REPORT OF PROCEEDINGS BEFORE

SELECT COMMITTEE ON THE PARTIAL DEFENCE OF PROVOCATION

INQUIRY INTO PARTIAL DEFENCE OF PROVOCATION

———

CORRECTED PROOF

At Sydney on Wednesday 29 August 2012

———

The Committee met at 9.00 a.m.

———

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

CHAIR: I am pleased to welcome everyone to the second public hearing of the inquiry into the partial defence of provocation. This Committee was established in June 2012 to inquire into the partial defence of provocation, which operates to reduce the charge of murder to a conviction of 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 matters.

Today we will hear from representatives from a range of organisations and individuals, including representatives from the New South Wales Law Reform Commission, the New South Wales Law Society, the Bar Association of New South Wales, the Director of Public Prosecutions and the Homicide Victims Support Group. There will be one final day of public hearings, to be held on Friday 21 September, when the Committee will hear evidence from other stakeholders. As Chairman of the Committee I thank all our witnesses who are attending today.

There are various procedural matters. The Committee has previously resolved to authorise the media to broadcast sound and video excerpts of the public proceedings. Copies of guidelines governing the broadcast of proceedings are available from the table by 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 and what interpretation is placed on anything that is said before the Committee.

Witnesses are advised that if there are any questions they are not able to answer today but would like to answer in the future when they have more time or certain documents to hand they are able to take the question on notice and provide us 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 they should consider at any stage during their evidence that their response to a particular question should be heard in private by the Committee they are to state the reason and the Committee will consider the request. I remind witnesses that freedom afforded to witnesses by parliamentary privilege is not intended to provide an opportunity for them 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. Finally, could everyone please turn off their mobile phones for the duration of the hearing.

I welcome our first witness, the Hon. James Wood, AO, QC, chairperson of the New South Wales Law Reform Commission.

JAMES WOOD, Chairman of the New South Wales Law Reform Commission, sworn and examined:

CHAIR: Do you wish to make an opening statement?

Mr WOOD: Very briefly. While I am happy to mention my own preliminary views about the partial defence of provocation, I am not in a position to speak on behalf of the New South Wales Law Reform Commission as it is presently constituted. It has not undertaken any recent review or consultation process on that topic, except inferentially in the course of the joint Australian Law Reform Commission and New South Wales Law Reform Commission report on family violence. As mentioned in our submission, the New South Wales Law Reform Commission did report on the defence in its Report 83 (1997)—Partial Defences to Murder: Provocation and Infanticide.

Since that time there have been a number of reforms in other Australian States other than South Australia, also in the United Kingdom and New Zealand, and a number of controversial decisions. As a result I am not in a position which I normally would be in if we had a specific reference on the topic to have undertaken consultation with the public, to have reviewed the various changes that have occurred elsewhere and their impact, and also to have reviewed the various cases. I am not, therefore, in a position to express the view I would have expressed had we undertaken the kind of inquiry we normally undertake. However, I do have some personal views about the defence. I also have some personal views about the recommendations in the prior report of the commission, it being the situation that I was not a member of the commission at that time.

If it is helpful for you I can indicate my views in relation to the matter. I am aware that there are well-rehearsed arguments for and against the defence. I am happy, if it assists you, at some stage to summarise those as I understand them to be. Otherwise, if the defence is to be retained, as I think would be my personal preference at this time, there would need to be some changes to the provision of the Crimes Act. If it helps you I can indicate those now.

CHAIR: Yes, that would be very helpful.

The Hon. HELEN WESTWOOD: Thank you.

Mr WOOD: There are a couple of problems with it. The first probably arises in relation to subsection 2 (b), which requires the conduct of the deceased to be such as could have induced an ordinary person in the position of the accused to have so far lost his self-control as to have formed an intent to kill or to inflict grievous bodily harm upon the deceased. I think that is problematic because of the "ordinary person" requirement. It is something which has been criticised in the decisions. In one case, for example, the House of Lords said that it thought the provision was beyond redemption for that reason.

I would like to reword it but even if it stays as it is it is interesting to note that it requires that the accused could have so far lost their self-control as to form an intent to kill or to inflict grievous bodily harm. It does not pick up the other element of murder, the reckless indifference element. There are problems bringing that in because one relates to the intent, the other relates to acting out. I have always had some trouble with the proposition that what is necessary is for the person to lose their self-control so as to form the intent without having to take the next step of acting out. This is something which has been addressed, for example, in the United Kingdom provision. I would like to see that provision reworded to say that the conduct of the deceased was such that the provocation of the accused, taking into account all of his or her characteristics and circumstances— including those in which the provocation came to his or her attention—was such as to warrant his or her liability being reduced to manslaughter. I like that because it is a similar provision to that which applies in relation to substantial impairment by abnormality of mind, the former diminished responsibility.

It means that the jury looks at all of the circumstances of the case and it determines whether the provocation, in all of the circumstances, was such as to warrant the liability or the culpability of the accused being reduced from murder to manslaughter. That provision would do a couple of things. First of all, it removes the ordinary person test and places the responsibility with the jury. The ordinary person test has its problems because, as the High Court has made it plain, when the jury looks at the ordinary person it does not look at its own reactions or own thoughts. It has to envisage some ordinary person, which may not be one of them. It is a difficult concept, I think, for a jury to say, "All right, we have to decide what an ordinary person could do, but we cannot look at our own views. We have to envisage some hypothetical ordinary person." I think this would remove that.

It also deals with what is the problematic area of the law relating to hearsay provocation, which is something that the Law Reform Commission did address. There have been a couple of cases of hearsay provocation. I sat on the Court of Appeal in the case of Quartly. The accused was informed by a third party that the deceased had raped and supplied heroin to a former girlfriend. This was relayed, as it were, second-hand to the accused. It was held by the Court of Criminal Appeal, consistent with authority, that provocation was not available in those circumstances because it was not something occurring in the presence of the accused. The question of hearsay provocation raised its head again in another case, of Davis. The accused was informed of a sexual assault of a former stepdaughter. Again it was held that the hearsay provocation was not available. On the special leave application to the High Court, the High Court expressed some doubt in argument about hearsay provocation but did not decide the point and did not grant special leave to appeal.

