

INQUIRY INTO PARTIAL DEFENCE OF PROVOCATION

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Date received: 10/08/2012



**Women's Domestic Violence
Court Advocacy Service NSW Inc**

***Submission to the NSW Legislative
Council Select Committee inquiry
into the partial defence of
provocation***

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10 August 2012

About WDV CAS NSW Inc

Established in 1996, WDV CAS NSW Inc (formerly the Women's Domestic Violence Court Advocacy Service (WDVCAS) Network Inc) is the peak body for women and their children experiencing domestic violence who require legal protection from the courts. WDV CAS NSW is an incorporated association comprising representatives from 28 individual WDV CAS¹ that operate in 108 local courts throughout metropolitan, regional and rural New South Wales.

In 2011/2012, the 28 WDV CAS provided 76,473 services to 27,526 clients across NSW. The WDV CAS made a total of 44,642 referrals, and assisted 3,168 Aboriginal clients and 5,123 culturally and linguistically diverse (CALD) clients.

In 2010/2011, the 28 WDV CAS provided 73,765 services to 21,219 clients across NSW (a 25% increase on last year and a 78.7% increase since program expansion on 1 July 2009). There was a 55% increase in the number of interim and final orders obtained since the expansion of the program. The WDV CAS made a total of 39,200 referrals, and assisted 1,407 Aboriginal clients and 4,499 culturally and linguistically diverse (CALD) clients.

In 2009/2010, the 28 WDV CAS provided services to female clients in 56,770 domestic and family violence related matters. 18,060 of these clients had children under the age of 16.

The purpose of WDV CAS NSW is to:

- advocate in social, legal and political settings on behalf of women and children who have experienced domestic violence;
- collaborate and consult with key stakeholders; as well as
- formulate recommendations for systemic policy and law reform.

The specific aims of WDV CAS NSW are to:

1. identify and respond to emerging issues associated with domestic violence, with a focus on systemic policy and law reform;
2. promote a co-operative and integrated approach to working in domestic violence to ensure effective service delivery;
3. collaborate with local courts, NSW police, referral support services and other relevant bodies where appropriate;
4. promote dialogue and debate on issues associated with domestic violence; and
5. identify, analyse and disseminate up to date research.

¹ Blue Mountains, Burwood, Central Coast, Central West, Far South Coast, Far West, Hunter, Hunter Valley, Illawarra, Macarthur, Macquarie, Mid-North Coast, New England, North Coast, North West, North West Sydney, Northern Rivers, Northern Sydney, Riverina, South Coast, South Eastern, South West Sydney, Southern, Southern Sydney, Sydney, Wagga Wagga, Western, Western Sydney

Members of WDV CAS NSW exchange information and discuss social, legal and procedural issues impacting on their services. In identifying and discussing systemic issues and developing strategies to address these issues, WDV CAS NSW acts as a strong advocate for legal and social policy reform for women and their children experiencing domestic violence.

Introduction

WDV CAS NSW appreciates the opportunity to make a submission to the NSW Legislative Council Select Committee inquiry into the partial defence of provocation.

As the peak body in NSW representing women and children to access Apprehended Domestic Violence Orders (ADVOs) through the local court system, our direct experience over 15 years makes WDV CAS NSW well placed to comment on the terms of reference for this inquiry.

Domestic violence is a gendered issue and WDV CAS NSW works within that context. WDV CAS NSW is alarmed by reports that domestic violence related homicide in New South Wales is increasing against the trend of homicide generally in the State.

Reports from the NSW Bureau of Crime Statistics and Research (BOCSAR) show unequivocally that domestic violence is a gendered issue and WDV CAS NSW is alarmed by claims from some that men and women are equally victims. Data from the BOCSAR's *NSW Recorded Crime Statistics from 2010* shows that:

- A woman is more likely to be killed in her home by her male partner than anywhere else or by anyone else²;
- 82% of alleged offenders (13,322 of 16,239) proceeded against by NSW Police for the criminal offence of domestic violence related assault were male³;
- 69% of victims (20,047 of 29,006) recorded by NSW Police in the criminal offence of domestic violence related assault were female⁴; and
- 86% of domestic violence related assault occurred in residential premises⁵

WDV CAS NSW does not suggest that women are never defendants. However, women who are the defendants in domestic violence matters often have a long history as a victim of violence or trauma (or both). In WDV CAS NSW's experience, a woman will suffer years of domestic violence in silence but, in a single moment of self defense or retaliation against the perpetrator, will find herself immersed in the criminal justice system having to defend an ADVO and criminal charges.

² NSW Bureau of Crime Statistics and Research, *NSW Recorded Crime Statistics 2010* (2011)

³ Ibid, 3

⁴ Ibid

⁵ Ibid

In WDV CAS NSW's experience, a woman defendant is more likely to be young, be from a culturally and linguistically diverse background, or have a mental illness. These added vulnerabilities make their interaction with the criminal justice system even more difficult and unbalanced.

