REPORT OF PROCEEDINGS BEFORE

SELECT COMMITTEE ON THE PARTIAL DEFENCE OF PROVOCATION

INQUIRY INTO THE PARTIAL DEFENCE OF PROVOCATION

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CORRECTED PROOF

At Sydney on Friday 21 September 2012

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The Committee met at 10.30 a.m.

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PRESENT

Reverend the Hon. F. Nile (Chair)
The Hon. D. J. Clarke
The Hon. T. J. Khan
The Hon. S. MacDonald
The Hon. A. Searle
Mr D. Shoebridge
The Hon. H. M. Westwood

Reverend the Hon. FRED NILE: Welcome to the third and final public hearing of the Select Committee on the Partial Defence of Provocation. This Committee was established in June 2012 to inquire into the partial defence of provocation which operates to reduce a charge of murder to a conviction for manslaughter. The Committee's terms of reference also require it to consider the adequacy of the defence of self-defence for victims of prolonged domestic and sexual violence as well as any other relevant matter. The Committee has already held two full days of public hearings and has received evidence from a range of legal services, advocacy groups and academics as well as from various Government departments and individuals impacted by the law in this area.

Today we are hearing from representatives from a range of organisations and individuals, including representatives from the Redfern Legal Service and Sydney's Women's Domestic Violence Court Advocacy program, the Victims of Crime Assistance League, the NSW Council for Civil Liberties as well as a barrister, Mr Winston Terracini SC QC and academic associate Professor Julia Tolmie who will be teleconferenced into the hearing from New Zealand.

As Chair of the Committee I would like to thank all our witnesses for their attendance today. Thank you for coming in to assist our Committee.

Before we begin I need to make some comments about procedural matters. The committee has previously resolved to authorise the media to broadcast sound and video excerpts of its public hearings. Copies of the guidelines concerning the broadcast of proceedings are available from the table at the door. In accordance with the guidelines, the media can film Committee members and witnesses but people in the audience should not be the primary focus of any filming or photographs. In reporting the proceedings of this Committee the media must take responsibility for what they publish or what interpretation is placed on anything that is said before the Committee.

Witnesses are advised that if there are any questions you are unable to answer today but you would be able to answer if you had more time or certain documents at hand, you are able to take a question on notice and to provide the Committee with an answer at a later date.

Witnesses, members and their staff are advised that any messages should be delivered through the attendants or the Committee clerks. I also advise that under the Standing Orders of the Legislative Council, any documents presented to the Committee that have not yet been tabled in Parliament may not, except with the permission of the Committee, be disclosed or published by any member of such Committee or by any other person.

Witnesses are advised that, if you should consider at any stage during your evidence that your response to particular questions should be heard in private, when we have cleared the room the Committee would be willing to hear your reasons and to consider your request. I also remind witnesses that the freedom afforded to witnesses by parliamentary privilege is not intended to provide an opportunity to make adverse reflections about specific individuals. Witnesses are asked to avoid making critical comments about specific individuals and instead speak about general issues of concern. Can everyone please turn off their mobile phones for the duration of the hearing.

I welcome our first witnesses, Ms Jacqui Swinburne, Acting Chief Executive Officer at Redfern Legal Centre and Ms Elizabeth Morley, Principal Solicitor at Redfern Legal Centre. We were to hear from Ms Susan Smith, Coordinator, Sydney Women's Domestic Violence Court Advocacy Service but she has advised that she is not well and she is excused from being a witness.

JACQUI SWINBURNE, Acting Chief Executive Officer, Redfern Legal Centre, and

ELIZABETH MORLEY, Principal Solicitor, Redfern Legal Centre, affirmed and examined:

CHAIR: Do either of you wish to make an opening statement?

Ms SWINBURNE: Redfern Legal Centre is an independent, non-profit, community-based legal organisation which auspices the Sydney Women's Domestic Violence Court Advocacy Service. We have read the options paper and some of the transcripts while this Committee hearing has proceeded but our position remains that we recommend the abolition of the partial defence of provocation and we recommend that the law of self-defence be reformed to reflect the community standards and to adequately address the social context of women who kill violent partners.

Our domestic violence team has a great deal of experience with assisting women attending court in domestic violence-related matters, usually as the victim or the person in need of protection in these matters. However, in certain circumstances the woman is the defendant. Every week where hear about the experiences of women whose lives have been affected by domestic violence and this is the knowledge that informs our recommendations.

Unfortunately, Susan Smith who is the team leader of our Domestic Violence Service and who drafted our submission is not able to be here today at short notice. We are happy to speak to her submission but we may need to take some questions on notice, as we prefer to have the benefit of her experience.

We also endorse the recommendations made to the inquiry by Graeme Coss from the University of Sydney. The recommendations made by Mr Coss were similar to our recommendations, including the enactment of legislation similar to section 9AH of the Victorian Crimes Act. Mr Coss also took the opportunity to suggest modifications to section 9AH and we want to reiterate our view, and his, that the changes need to be packaged if justice is to be achieved.

CHAIR: Ms Morley, do you wish to say anything?

Ms MORLEY: No, I will respond to questions at this stage, thank you.

CHAIR: You are very direct in the recommendations in your submission—there are no half measures. You recommend that the partial defence of provocation be abolished. One of the concerns that has come through from witnesses is that, if it were abolished, would it have any effect where women need to use it in cases of abuse and so on. So your second recommendation, that "the law of self-defence be reformed to reflect community standards", et cetera in order to address the social context of women who kill violent partners, do you feel that that recommendation would provide protection for women who have experienced the battered wife syndrome and so on?

Ms SWINBURNE: Yes we do, we think it gets more into a self-defence argument than a provocation argument. We have the same concern that there should not be small changes made because it is harder to bring that through into case law. It should be a complete change.

Ms MORLEY: I think at this stage we feel that provocation is based fairly firmly in traditions of the past that are no longer appropriate to modern society. We think they validate and continue to validate the right of people to take violent action against their spouse, simply because they have been insulted and based on proprietorial views. We do not think that that should continue to stand and that a clean break with that view should be made. We believe that the way to do that is to remove the partial defence and to move to amending the defence of self-defence.

The Hon. SCOT MacDONALD: You seem to be leaning towards the Victorian reforms but in the next breath you acknowledge that the Victorian reforms might not be as good as they could be. So my fear would be that you have reservations about provocation and how it can be misused or not do the job, but if we then rely on self-defence, potentially we will have women standing up before a murder charge and as I understand it, generally facing longer sentences. Does that trouble you?

Ms MORLEY: Generally speaking we take the position that killing someone in response to insult is not an appropriate response and that domestic violence is quite different in character to responding to insult. Domestic violence is a longstanding situation where one person exercises control over another person. In most of those instances the woman will have been insulted for a long time, demeaned, and yet has not responded until she feels quite lost and trapped in that situation.

The Hon. SCOT MacDONALD: When the Assistant Commissioner of Police appeared before us he said that usually the first time they hear about a domestic violence incident is when they go to a very serious crime, where there is a body or a very serious assault, so there may have been quite a long history—

Mr DAVID SHOEBRIDGE: That was not quite what he said. He said it can be.

The Hon. SCOT MacDONALD: It can be. Forty-two occasions was the figure I think he used. Is there not a risk, if there is that long history of psychological abuse or whatever type of abuse where you do not have witnesses and it is difficult to prove, that by trying to do a good thing here and stop men from getting a short sentence—six or seven years or whatever it is for a brutal crime—if we throw out provocation and rely on self-defence some instances of self-defence will be very difficult to prove?

Ms MORLEY: That is one of the concerns. However, that history of abuse and insult also remains an issue in terms of the defence of provocation. In our view—I am trying to formulate my response—we think it is not working for women at the moment and it is not protecting women.

Ms SWINBURNE: In some of the cases that Susan has spoken to us about in preparing for this, women who have killed have been encouraged by their solicitors to argue provocation, not self-defence. It appears they may think that is an easier defence. However, you still go to jail for that and self-defence is an all-or-nothing defence. In one of the cases we had the woman was quite adamant that, no, she did not want to argue provocation she wanted to argue self-defence, and she was successful. That was against the advice of her lawyers. However, we feel that in many of these cases even though the law of provocation may be used it is really not the issue; it is self-defence, and the self-defence law needs to be amended to take into account domestic violence situations and how they occur, not an immediate response necessarily.

Ms MORLEY: In some of the proposals that have been put forward the option is a reversal of onus of proof in proving provocation, certainly in the circumstance you have described where the women have not come forward in the past. Our experience shows that women who are very frightened are often the ones that are least willing to come forward and have the least history of report. They would certainly be disadvantaged by a reverse onus of proof because they would not have the corroborating support evidence. But if they are very frightened they are the ones who are most going to want to call on a defence of self-defence as opposed to a partial defence of provocation.

Ms SWINBURNE: From what Susan has told us they also are often very fearful of leaving. In one case she told us about someone had left her partner and then described to Susan that she felt more fearful after she had left because she did not know what he was thinking or what he was going to do. At least when she was there she knew how he was feeling and what she might expect and how to keep him happy. That fear of leaving is a big factor.

The Hon. TREVOR KHAN: Can I put this scenario to you? It arises in the English decision of *Director of Public Prosecutions v Camplin*. It involved a young man but equally you could see circumstances where it involved a woman. In that case a young man of about 15 was sexually assaulted—to use the old term, sodomised—by a much older man and having sexually assaulted him the older man was derisive towards him and laughed. The young man reacted and killed the older man. You could see that in the circumstances of any sexual assault arising. If we adopt your proposal it could not be said that that young man could rely upon self-defence. The sexual assault occurred and the action arose from the derision the young man faced, or it could very well be that a young woman faced at the hands of an older man. That person would then probably be convicted of murder. What do you think of that?