The Law Reform Commission's report sought to deal with that by referring to the situation where the accused has a reasonable belief as to the provocation. I think that is problematic, and I will come to that a little later on. I think this particular reform of mine might deal with hearsay provocation because it would take into account the circumstances in which the provocation came to the person's attention, namely, directly—in their face—or, alternatively, by a third party source. When you look at the third party source you can look at the reliability of it: is it some spurious thing which is said; is it a person who is in a position to know; are they reporting hearsay upon hearsay, or so on? There could be reasons why the person could believe, on reasonable grounds, having regard to the apparent veracity by which the circumstances come to notice. There are other occasions where you might react without being in a position to have a reasonable belief.

The second thing I would do, and I realise this is quite radical, would be to reverse the onus, to say that the onus is on the accused to prove that they acted under provocation. The reason I say that is twofold. First of all it would bring provocation into line with the substantial impairment defence, where the onus does lie upon the accused. That is important because in these cases, almost always, there is both substantial impairment and provocation. Particularly in the battered wife situation, very often the accumulative abuse and so on has produced what can be an abnormality of mind or a substantial impairment. The two things run together, so a jury is faced at the moment with different onuses if the two defences are raised.

Secondly, I think it is important because the only person who really knows the true facts is the accused, and I think that that accused should be in the position of placing the facts before the court and having the onus of establishing the diminished responsibility; otherwise it is not easy for the prosecution to negative it. Accompanied with that, I would also like to see a requirement for pre-trial disclosure of the defence. There was already a provision in the Criminal Procedure Act for the accused to disclose pre-trial where there is an intention to rely upon substantial abnormality of mind, and I do not see why the same should not apply to provocation, having regard to the overlap.

The other thing I would like to do—and part of this is done by the previous Law Reform recommendation—was to consider expressly excluding from the defence provocation which really is either revenge or in response to sexual infidelity and self-induced provocation. There clearly are circumstances where a person will incite another person to behave provocatively and then respond to it, and I think that where that arises, as in the case of self-induced intoxication, well, self-induced provocation certainly needs to be excluded. So I think I would want to see those things happen, again purely from my personal perspective and not from a considered Law Reform perspective, if the offence is retained. If it helps you, I could make some comments then about the previous Law Reform proposal, if that is of any assistance to you.

CHAIR: Yes, thank you.

Mr WOOD: Some of those perhaps I have already dealt with, but one of them which they dealt with was subsection (2) of the recommendation. They talk about the act or omission being the result of loss of self-control induced by a belief of the accused based on reasonable grounds as to the existence of the conduct. That picks up that third party or hearsay provocation that I would like to see dealt with differently. The next one relates to, I guess, the fact that the defence would be available if the provoked person kills a third party when attempting to kill or injure the person who was believed on reasonable grounds to have offered, or offered, the provocation. I do not particularly like that. I really do not see why, if you happen to kill a third party who has absolutely nothing to do with the provocation the defence should arise. It is a case where if you do happen to kill a third party then provocation or the reasons for your acting might be taken into account in a sentence but I do not see why it should reduce murder to manslaughter in that situation.

Section 2 (b) goes some of the way to what I was suggesting as the formula in place of the ordinary person test, but I think the suggestion I made might be a little easier to work with because it talks about the person being excused for having so far lost their self-control as to warrant the reduction in responsibility but it maintains the requirement of having so far lost their self-control as to form the intent to kill or to inflict grievous bodily harm without having acted out, that is, without having reacted, which I think is important. But it does add the third element, or to have acted with reckless indifference. So even there you have a juxtaposition of two concepts: one is the formation of intent to kill or cause reasonable bodily harm and the next is having acted with reckless indifference. So that I think conceptually is problematic because it is sufficient if the intent is established; the second or the third element is having acted. I do not think we should have a combination, part of which depends on forming an intent without acting, and the other which depends upon acting.

The other aspects of the Law Reform are quite useful, because subsection (4) does exclude self-induced intoxication and (5) excludes self-induced provocation, but (6) maintains the current onus provision, which I am not terribly happy with. So they are my views if the defence is maintained. I do think personally at the moment I would rather see it maintained, although I recognise that there are arguments, and they are well-rehearsed arguments, both for and against its retention.

CHAIR: I note in your submission you explain how sentencing is undertaken and how provocation is treated at the sentencing stage: "This will be considered closely in our sentencing reference." Some of our witnesses have recommended to us that we should refer the provocation matter back to the Law Reform Commission because you are doing the sentencing reference. There is an overlap. What are your views on that?

Mr WOOD: I must say I would be more than happy to do it, but we have at the moment two challenging references, one dealing with mental health and the other dealing with sentencing law generally. I would very much welcome the opportunity to look again at provocation but at the moment we would have to work out our priorities. I do not know that we could give it the first priority because I know there is a pressing demand to have the sentencing laws reviewed. We have dealt with one part of that. We have dealt with the standard non-parole aspect, and for the mental illness or cognitive impairment we have issued one report, the first report, dealing with the diversion matter but we have some significant matters to look at, including the McNaughton defence and special hearings and so on for those who are unfit to plead. So there is a lot of work to be done yet.

CHAIR: So would it be confusing to expand your sentencing reference to include provocation? You are talking as if it should be a separate matter. We thought it might relate to your sentencing inquiry.

Mr WOOD: It does in the sense that provocation is one of the factors we take into account at the moment as a mitigating circumstance for all offences, but it has a special relevance for a murder case because it reduces murder to manslaughter and therefore reduces the maximum available penalty from potentially life to 25 years. The fact that provocation is available as a sentencing factor for all offences is one of the arguments why provocation should go and be dealt with simply as a mitigating circumstance. It is quite interesting in some ways because provocation is not a defence to attempt to murder, nor is it a defence to conspire to murder, nor is it a defence to do an act with intent to kill. Part of the reason I suspect that provocation is still regarded as important for people is that the expression "murder" has a very emotive meaning and people do not want to be convicted of murder but you can still be convicted of conspiracy to murder or attempt to murder without provocation being available, although clearly provocation will be taken into account as a sentencing factor.

