

**Submission
No 41**

INQUIRY INTO PARTIAL DEFENCE OF PROVOCATION

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Legislative Council,
Select Committee on the Partial Defence of Provocation
NSW Parliament
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Submission to the Legislative Council Select Committee on the Partial Defence of Provocation

This letter is in response to the call for submissions on *the Partial Defence of Provocation and related factors*. I am a criminologist, and Professor in the Faculty of Law at the University of NSW, with a longstanding research interest in violence against women, homicides that arise in the context of domestic violence and defences to homicide. In this submission I draw upon research concerning those issues that I have conducted jointly with Professor Elizabeth Sheehy of the University of Ottawa and Associate Professor Julia Tolmie of the University of Auckland.

1. The need for a comprehensive review

A comprehensive review is required because of the complexity of the issues and the challenge of bringing about effective reform in this area. Such a review should have regard to:

- the very different contexts within which men and women typically resort to homicide
- the need to overcome any gender bias in laws and their application
- the interests of women, as victims and offenders
- the interconnection of homicide laws, (partial) defences, evidence and sentencing, and
- factors outside the doctrinal content of the defences that shape how the relevant laws are interpreted and given effect.

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In 2010, the NSW Law Reform Commission and the Australian Law Reform Commission considered the laws of homicide, defences to homicide and related matters as part of their family violence inquiry.¹ The NSW Law Reform Commission (NSWLRC) currently has a reference on sentencing. Thus the NSWLRC has the technical expertise and recent experience that would allow it to undertake the detailed review that this issue warrants in a timely manner.

Recommendation: That the Select Committee refer this inquiry to the NSW Law Reform Commission for a comprehensive review.

1.1 Background to this recommendation

1.1.1 The different contexts within which men and women typically resort to homicide

An inquiry needs to recognise the very different contexts within which men and women typically resort to homicide.² Just over half of the homicides in Australia are 'domestic' and approximately 60% of these are intimate partner homicides, mostly committed by men.³ It is much less common for women to kill, and when they do so, it is often after having suffered domestic violence⁴ committed by the deceased.⁵

Much of the criticism of the defences to homicide, and the partial defence of provocation particularly, has arisen with respect to homicides that occur in the context of domestic violence. Thus an inquiry needs to have a significant focus on domestic violence.⁶

¹ Australian Law Reform Commission/New South Wales Law Reform Commission (ALRC & NSWLRC), *Family Violence – A National Legal Response, Final Report* (2010), chapter 14.

² Morgan, J (2002) *Who Kills Whom and Why: Looking Beyond Legal Categories* (Occasional Paper). Melbourne: Victorian Law Reform Commission; Morgan, J (forthcoming 2012) 'Homicide Law Reform and Gender: Configuring Gender' *Australian and New Zealand Journal of Criminology* 45(3).

³ Virueda, M and Payne J (2010) *Homicide in Australia: 2007–08 National Homicide Monitoring Program annual report*, Monitoring Reports No. 13 Canberra, Australian Institute of Criminology at 9.

⁴ In this submission the terms domestic violence and family violence are used interchangeably, since law and practice in NSW uses domestic violence but the VLRC and the ALRC & NSW reports use the term family violence to refer to similar matters.

⁵ Morgan 2002 above note 2.

⁶ Morgan, J (forthcoming 2012) above note 2.

1.1.2 The need to overcome any gender bias in laws and their application

The fact that it is much less common for women to kill and that women are more commonly victims than offenders in homicide incidents⁷ has meant that the defences to homicide and the standard interpretations and applications of those defences have largely developed on the basis of male experience. Any reforms should seek to redress gender bias in the substance or application of relevant laws or rules.⁸

1.1.3 The interests of women, as victims and offenders

Recent public concern about the use of the partial defence of provocation has arisen with respect to men's use of provocation where they have killed a female partner, or where they have killed another man alleged to have made a non-violent sexual advance. However, women too rely on partial defences to homicide in some circumstances. Thus, women's interests arise both in ensuring that men do not use provocation inappropriately, for instance to trivialise violence against women, and in ensuring that women have access to the partial defence of provocation in relevant circumstances.

Future developments in law should adequately reflect women's experiences and interests as victims or offenders, and respond to the contexts in which they find themselves, including those that might shape an abused woman's resort to homicide.