Ms MORLEY: In his submission Graeme Coss discusses the issue of murder versus manslaughter and where that stands these days, and I think he describes that very well. The reason for supporting a package of reforms is that certainly those things go to culpability. What we would be looking for in the package is exactly what is going to go into sentencing guidelines. Those kinds of issues should be taken into account in sentencing guidelines. The devil there will be in the detail.

The Hon. TREVOR KHAN: Sure.

Ms SWINBURNE: Obviously we are never going to advocate that killing is okay and that people should be taking the law into their own hands. That is why we see it as a package deal and some of those circumstances should be taken into sentencing not into the defence of provocation.

The Hon. TREVOR KHAN: Even under our current sentencing guidelines provocation is one of the factors to be taken into account.

Mr DAVID SHOEBRIDGE: In relation to the issue that you raise about women resorting to provocation as a partial defence they think they can prove, some witnesses have suggested that comes about as a result of overcharging. The police and the DPP have a set of circumstances that would allow for a charge either of murder or manslaughter, but they are charging a number of women with murder even though they can see on the facts that there is a perfectly valid case of provocation. That means the women are entering a plea on manslaughter on the basis of provocation to avoid a sentence of murder, whereas if they were charged with manslaughter under the current laws they could run their self-defence argument without the risk of having a conviction of murder. Do you have any views about overcharging?

Ms MORLEY: I think we should take that on notice and look into it a little more. Because we are not a criminal law practice as such we have less immediate experience of that.

Ms SWINBURNE: We do see some cases where the women are charged as the perpetrators in domestic violence situations where we think that is incorrect and the person who should have been charged—

Ms MORLEY: That in fact they are the primary victim and what has happened is that after years of abuse they have finally retaliated, and the system is used as part of the tool kit of continuing control and abuse. By the time the police get there the perpetrator, who is quite calm and controlled, puts their case to the police and the police then charge the victim, in effect.

The Hon. TREVOR KHAN: And the victim does not have provocation available unless the person is dead?

Ms MORLEY: In the scenarios we are talking about we are talking about assault.

Mr DAVID SHOEBRIDGE: And there is no partial defence of provocation?

Ms MORLEY: No.

Mr DAVID SHOEBRIDGE: In terms of abolishing provocation entirely, there might well be a set of circumstances where the violent conduct is understandable, killing somebody is understandable but it is not reasonable, and that seems to me to be the sort of area where provocation operates. One of the examples was given by the Hon. Trevor Khan. Another example might be where a woman has been the subject of belittling and humiliating behaviour for a substantial period of time and responds by killing her partner. A jury might think that that is not a reasonable response and therefore would not entitle the woman to self-defence. But the jury might say that is an understandable response and therefore reduce the culpability to manslaughter by reason of provocation. If we get rid of provocation might there not be women who fall through the gaps?

Ms MORLEY: The issue, I think, is to what degree has that demeaning and insult of the woman continued on, because it may well reach the stage where she is completely trapped and imprisoned within that situation. I hear what you are saying about whether the jury would find it reasonable or not but, again, I think this goes to the culpability factors perhaps and should be considered within that and can be adequately addressed within that.

Mr DAVID SHOEBRIDGE: If we get rid of provocation there is just going to be a hard and fast line there, if we adopted amended self-defence. There will be women who can make the argument that they were completely trapped and had no other response and it was a reasonable act of self-defence. But there might be other women who are almost at that point and can make out a pretty humiliating and tortured life but not get to the point where they can prove that they were trapped and that was their reasonable response and then they are treated as murderers with no recognition in terms of culpability about that conduct.

Ms SWINBURNE: It is in our experience that women do not kill for being just verbally insulted, even over a long period of time; it is a long history of violent abuse and control.

CHAIR: It is physical abuse.

Ms SWINBURNE: Obviously a combination.

The Hon. DAVID CLARKE: But situations will arise, as Mr Shoebridge has pointed out, where they do not get to that level required. I ask you to assume that what Mr Shoebridge says is correct and there may be situations that fall into that category. How would you deal with them?

Mr DAVID SHOEBRIDGE: Mocking, humiliation, belittlement, destruction of any sense of self-worth.

The Hon. HELEN WESTWOOD: But that is still psychological abuse, and in the Victorian law that is covered. It is self-defence.

Mr DAVID SHOEBRIDGE: What I am saying is that there is a spectrum there.

Ms MORLEY: I hear that spectrum; I hear what you are saying. But I am trying to cast my mind across cases I have seen in the media over the last 30, 40 years and I am not aware of any cases where a woman has killed because of insult and demeaning behaviour as opposed to quite serious domestic violence.

Mr DAVID SHOEBRIDGE: The Bar Association gave us some quite surprising figures that showed slightly more than half of people accessing the defence of provocation were women, which did not accord with the media reporting of provocation, which reports the violence by men. Perhaps if you could take that issue on notice and have a look at some of those figures provided by the Bar Association?

The Hon. HELEN WESTWOOD: But then it might also be about overcharging as well. That could be the other relationship there, and I am not really sure whether we are able to tease that out.

Ms SWINBURNE: It may be because the current defence of self-defence is not adequate for the situations. But we would like to take that on notice.

CHAIR: In this issue of self-defence have there ever been cases where women you have been helping have been documenting the actual abuse if it went on for a period of time, in a notebook or something like that?

Ms MORLEY: The nature of domestic violence is such that it creeps up on people very often, that they do not even notice that is what is happening to them until, in fact, they are well lost in the situation, and even then they often do not characterise it as domestic violence because they have internalised that they are the problem, that the reason he gets angry is because they have done something wrong. It is only when they start to engage with outside agencies who say that what they are experiencing is domestic violence that they attach any of that analysis to it. So at that point they may well be advised by the outside workers to start to keep a diary or to document what is happening and there will start to be some record in those agencies of reports of the domestic violence. But, as I say, for many women it can go on for years and years and years before they even have a framework in which to see that this is not an acceptable situation that they are in.

CHAIR: Have some of them said that the result of the actual violence was so extreme that they have had to go to hospital and have some treatment for broken bones or something like that?

Ms MORLEY: That will be the case, but often they will give an excuse for that because they are embarrassed or they have a lot invested in their situation. I had one woman, who was thrown downstairs in front of her child, who did not want action taken because her husband was about to commence a business venture and she thought that the loss of reputation would undermine that risky business venture at that particular point and their whole economic situation would come tumbling down, including where their child was at school. So there are a lot of reasons why at that point they do not report what the cause of the injury was or what the circumstances are.

The Hon. ADAM SEARLE: I understand what your organisations say about needing a specific law that recognises the history of the context of violence towards women and I also understand what you say about the history of provocation and its historical and cultural roots, but outside the context of domestic and family violence, provocation also has an operation between people who may not be in intimate relationships. I am just a bit concerned that if we were to abolish provocation as a defence altogether there would be whole classes of defendants completely outside the scope of domestic and family violence who may be adversely affected, who would no longer have even a partial defence available to them. You may need to take that on notice, but that would be a concern of mine.

Ms SWINBURNE: We still do say that that should be part of sentencing, any circumstances like that. But the laws and community values are changing and it is not okay to respond with violence; for example, the law about hitting children that was recently changed. The law should not be condoning that it is okay to take the matter into your own hands and respond with violence.

The Hon. ADAM SEARLE: I do understand that, but you would accept there is a qualitative difference, at least in the current context, between a conviction for murder, which carries the most moral opprobrium, and a conviction for manslaughter, which although very serious and can lead to very heavy sentences.

Ms MORLEY: Graeme Coss in his submission speaks of some of the inconsistencies in that and whether or not that remains appropriate in relation to provocation. I thought he made very good sense in what he said. As Jacqui noted, there has been a change in public perception about the acceptance of violence and the acceptance of a violent response. We have seen what is happening in Kings Cross at the moment and a cultural violence. Society does not support that and we are looking at ways of winding back all of that approach. I think that it is an acceptable outcome at this stage to make that change.

Mr DAVID SHOEBRIDGE: I assume it would have to come with a review of the sentencing guidelines on murder so that we do not get those sorts of accepted standard minimum sentences; you would have to also revisit those guidelines on murder.

Ms MORLEY: Exactly, that is why we say it is a package. You cannot do one without the rest.

The Hon. HELEN WESTWOOD: I would like to tease out your suggestion that we strengthen the defence of self-defence. As you have already heard and you may have already looked at some of the evidence that we have received, a number of witnesses have raised concerns about the outcomes in Victoria. I am wondering whether or not you have had an opportunity to look at that and whether you think there is something additional we could do if we were to recommend your suggestion that we abolish the defence of partial defence of provocation and look to self-defence. Is there something additional you think we need to do to that law of self-defence?

Ms MORLEY: We would have to take that question on notice. We note from the transcript there has been a discussion, but we are not aware of those outcomes from the other jurisdictions.

Mr DAVID SHOEBRIDGE: I note from your submission you talk about allowing self-defence to also incorporate excessive force. If a defendant made a plea of self-defence and had it accepted that there was self-defence but excessive force used in the self-defence, what outcome do you think should arise in those circumstances? Is it a complete defence? Is it a partial defence?

Ms SWINBURNE: Each case is always different. We would have to take that one on notice. We want to reiterate that we prefer the model that Graeme Coss has put out with some of the amendments to the Victorian—

CHAIR: Have you had any discussion with and feedback from the women you are working with on this issue? I assume your views reflect—

Ms SWINBURNE: Susan Smith would be able to answer that better. In day-to-day practice we do not work with those women. Elizabeth does a little bit, but that is something Susan would have to answer.

Ms MORLEY: I understand that Ms Katherine Smith is putting in a submission or has put in a submission.

The Hon. HELEN WESTWOOD: I know your submission is directly related to women victims of domestic violence, but given that the Redfern Legal Centre—in its very location and its history—would have a broader clientele, I am wondering about that other area we have looked at in terms of provocation. It has certainly been raised with the inquiry. Do you have any views on non-violent homosexual advance where provocation is used or have you had any experience with clients around that issue?