Similar considerations can apply for an accessory to murder because the accessory, especially with accessory before the fact and so on, would not necessarily get a defence of provocation, whereas the principal who carries it out who is the provoked person might get manslaughter. So there are some problems in theory having a specific offence for one offender where provocation reduces the offence but other offences where it does not, even though they are all connected with either intent to kill or attempt to kill or even killing.

The Hon. DAVID CLARKE: One of the reasons—probably the major reason—having driven the setting up of this Committee is public perceptions relating to cases like Singh and Won. With that in mind, do you believe that conduct that can be relied upon by an accused to plead the partial defence of provocation should be restricted to physical criminal conduct or serious physical criminal conduct? Is that a pathway that you think might be fruitful in going down?

Mr WOOD: By definition, the conduct of the accused is always going to be particularly serious in that it involves killing—

Mr DAVID SHOEBRIDGE: This is the conduct of the killing.

Mr WOOD: I understand that. So far as the person provoking the person into that situation, I think that if the person provoked is faced with serious physical threat or assault then self-defence is always going to be available or excessive self-defence will reduce it to manslaughter. So I am not sure that there is much help in gradations. I think there are problems in working out what are gradations of the seriousness of the provocative threat and to say that it only arises where there is a serious threat, because insulting words or threatening words can be provocative, depending on the circumstances, particularly if it is a longstanding abusive relationship.

The Hon. DAVID CLARKE: Although it would reverse the outcome of cases like Singh and Whan.

Mr WOOD: Yes, it could.

The Hon. DAVID CLARKE: Is there any particular jurisdiction where the law on this issue is one that you are supportive of or comes close to what you would want to see?

Mr WOOD: I think the English provision gets close, although they maintain the prosecution onus. I am not enamoured by the Victorian or the Queensland approaches. I think they are too complex and there is a significant overlap with excessive self-defence. The problem with provocation is that the difficult cases nearly always arise in the context of interpersonal relationships, family relationships, and domestic relationships and so on and it throws in the difficult areas of sexual infidelity and jealousy and possessiveness and control and so on, and that is very difficult, but it is distinct from the battered wife who clearly should come within a reduced culpability.

The number of cases that I tried where provocation raised its head in domestic violence situations, I think every single time the defence was made good, and properly made good, because there had been a longstanding abusive relationship where it is always the women who have finally cracked and understandably so, and juries were very sympathetic, I found.

The Hon. DAVID CLARKE: Do you have a view on the outcome of cases like Singh and Whan without referring to any particular case?

The Hon. SCOT MacDONALD: Do you want to try that again?

The Hon. DAVID CLARKE: Do you have a view on those types of cases?

Mr WOOD: I am very reluctant to express views on particular cases that have been decided by individual juries but as a general proposition I would not want to see provocation being available where the person's loss of self-control was attributable to discovery or reporting of sexual infidelity or that the person was leaving the relationship or threatening to leave the relationship, or was even making taunts about their inadequacy. I think they are very difficult. When you get into custody disputes with a partner threatening to take children away and deprive them of access to the child forever—that kind of thing—I think that is a bit stronger but these are very much jury questions where you can understand a person will lose their self-control when pushed too far and that their criminality is not such as to be so objectively serious as to justify murder.

I would like to see some brakes on it. One would have hoped that the juries would get it right but clearly sometimes they do not necessarily do so. One of the other areas that has always floated around my mind is whether it is time to forget about murder as an offence and to have a series of structured offences of unlawful homicide. This was proposed in the United Kingdom with homicide one and two, and two would embrace cases of provocation and diminished responsibility, but that is problematic. I have always had this feeling that murder still has this emotive impact, which it does not necessarily have to lawyers but it certainly does to the public. That is the reason, I guess, manslaughter is there. That is a big call. I do not suggest for a moment that we should be looking at unlawful homicide in its place at this time.

The Hon. SCOT MacDONALD: One of the submissions received by the Committee suggests that the partial defence of provocation should be abolished because it is illogical to require a person to lose self-control and then act with intent. If I understand your changes, if we can overcome that with your suggested changes to 2 (b) then we can retain that self-defence?

Mr WOOD: That is correct. That is as I understand it.

The Hon. SCOT MacDONALD: So you can break that nexus?

Mr WOOD: I think you can break that nexus and you can also get rid of the ordinary person test, which I just find problematic. I do not know what a jury envisages the ordinary person is. In real life they are going to say, "Look, we are ordinary people. This is our view." They are not going to find the traditional person on the Clapham omnibus that was a reasonable person test from the civil law. They do not understand that person. They will always put their own values on the case. I think the ordinary person test is fundamentally flawed.

The Hon. ADAM SEARLE: The Hon. David Clarke asked about whether or not provocative conduct should be limited to serious or violent criminal activity. One of the things of concern to the members of this Committee is the availability of the defence by men when they have killed their intimate partners. We would not want to create a situation which would limit the availability of at least a partial defence to women who are accused, but the Committee did think one possible way was if a defendant was restricted to relying on conduct that was serious and violent criminal conduct that that might solve the problem, given that in some cases self-defence would not be appropriate—for example, where there is no immediate threat or the threat has passed or a case such as that English case.

Mr DAVID SHOEBRIDGE: The comatose drunken spouse—

The Hon. ADAM SEARLE: Yes.

Mr WOOD: I understand the force of that submission but the problem I think is that it does not really address the true abusive domestic relationship, which is a combination of many things including belittling the partner, continuing taunts, criticism, accompanied by a degree of physical violence. If you just confine it to serious violent threats and so on and eliminate what is the reality of an abusive domestic relationship with all its other components of taunts, abuse, preventing people from having sufficient means to look after themselves, money pinching, all of those things—

The Hon. ADAM SEARLE: Does there need to be a specific defence to deal with these situations rather than trying to rehabilitate provocation?