1.1.4 The interconnection of homicide laws, (partial) defences, evidence and sentencing

The consideration of the merits of the abolition of provocation and of the adequacy of self defence for victims of prolonged domestic and sexual violence should not occur in isolation.

The laws of homicide, defences and partial defences, sentencing and rules of evidence intersect and '[t]he consequences of change in one area need to take account of effects in another to balance the varying circumstances in which offences and defences may arise and interact.'⁹ The failure to consider this interaction may result in unintended negative consequences arising from any reforms.

New Zealand provides a key example. The abolition of provocation occurred without due consideration of other relevant factors such as the absence of

⁷ Mouzos, J. (2005). *Homicide in Australia: 2003-2004 National Homicide Monitoring Program (NHMP) annual report* (Research and public policy series, no. 66). Canberra: Australian Institute of Criminology; Morgan, J (2002) above note 2.

⁸ Victorian Law Reform Commission (VLRC) *Defences to Homicide*, Final Report (2004) at xxv; ALRC & NSWLRC above note 1 at ch. 14.

⁹ Law Reform Commission of WA (LRCWA) *Review of the Law of Homicide, Final Report*, 2007 at iv; see also VLRC 2004.

other partial defences, the narrow way in which self defence is interpreted in practice in that country, the relevance of evidence of domestic violence, or sentencing provisions. Our recent research suggests that the abolition of provocation in New Zealand may be associated with more battered women defendants being convicted of murder rather than manslaughter, and receiving harsher sentences including life imprisonment.¹⁰

Even in Victoria, where the Victorian Law Reform Commission (VLRC) provided an excellent and comprehensive report,¹¹ the reforms that were enacted seem to have produced some unintended outcomes. For instance, the newly introduced defensive homicide provisions have attracted criticism.¹² They were intended as a safety net for battered women who could not meet the requirements for self defence, but have instead been used by men in unintended ways, and are now subject to further review.

This demonstrates the complexity of the issues and the challenge of bringing about effective reform in this area.

1.1.5 Factors outside the doctrinal content of the defences that shape how the relevant laws are interpreted and given effect

The outcomes of homicide cases are also shaped by factors beyond the formal content of the laws. Factors which shape how cases are charged, conducted and directed in practise include levels of knowledge and expertise concerning matters such as domestic violence,¹³ aspects of legal culture, prosecutorial policy and practice.¹⁴

2. The retention of provocation

The continued use of provocation as a partial defence to murder by men to minimise or excuse male violence towards women, or other men - as in

¹⁰ Sheehy, E. Stubbs J and Tolmie J (forthcoming 2012) Battered Women charged with homicide in Australia, Canada and New Zealand: How do they fare? *Australian and New Zealand Journal of Criminology* 45(3);

Sheehy, E. Stubbs J and Tolmie J (forthcoming 2012) Defences to Homicide for Battered Women: A Comparative Analysis of Laws in Australia, Canada and New Zealand *Sydney Law Review*.

¹¹ VLRC (2004) above note 8.

¹² Kate Fitz-Gibbon & Sharon Pickering, "Homicide Law Reform in Victoria, Australia: From Provocation to Defensive Homicide and Beyond" (2012) 52 *British Journal Criminology* 159; Tyson D (2011) Victoria's New Homicide Laws: Provocative Reforms or More Stories of Women 'asking for it'? *Current Issues in Criminal Justice* 23: 203–233. Victoria, Dept of Justice (2010) *Review of Defensive Homicide Discussion Paper* at Part 3.

<http://www.justice.vic.gov.au/wps/wcm/connect/justlib/DOJ+Internet/resources/1/2/120303804377b0c39d7dfd34222e6833/DiscussionPaperDefensiveHomicide.pdf>.

¹³ ALRC/NSWLRC above note 1; VLRC above note 8

¹⁴ Sheehy et al (forthcoming 2012) *Sydney Law Review* above note 10 at Part 2.

cases of non-violent sexual advance - is a matter of legitimate concern which has attracted widespread criticism.¹⁵

However, in the absence of a comprehensive review and package of reforms, any move to abolish provocation may be counter-productive in at least two ways. First, the damaging, victim-blaming narratives that many advocates seek to have excluded via the abolition of provocation may re-emerge in other partial defences or in sentencing.¹⁶ Secondly, people who have a well founded argument that their resort to homicide should be seen as less culpable than murder, such as some women who kill in the context of having been victims of domestic violence, may be deprived of a partial defence and be dealt with more harshly than is currently the case.¹⁷

Recommendation: The partial defence of provocation should be retained.