Ms MORLEY: Our view is that it is not an acceptable defence at this stage. Women cannot use that defence if they are sexually harassed in the workplace. It is not an acceptable defence at this stage.

Ms SWINBURNE: We do not run a criminal law practice either.

Mr DAVID SHOEBRIDGE: I want to ask you about your experience of how difficult the task is in getting women who have been the subject of domestic violence to tell their story and how that might impact on the reversal of the onus of proof.

Ms MORLEY: It is often very difficult to get the woman to tell the story, quite often because they have completely internalised the issues that have happened and have taken on board a sense of shame and fault. Sometimes they do not have the framework to analyse what has happened to them and tell it, so they do not know what you are asking them to tell. This can be a great problem. It requires a high level of trust. It can be very difficult particularly with Indigenous women to get the information out because there is a very shameful, internal, private family discussion. It can be difficult for those things to come out.

Mr DAVID SHOEBRIDGE: What about to tell a judge or a jury compared to telling a solicitor?

Ms MORLEY: It is difficult to be asked about those things and to tell anyone at that stage. It is very difficult.

CHAIR: We thank you very much for coming today and helping with our inquiries. It is important to get your view on this issue.

Ms SWINBURNE: Thank you. We are very pleased to be asked to come.

CHAIR: All the best with your work.

(The witnesses withdrew)

(Short adjournment)

JULIA TOLMIE, Associate Professor, University of Auckland, Faculty of Law, before the Committee via teleconference, affirmed and examined:

CHAIR: We appreciate your cooperation with this inquiry. I note in your submission you are very critical of the decision in New Zealand to abolish the defence of provocation and you state in your covering letter that it was a mistake. Why was it a mistake?

Associate Professor TOLMIE: I think it was a mistake for several reasons. I think something had to be done with the defence. I want to make that clear up front. I think the evidence is overwhelming that it has been misused. The way I see it is it was originally designed for people caught up in extraordinary circumstances and there is a recognition that every human being caught up in those sorts of circumstances could be pushed beyond the bounds of human endurance. But it has been applied to circumstances and cases which are not extraordinary.

We all go through unrequited love, we have relationships that break up, we have to deal with sexual advances from people we are not attracted to. These are not extraordinary circumstances. They might be hurtful but they are not extraordinary. But the reason why I think it is a mistake to abolish the defence is that there are people who are caught up in extraordinary circumstances but who are not acting in self-defence. Those cases are not common but so long as the penalties for murder are still so harsh—and I am not just talking about the head sentences; I am talking about the non-parole periods and the stigma of murder—then I think those people need a defence.

The second point is that abolishing the defence is not going to get rid of the stock stories that it seems to be condoning culturally. I think that it is better to confront the issues and make it clear what we do not as a society think is acceptable to argue in the mitigation of criminal liability. I can illustrate that point by a conversation I had with a barrister in New Zealand before we abolished the defence. He said, "I don't care. I don't understand it anyway. When I get these sorts of cases I'm just going to argue lack of mens rea due to anger." I think at least modifying the defence provides guidance of what we consider to be acceptable and what we do not.

CHAIR: As you know the move around Australia has been to abolish the defence of provocation in the other States but in your material that you sent to us you were impressed with what was happening in Canada. Can you explain their situation?

Associate Professor TOLMIE: I am not so impressed with how they have used provocation in Canada. I am impressed with how the Canadian judiciary is responding to battered defendants. Victims of domestic violence are victims that I am concerned about when I think about abolishing the partial defences to murder. We have had a couple of cases, for example, in New Zealand where provocation has been applied to those cases. We have recently had one which has arisen where the defence is not available and it is a classic case of where it should have been available.

CHAIR: So your concern is not so much the situation of males murdering wives, but the defence that a battered wife needs. I am concerned about men murdering their wives and using provocation to justify their murder.

Associate Professor TOLMIE: I think we are walking a tightrope. On the one hand we want to remove it from people who are facing circumstances that are not extraordinary—they are using it to assert dominance or control over their partner—while at the same time leaving it available to people who have had their fundamental human rights breached in ways that they are justifiably reacting to. I would measure reform against balancing those two things: on the one hand removing it from situations where it is being used completely inappropriately, but retaining it for that small body of cases where it is still appropriately raised.

The Hon. SCOT MacDONALD: My understanding of what you are saying is that the self-defence provocation is flawed but not so flawed that we should abolish it. Perhaps the approach should be to guide the judiciary. If so, how do we guide the judiciary so that it is used appropriately?

Associate Professor TOLMIE: Yes—how we reform it so that on the one hand it is not used in cases where it is egregious and on the other hand make it more available to people who really do deserve it.

The Hon. SCOT MacDONALD: Yes.

Associate Professor TOLMIE: That is the really tricky question. I will provide the example of a case we have just had where a woman has been sentenced for murder when the defence of provocation might have been appropriate. Would that be useful?

The Hon. ADAM SEARLE: Yes, it would.

Associate Professor TOLMIE: The woman was in an extremely violent relationship for 11 years. There had been more than 50 police call-outs over that time. During most of the relationship she was trying to leave. It was the classic situation in that wherever she went he would find her and her whole family supported him in finding her. She had three children to that relationship and two were removed at birth because of the abuse. The third one was bounced around the extended family and finally she was told by the Department of Child, Youth and Family that it was her last chance to care for the child. It was a condition of her parenting that she not associate with the perpetrator because the child was exposed to domestic violence.

That was a really unfair condition because she never had any choice about associating with him. He came to her house and the child was uplifted. She then kicked him out of the house and her sister brought him back in. He was so drunk that he was not posing a threat to her at that time. There was just a rage. From her point of view, this guy had ruined her life and taken everything that mattered to her from her. If we look at international human rights literature on the subject and the cases coming out of the European Commission of Human Rights we can see that she had her fundamental human rights taken from her. Her right to associate and her right to be free from torture were completely violated by this person over that time. However, she could not argue self-defence because she was not acting in self-defence at that time.

The Hon. SCOT MacDONALD: He was not at that time an immediate physical threat?

Associate Professor TOLMIE: No, he was absolutely drunk.

Mr DAVID SHOEBRIDGE: Was the defence run and rejected, or was it not even run?

Associate Professor TOLMIE: We do not have it.

Mr DAVID SHOEBRIDGE: No, the defence of self-defence; was there an attempt to run that defence?

Associate Professor TOLMIE: No, there was no attempt to run self-defence in this case.

The Hon. HELEN WESTWOOD: Have you looked at the Victorian legislation? Provocation has been abolished as a defence and self-defence has been strengthened.

The Hon. TREVOR KHAN: No, that is not what they really did.

Mr DAVID SHOEBRIDGE: It was domestic homicide.

The Hon. HELEN WESTWOOD: I am sorry: domestic homicide.

CHAIR: Have you looked at the Victorian solution?

Associate Professor TOLMIE: Yes, I have looked at the Victorian solution. I think Victoria has done some brilliant things. For example, one thing I really think—although it is not in any of the suggested options, in the consultation on reform options—is brilliant and that is the evidentiary provisions. They have expanded the range of evidence that needs to come to trial. There are two issues, it seems to me: one is what the law says and the other is how the law is used and applied in different cases. I think that is absolutely brilliant.

The Hon. ADAM SEARLE: Associate Professor, we have some evidence before the Committee that suggests that those provisions may not be necessary because of our evidentiary regime that we have in place here.

The Hon. TREVOR KHAN: Stephen Odgers, SC.

The Hon. ADAM SEARLE: Yes, Stephen Odgers, SC.

Associate Professor TOLMIE: Yes.

The Hon. ADAM SEARLE: But have you had a chance to have a look at the different reform proposals that the Committee has formulated? Do you have any particular responses to any one of them?

Associate Professor TOLMIE: I have had a look at those proposals. I think I would test every proposal based on this tightrope that you're walking between on the one hand wanting to reject provocation in circumstances when someone has simply reacted to the loss of entitlement to their partner or when it is been tried to be used to condone homophobic violence, and on the other hand allowing it in very extraordinary circumstances when a person has had their fundamental human rights breached. We are looking at those bearing in mind that women traditionally have had a great deal of difficulty accessing the criminal defences.

I have looked at the different options using my own criteria of "Walking this tightrope?" as guidance in deciding what reforms need to be made. For myself, I think it is inappropriate to reverse the onus of proof. The reason for that is that, to me, it is like using a sledgehammer to crack a nut. Battered women traditionally have struggled to raise provocation along with the other criminal defences, so I think to reverse the onus of proof is just going to place extra obstacles in front of those defendants. It is not targeted particularly to the situations where we want to remove the defence.

The Hon. TREVOR KHAN: Professor—

Mr DAVID SHOEBRIDGE: She is still going, Trevor.

The Hon. TREVOR KHAN: Professor, could I just ask this?

Mr DAVID SHOEBRIDGE: She is still going, Trevor.

The Hon. TREVOR KHAN: Putting the issue of onus aside, are you able to look at what I think are the three options, not concentrating on the issue of onus, but the other, in a sense, subtleties of those options as to whether you can nominate one of those?

The Hon. ADAM SEARLE: Or a combination.

The Hon. TREVOR KHAN: Or a combination, yes.

Associate Professor TOLMIE: I prefer option three, but with some modifications.

Mr DAVID SHOEBRIDGE: That is the Wood model?

Associate Professor TOLMIE: That is the Trevor Khan model.

Mr DAVID SHOEBRIDGE: Or just option three, as it is described in the papers.

The Hon. TREVOR KHAN: That is lovely. I am loving to hear that there are some permutations.

Associate Professor TOLMIE: Can I just say a little bit about the modifications I would like?

CHAIR: Yes. You can outline those.