Mr WOOD: You can do that and I guess that is what has been proposed in other States, but I am not sure that is the best approach because I think there are other circumstances where words have in the past been held to be sufficient. They have to be of a gross and violent kind and that is the sort of situation, of course, that is picked up in the United Kingdom provision, which I think does have some merit. You just exclude ordinary offensive words and so on but it has got to be something a bit more than that to pick up the English provision, which I have somewhere but I have lost it.

Mr DAVID SHOEBRIDGE: But you would not just do it in isolation. You would be limiting the provocative conduct to requiring it to have at least one significant element of serious violence and you would do it together with social framework evidence, actually crafting the legislation to allow that social framework evidence to also be brought so as you could put it in context. If you had those two running together do you think that might be a way to eliminate the Singh kind of cases but allow battered wife cases to properly be run?

Mr WOOD: You could do it. Alternatively, in the formulation I propose you could identify amongst the circumstances to be taken into account things such as that. My formula would involve the question whether in all the circumstances the provocation was such as to reduce the criminality and you could identify if you liked the following circumstances and even exclude some aspects. But that might be a way of handling it.

Mr DAVID SHOEBRIDGE: Does your formula though ask the jury to make a value judgement about manslaughter as against a murder rather than actually consider the factual elements of an offence? I just wonder if you can cite other examples whereby we ask juries to make value judgements between two offences.

Mr WOOD: I think they do at the moment. They have to make a value judgement now I think in determining what the ordinary person could have done.

Mr DAVID SHOEBRIDGE: But that is quite different, is it not, to a value judgement about manslaughter versus murder? That is a very abstract kind of—

Mr WOOD: I think it happens. I think it also happens in relation to substantial impairment because that is the formula which is used there: the impairment is such as to reduce the criminality.

The Hon. HELEN WESTWOOD: The Committee has received evidence—an issue you have also raised—about the complexity of provocation for juries that leads to some outcomes which are very difficult to understand such as the Singh case. I am wondering whether or not what you are proposing as a way in which we could amend provocation would simplify it for juries. Do you think there is anything else we could do to assist juries to really understand what is being put before them?

Mr WOOD: I would hope that my approach might simplify it but, of course, the simplest way of doing it is to remove provocation entirely and leave it simply as a sentencing factor, and it would then apply to all offences. Bearing in mind the only reason provocation ever existed was that murder once attracted capital punishment and then later mandatory life, that is really its primary justification—and it has been justified otherwise. It does have the problem which arises in the ordinary person test that ordinary people are not expected to lose their self-control so far as to kill.

The Hon. HELEN WESTWOOD: If the Committee did look to abolishing provocation is it possible for us to then expand the provisions of self-defence as a defence, particularly where it relates to women who have been in long-time abusive relationships who have killed their male partners?

Mr WOOD: I think excessive self-defence is pretty good but the problem with that really is that you have to be put in fear of your life or your personal integrity. I am not sure that self-defence by itself is really a complete answer—excessive self-defence. It certainly is where you are faced with immediate threats of violence or, indeed, cumulative threats to the point where you think that maybe tonight is the night that something serious is going to happen to me. It goes a fair way if fairly applied.

CHAIR: Just to clarify, if the defence of provocation was abolished and it was just left to the sentencing stage, which means the jury would not be involved in it?

Mr WOOD: That is right.

CHAIR: Only the judge would be involved.

Mr WOOD: That is right.

CHAIR: That may be a way of handling it because, as we have said, it is complicated for juries to comprehend.

Mr WOOD: It is a way of handling it, but if that were to happen I would like to see some guidance in the Sentencing Act or, alternatively, a guideline judgement by the Court of Criminal Appeal that says qualitatively what kinds of things are to be taken into account when provocation arises in this context.

Mr DAVID SHOEBRIDGE: For the crime of murder we have got effectively mandatory minimum sentence provisions?

Mr WOOD: In certain circumstances, yes.

Mr DAVID SHOEBRIDGE: Well, standard non-parole periods. When we see cases such as *R v Burke*, which a number of academics have cited, that indicate the very same factual circumstances that ordinarily would have led to a plea of provocation and a manslaughter charge—and the judge himself noted that in that case—where there was a conviction for murder and the sentence was substantially stiffer because, as you say, of society's view about the crime of murder, is that not a difficulty if we just put it all in the sentencing?

Mr WOOD: I am not so sure, when you look at the current maximum sentence. The maximum sentence for manslaughter, which is the result of provocation being made good or not being eliminated, is 25 years. That, of course, encompasses the maximum sentence that you normally get for murder. There are not too many cases where murder attracts a head sentence of more than 25 years. So within that area of manslaughter

effectively you get pretty much what you get for murder but you have got a full sentencing discretion. I would think if there are significant features of provocation in the case the judge sentencing would be bringing back similar sentences to those which currently arise from manslaughter.

Mr DAVID SHOEBRIDGE: But just putting it all to sentencing does not resolve the essential difficulty which I think the Committee is grappling with, which is that there is certain provocative conduct that society fully understands could lessen culpability such as a battered wife responding to years of abuse.

Mr WOOD: Yes.

Mr DAVID SHOEBRIDGE: There is other provocative conduct that society and probably many members of this Committee are affronted by being used to reduce culpability such as jealous rage, infidelity. Pushing it all off to sentencing does not resolve that issue, does it? We are still grappling with what is provocative conduct.

Mr WOOD: I think if you either had a guideline judgement or some aspects spelt out in the sentencing law that would exclude those. At the moment the Sentencing Act simply says provocation is a mitigating circumstance, but you could qualify that by saying provocation where it arises out of sexual infidelity, jealousy, possessiveness or control et cetera is not to be taken into account. You can adjust that by amending the Sentencing Act maybe.

Mr DAVID SHOEBRIDGE: But then the list of exclusions could grow and grow. We would probably want to exclude honour killings and other matters. Might it not be better to work out what we think legitimately allows provocation to be pleaded?