2.1 Relevant Considerations in Assessing Provocation

a) Will battered women be able to avail themselves of other defences (if provocation is abolished)?

Self defence: Our research found numerous cases in which the facts suggested strong defensive elements but self defence was not raised.¹⁸ Even where self defence is raised, much will turn on the range of evidence that is seen as relevant. This may be especially significant in cases in which battered women use lethal violence in a non-confrontational context. For instance, Rebecca Bradfield's analysis demonstrates how, in the case of *Bradley*,¹⁹ a long history of domestic violence was not given great weight, but instead the focus was placed on events immediately before the killing and an insult uttered at that time. Thus self defence was not left to the jury and the matter was seen as one of provocation. This demonstrates how much relies on how the threat which the woman faces is construed by judges and lawyers and, in turn, on whether legal professionals have an adequate understanding of domestic violence.

Even with broad interpretation and sensitive application, it is unlikely that self defence will be available to all battered women who kill in response to

¹⁵ A good summary of the critique and analysis of the issues is provided by VLRC 2004 above note 8; see also Stewart F and Freiberg A *Provocation in Sentencing Research Paper 2nd* ed. 2009

¹⁶ Fitz-Gibbon and Pickering 2012 above note 12; Stewart and Freiberg, 2009 *ibid*; VLRC above note 8 at 270

¹⁷ VLRC *ibid*.

¹⁸ Sheehy et al (forthcoming 2012) *Sydney Law Review* above note 10.

¹⁹ Unreported Supreme Court Victoria 14 December, 1994; see Bradfield, R (2002) *The Treatment of Women Who Kill Their Violent Male Partners Within the Australian Criminal Justice System*, Unpublished PhD Thesis, *University of Tasmania*, at 211ff.

desperate circumstances as not all fact situations will meet the requirements of self defence.

Excessive self defence: For similar reasons to those discussed above, not all homicide cases in which battered women kill, even where there are defensive elements, will meet the requirements of excessive self defence.

Substantial impairment: There has been a welcome shift away from relying on the partial defence of substantial impairment (previously diminished responsibility) possibly in recognition that it is not consistent with the circumstances of most battered women who resort to homicide. It has been subject to trenchant criticism for psychologising domestic violence²⁰ and seeing the women involved as less rational rather than as less culpable for resorting to lethal violence when faced with desperate circumstances. It would be a retrograde step to revert to battered women having to rely on substantial impairment as a basis for offering a partial defence to murder.

b) Plea bargaining

Our recent research demonstrates that in NSW the majority of battered women defendants charged with a homicide offence plead guilty, and that the partial defences including provocation provide an important basis for plea bargaining.²¹ This confirms the findings of earlier research by Bradfield.²² Whether this course of action is available to the accused depends on the view of the facts taken by the prosecution and thus is not simply a defence strategy.

It is likely that the abolition of provocation will limit the circumstances in which the prosecution is willing to accept a guilty plea to manslaughter and necessitate more women going to trial for murder.

c) Sentencing issues

i. Issues of provocation arising at sentencing

The Victorian Sentencing Advisory Council (VSAC) has provided a detailed discussion of the implications of the abolition of provocation in Victoria on sentencing practice which argues that 'it is imperative that the problems and flaws of the pre-existing law not be transferred from the substantive

²⁰ Bradfield, R (2002) *ibid* at 103, and chapter 4 generally.

²¹ Sheehy, et al., (forthcoming 2012) *Australian and New Zealand Journal of Criminology* above note 10.