Associate Professor TOLMIE: That is the one where we are raising the normative bar, or we are saying that we do not just expect provocation: we expect gross provocation. It seems to me what I like about that is that we are making it very clear that we are keeping the defence for exceptional circumstances, extraordinary circumstances, not ordinary human life experiences. Raising the bar in that way, without being too prescriptive about what kind of conduct can comprise provocation, but at the same time being very clear about what conduct is being withdrawn from the defence of provocation—the list of circumstances which are not considered to be exceptional and extreme circumstances—I would add a little bit more too. I do not think it covers situations in

which it is quite common for men not to kill their ex-partners but to kill their ex-partner's new partner. That makes it sound like the provocation has to have come from the deceased.

The Hon. TREVOR KHAN: Right.

Associate Professor TOLMIE: So I would include that. I think it needs to be made clear that the context of the relationship should be considered. I agree with Professor Odgers that it is possible to consider that contextual evidence in New South Wales but the advantage of listing it in a piece of legislation is that in many instances, while it is possible to include that legislation, in fact lawyers do not run that kind of evidence. That is why I think having it in the evidence makes it very clear that this is desirable, that we need to be thinking more contextually when we approach these cases. I also thought that there does need to be provision made for the jealous stalker, who is not actually in a domestic relationship but thinks they are in a love relationship with their target as well.

CHAIR: We have some women's groups arguing for the abolition of the partial defence of provocation, but recommending that the law of self-defence be reformed to reflect community standards and to adequately address the social context of women who kill violent partners.

Associate Professor TOLMIE: Yes, and I absolutely think that needs to happen as well. But I still think that there will be battered women who are not able to raise the defence of self-defence, even if it is reformed in that fashion.

CHAIR: Thank you.

The Hon. HELEN WESTWOOD: Associate Professor, can I go back to the case that you cited as an example in which the defence of provocation was not available and ask you to again reflect upon the changes in Victoria where the violence or the threat does not have to have been immediate. Do you think that would be a defence that would be available in New Zealand?

Associate Professor TOLMIE: Effectively, what the Victorians have done is kept excessive self-defence as a partial defence when a women is reacting in self-defence but she has overreacted in a sense, and then they have tried to broaden self-defence so it is the general threat posed by the relationship. In the example that I have given, the woman was reacting to the person's presence and the uplifting of her child—the direct outcome of a long history of abuse—but it was not a defensive response. So under the Victorian model, you do have to be defending yourself to raise self-defence, and you have to be defending yourself—

The Hon. SCOT MacDONALD: Reasonably.

Associate Professor TOLMIE: —unreasonably or inappropriately to raise their version of excessive self-defence. You have to be acting in defence of yourself or another.

The Hon. HELEN WESTWOOD: Does a similar law exist in New Zealand?

Associate Professor TOLMIE: No, we have no partial defences. We have a disastrous situation in New Zealand, in my opinion.

Mr DAVID SHOEBRIDGE: Professor, that case that you described, the deeply disturbing case, what was the sentence that the women got in that case?

Associate Professor TOLMIE: She is awaiting sentencing. But, unfortunately, we have a presumption in favour of life imprisonment.

Mr DAVID SHOEBRIDGE: Can I ask you to take a step back out of the nitty-gritty of the law and think about the culpability in that case. Do you think in that case there should have potentially been a complete defence available, or only a partial defence?

Associate Professor TOLMIE: That is a very good question, and it is a hard question for me to answer. It is a hard question for me to answer because there is not really …… "not acting defensively" …….. There is not really a defence that is a complete defence that does not involve acting defensively in any of the jurisdictions that I have looked at—

The Hon. TREVOR KHAN: That is right, and never has.

Associate Professor TOLMIE: —Canada, Australia or New Zealand, which does not mean that there should \ not be, but it is a very hard question to answer.

Mr DAVID SHOEBRIDGE: I was asking you to try and answer that, to try to sort of pull your head out the history and the structure of the law, and give us a normative or a values response in that case.

Associate Professor TOLMIE: My own personal view is it would be great to have a complete defence in that case.

The Hon. TREVOR KHAN: It does not fall within our terms of reference.

Associate Professor TOLMIE: I personally think this is a person who we have failed as a society. We have failed to keep the person or her children safe.

The Hon. SCOT MacDONALD: In this case, at the sentencing stage, was there a discussion about mitigating factors? Will that come up?

Associate Professor TOLMIE: It will come up, yes, but there is a presumption in favour of life imprisonment in New Zealand. My understanding is that New South Wales has a presumption or a mandatory non-parole period, which is fairly extreme in the case of murder. Is that right?

The Hon. ADAM SEARLE: We have standard non-parole.

Mr DAVID SHOEBRIDGE: It is a guideline sentence.

Associate Professor TOLMIE: Right.

Mr DAVID SHOEBRIDGE: Effectively it puts in a minimum non-parole sentence, unless there are compelling reasons.

The Hon. TREVOR KHAN: No, it is not a guideline.

Associate Professor TOLMIE: I think it is 20 years. It is something fairly extreme. Is that correct?

Mr DAVID SHOEBRIDGE: Yes.

CHAIR: There is a big difference between murder and manslaughter sentences.

The Hon. TREVOR KHAN: Professor, the answer in New South Wales is that there is a standard non-parole period that is specified. The justice is required to specify the reasons for moving away from the standard non-parole period. So it is indicative of what the sentence should be, but certainly the justice retains the discretion with regards to sentencing.

Associate Professor TOLMIE: The same is true in New Zealand with life imprisonment. We have a presumption in favour of life imprisonment, which can be overturned. Professor Stubbs, Professor Sheehy and I looked at all the cases that we could find over an 11-year period across our three jurisdictions. With our 10 cases in that time in New Zealand there were four convictions for murder and the presumption in favour of life imprisonment has only been overturned in three of those four. It is quite hard to do still.

The Hon. TREVOR KHAN: That is a more extreme circumstance than in New South Wales.

Mr DAVID SHOEBRIDGE: When we look at the sentences for murder, because of that standard minimum, the sentences for murder are far tougher than the sentences for manslaughter in New South Wales.

Associate Professor TOLMIE: Yes. That is why I believe the partial defence is necessary.

CHAIR: We have had some cases of very brutal murders of wives, and the males have been able to claim provocation and get a sentence, basically, of six years after a very brutal murder.

Associate Professor TOLMIE: Which I think is unacceptable when she was only threatening to do something she has absolutely every right to do as an autonomous human being. I absolutely agree that the way it has been operating is unacceptable.

CHAIR: You mentioned one case in New Zealand. Have there been some cases you can refer to where, because you have abolished provocation, women are being treated unfairly? I think you mentioned one.

Associate Professor TOLMIE: Yes, this is the only one I am aware of. These things do not come up very commonly in New Zealand. It is a tiny little jurisdiction. I expect they will show up every one or two years now that we do not have a partial defence. I must say, in Australia, when we did the research—Professors Stubbs, Sheehy and I—we did find that provocation was being used in cases involving battered defendants. Probably in some of those cases self-defence would have been appropriate to have been used in plea bargaining and at trial. In some of those cases self-defence would have been appropriate; in some other cases they may not have been able to be fit within a self-defence framework, as we currently understand it.

The Hon. HELEN WESTWOOD: One of the things we have discussed around that is the overcharging by police and the advice battered women have received. That is why they have resorted to the defence of provocation rather than self-defence. Do you have a view about that?

Associate Professor TOLMIE: I think in most cases that will be the case and in some cases it will not be. There will be a small number of battered defendants who are not acting defensively at the time that they killed.

CHAIR: Has there been a change of opinion in New Zealand by women's groups in view of that case you have mentioned? Are they still strongly supporting the abolition of self-defence and provocation?

Associate Professor TOLMIE: Many of these cases do not hit the media. I know about this case because I was contacted by this person's lawyers, but it is not something that has received much media coverage. Basically there has been a guilty plea, there is no legal defence available, and there is no story for the media. Many of these cases are quite hidden. They are behind the scenes, not necessarily making it on to the public stage.

CHAIR: It is very different in New South Wales. We have a more aggressive media.

Associate Professor TOLMIE: Yes. When we did that search across Canada, Australia and New Zealand, we found many more Australian cases than Canadian cases. We expected them to be roughly a similar amount, and I think that indicates that the media has covered cases in Australia possibly more than they were being covered in Canada. So, that may well be a fair comment.

The Hon. HELEN WESTWOOD: At the time the defence of provocation was abolished in New Zealand was there any discussion about strengthening self-defence from those who were proposing to change?

Associate Professor TOLMIE: Yes. We had a Law Commission report in 2001 which recommended strengthening self-defence, but it has not been enacted. We also had a Ministry of Justice report saying—I am not quite sure on what basis—that we could trust judges to modify and change it. The problem is we have not had those test cases going out in which there is a chance to try to modify and change it. I think we have had a very mixed response from the judiciary in indicating an understanding around domestic violence. I think people assume they understand abusive relationships because they have been in relationships or they understand relationships, but it is a fairly specialised subject.

Mr DAVID SHOEBRIDGE: In the options paper a couple of different tests are being floated. One is the one you raised in the Hon. Trevor Khan's model, which talks about gross provocation—

Associate Professor TOLMIE: And makes it clear specifically what cannot be provocation.

Mr DAVID SHOEBRIDGE: Yes. One of the other models is Justice Wood's model which talks about the provocation been such as to warrant the liability being reduced from murder to manslaughter. Do you have any view about that second model, the Wood model?

Associate Professor TOLMIE: I think that is another way of saying that provocation can only be raised when there are extraordinary circumstances. I think asking for gross provocation is a little clearer in doing that.

Mr DAVID SHOEBRIDGE: If we float the term gross provocation, though, in the legal scene we have at the moment, do we not potentially risk that the law, with its big cultural history, will reflect that current test in the light of past conduct? How do we stop that happening?

Associate Professor TOLMIE: As well as having gross provocation you have to have a special situation, as you do under the Khan model, where specific behaviour is said not to be provocation, it cannot lawfully constitute provocation.

Mr DAVID SHOEBRIDGE: Do you think that is enough or do we need to put further guidance about, positively, what gross provocation would amount to?