Due to resource constraints, each WDV CAS has limited capacity to assist women and children at hearings to provide support and legal information. A woman defendant supported by WDV CAS is more likely to "want it all over and done with" and will plead guilty to criminal charges as soon as she is able rather than request legal advice, attempt to plea bargain or go through the harrowing experience of a hearing and cross examination.

This is compounded by the fact that a woman may not have had access to relevant support at all times, such as, an interpreter attending the premises with Police after the domestic violence incident.

Recent media coverage of the sentence imposed on a man for the offence of killing his young wife⁶ thrust the partial defence of provocation into the public spotlight and has reignited the debate on the place of provocation in the State's criminal justice system.

The man, Chamanjot Singh, pleaded guilty to the manslaughter of his wife, Manpreet Kaur. It was reported that Singh claimed "that he was not guilty of murder because Ms Kaur had provoked him by verbally abusing him" and that he "just lost it, I had no control of my body or mind".⁷ Mr Singh was sentenced to six years imprisonment.

While WDV CAS NSW accepts the role of plea-bargaining generally in our judicial system, our experience shows there are significant differences in the way that women and men interact with the legal system and the consequences that flow from those interactions.

The retention of the partial defence of provocation

*... any argument that it is murder for a battered woman driven to desperation to kill her partner but only manslaughter for a man to do the same after discovering her committing adultery is offensive to common sense.*⁸

The partial defence of provocation appears in section 23 of the *Crimes Act 1900* and attempts to reduce the culpability of a person for an act or omission causing the death of another because the conduct of the deceased person caused them to lose self control.

⁶ Paul Bibby, *Victim's sister hits out as box-cutter killer jailed for six years*, Sydney Morning Herald, <http://www.smh.com.au/nsw/victims-sister-hits-out-as-boxcutter-killer-jailed-for-six-years-20120607-lzxx.html>, accessed 20 June 2012

⁷ Ibid

⁸ New South Wales, *Provocation and Self-defence in Intimate Partner and Homophobic Homicides*, Briefing Paper No 3/07, 21

WDVCAS NSW strongly asserts that no one ever asks to be the victim of violence, and that culture is never an excuse for violence. Further, there are strong gender contrasts in the use of violence, including:

- the impact of the violence in creating a lasting and ongoing sense of fear in the victim;
- the nature and severity of the act or acts of violence;
- the circumstances in which the violence is conducted, that is, by the victim in self defence, or by the perpetrator for the purpose of power and control to coerce the behavior of the victim; and
- the reporting (or not) of any or all of the incidents of violence.

In WDVCAS NSW's experience, it is grossly unsatisfactory to attempt to distort the complex nature of domestic violence into quite simply a "loss of self control". For thousands of women a generation can pass before they are able to contemplate speaking about their experience of domestic violence and considering their escape, support and recovery options. WDVCAS has assisted many women who relay the story of staying in violent domestic relationships until their children have reached adulthood before seeking protection from the police or court.

Unfortunately for some victims of domestic violence (as evidenced by the horrific violence endured by Catherine Smith and her children at the hands of her husband Kevin), the police and court response is so inadequate over many years that they believe their only chance of escape and safety is to resort to violence.⁹

Further, despite enduring years of domestic violence, there is often no documented evidence of injuries; reports to family, friends, doctors or police; or photos of injuries. It is not unusual for women who are experiencing domestic violence to make every attempt to conceal the situation and present that their relationship is "normal". But, a lack of traditional evidence does not equate to no act of domestic violence, not least because domestic violence is not restricted to physical assault. To assume so is to misunderstand the manifestations of domestic violence.¹⁰

*Since 1996, more new studies have been published on the characteristics of intimate partner homicides. These studies confirm findings of earlier studies, namely that men are more likely to kill their female partners (or sexual rivals) out of jealousy, possessiveness or control whereas women are more likely to kill their partner in response to violence from them.*¹¹

WDVCAS NSW supports the finding of the Victorian Law Reform Commission that factors that influence a person's ability to accept responsibility for the consequences of their act or omission causing the death of another person should be taken into account at sentencing rather than form the basis for a separate partial defence.

⁹ Australian Story, *Abused woman's long journey for justice*, ABC News, <http://www.abc.net.au/news/2011-09-19/catherine-smith-australian-story/2902804>, accessed 20 July 2012

¹⁰ Examples of domestic violence are included in Appendix 1

¹¹ Ibid 8, Executive Summary

We note that provocation is already included as a mitigating factor to be taken into account in determining the appropriate sentence for an offender in section 21A of the *Crimes (Sentencing Procedure) Act 1999*.

WDVCAS NSW recommends that the partial defence of provocation is abolished in New South Wales.