²² Bradfield found that in Australia over the period 1980 to 2000, 22 women pleaded guilty to manslaughter on the basis of a lack of intention to kill, 10 did so on the basis of provocation, and 1 on the basis of diminished responsibility; Bradfield above note 19 at 27.

criminal law into the law of sentencing'.²³ They argue that 'old assumptions will need to be discarded and a new normative framework must be developed' in order to prevent provocation re-emerging 'in a new guise as a particular variety of murder'.²⁴ They acknowledge that little attention has been paid to provocation as a sentencing factor in sentencing law or theory and they have begun to develop a framework for considering provocation in sentencing.²⁵

The VSAC report emphasises the complexities of law reform in this area and the need for careful consideration of the implications of the abolition of provocation for sentencing. In the absence of a new framework to guide sentencing where provocation is an issue, the objectives of any reforms may be undermined.

- ii. Failing to properly credit the domestic violence faced by battered women defendants

Our previous research found that at sentencing, the link between the battered woman defendant's criminal actions and the deceased's violence was not always properly credited. The formal defences of self-defence and provocation require an examination of any link between the behaviour of the deceased and that of the accused. However, in sentencing following a guilty plea, there was commonly a 'disconnection between the violence of the deceased and the response of the defendant' which was most evident in remarks about the need for general deterrence as a sentencing consideration.²⁶

With the abolition of provocation, it is unclear whether the desperate circumstances typically faced by battered women who resort to homicide will be fully credited in sentencing or in what way.

- iii. The likelihood of harsher sentences in cases where that is unwarranted

Given the relative infrequency of battered women's homicide cases, it is too soon to determine the effects of the abolition of provocation on case outcomes and sentencing in any of the jurisdictions in which provocation has been abolished. However, there is good reason for concern that in New

²³ They have suggested a framework for approaching sentencing differently that seeks to avoid that happening. The framework seems to have much to recommend it, although it has not yet been tested in practice; Stewart and Freiberg above note 15 at 1.1.4 and chapter 8.

²⁴ Ibid.

²⁵ The framework seems to have much to recommend it, although it has not yet been tested in practice; Stewart and Freiberg above note 15 at chapter 8.

²⁶ Stubbs J & Tolmie J (2005) 'Defending Battered Women on Charges of Homicide: The Structural and Systemic Versus the Personal and Particular' in W Chan, D Chunn & R Menzies (eds), *Women, mental disorder and the law*, at 10.5.2.

Zealand the abolition of provocation has made things more difficult for battered women.²⁷ This may also be the case in Tasmania given the absence of partial defences in that state.²⁸

It has been argued that provocation is unnecessary in jurisdictions which do not have mandatory life sentences for murder²⁹ and that the interests of women who kill in the context of domestic violence and are convicted of murder can be adequately addressed at sentencing.³⁰ However, this fails to acknowledge the substantially different sentences that apply to murder as compared to manslaughter.³¹

A NSW Judicial Commission study notes that 100% of people convicted of murder in NSW over the period 2003-2007 received a prison sentence, regardless of plea.³² Following the introduction of standard minimum sentences in NSW in 2003,³³ the length of prison sentences for murder increased significantly, especially for those who had pleaded not guilty.³⁴ While data are not provided separately for women offenders, the median terms of imprisonment for murder were substantial - a median non parole period of 16yrs 6mths and a median full sentence of 23 yrs.

By contrast, sentences for manslaughter do not have a standard minimum non-parole period, and are able to be more targeted to the specific case. Thus, convictions for manslaughter based on provocation properly attract 'a wide range of sentences... indicative of the variable objective and subjective circumstances in which provocation offences occur'.³⁵ Not all cases result in imprisonment.

A second Judicial Commission study reported that over the period 1990-2004, five women who had successfully raised provocation received non-

²⁷ Sheehy et al (forthcoming 2012) *Sydney Law Review* above note 10

²⁸ Bradfield R (2003) Contemporary Comment: The Demise of Provocation in Tasmania. *Criminal Law Journal* 27: 322-4.

²⁹ LRCWA above note 9 at 222.

³⁰ Jackson J (2003) *Tasmania Parliamentary Debate*. House of Assembly, 20 March: 59-60.

³¹ For a detailed discussion, see Stewart and Freiberg above note 15 at chapter 7.

³² Poletti P & Donnelly H *The impact of the standard non-parole period sentencing scheme on sentencing patterns in New South Wales* Research monograph, NSW Judicial Commission, 2010 at 25.