Associate Professor TOLMIE: I think it would be helpful. You could provide an example of family violence. That would be helpful, as long as it is not prescriptive. I am a little worried about putting hurdles in front of women who have traditionally found facing the criminal system quite difficult. In appendix 1 there is a proposal by the Hon. Adam Searle which talks about a reaction to violent criminal acts which constitute domestic or family violence. My worry with that provision is that it is—I have two worries about that provision. One is that traditionally the criminal justice system is has approached family violence cases looking for egregious physical incidents of violence. What we know about family violence is that it is much broader than that.

The Hon. ADAM SEARLE: What I had in mind there was the definition used in the Victorian legislation. It describes violence as extending to non-physical violence—harassment, intimidation, emotional abuse—extending over a period of time.

Associate Professor TOLMIE: I think we need to be very clear about that definition. Otherwise we could find a shift to focusing on severe physical abuse. You have violent relationships where there is quite minor physical abuse but it is repetitive and cumulative, or there may be only one or two incidents but they are enough to keep the victim in check, and combined with another raft of abuse.

Mr DAVID SHOEBRIDGE: You said there were two concerns. One was the issue of the definition of violence. What was your other concern?

Associate Professor TOLMIE: My other concern is the need to have a well-informed jury when the immediate event that the defendant is reacting to is not the abuse, something that is only provocative because of that background. Some juries have demonstrated great capacity to do that and other juries have not done that very well at all. That is my other worry about that.

The Hon. ADAM SEARLE: That would be a problem with any partial defence, though, would it not?

The Hon. HELEN WESTWOOD: The Committee has heard evidence that often the jury does not understand the complexity of what is being argued or the complexity of the law. I am concerned in any of these models if we make the law more complex are we likely to get better outcomes and cause more confusion? I am also concerned in a couple of these models, in particular the Khan model, where we talk about excluding the ending of a relationship and changing the nature of a relationship, is there any chance that too could be used to exclude battered women from using that defence?

Associate Professor TOLMIE: That is a very good question. I think one case that the Committee would be well served to read as a cautionary tale is *R v Clinton, Parker, Evans*: a recent House of Lords decision this year. England tried to modify its provocation defence—they called it something other than provocation—and the House of Lords unpicked it in that particular case. I think they called it a "loss of control" defence. Sexual infidelity was removed as a qualifying trigger. The decision involved three men, each of whom had executed their partners on separation, and the House of Lords unpicked the provision. The House of Lords said

it was ridiculous and it could not apply it. It effectively read it in such a way that it is a dead letter. I think it is a cautionary case to read and to think about what judges can do with these provisions if they are not very carefully crafted.

Mr DAVID SHOEBRIDGE: They were still allowed to run the partial defence—

The Hon. TREVOR KHAN: That was the problem in Clinton.

Associate Professor TOLMIE: Yes.

CHAIR: Thank you for agreeing to give evidence to the Committee. It has been very helpful. The Committee much appreciates your expertise on this issue.

(The witness withdrew)

HOWARD WILLIAM BROWN, Vice President, Victims of Crime Assistance League, sworn and examined:

CHAIR: Do you wish to make an opening statement?

Mr BROWN: A very brief one. From listening to the evidence previously given I wish to make it perfectly clear that I think the issue in relation to provocation is a particularly complex issue. A number of people who have made submissions to the inquiry appear to be looking for some simplistic way of resolving the issue. I do not believe that there is a simplistic way to resolve this issue. I believe it will take a great deal of thought and a great deal of consideration before we can achieve a model that will effectively work for everyone concerned.

Mr DAVID SHOEBRIDGE: I thank you for your submission. I thought it was one of the most thought-provoking yet short submissions that really encapsulated the difficulties. I found it a pleasure to read.

Mr BROWN: Thank you.

The Hon. ROBERT BROWN: In your submission you reflect on the recent case of *R v Singh*. You commented that you thought the problem with that case was not so much with provocation law but with the low sentence that caused the public backlash. Will you explain that?

Mr BROWN: That is one of the reasons why I say that I do not believe there is a simplistic response to this particular issue. I believe that the outcry in relation to the decisions in *R v Won* and in *R v Singh* has come about as a result of the very small penalty that was attached to each particular crime. Therefore people have said post hoc ergo propter hoc—after that, therefore because of that.

The Hon. TREVOR KHAN: Thank you for that interpretation.

Mr BROWN: It is one of the fallacies they talk about in statistical data. My view is that the real outrage was not that the defence of provocation was available—although I do not honestly believe that he should have been entitled to that defence—but where the real outrage came from was that a person's life was lost, especially in Singh's case, under the most atrocious of circumstances. That should have been a case which would have been automatically attracted into the upper case of seriousness, yet his honour was unable to find that that was the situation and, as a result, we finished up with a very small penalty. Whereas if the law had been applied appropriately I believe a more appropriate penalty would have been found, and had that been the case the outcry from the public would have been far less cumulative than it actually was as a result of it.

Mr DAVID SHOEBRIDGE: The double discount because of the early plea.

Mr BROWN: Most definitely.

CHAIR: It was lowered from the murder to manslaughter.

Mr BROWN: That is right. Automatically life imprisonment was off the books and the maximum penalty that could have possibly been imposed was 25 years, with the standard non-parole period of 20 years. But the judge—and I believe erred—then went to the general statistics in relation to all manslaughter matters and said, "They average sentence falls within this range and that will be my starting point." That is where I believe he erred.

Mr DAVID SHOEBRIDGE: He then gave a 25 per cent discount for an early plea.

Mr BROWN: Exactly.

The Hon. TREVOR KHAN: I am not quite certain whether we know that. I think that is what happened but—

The Hon. ADAM SEARLE: We can weight that point when we see the transcript—

The Hon. HELEN WESTWOOD: Can I ask if there was an error—

CHAIR: We will only have one person speaking at a time.

The Hon. HELEN WESTWOOD: — why then was it not appealed? The fact it has not been appealed actually suggests that we as a society and a government are saying that that was a just outcome.

Mr BROWN: That is one of the reasons why in my submission I spoke to the fact that there are a number of issues which accumulate in relation to these matters which have led to this type of error. I have great concerns about the manner in which the Office of the Director of Public Prosecutions goes about deciding which matters it will appeal and which matters it will not appeal. To be perfectly frank with you, as you would probably be aware, yesterday Mr Babb announced that they would be appealing the decision in the Bob Knight case. I have to say to you that he has been brought to that opinion dragging and screaming because he was not originally going to appeal that sentence because it fell within the range. I only believe it was as a result of the intervention of the Attorney that we have had that change of attitude and the appeal lodged. We have constant contact with some of the most senior Crown's within the Office of the Director of Public Prosecutions who have great angst over the number of matters that are not being appealed, because the net effect of that is that we cumulatively drop the average sentence by not appealing what we consider to be a case that is manifestly inadequate.

Mr DAVID SHOEBRIDGE: Is one of your criticisms that there is a very mechanistic way of going about sentencing? You look at each of the various elements but there is not at the end of it a sort of overall reflection about the culpability? This was a case where you went from murder to manslaughter, you went from manslaughter to the average statistics, you went from the average statistics to a 25 per cent discount and then an answer popped out of a sausage machine at the end. Is that your concern?

Mr BROWN: It is my concern. It is almost the same concern that I have with the ordinary person test. I think at times judges lose sight of the dynamic of what led to the death. We have to send a very clear message and the only way we can send that clear message to our community is to say that we abhor the taking of a life. We are not doing so on reflection of the standard sentences being handed down in these matters.

CHAIR: You made a quick comment earlier that in *R v Singh* the defence of provocation should not have been used.

Mr BROWN: No, I am not saying it should not have been used. I am saying I do not believe that a jury properly instructed would have come back and said, "This does fall within provocation." Because I do not believe that it met the ordinary person test.

CHAIR: You are not against it being used; you are against how it was applied?

Mr BROWN: Yes. That is one of the reasons why in my written submission I suggested that the ordinary person test is a very complex test and not one which I believe juries are capable of completely understanding. Of course, as a result, they came back with a decision which in my view did not meet the ordinary person test, which is why I have suggested that these matters go to judge alone.

The Hon. TREVOR KHAN: If you go back and look at the media attention given in the Singh case, the outrage commenced on publication of the verdict. There was outrage in the community already that Mr Singh was convicted of manslaughter, not murder?

Mr BROWN: Yes. I would not disagree with you on that.

The Hon. TREVOR KHAN: In that case the community outrage was because of the perception that that crime should have been appropriately labelled as murder?

Mr BROWN: Quite so, but then it escalated grossly on penalty.

The Hon. TREVOR KHAN: No doubt; almost a shock?

Mr BROWN: Yes. I am willing to concede that though, most definitely.

The Hon. TREVOR KHAN: You talk about the ordinary person test. Is not one of the difficulties for juries that they receive directions at the start, in the middle and at the end about the Crown bearing the onus?

Mr BROWN: Yes.

The Hon. TREVOR KHAN: Then they receive a very complicated direction with regards to the law of provocation?

Mr BROWN: Quite so.

The Hon. TREVOR KHAN: That the Crown essentially bears the onus of excluding the reasonable possibility that this person was provoked?

The Hon. ADAM SEARLE: Could have been provoked.

The Hon. TREVOR KHAN: Could have been provoked?

Mr BROWN: Could have been provoked, quite so.

The Hon. TREVOR KHAN: Essentially, therefore, what you have is not, in fact, a consideration of the ordinary person test; you have this jumble of legal words and a jury being constantly reminded that it is the Crown that has to prove this beyond reasonable doubt, the upshot of which, in essence, is that they say, "I suppose there's a possibility that something happened that really we should acquit this bloke." Is that not the explanation for Singh?

Mr BROWN: It is part of the explanation, but I would draw the Committee's attention to the Law Reform Commission's report of 2007 when it was talking about provocation and the ordinary person test. Unfortunately, I cannot remember the page reference—

The Hon. TREVOR KHAN: I think we will forgive you for that!