Mr WOOD: I am happy with that quite frankly. That is why I suggested in my formulation that if you are going to retain provocation and have my different test then you could exclude those ones that trouble you such as sexual infidelity, revenge and so on. Revenge has been excluded in the United Kingdom.

CHAIR: If the Committee were to recommend that the partial defence of provocation be abolished would that make it more difficult for these charges to be reduced from murder to manslaughter, which has been happening mainly because of the partial defence of provocation?

Mr WOOD: If the provocation defence went then the only way at the moment you would get murder reduced to manslaughter is if you could make good substantial impairment or excessive self-defence or convince the jury that because the accused was intoxicated they could not form the intent to murder or, alternatively, you could convince the jury that they did not have the intent and it was just an unlawful and dangerous act. So you could still get manslaughter, but if provocation otherwise goes then unless you come into those areas you are not going to get manslaughter; you are going to get murder. Then it would be a matter for the judge to sentence taking into account the provocation.

CHAIR: That would probably reflect more closely community attitudes: people have been puzzled as to how—as in the Singh case, for instance—what is a brutal murder can be watered down to manslaughter?

Mr WOOD: That probably depends on their trust of the judges. If they trust the judges to get it right and reflect community attitudes and so on then I think it might remove the problem. It does pass the responsibility to the judge. Juries have a tremendous responsibility and they get very troubled by these cases. I have had jurors in tears who have to deal with these cases and they are very dramatic cases in the domestic situation. The important thing I think is that there would need to be some guidelines in relation to provocation either through the Sentencing Act or otherwise through a guideline judgement.

The Hon. HELEN WESTWOOD: One of the things that I have struggled with is how provocation is used, particularly in recent cases. Effectively, it is the victim, the deceased, who is on trial for provocation. In those cases it seems to non-lawyers such as myself that she has been found guilty of provocation: she has provoked her own murder. I question how one can make that judgement beyond reasonable doubt when she is not there to give her side of the story. I wonder whether one way to overcome that—and you may have mentioned it, but it has certainly been suggested to us in submissions—is to reverse the onus of proof so that it is then the accused who has to prove that he or she was provoked. Could you comment on that?

Mr WOOD: One of the suggestions I made was to reverse the onus of proof. I would be happier seeing the onus rest upon the accused in effect to make good the provocation, for the reason that the accused is best placed to know the facts. Additionally, as you pointed out, the current offence tends to place the blame on the victim. That in itself is not a terribly happy situation; however, it is almost inevitable. If you are going to rely on provocation, either as a defence or as a mitigating circumstance, you are going to have to look at what actually caused the problem, and whether it really did cause a loss of self-control.

The Hon. ADAM SEARLE: If the onus was changed in the way you suggest would that make the defence of provocation harder to access for women who are on trial for killing their intimate partners in the circumstances we have been discussing?

Mr WOOD: I do not think so. I think in reality there has to be some material placed before the court before judges will leave provocation. They have got to be satisfied there is sufficient evidence to go to the jury. But that does leave the prosecution in a position where it is very difficult, unless it has all the facts placed before it, to negative that. It could make it more difficult, I agree with you. That, of course, is associated with the other situation: if provocation as a partial defence is removed, that may reduce the plea rate.

The Hon. ADAM SEARLE: And self-defence was expanded in some way as an offset?

Mr WOOD: Depending on how it was expanded. I think it is important to note that one of the reasons that support retention of provocation is that it does provide a bit of an incentive for people to plead guilty, even though that is to a lesser offence, thereby saving the community and the victim's family and so on at least the trauma of a trial. But I think it would be the reality that if provocation went there would be less incentive to plead guilty. Plea bargaining I do not particularly like, and charge bargaining obviously is a different situation, but one would hope reality might apply and the prosecution would accept that there are provocative circumstances here and that those could be properly taken into account in sentencing.

CHAIR: Our time has expired, so we will have to ask you to take other questions on notice. We thank you very much for your attendance. In view of the heavy workload that you have we appreciate your time. If there are questions on notice, the answers to those need to be returned within 21 working days. Thank you very much.

(The witness withdrew)

PENELOPE MUSGRAVE, Director, Criminal Law Review, Department of Attorney General and Justice, affirmed and examined:

CHAIR: Thank you, Ms Musgrave, for your attendance at the inquiry. If there are questions that you would rather take on notice, you need only indicate that you will take those questions on notice and supply responses in due course. If at any point you wish to give part of your evidence in camera, you have the right to ask the Committee to consider that. Would you like to make an opening statement?

Ms MUSGRAVE: I might make a very short opening statement, really just to set out the parameters of work that the Criminal Law Review has been involved in over recent years, because that might affect the questions that I answer today and those that I will take on notice and the limits of the assistance I can give. The last round of legislative amendments in this space was in 2002; and, although we have been involved in a number of reviews that have touched on provocation and self-defence over recent years, that matter has not been the subject of a discrete body of work. I do have access to some historical material, but Criminal Law Review over recent years has not had a focussed body of work in this space. I have looked at the list of witness that the Committee has coming to this inquiry; you have some very well respected experts in the field who can give you very solid technical advice. I just wanted to flag that my expertise today probably relates more to historical law reform and the history of amendments, rather than the technical advice that others can give you.

CHAIR: So there has been no proposal within your department to have a review of the partial defence of provocation?

Ms MUSGRAVE: It has been touched on in other areas; for example, Family Violence has raised a lot of these issues. And, of course, you will be aware of the New South Wales and Australian Law Reform Commission reviews, and that there have also been reviews being conducted of chapter 2 of the Criminal Code. So it has been touched on in other areas, but it has not been a separate body of work. I suspect that the Committee is fully aware that it is a very complicated area and it needs very thorough understanding. We have not had the advantage of undertaking that task in recent years.

The Hon. SCOT MacDONALD: One of the things that I am trying to get on top of is why this is so slow. It seems to bounce around the Law Reform Commission. I am not on top of all the bodies, because I am not a lawyer, but we seem to have a few cases that cry out for public attention, yet the issue bounces round and round. Would you have a comment on whether it is the Committee's role to get on with it, or do we flick it back to the Law Reform Commission for another couple of years? Where are we at?