³³ 20 years for most cases, and 25 years for cases involving children under 18yrs or specified categories of victims such as those working in public service roles; Part 4, Div 1A (ss 54A-54D) was inserted into the *Crimes (Sentencing Procedure) Act* 1999.

³⁴ 'For offenders who pleaded not guilty, the median full term increased by 27.8% from 18 years to 23 years, 123 and the median non-parole period increased by 17.9% from 14 years to 16 years 6 months'....'For offenders who pleaded guilty, the median full term and the non-parole period increased by 8.3% from 18 years to 19 years 6 months, 125 and 7.4% from 13 years 6 months to 14 years 6 months, respectively'; Poletti & Donnelly above note 32 at 25.

³⁵ Indyk S et al., *Partial Defences to Murder in NSW 1990-2004*, June 2006 NSW Judicial Commission at 70.

custodial sentences³⁶ (two of these raised provocation together with diminished responsibility/substantial impairment).³⁷ For those women sentenced to imprisonment, head sentences ranged from 36 to 126 months and non-parole periods from 18 to 96 months.

While the data presented in these two Judicial Commission reports are not strictly comparable, they demonstrate the very markedly different sentences handed down for murder as compared with manslaughter, and thus give good reason to believe that, should provocation be abolished, battered women convicted of murder who might currently be able to argue provocation will face much harsher sentencing than is currently the case. That would be an undesirable outcome.

The case of *R v Burke*³⁸ demonstrates clearly the dilemma facing a judge sentencing an Aboriginal woman for murder who had experienced an extensive history of abuse and extreme disadvantage; the judge found that the case more closely resembled manslaughter but felt constrained in setting an appropriate sentence by the need to reflect the seriousness of the offence of murder.

The VLRC recognised the possibility that battered women convicted of murder following the abolition of provocation might, without other reforms, be sentenced more harshly. They acknowledged that this was undesirable and made recommendations that sought to avoid this outcome, including that the full range of sentencing options be available in such cases,³⁹ public education to help explain why those convicted of murder might nonetheless deserve short sentences or non-custodial sentences,⁴⁰ professional education about family violence for judges and lawyers,⁴¹ appellate court guidance for judges sentencing in such circumstances,⁴² and the use of expert evidence about family violence to assist at sentencing.⁴³

In NSW it is not possible to simply follow the VLRC approach to protecting battered women convicted of murder from unduly harsh sentencing due to the existence of standard minimum sentences in this state. To achieve such an objective would require a more fundamental change to sentencing law and policy, which reinforces the need for a detailed examination of these issues by the NSWLRC.

³⁶ Ibid at 69.

³⁷ Ibid at 73.

³⁸ *Regina v Burke* [2000] NSWSC 356; note that this case was heard before the introduction of standard minimum sentences.

³⁹ VLRC above note 8 at [7.53] and chapter 7 generally.

⁴⁰ VLRC ibid at [7.54].

⁴¹ VLRC ibid at [7.49].

⁴² VLRC ibid at [7.56].

⁴³ VLRC ibid at [7.50-51].

3. Self defence

The statutory framework for self defence in NSW should be able to accommodate the circumstances facing many of the women who kill in response to prolonged domestic and or sexual abuse.⁴⁴ However, this will depend a good deal on the extent to which the lethal violence is presented in its context, and on the range of evidence that is seen as relevant to determining the objective and subjective elements of self defence.

In order to ensure that 'self-defence is defined and understood in a way that takes adequate account of women's experiences of violence', it may be necessary to reform rules of evidence and 'clarify the scope of the defence' as was recommended by the VLRC.⁴⁵

4. Evidentiary issues

Women charged with offences committed in response to domestic violence have poor prospects that their behaviour will be assessed fairly if the social context of their offending is not understood.⁴⁶

Without legislative guidance there is no reason why such evidence should not be admissible, but the onus is on individual lawyers and judges to recognise its relevance and significance. This level of expertise cannot be guaranteed.