Mr BROWN: One thing it spoke about was that there were over 200,000 divorces in New South Wales over that period and the funny thing about that is that in those 200,000 divorces no-one died. So, the ordinary person test says, "Well, the ordinary person, 200,000 people who go through a divorce don't then go out and kill their spouse through jealousy or whatever." But when closing submissions were made by the DPP in relation to the majority of the matters involving provocation where we have had an involvement, they have not explained that to a jury. Unless you explain it to people in those very simple terms, "what is the ordinary person test" and you cite that type of example, the jury will—

The Hon. TREVOR KHAN: They are not allowed to do that. I suspect you will find from an evidentiary point of view that they would be proscribed from leading evidence in that way.

The Hon. HELEN WESTWOOD: Why?

The Hon. ADAM SEARLE: Because it is not the ordinary person test either.

The Hon. TREVOR KHAN: It is not relevant.

The Hon. ADAM SEARLE: Mr Brown, you have seen some of the options paper prepared by the Committee?

Mr BROWN: I have.

The Hon. ADAM SEARLE: The models proposed by former Justice Wood and by the Hon. Trevor Khan both essentially remove the ordinary person test; they talk about a person with the same or similar characteristics of the defendant.

Mr DAVID SHOEBRIDGE: Gross provocation.

The Hon. ADAM SEARLE: Not just gross provocation, but the characteristics of the defendant. Do you think that might be a more readily understood test for a jury rather than this mythical ordinary person test?

Mr BROWN: The short answer to that question is no. Mr Khan, unfortunately, I do not know enough of your history, but I regrettably do in relation to James Wood because I work with James on the NSW Sentencing Council and have developed quite a rapport with James. So I have a great deal of respect for him and for his opinion. Regrettably, however though, I still find that the models, especially that contemplated by James, is still one that to me seems to be too proscriptive and will not give allowance for those very unusual characteristics of cases. I am talking not just about domestic violence; I am also talking about ongoing protracted sexual abuse. We deal with a number of people who have been abused at the hands of the clergy. They have often been denied access to counsel and so they do not have a diminished responsibility response as a defence. With the dynamics and complications of those particular matters it is almost impossible to prescribe a set of circumstances that will apply to every case. That is the difficulty I have.

The Hon. SCOT MacDONALD: I still do not understand the answer to the Hon. Helen Westwood's question about why these cases are not appealed?

Mr BROWN: One of the things I have advocated before various parliamentary committees is that I have a problem with the terms under which the DPP can appeal.

The Hon. TREVOR KHAN: Is that the manifest inadequacy?

Mr BROWN: The manifestly inadequate part of the sentence is one of the problems. Generally speaking, the directors and Nick Cowdery, who also sits on the Sentencing Council—I have known Nick for far too long; I put my grey hair down to Nick—have always said to me that most of the sentences fall within the range. If they fall within the range, it is not economically viable—and, unfortunately, that is what it comes down to—to mount an appeal. I believe that is wrong. I would love to see the direction given to the DPP to take away that word "manifestly" and just say that the sentence is inadequate. Again I revert to my original concept: if a sentence is inadequate and you do not appeal it, it effectively drops the range and brings the series of offences to a smaller and smaller period. In my view, that is unacceptable.

Mr DAVID SHOEBRIDGE: But it is always a discretion.

The Hon. SCOT MacDONALD: I am sympathetic to what you say, and it might offend you that it is manifestly inadequate, but we are dealing in the real world and resources are limited, there is a backlog and all those things. How can you dismiss that?

Mr BROWN: Please do not take me wrong, and I certainly do not take offence at the question, but I understand your point exactly. But there are cases that are clearly inadequate, yet they do not pass that manifestly inadequate test. There are points, especially as legislation evolves, where it is imperative that a benchmark is set and the only way you will achieve that is by lodging appeals to the Court of Criminal Appeal.

The Hon. TREVOR KHAN: I suggest that there is a twofold problem that can be identified. The first potentially is the manifest inadequacy test. The second is the double jeopardy rule that applies to a Crown appeal.

Mr BROWN: On sentence, yes.

The Hon. TREVOR KHAN: Even if you overcome the hurdles of manifest inadequacy, the prisoner will receive a significant discount on the basis of a re-sentence—from a quarter to a third? So you are not going to move the sentence out to what in fact it might be?

The Hon. SCOT MacDONALD: Is there a risk of even a reduction?

The Hon. TREVOR KHAN: No. That is a different issue. But even if you are able to overcome it, you still get a discount on a Crown appeal because it is a re-sentence?

Mr BROWN: Yes.

Mr DAVID SHOEBRIDGE: Sentencing always is essentially discretionary, and reasonable minds will differ. If we just allow the Crown to have a second go on each occasion, effectively you are just going to substitute the trial judge's discretion for the Court of Appeal's discretion. Is that a sensible or effective outcome in the criminal justice system, one discretion for another?

Mr BROWN: In very base terms, certainly not. But one of the things we tend to lose sight of, and this was the argument I mounted when we were talking about amendments to section 132A of the Criminal Procedure Act, is the power of the minds responsible within the DPP before they actually come to a view that they want to lodge an appeal. If we were to remove the "manifest" section of the guidelines for them, I would not all of a sudden see a floodgate opening and the DPP lodging appeal after appeal. Of course, the difficulty is that the reverse does not apply.

One big problem we have with our victims is that we walk them through the court process. I was just involved last Friday with the final sentencing of Terry Donai, who was responsible for the death of Bill and Pam Weightman. That death occurred in 2000. This is 2012 and we have only now just had that matter finalised. The chances are that that also will go to the Court of Criminal Appeal. We know that in the majority of these circumstances the defence will appeal the sentence anyway. What I am saying is that in cases like that the DPP should then rebut and say that not only is it not inadequate—

Mr DAVID SHOEBRIDGE: Or excessive.

Mr BROWN: Yes.

Mr DAVID SHOEBRIDGE: Another part of your submission is suggesting that the question, the ordinary person test, the reasonableness test, whatever the test is should be being determined by a judge rather than a jury. I have a lot of respect for judges. They seem to be a very fine class of people.

The Hon. TREVOR KHAN: You are a barrister; you have to say that.

Mr DAVID SHOEBRIDGE: But surely ordinary community values are much better reflected in 12 citizens than in a bunch of people who come from inevitably male white privileged backgrounds.

Mr BROWN: One of the things—and perhaps I should have even said this in my opening address—is that I am a great advocate for the jury system. I am a firm believer in the jury system. But regrettably—and we have noticed this with DNA for example—the understanding of the complexities surrounding DNA evidence is one which is getting to the point which is beyond juries. The issue in relation to the ordinary person test is one which, from all the decisions that we have seen where that has been applied, and it has been left to a jury, they really have not, in my view—of course that is one of the problems; I am biased—been able to satisfy that ordinary person test.

Mr DAVID SHOEBRIDGE: Do you have any basis upon which to say that that small class of people who are judges would do any better at working out what an ordinary person would do than 12 citizens?

Mr BROWN: That is an embarrassing question because the short answer is no because I have a number of judges, especially within the District Court, who, to be quite frank, I do not think should be left to adjudicate a tennis match, purely and simply from some of the decisions and some of their comments.

Mr DAVID SHOEBRIDGE: I am not necessarily adopting your characterisation of those District Court judges but is that not the concern—if we take it out of the juries and we give it to judges we will just have another class of people who we criticise for their decisions?

Mr BROWN: I think the point is that if we leave the decision to a jury that is something that is virtually not appealable because we are not privy to the discussions of a jury so we do not know how they have established that ordinary person test. When a judge sits as a judge alone he unfortunately—and that is difficult for a judge sitting alone because they have to, in their judgement, detail prescriptively how they have come to a particular view. So if they err in their understanding of the ordinary person test it would automatically open the door for an appeal because there was an error at law.

Mr DAVID SHOEBRIDGE: So it is not necessarily because judges were more likely to get it right than juries; it is just to enable the reasoning to be exposed to an appeal.

Mr BROWN: Exactly.

The Hon. ADAM SEARLE: Does this not go back to the question of the problems with the ordinary person test? In the model you are proposing it is quite likely that no-one will get it right at least some of the time. It goes back to the problems inherent in this mythical ordinary person, does it not?

Mr BROWN: It is difficult. You would have noted from my submission that in the Masciantonio case Justice McHugh had great difficulty in understanding the rationale of his brother and sister judges in the earlier case of Stingel. So there was this complication where even judges are questioning their brother and sister judges as to how they have come to a particular view. The difficulty I have though is that if we remove the ordinary person test how do we then adjudicate on what we all perceive as being the ordinary person test? You asked a question of the previous testament as to whether provocation should be retained as a partial defence or a full defence. My view on that is that we still have to and we must through our courts indicate that no matter what the circumstances, even if we allow a person the defence of provocation, we still at some stage have to make our disgust perfectly clear that it is not right to take another person's life. So I would always say that it should only ever be a partial defence and never a full defence.

The Hon. HELEN WESTWOOD: I go to the last paragraph in your submission, on which a number of my colleagues have commented. It leads me back to the history of this defence. It is a relic of our past. It is a relic from a time, it seems to me, when our values were so different. The patriarchal society of that time bears no relationship to the society in which we live today. It seems that we continue to amend and change a law to try to get it to fit and in the end we have made it so complex that we do not get just outcomes. We keep talking about the ordinary person test. The ordinary person test outside the criminal justice system says this was not a just outcome. How the hell did we get there? I wonder whether you have a view. Another thing that seems to me, as one of the non-lawyers here, is that the legal profession owns it. I wonder if it would be much better if people outside the profession had much more input into this process.

Mr DAVID SHOEBRIDGE: Juries.

The Hon. HELEN WESTWOOD: From what I have heard from the evidence of witnesses, it is from what the legal profession advises them and instructs them that indeed it becomes so complex and you get these unbelievable, quite astonishing outcomes.