Ms MUSGRAVE: All I could do is make a comment. I think your question is probably best answered by the overview of the submissions you have. There are quite divided opinions about what to do in this space. That is a reflection of the social complexity and the technical complexity of the area. Some years have passed since the Law Reform Commission looked at it. It is an area that is deserving of very thorough examination. There has been a fair bit of comparative work done across Australia. Frankly, my fingers would itch to look wider than that. It is interesting that the submissions you have got are very divided, possibly more so than in other inquiries that the Committee is usually involved in.

The Hon. ADAM SEARLE: This is a very heavily contested area.

Ms MUSGRAVE: Yes, it is, because it is covering such a wide variety of human circumstance.

The Hon. SCOT MacDONALD: Pardon my naivety, but this is a subset of the Legislature. Is it not our responsibility to break that impasse?

Ms MUSGRAVE: I cannot comment on that. I am simply indicating that it is a complex area deserving of a very thorough body of work. That is really all I can say about that.

The Hon. ADAM SEARLE: I think the answer is yes.

Mr DAVID SHOEBRIDGE: If we send it off to the Law Reform Commission or some other body, are we likely to come up with an ambivalent response, which will then be considered in an ambivalent situation, and we will never get any reform?

Ms MUSGRAVE: I do not think I can answer that.

Mr DAVID SHOEBRIDGE: That is not really a fair question to ask a public servant, but I think that is probably the issue.

CHAIR: If we could constrain ourselves to asking questions.

The Hon. TREVOR KHAN: Could I go back to 1998, when a working party was established to deal with the homosexual advance defence.

Ms MUSGRAVE: Yes.

The Hon. TREVOR KHAN: That went nowhere. Is that essentially the situation?

Ms MUSGRAVE: That would not be my assessment of the working group. I was not personally involved in it, but I do have access to the papers. One recommendation was not acted on; that is correct. So removing the homosexual advance defence from the scope of provocation was not acted on. But my understanding is that—

The Hon. TREVOR KHAN: But that was the primary one.

Ms MUSGRAVE: True. But there was a committee set up, following that working group, on the issues paper. It continued up until the time I commenced in the position I am in, so round about 2006 or 2007. It was a very active committee with very interested participants, but it ceased meeting because they felt there had been a decline in the incidence of homosexual advance defence cases. That is not to say that the issues disappeared. But, looking at the evolution of it from the time the paper was issued and those educative campaigns were undertaken, in 2007 there had been a diminution in their view. Having said that, we have not gone back and done a review of the incidence of it, and that could happen. That one recommendation was not acted on; but the others were.

The Hon. TREVOR KHAN: So a committee met essentially for eight years to consider a legislative amendment, and then nothing happened?

Ms MUSGRAVE: No. The committee met to monitor the incidence of homosexual advance defence cases to ensure that the bench book, the education and all those other recommendations were producing some response. They were not tasked with pursuing the legislative amendment.

CHAIR: It seems strange that despite the outcry over those recent cases, such as the Singh case, there seems to have been no electric shock in your department to say, "Should we look at this and respond to community concerns?" Or do you wait for the Attorney General to tape you on the shoulder?

Ms MUSGRAVE: That is a very difficult question for me to answer.

The Hon. TREVOR KHAN: When the Victorians reformed their law in this area they did a number of things. Obviously, we know that they created a new offence and the like. They also created a new section 9AH in their Crimes Act to deal with family violence in a broader way than simply specific evidence relating to specific incidents. You are alive to those amendments.

Ms MUSGRAVE: Yes.

The Hon. TREVOR KHAN: Has your section, group or the like looked at the implications of the introduction of such a section into our Crimes Act?

Ms MUSGRAVE: We have not looked specifically at introducing those types of provisions into our Crimes Act. We are very interested in the reviews that are going on in Victoria. There continues to be a lot of work in the evidence space as part of the Uniform Evidence Law project; and it would always be our preference to take a national approach and put the amendments into the Uniform Evidence Law. The short answer to your question is that there has not been any specific consideration of the introduction of 9AH type provisions into the New South Wales Crimes Act.

The Hon. TREVOR KHAN: Has your department given any consideration to what seems to me to be problematic, and that is that these cases involve the adducing of evidence of conduct only known to the accused, and that traduces the reputation of the victim in circumstances where the defence is essentially irrebuttable?

Ms MUSGRAVE: I completely understand the issue. I cannot say there has not been work done on that. Can I go back to a previous point that is linked to it in a way? There has been reference to the capacity in New South Wales to look at those sorts of evidence in various reviews. There has never been an absolute "An amendment is required", or, "This is truly crying out for reform," because I think it was the New South Wales Law Reform Commission report—and I am sorry that I cannot recall the specific reference—that, in passing, felt that the New South Wales law was able to admit some of that evidence, the tendency type evidence and those things. I can find those references and send them to the Committee.

The Hon. TREVOR KHAN: I would be grateful.

Ms MUSGRAVE: They were in the commentary rather than the recommendations. It was in the discussion of the proposals.

The Hon. TREVOR KHAN: It might be useful to the Committee.

Ms MUSGRAVE: It could have only been a passing reference, but it is one of those things that stuck in my mind. It was in one of the reviews.

CHAIR: You referred to a national approach or uniform evidence law and each State doing its own thing.

Mr DAVID SHOEBRIDGE: New South Wales is trying.

Ms MUSGRAVE: New South Wales is a leader in adopting the uniform Evidence Act. It was a very active participant in that committee. Wherever we can we try to put up amendments to evidence law at the national level so that those States that have adopted the uniform evidence law adopt them uniformly. There are some exceptions and we might make some amendments to the Criminal Procedure Act. Typically we would put them to the national committee and say that New South Wales has done this and it should be considered.

CHAIR: Would that happen with the partial defence of provocation issue?

Ms MUSGRAVE: It would be the evidentiary aspects that attach to the offence provision.