The admission of evidence concerning Battered Women Syndrome (BWS) in Australia cases has not redressed this concern, and may even exacerbate the difficulties faced by some battered women since BWS can be narrowly understood to signify pathology or helplessness that undermines claims to self defence.⁴⁷ As we have argued elsewhere:

expert evidence on Battered Woman Syndrome (BWS) is often interpreted by the Crown, judges and juries as explaining the woman's subjective state of mind but not the state of mind of a reasonable person in her position. BWS evidence attempts to explain why the woman reasonably perceived herself to be trapped in the violent relationship, under a particularly dangerous threat and unable to defuse the threat by legal means.... even if the expert gives

⁴⁴ ALRC & NSWLRC above note 1 at [14.93]

⁴⁵ VLRC above note 8 at 68.

⁴⁶ Stubbs J & Tolmie J (2005) above note 26 at 194.

⁴⁷ Ibid at 10.4; Stubbs J & Tolmie J, "Falling Short of the Challenge? A Comparative Assessment of the Use of Expert Evidence on Battered Woman Syndrome" (1999) 23 *Melbourne University Law Review* 709; Sheehy, E Stubbs J & Tolmie J "Defending Battered Women on Trial: The Battered Woman Syndrome and its Limitations" (1992) 16 *Criminal Law Journal* 369.

evidence that the woman's response was a *normal or 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. This is part of a deeper struggle to communicate to judges and jurors what it is to experience a profound emotional bond and severe trauma concurrently and cumulatively over the passage of time, as well as to illuminate the structural constraints of women's lives, particularly those of women embedded in dangerous relationships.⁴⁸

Rather than relying on BWS, there is a need for a clear provision for the leading of evidence about domestic violence, as in Victoria.

Victoria enacted legislation in 2005 to make it clear that in cases where family violence is alleged, a wide range of evidence is relevant to the subjective and objective aspects of the self-defence requirements.⁴⁹ This includes evidence about:

- the history of the relationship and violence within it;
- the cumulative effect, including the psychological effects, of the violence on the victim;
- social, cultural and economic factors that impact on a person who has been affected by violence;
- the general nature and dynamics of relationships affected by family violence, including the possible consequences of separating from the abuser;
- the psychological effect of violence on people in such relationships; and
- the social or economic factors that impact on people in such relationships.

The ALRC & NSWLRC report notes that '[s]takeholders unanimously supported the Commissions' proposal for the enactment of legislative guidance about the potential admissibility of family-violence related evidence in the context of homicide defences'.⁵⁰

The nature and scope of any such reforms needs to be carefully considered within the NSW legal context, but the Victorian reforms provide a good model for the reasons given in the VLRC report.⁵¹

⁴⁸ Sheehy, et al., (forthcoming 2012) *Sydney Law Review* above note 10.

⁴⁹ Section 9AH(3)(a)-(f), Crimes Act 1958 (Vic).

⁵⁰ ALRC and NSWLRC above note 1 at [14.87].

⁵¹ VLRC above note 8.

5. Other matters

The option of introducing a specific defence for battered women should not be pursued; it has been canvassed and rejected for good reason by the ALRC & NSWLRC and by the VLRC.⁵² The provision introduced in Queensland has been subject to considerable criticism and is seen by many critics as counterproductive.⁵³

Finally, as recognised by the ALRC & NSWLRC

‘a focus on the doctrinal content of defences is insufficient to ensure that the experiences of family violence victims who kill are accommodated in practice. Continuing legal professional and judicial education is essential to ensuring that judges and lawyers practising in criminal law understand the nature and dynamics of family violence, and how evidence of family violence may be relevant to criminal defences’.⁵⁴

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⁵² ALRC and NSWLRC above note 1 at 642-644, and [14.93] ; VLRC above note 8 at [3.26].

⁵³ Eastal P and Hopkins A, “Walking in Her Shoes: Battered Women Who Kill in Victoria, Western Australia and Queensland” (2010) 35(3) *Alternative Law Journal* 132; Andrew Boe comments (of this provision): “I, and most others consulted about this proposal disagreed quite vehemently with the terms of the amendment. We were collectively ignored, as were the raft of women’s organizations that were also consulted.” “Domestic Violence in the Courts: re-victimising or protecting the victims?” National Access to Justice and Pro Bono Conference, 27-28 August 2010, Brisbane at para [14]. see: https://wic041u.server.secure.com/vs155205_secure/CMS/files/cms/NA2JPBC2010-Boe.pdf

⁵⁴ ALRC and NSWLRC above note 1 at [14.99].