The Hon. SCOT MacDONALD: But if you do not have that you will have a bigger problem potentially.

Mr BROWN: I think one of things you must always take into consideration, and it is no different to provocation than if we are trying to find a person not guilty on the grounds of mental illness. So have some sort of understanding of the history of why we introduced these defences and partial defences. All of these defences and partial defences were introduced because murder was a capital crime which would see you go to the gallows. Obviously there were circumstances where we would say we do not want to send a person to the gallows. There is no question that there are good sound reasons as to why you do not.

The Hon. HELEN WESTWOOD: But it was also a time when women were property.

Mr BROWN: There is no question about that.

The Hon. HELEN WESTWOOD: And men's honour had to be defended, men's sexuality—

Mr BROWN: I do not disagree with you on that, and I am not trying to be critical of you, but one of the things you are losing sight of is that this is not a woman-only type offence. Women are not the only people who are victims of domestic violence. There are some men.

The Hon. HELEN WESTWOOD: Overwhelmingly it is women.

Mr BROWN: Overwhelmingly there is no question but men are also victims. But when we talk about ongoing sexual abuse the number of men who have been victims of abuse is obvious.

The Hon. HELEN WESTWOOD: But it is rare where we are seeing those cases where this is used though.

Mr DAVID SHOEBRIDGE: Not in the media.

The Hon. HELEN WESTWOOD: Seriously, where though? What cases?

Mr BROWN: I think it depends on your point of view.

The Hon. TREVOR KHAN: Green.

Mr DAVID SHOEBRIDGE: Can we let the witness answer?

Mr BROWN: I was just going to say I think it depends on your point of view. Some six years ago we were involved with a case where a man in his late 40s who had been abused as an altar boy at a very young time was give very poor advice by a counsellor and that poor advice was that the counsellor suggested that he go and confront the person responsible. So he attempted to so do. When he arrived at the place where he believed this priest was still working he could not find the priest until he went looking and he walked into the sacristy only to find another priest having oral sex with an 11-year-old boy. He walked out, picked up a candlestick, walked in and beat this person over the head. Fortunately he survived; my victim did not. My victim then went out and committed suicide immediately after that. So there was no court case. There was no end to that. They are the type of things—

The Hon. HELEN WESTWOOD: I hear that but I am not sure how that relates—

Mr BROWN: The point is that had he not taken his own life and had that priest died, he would have been facing—if we had removed the defence of provocation what relief, if any, would he have? My point is that we need to be very careful. I completely agree with you that our law has always been based around a patriarchal system and that has to change. But we need to be very careful, and I think I may have said on numerous occasions to the Committee, when we look to changing laws we have to be very careful that we do not throw the baby out with the bathwater.

CHAIR: Thank you for your attendance today.

Mr BROWN: My pleasure. I hope I have been of some assistance. I have your additional comments about further submissions to be due in October as a result of those further option papers. I will certainly undertake to make a further submission and should there be any questions that arise today, which we all tend to think of half an hour later, I am more than happy to take any further questions at a later date.

(The witness withdrew)

CAMERON LIONEL MURPHY, President, New South Wales Council for Civil Liberties, and

DAVID MICHAEL BERNIE, Vice President, New South Wales Council for Civil Liberties, affirmed and examined:

CHAIR: Do you wish to make an opening statement?

Mr MURPHY: I will make a very brief opening statement just summarising our view, which is that the terms of reference of this Committee, the heart of the issue involved is really about whether you have confidence in the jury system to be able to determine these matters appropriately, whether juries will get decisions right. In a sense, to remove the defence of provocation, in the absence of some other legislative provisions that would cover the circumstances in which we see it, positively used, is just a snub to the jury system and sentencing process.

The first step in this process ought to be to properly research this. We have a Law Reform Commission and they should be in a position to take submissions, to canvass this completely and to look at whether it should be reformed. If there is a compelling case for that they can look at the manner in which it should be reformed. Otherwise the danger is to simply remove it, perhaps to partially legislate to cover some of the more common areas, and we may end up in a situation where there are unintended consequences. If murder is the only option left I think there is a danger that you will have people unfairly convicted of murder or you might have people unusually acquitted because there is no other option. I will leave the opening statement there and I am happy to answer questions.

CHAIR: You are supporting the retention of the current system unless there is further evidence it should be changed?

Mr MURPHY: There are concerns raised in a number of areas. A lot of the submissions I have read go to those, such as the gay advances defence which is anachronistic and has been around for a long time. It originated from a position where women were treated badly and as property. We have just heard that. There are certainly those points of view. Our view is that it ought to be retained until we know what we are going to replace it with. At the moment to simply remove it and leave the field absent an option to run the defence and for there to be, in effect, no third way that may be suitable in many cases, for example, of battered women, I think is the problem. It ought to be properly researched and looked at and a decision made about what we are going to replace it with before it is simply removed.

Mr DAVID SHOEBRIDGE: Should it be there in homosexual advance cases? What is the view of the Council for Civil Liberties?

Mr MURPHY: My view is, no, it should not. The jury system is there to reflect community values. A lot of the cases that I looked at occurred a long time ago in different circumstances.

The Hon. TREVOR KHAN: How long ago? How long ago was Green?

Mr MURPHY: I think we are always going to find that the jury system is imperfect and there may be a problem with a particular case. You might be able to find a case where there has been an outcome that the community generally does not like in relation to a woman or somebody who is powerless. The question is though; is what you are going to replace it with going to lead to a better outcome?

The Hon. TREVOR KHAN: I asked a specific question. You talked about "a long time ago", you are not saying that there has been an epiphany in community attitudes since Green, are you? If you are what is the evidence of it?

Mr MURPHY: What I am saying is before you say here is an example of a case we do not like and make a change, we must realise we are going to find cases that the community may not like; the question is how do you overcome that? What would you replace it with?

The Hon. ADAM SEARLE: There is clear disquiet in the community and among members of the Committee in relation to cases like Singh and Ramage where there is a clear pattern of men killing their current or former intimate partners. Leaving aside any criticism of the jury system, the Crown not only bears the onus of

proving the case beyond a reasonable doubt as to the offence but must also negative any reasonable possibility that the person was not provoked. Inherently in a situation like this only two people may know what happened and one of them is dead.

In that situation it is a practical impossibility for the Crown to negative the possibility of the person having been provoked and that causes some disquiet. Some members of the Committee and former Justice Wood have proposed some reform options which it may be inferred are designed to address that situation without removing juries and without abolishing the defence. If you are not in a position to say so please take it on notice, but I would be interested in the council's response to any one of those proposals or any combination of them?

Mr DAVID SHOEBRIDGE: A view on the discussion paper.

Mr MURPHY: I am happy to take it on notice and provide you with a formal view about those. I think the problem from our perspective is what we are doing is rushing into making a decision about what may or may not be appropriate. The Council of Civil Liberties has an open mind. There are serious issues where we accept there is certainly a problem in terms of the perception of the way this may be used in the community. We have seen a couple of cases, we look at them and they are quite awkward outcomes.

The Hon. TREVOR KHAN: It is not a couple.

Mr MURPHY: Sure. As I say we may not have publicity about other cases, and there are some identified by the Bar Association in their submission, which explain how this has been used as a defence with results I presume most people here would accept. Cases where you have had battered women and other people who have had this defence available to them and the outcome may have been more in line with our perception of community expectations.

Mr DAVID SHOEBRIDGE: Can I ask you about the principled idea of proscribing a variety of conduct that cannot be relied upon for the purpose of provocation such as infidelity, sexual jealousy and homosexual advance. Intellectually principally what is your view on that?

Mr MURPHY: I am open to the idea of changing it in a manner that may allow the extremes that we have seen in some of these cases to be dealt with. All I say though, is I think that it would be dangerous to do that now, without researching it properly and canvassing all of the problems that may occur with that. I think the process should be to have the Law Reform Commission do extensive research and to pull out all of the cases so that we have got a comprehensive view. It should not be simply a view where there are a few—for want of a better word—highlights that we are aware of that are either good or bad. We need to actually look comprehensively at what the position is and look at other jurisdictions and the way they have handled it and from there we might be in a position to look at what sort of reform should occur.

The Hon. DAVID CLARKE: What would you suggest in the present circumstances? Say this matter did not go to the Law Reform Commission?

The Hon. ADAM SEARLE: In fact, it already has.

Mr MURPHY: It has in the past.

The Hon. DAVID CLARKE: On the issue that you are talking about.

Mr MURPHY: Our view about it was at the moment, in the absence of a proper proposal for reform that has been carefully considered, it ought to remain where it is. There may be unintended consequences from simply removing it.

The Hon. DAVID CLARKE: How would you deal with the unintended consequences? I think you said earlier that they should be looked at.

Mr MURPHY: I think they should be looked at but I think the problem with simply removing it is, if you remove the defence at the moment, the likely outcome is that you are going to have other cases where there are perceived unjust results.

The Hon. TREVOR KHAN: Have you read the transcript of Wood J's evidence before this inquiry?

Mr MURPHY: No, I have not.

The Hon. SCOT MacDONALD: Is this an example of where juries or the justice system are falling somewhat behind our values and our norms? And, if that is the case and you are not comfortable with legislative reform, what other way do we catch up, or is that not a problem? Are our judiciary and our justice system always a little bit behind and is that just the price we pay for having the common law?

Mr MURPHY: I understand where the Committee is coming from and there are examples we can all point to where we look at a result and we may feel that that is not the result that we would have liked as an outcome or it may not be the result that we would have expected. But ultimately, after we look at that and canvass it, the problem is that inherent in the nature of having a jury system is that sometimes you are going to get quite bizarre results from a jury. The jury is supposed to reflect the community and has made the decision. They are the ones who have heard the evidence and considered it. We really cannot control what a jury is going to do. The difficulty is that the only alternative would then be to confine or restrain or to allow a judge to make a decision or to come up with a different process where Parliament tries to create a legislative framework to deliver a better outcome. I do not know that that, in the end, is going to solve the problems you are looking at or provide a better solution. It may just be that we end up with cases where there is a perceived injustice in other areas, as a result of that.

