thesis at 27.

¹⁵⁷ Sheehy et al, *Defences to Homicide* at 24.

¹⁵⁸ Sheehy et al, *Defences to Homicide* at 24.

¹⁵⁹ Sheehy et al, *Defences to Homicide* at 25.

¹⁶⁰ Sheehy et al, *Defences to Homicide* at 25. See also footnote 166 for an outline of these cases.

¹⁶¹ Bradfield thesis at 196.

there are only limited appeal decisions reported, and thus available as precedents, regarding self-defence for battered women.¹⁶² This, combined with the fact that acquittals are not reported, makes it difficult for defence counsel to be aware of how and when self-defence may be a feasible option for their clients.¹⁶³ As a solution, Bradfield proposes the publishing of case comments in the “significant criminal law publications” and that “relevant portions of the transcript” be included on AUSTLII or Butterworths Online.¹⁶⁴ These are matters that should be included for further consideration in a more extensive review of NSW homicide defences.

Prosecutorial guidelines

Sheehy et al note their grave concern about the prosecution appearing to overcharge yet then accepting guilty pleas to manslaughter in circumstances where defensive elements are present.¹⁶⁵ The DVCC shares this concern – it suggests that this practice (whether or not it is policy) may be an expedient method of disposing of the prospect of expensive trials.

Sheehy argues that this highlights the strong need for prosecutorial guidelines for plea negotiations, particularly where there is “some evidence of self-defence”.¹⁶⁶ We support the proposition that in such circumstances the Crown consider proceeding to trial on manslaughter rather than murder so as “to reduce the pressure on the woman to plead guilty [to manslaughter] and thus allow the self-defence evidence to be heard by the trier of fact.”¹⁶⁷ This is also consistent with Recommendation 11 in the VLRC report, *Defences to Homicide Final Report*.

The DVCC has been advised that it is not at all uncommon to bargain away facts (for

¹⁶² Bradfield thesis at 196.

¹⁶³ Bradfield thesis at 196.

¹⁶⁴ Bradfield thesis at 196.

¹⁶⁵ Sheehy et al, *Defences to Homicide* at 26-27

¹⁶⁶ This was a recommendation by Judge Ratushny who conducted the Canadian Self-Defence Review, cited in Sheehy et al, *Defences to Homicide* at 27. It has also been recommended in the VLRC *Final Report* at [3.126] and Recommendation 11. We note that the NSW Prosecution Guidelines state: “An alternative plea will not be considered where its acceptance would produce a distortion of the facts and create an artificial basis for sentencing ... or where the accused person intimates that he or she is not guilty of any offence.”¹⁶⁶ ODPP, [Prosecution Guidelines of the Office of the Director of Public Prosecutions for New South Wales, 2003 at 38 accessed on 12 August 2012](#).

It would be helpful to understand how this is working in practice. A review of Prosecutorial Guidelines should be part of a comprehensive review of defences to homicide.

¹⁶⁷ This was a recommendation by Judge Ratushny who conducted the Canadian Self-Defence Review, cited in Sheehy, 2012 at 27. It has also been recommended in the VLRC *Final Report* at 3.126 and Recommendation 11

example, in *R v Koch*) and recommends a review of prosecutorial guidelines and practice, particularly as they relate to the practice of plea bargaining in such cases and policies surrounding it. These practices must be made transparent.

Ongoing education about family violence

Stubbs and Tomlie's earlier research indicated another barrier included "reluctance by defence counsel to argue self-defence."¹⁶⁸ Education is key to overcoming this barrier and the question arises as to why there is such reluctance.

The VLRC *Defences to Homicide Final Report* recommended professional education for police, legal practitioners and judiciary on the broader social context in which homicide takes place, the nature and dynamics of domestic violence and its long-term effects,¹⁶⁹ as well as the interrelationship between family violence and use of fatal force and a "continuous improvement approach in ensuring family violence is properly understood and taken into account."¹⁷⁰ This education needs to begin at law school. The VLRC felt this was "essential to the effective operation of defences and informed decisions being made concerning pleas and sentencing."¹⁷¹ The VLRC also argued that a proper understanding by police, legal practitioners and judiciary of the interrelationship between family violence and use of fatal force would "have a significant impact at a number of stages of the legal process."¹⁷² This includes at the preliminary and investigations stages, pre-trial, trial and at sentencing.¹⁷³

The VLRC also recommended that any future training for police examine particular barriers to disclosing family violence and to accessing effective assistance, particularly for people from Indigenous or CALD backgrounds, people with a disability, people in same-sex relationships and people in regional and remote areas.¹⁷⁴ These issues need to be explored more fully.

¹⁶⁸ Julie Stubbs & Julia Tomlie, "Battered Women Syndrome in Australia: A Challenge to Gender Bias in the Law?" in J. Stubbs (ed) *Women, Male Violence*, The Institute of Criminology, Sydney, 1994 cited in Bradfield thesis at 195.

¹⁶⁹ VLRC *Final Report* at [4.169]

¹⁷⁰ VLRC *Final Report* at [4.174]

¹⁷¹ VLRC *Final Report* at [4.169]

¹⁷² VLRC *Final Report* at [4.154]

¹⁷³ See VLRC *Final Report* at [4.154] for a detailed explanation.

¹⁷⁴ VLRC *Final Report* at [4.173]

Better funding of women's domestic violence services

The DVCC recommends that any review of partial defences to homicide should take a holistic approach, including examining the background and precipitating factors in domestic homicide. Research in the United States has found that where there is adequate and appropriate legal assistance, accommodation and other victim support services, the number of women killing their violent intimate partners is lower than where these services are not available.¹⁷⁵

An important part of any holistic review of homicide defences, particularly the adequacy of such defences for victims of domestic violence who kill their violent intimate partners, should include recommendations to increase funding for women's domestic violence services. NSW is the State worst off in terms of specialist domestic violence services for victims of domestic violence and their children. Based on the US research, such funding will not only reduce preventable deaths of victims of domestic violence at the hands of their violent partners, it should also reduce the incidence of women victims of domestic violence feeling they have no other option but to kill their violent partner.

Recommendation 9: That in reviewing practices of both defence and prosecution lawyers, research should be conducted into:

- **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 an indictment of murder rather than manslaughter in cases where evidence of mitigating circumstances is not in dispute.**

Recommendation 10: That, within a comprehensive review, consideration be given to the notion of reversing the onus of proof so that the defence has to demonstrate the elements of provocation, rather than the prosecutorial onus to prove that they were not present.

¹⁷⁵ Angela Browne and Kirk R. Williams, "Exploring the Effect of Resource Availability and the Likelihood of Female-Perpetrated Homicides," *Law & Society Review* 23(1) (1989) at 87, 90.

Additional reading that the DVCC recommends to the Committee

In formulating this submission the DVCC has read widely about the nature of the partial defence of provocation, the limits of reform, and the experiences of different jurisdictions. We have drawn on this reading in the preparation of this submission and have also identified a number of references that we recommend that the Committee read in full, these are:

- Victorian Law Reform Commission, *Defences to Homicide: Final Report*
- Kate Fitz-Gibbon, *The Aftermath of Provocation: Homicide Law Reform in Victoria, New South Wales and England*
- 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 194.
- Elizabeth Sheehy, Julie Stubbs and Julia Tolmie, *Defences to Homicide for Battered Women: A Comparative Analysis of Laws in Australia, Canada and New Zealand* (forthcoming *Sydney Law Review*)
- Carolyn Ramsey, *Provoking Change: Comparative Insights on Feminist Homicide Law Reform* (2010) 100 *Journal of Criminal Law and Criminology* 33