The adequacy of the defence of self-defence for victims of prolonged domestic violence

In Australia, self-defence might be considered the most appropriate defence to a charge of murder for a woman who kills to protect her life or the lives of her children in a domestic violence context. It is about the rational act of a person who kills in order to save her (or his) own life. But the lack of success in raising self-defence in Australia for battered women has meant that provocation has been the main focus of the courts.¹²

WDVCAS NSW is concerned that the statutory definition of self defence does not adequately account for the experiences of victims of domestic violence to be adduced as evidence in court. WDVCAS NSW strongly asserts that the current framework does not contain within it an inherent recognition of the range of gender, social, cultural and economic factors which can compound a victim's experience of violence, and her response to the violence.

Section 418(2) of the *Crimes Act 1900* sets the criteria for when self defence is available to include:

A person carried out conduct in self-defence if and only if the person believes the conduct is necessary to defend himself or herself or another person,... and the conduct is a reasonable response in the circumstances as he or she perceives them.

In our opinion, where a woman is charged with murdering her partner, it is critical that all evidence of the nature and impact of any domestic violence is put before the court for consideration to assist a judge or jury to understand her perceptions and actions, for example, a victim of domestic violence might have a heightened perception of imminent harm by reason of her past experiences of violence.

It has been suggested that the defence of self-defence may often be the most appropriate defence for women who kill following a history of domestic violence, since self-defence recognises that many women are acting in self-preservation rather than as a result of loss of self control or a disturbed mind.¹³

WDVCAS NSW supports research which has shown that in situations where a female victim of domestic violence ultimately kills her partner there has

¹² *Battered woman defence*, http://en.wikipedia.org/wiki/Battered_woman_defence, accessed 20 July 2012

¹³ *Ibid* 8, 15

been a turning point; one or more factors have differentiated that particular incident from countless others.¹⁴ In addition, we are concerned that the current application of self defence fails to recognise and consider the range of impacts (for example, social isolation) of domestic violence experienced by women from diverse cultural backgrounds.

It is our strong assertion that victims of domestic violence are significantly disadvantaged by the legal process if she is unable to convey through evidence her experience of domestic violence, even if this means including what might not be traditionally considered in the scope of admissible evidence. WDVCAS NSW suggests that guidance could be provided on what might constitute relevant evidence, and the weight to be given it by a jury, including:

- evidence of prior acts of or threats of domestic violence;
- history of the relationship;
- evidence of attempts to leave or gain assistance and support; or
- social, cultural and economic impacts.

WDVCAS NSW recommends the admission of “social framework evidence”, or evidence that places a greater emphasis on the context and consequences of domestic violence.

Conclusion

Violence should never be tolerated by the community, particularly violence against women and children. WDVCAS NSW is greatly concerned that domestic violence related homicide in New South Wales is increasing against the trend of homicide generally in the State.

WDVCAS NSW is mindful that it is sometimes difficult for the judicial system to respond in ways that are well received by the community when matters before the court are at the centre of emotive media attention. However, WDVCAS NSW is committed to working with the NSW Government, victims of domestic violence, police, courts and other key stakeholders to ensure an effective, measured and appropriate response to serious offences of violence.

¹⁴ Zoe Craven, Battered Woman Syndrome, Australian Domestic & Family Violence Clearinghouse Topic Paper, 2003, 8

Appendix 1

Defining domestic violence

Domestic violence includes:

- emotional abuse – blaming the victim for all problems in the relationship, undermining the victim's self-esteem and self-worth through comparisons with others, withdrawing interest and engagement and emotional blackmail;
- verbal abuse – swearing and humiliation in private and public, focusing on intelligence, sexuality, body image or the victim's capacity as a parent or spouse;
- social abuse – systematic isolation from family and friends, instigating and controlling relocations to a place where the victim has no social circle or employment opportunities and preventing the victim from going out to meet people;
- economic abuse – controlling all money, forbidding access to bank accounts, providing an inadequate 'allowance', preventing the victim seeking or holding employment and taking wages earned by the victim;
- psychological abuse – making threats regarding custody of children, asserting the justice system will not believe or support the victim, destroying property, abusing pets and driving dangerously;
- spiritual abuse – denial and/or misuse of religious beliefs or practices to force victims into subordinate roles and misusing religious or spiritual traditions to justify physical violence or other abuse;
- physical abuse – direct assaults on the body, use of weapons (including objects), assault of children, locking the victim out of the house, sleep and food deprivation; and
- sexual abuse – any form of pressured/unwanted sex or sexual degradation, causing pain during sex, coercive sex without protection against pregnancy or sexually transmitted disease, making the victim perform sexual acts unwillingly and criticising or using degrading insults.

Family violence is a broader term referring to violence between family members as well as violence between intimate partners. This term also covers a complexity of behaviours beyond that of direct physical violence. The Australian and New South Wales Law Reform Commission's review of family violence law in Australia recommended that state and territory legislation 'should provide that family violence is violent or threatening behaviour, or any other form of behaviour, that coerces or controls a family member or causes that family member to be fearful'.¹⁵

¹⁵ Parliamentary Library, Commonwealth of Australia, Domestic Violence in Australia – an overview of the issues (2011) 2