The Hon. SCOT MacDONALD: You obviously have a broad range of interests and we are looking here at a relatively narrow issue. Is this the situation with other fields that you look at? I am not really sure, off the top of my head, what I can point to, but other ranges of civil liberties where the Jury system is a bit behind. Do you see what I am getting at? Is this untypical?

Mr BERNIE: The Jury system is 12 people; it is not a judge and it is not a law. It is supposed to reflect community values and I think we have to be careful. The jury system may result in decisions that you or I would not like and indeed, have made decisions that I find surprising. But it is there to represent community values. They may not always be the community values that you or I particularly like. I think the Committee is concerned about taking things away from juries. Remember that the decisions that we are talking about today, which we probably sometimes feel outraged about, are decisions made by a jury of 12 people. I think we have to be careful that we do not try to become the jury in every case that comes forward in New South Wales.

I think the Hon. Adam Searle referred to community disquiet. The jury should be there to deal with community values and the Council of Civil Liberties has generally been in favour of these matters going to juries and not taking them away from juries. But intellectually, what Mr David Shoebridge made reference to, in terms of a jury being influenced by directions it gets from the judge, I do not have an intellectual objection to trying to limit those areas. This is an area where it is already quite complex relating to directions going to juries, particularly about the law on manslaughter, as I understand it. Bear in mind that, although we may be outraged by these decisions, they are decisions that have been made by 12 members of the community.

The Hon. HELEN WESTWOOD: We keep hearing this argument that the jury system and juries reflect community values but there are really stark examples where they do not. There are examples where they are at odds with community values. Surely we need to examine those to understand how we get outcomes that are completely out of step. It is not a matter of just my values or the Hon. Scott MacDonald's values. There is no way that the outcome in the Singh case reflects community values—it has failed. I just find, as a legislator, do we ignore that?

Mr DAVID SHOEBRIDGE: There are two elements in the Singh case though, there is the sentencing and the provocation.

CHAIR: Yes, the question is, was the jury at fault or the judge?

The Hon. HELEN WESTWOOD: Yes, should we not be examining that? Surely it is not improper for us to do that.

Mr MURPHY: What should be considered is whether you are looking at the system as a whole and all of the decisions made. I think that, as we have canvassed today, we are always going to be able to find individual cases where there is a bizarre outcome that we may think is not in line with community standards.

There are many that I am uncomfortable with and cannot explain. I do not know why that decision has been made. However, I wonder, if we had an alternative course and we left this up to a judge, whether we would be having a debate about terrible decisions made by unrepresentative judges who have done the same thing.

The Hon. TREVOR KHAN: You have obviously heard what has gone on before. Let us assume that that is one option that the Committee may or may not consider. Firstly, have you read what we are now describing as the options paper?

Mr MURPHY: No.

Mr BERNIE: No.

The Hon. TREVOR KHAN: There has been an options paper that has been distributed to your organisation, that sets out some alternative possibilities to abolition. There are at least three appendices to the options paper that deal with reform including, for instance, limiting the behaviour that can be used for the defence of provocation. For instance, the Homosexual Advance Defence [HAD]. Those are not matters that involve a complexity of the jury direction, it would come down to a decision of the judge as to whether it goes to them, so it does not create an added complexity for the jury.

CHAIR: You may like to look at that options paper and give us your thoughts as a question on notice. Could you do that?

Mr MURPHY: Yes, absolutely. I have had a look but I am not sure that we were given a copy of that. I do not have a copy.

CHAIR: You are happy to take it on notice then, the response to the options paper?

Mr MURPHY: Yes.

The Hon. SCOT MacDONALD: Does the jury system routinely fail us?

Mr MURPHY: My view is no. There are jury trials going on every sitting day of the week and nobody comments about the outcome of most of them and the system generally works. We have had a system that has its imperfections. We can always find cases at the fringes that are difficult to explain and we do not understand why they have reached that conclusion, but I am struggling to see that there is a better system. I would be very uncomfortable replacing it.

The Hon. SCOT MacDONALD: Do we go to the French system?

Mr BERNIE: I was going to mention that.

The Hon. SCOT MacDONALD: Do we prescribe absolutely everything?

Mr DAVID SHOEBRIDGE: I think that might be outside the terms of reference.

CHAIR: We are not evaluating juries. It is whether we replace the provocation law. We are all in favour of juries.

Mr MURPHY: I am not confident of that.

The Hon. ADAM SEARLE: Most of us are, Mr Murphy.

Mr DAVID SHOEBRIDGE: It is not part of our terms of reference.

Mr BERNIE: No system of justice is perfect. Systems of justice are manmade systems and there are going to be imperfections in them. As I understand the French system they still have juries, it is just that the judge leads the prosecution and the investigation, so it is less adversarial.

The Hon. TREVOR KHAN: Unless you are the defendant.

Mr BERNIE: Yes, but as you say that is outside the terms of reference. You are always going to find these problems in cases where you say the whole system is wrong as a result of it. Do not fall into the trap of saying the whole system is wrong because you get a case—

The Hon. TREVOR KHAN: We are not.

CHAIR: Do you think there should have been an appeal against the Singh case with only the six years—

Mr BERNIE: I think it would have been very difficult to appeal the finding of the jury. That is always very difficult to appeal—

CHAIR: No, the judge's sentence.

Mr BERNIE: As I understand the situation in New South Wales now there are guideline sentences and whether there should be a guideline sentence about that—the Court of Criminal Appeal sometimes gives guideline sentences, but I am not aware whether there is in relation to the offence of manslaughter.

Mr DAVID SHOEBRIDGE: It would be next to impossible, wouldn't it?

Mr BERNIE: Yes, because manslaughter covers such a range of areas, but a guideline sentence in judgement often tries to cover the range of areas.

The Hon. TREVOR KHAN: They did in "manner dangerous".

Mr BERNIE: Yes.

CHAIR: Should it have been appealed?

Mr BERNIE: I am not an expert in criminal law so I am not going to offer an opinion. We were hoping to have some of our members along who do more practice in criminal law, but you might ask—

CHAIR: Just for the brutality.

Mr BERNIE: It does seem to me towards the lower end of the range, given there is a 25-year maximum and given the nature of the assault on the victim. I would have expected it to be at the higher end of the range than the lower end of the range. As your previous witness pointed out, the difficulty comes once you get into that range in making an appeal and whether it is successful or not.

Mr DAVID SHOEBRIDGE: You have said on a number of occasions, and I agree with the general proposition, that juries determine community values and are probably the best tool for determining community values. It may well be, contrary to what the Hon. Helen Westwood says, that community values on occasion are permissive of violence against women that the Parliament might have trouble with. That might be what we are coming to grips with here. There might be an element of permissiveness in the broader community that we may not appreciate and we might condemn. Is there a role for the Parliament to show some leadership, if you like, and structure the law so that it delivers better outcomes?

Mr MURPHY: Certainly that is the case. What I would caution against is simply removing the defence without carefully considering how you do that.

The Hon. TREVOR KHAN: Read the options paper. That will help. It will give you a hint.

Mr MURPHY: We will do that and provide a response. I think it should be sent to the Law Reform Commission to be looked at properly.

Mr DAVID SHOEBRIDGE: It may not be that the editors of the *Daily Telegraph* or the people sitting round this table are the best repository of community values. Community values might not always find the reflection in Parliament.

CHAIR: Can we stick to questions?

Mr DAVID SHOEBRIDGE: Can I ask you to look at the options paper in light of that—the potential role for the Parliament to be directing it?

Mr MURPHY: Absolutely. I will have a look at the options paper and we can comment on the options you are putting forward.

The Hon. ADAM SEARLE: It is very much in the mode of reform rather than abolition.

Mr MURPHY: All right.

The Hon. HELEN WESTWOOD: That is still an option for us to recommend. We cannot rule that out. We have had some evidence this morning that certainly suggests that, particularly from those who represent women who are victims of domestic violence. I cannot accept that the community thinks it is appropriate for men to murder women when they are trying to end relationships. You are from the Council of Civil Liberties; surely you think women have the liberty to end relationships without being murdered?

Mr MURPHY: Absolutely. Let me make that clear.

The Hon. HELEN WESTWOOD: Where is someone speaking for them? Where is their voice in this?

Mr MURPHY: In terms of a proposal and the terms of reference looking at whether to abolish the defence that is what we would be cautioning against in the absence of something else that can deal with the myriad issues we have here.

The Hon. HELEN WESTWOOD: How about reversing the onus of proof? She ends up being put on trial, and that is what happened in that case. She has been found guilty of provoking her own death.

Mr MURPHY: I think the issue is one that was raised earlier where there might be a misconception that successfully using a provocation defence is somehow escaping a crime. In many of the cases generally it is a matter of sentencing and the sentence for manslaughter can be verging on the sentence for murder.

The Hon. TREVOR KHAN: Oh, Mr Murphy, please. That clearly is statistically just not correct. You must know that.

CHAIR: Just ask questions. The witnesses give evidence, not the Committee.

Mr BERNIE: Do bear in mind, and this is the thing about abolishing the offence, in relation to the cases that were found by the Judicial Commission in New South Wales, there were 10 where a woman successfully relied on the provocation defence after killing her violent male partner.

The Hon. HELEN WESTWOOD: That is true. One of the things we have heard in evidence is that that is perhaps a consequence of overcharging—police charging a woman with murder rather than manslaughter—and the advice women are receiving in those circumstances is inappropriate in that they could be looking at self-defence. We have evidence of where women have successfully used the defence of self-defence.

CHAIR: Thank you very much for giving evidence today. We know you are very busy at the Council of Civil Liberties and Mr Murphy especially.

(The witnesses withdrew)

(The Committee adjourned at 12.48 p.m.)