The Hon. TREVOR KHAN: That brings me back to an observation you made about the division of opinion. Noting some of the groups that have expressed an adverse opinion to doing anything in this regard, would I be correct in saying that, for instance, when amendments were introduced to prevent the leading of evidence of prior sexual conduct that groups such as the Bar Association and the Law Society were less than enthusiastic about them?

Ms MUSGRAVE: I would have to check those submissions.

The Hon. TREVOR KHAN: Would you do that?

Ms MUSGRAVE: That was some years ago. They are probably in an archive box somewhere. My only hesitation is that I do not know the status of those submissions and whether they were reflected in the report and made public. I can go back and look at the publicly available material.

Mr DAVID SHOEBRIDGE: I think that is a substantial body of work.

Ms MUSGRAVE: I am happy to liaise with the Committee and to establish how accessible it is.

The Hon. SCOT MacDONALD: I would like a reaction to a comment made by a witness yesterday. He said that it did not seem to matter how appropriate or how long the sentences were. There was comment in the room that in some cases the six-year sentence should have been much longer. Even if the Committee were able to improve the partial defence of provocation and to provide for more appropriate and longer sentences,

that will not change the incidence of domestic violence. We are not having an impact on the serious cases, whether they be assault or murder.

Ms MUSGRAVE: Is this really a question about the deterrent value and the ultimate sentences?

The Hon. SCOT MacDONALD: Yes.

Ms MUSGRAVE: There is real division of opinion about whether sentences handed down to individuals have any general deterrent effect. There are new bodies of academic work suggesting that it has minimal general deterrence. That is an issue. I do not know whether you asked this question of James Wood, but I do know that it is a question that is squarely on the agenda of the Law Reform Commission in its review of sentencing. It was raised in, I think, the first or second discussion paper and was the subject a roundtable yesterday.

The Hon. SCOT MacDONALD: The Committee might put a lot of energy into finetuning this, improving it, aligning it to current community values and so on, but we would still have assaults, deaths and injuries.

Ms MUSGRAVE: I think that is a reality of life and that maximum sentences and the sentences imposed on an individual are a fairly blunt instrument to apply deterrence to the general community.

The Hon. SCOT MacDONALD: Does the department have a plan B? What are the other strategies?

Ms MUSGRAVE: To reduce family violence?

The Hon. SCOT MacDONALD: We have just had a good social affairs inquiry into domestic violence.

Ms MUSGRAVE: Yes. There is an extraordinary amount of activity in the domestic violence space. I know that not only my division but also other divisions of the department are busily working on it. The executive summary of the most recent committee report tracks all the work that is happening and reduction in family violence is a priority. I do not think that could be disputed.

CHAIR: Would it be correct to say that there has been a big increase in domestic violence, but the incidence of murder and manslaughter has remained static, although there have been some sensational cases?

Ms MUSGRAVE: I do not have those figures at my fingertips. One thing I can talk about is the Domestic Violence Death Review Team, which sits within the Coroner's Office. It was established about three years ago with the mandate of trying to think laterally. Sorry, it is not its mandate to think laterally, but the intent was that it would think very laterally and explore the reasons behind family violence and ensure there was a decent data set and that we actually had a proper record of homicides that arose from family violence. It should also be acknowledged that police are investigating a matter to get an offender and that group has been tasked to look much more widely to establish the indicators that could have picked up the family violence at an earlier stage and prevented that homicide.

The Hon. SCOT MacDONALD: The Committee can do its best possible job, it can take on board the things mentioned by the previous witness and improve the self-defence provisions, but at the very most it will make only small changes at the margins. Does the Department of Attorney General and Justice have any other bows in its weaponry?

Ms MUSGRAVE: In the area of family violence the answer is yes. There will be the response to the committee report and there is the work recommended by the Australian Law Reform Commission and the New South Wales Law Reform Commission.

The Hon. ADAM SEARLE: At what stage is that?

Ms MUSGRAVE: The joint Law Reform Commission report?

The Hon. ADAM SEARLE: Yes.

Ms MUSGRAVE: It is up to a couple of different stages. There is no finalised government response. From memory, there were 186 recommendations that fell into what I see as three conceptually different buckets. There is a group of recommendations that are being examined at a national level and that national response should be formulated by the end of this year. There is a bundle of recommendations that are being addressed in the statutory review of the Crimes (Domestic and Personal Violence) Act. That leaves the remainder of the recommendations, some of which New South Wales does not need to act on because it has already addressed those issues. It must be remembered that it was a national report and we had already acted on a number of the recommendations. Because the statutory review is being finalised, it is likely the government response will finalised at the end of that.

The Hon. ADAM SEARLE: Where is the response to the second bucket?

Ms MUSGRAVE: With regard to the statutory review?

The Hon. ADAM SEARLE: Yes.

Ms MUSGRAVE: The submissions are closed and we are hoping to finalise that statutory review this year.

CHAIR: Various witnesses have raised the issue of social framework evidence.

Ms MUSGRAVE: I am not familiar with the term.

The Hon. ADAM SEARLE: It is part of what they did in Victoria. Apart from the new defences they created a suite of provisions that facilitated the giving of evidence not only about the individual and their circumstances but also the nature of domestic violence, why women do not leave and the whole social context of the phenomenon.

Mr DAVID SHOEBRIDGE: It was partly covered in Trevor Khan's earlier questions.

The Hon. ADAM SEARLE: We had evidence from a public defender yesterday that she was able to get that evidence admitted on behalf of her client in all her cases. However, we have had other suggestions in submissions that it can be hard to get it admitted, not so much the specific material but the more general societal material.

The Hon. HELEN WESTWOOD: It depends on whether the victim is a woman or a man. Where the accused is a woman in a long-term violent relationship it is easier, but where a man kills his intimate partner and there is a history of domestic violence that is not presented in evidence.

Mr DAVID SHOEBRIDGE: It is both sides.

The Hon. ADAM SEARLE: Is such a legislative regime necessary and desirable? Do you have any views about that? We are happy for you to take that question on notice.

Ms MUSGRAVE: I can make some preliminary comments. I have not looked at it in the family violence context. However, similar issues have come up in other areas. Child sexual abuse springs to mind and the vulnerability of children. There is some discussion in academic writing about how to educate juries about children's capacity, where they are at and how they understand things.

The Hon. TREVOR KHAN: It is particularly relevant in that context in terms of the delay in disclosure.

Ms MUSGRAVE: Yes. There are broader contextual issues. I am always hesitant to look at it solely in the context of family violence. I think there are many areas where contextual evidence may be relevant or useful and there are the same challenges about leading that evidence, who gives it, who is an expert qualified to give it and what form it should take. It is coming up in people's writing; it is a recurring issue. It is something I think would merit a significant piece of work, which we have not yet done.

Mr DAVID SHOEBRIDGE: One of the common themes in a number of submissions is that women are pleading to manslaughter because they are being charged with murder. The threat of being sentenced to murder is so significant that they are not running self-defence cases. Has your department looked at that issue?

Ms MUSGRAVE: No. The Committee has a submission from the academic who has looked at cases recently. That may be the one you are talking about.

Mr DAVID SHOEBRIDGE: There is more than one submission.

Ms MUSGRAVE: The most recent published report was of course the Judicial Commission report. We have checked with them and they do not have any ongoing work at the moment.

Mr DAVID SHOEBRIDGE: Does the department intend to monitor or review this going forward?

Ms MUSGRAVE: There is no intention to review it at the moment.

Mr DAVID SHOEBRIDGE: When we raised this with the police yesterday it would be fair to say that their view was that they charge on the basis of the evidence and then leave it up to the court system to work out how it is resolved. If you have the court doing one thing and the police doing another, someone needs to look at how the two systems are interacting in order to produce fair outcomes for women. Is that not your department's job?

Ms MUSGRAVE: I am probably not best placed to provide a full answer to that question. It would probably assist the Committee if it were to get evidence from the Director of Public Prosecutions because these are serious charges. Yes, the police investigate and charge the person at the initial point an then they hand the case to the Director of Public Prosecutions. It would be very useful to ask that question of the Director of Public Prosecutions about the process of settling an indictment and finding a bill. If there is anything outstanding once those questions have been asked, I am happy for the Committee to contact me to see if there is anything I can add. However, the court adjudicates the indictment and the Director of Public Prosecutions settles that indictment.

Mr DAVID SHOEBRIDGE: Does your department have any dialogue with the Office of the Director of Public Prosecutions about its prosecutorial guidelines?

Ms MUSGRAVE: No.

Mr DAVID SHOEBRIDGE: You said that the Government is very active in the domestic violence field. One of the most disturbing pieces of evidence I heard yesterday was from the Aboriginal Legal Service. The Committee was told that 29 per cent of all women in prison are Aboriginal and that a not insignificant part of that arises from a response to domestic violence and substantial domestic violence issues in the Aboriginal community. What is your department doing to address the incidence of violence and imprisonment in the Aboriginal community?

Ms MUSGRAVE: I will have to take that question on notice. That is looked after by another section of the department, but I am happy to take it on notice and to respond to the Committee in writing.

The Hon. HELEN WESTWOOD: Just going back to the Domestic Violence Death Review Team, have they been providing interim reports to the department that you have been able to monitor or gauge any trends or—

Ms MUSGRAVE: Not to me. They do have an obligation to publish an annual report, and I am fairly confident the first report has been done. I think that probably did relate very much to the establishment of the Committee and the system that it set up and what it was doing in order to gather the data it was getting. I am sorry; I am hesitating because I just cannot remember when they were established. I was involved in the establishment of the team but I have not been involved in it since then.

The Hon. HELEN WESTWOOD: I think it was about 2009, from memory, something like that.

Ms MUSGRAVE: They do have publicly available annual reports.

The Hon. HELEN WESTWOOD: Does your department monitor those reports? The aim of that team was to look at systemic issues—where is it breaking down and—

Ms MUSGRAVE: I should say there are departmental representatives on that Domestic Violence Death Review Team. From memory, the departmental representative is actually the Domestic Violence Project Manager from the department; James Wood is also on the Domestic Violence Death Review Team; and there are very senior representatives from all the relevant agencies. They are informed by the secretariat of the team at the meetings about where they are at. So however frequently the meetings happen they would be updated on what is happening in that way.

CHAIR: Do you have any views on what they did in Victoria when they abolished the partial defence of provocation and had defensive homicide introduced? There seem to be some reports that it is not working or it is having unintended consequences.

Ms MUSGRAVE: I have not had the opportunity to look at it in depth. I am aware that it is still subject to review and I have not spoken to my colleagues down in Victoria about that.

CHAIR: And you have not heard any feedback?

Ms MUSGRAVE: No, I have not had any recent conversations with relevant people.

Mr DAVID SHOEBRIDGE: Does the department have a position on the homosexual advance defence or gay panic defence? Has it been a matter that you have looked at? You said before that the incidence of it being used has diminished. Apart from observing a diminution in use is there any position from the department?

Ms MUSGRAVE: No.

The Hon. HELEN WESTWOOD: Can I just ask about juries? One of the issues that has been raised with us is the complexity of provocation as a defence and how it may be difficult for juries to really come to a fuller understanding and appreciation in making their judgements. Is that something that the department has looked at? Do you do any research with juries afterwards in a range of matters to understand whether or not they have fully appreciated all of the complexities of the matters before them?

Ms MUSGRAVE: Three areas spring to mind. The Law Reform Commission has a reference to look at jury directions, and that report has not been finalised. The Chief Justice of the Supreme Court has something called the Jury Task Force, which is responsible for looking at those sorts of issues. They may not do the research or make recommendations themselves but they are actively involved in engaging with researchers and they act as a clearing house. Thirdly, yes there are a number of academics working very actively in the area, and I am aware of that because of the Jury Task Force—Jane Goodman-Delahunty, for example, and I am sorry I just cannot remember the names of some other academics working in the field; there are a couple though. They have been involved in a number of pieces of research where they have engaged with the Sheriff's Department—the sheriffs of Attorney General and Justice—and have done things like used people who have been called up for jury duty but have not actually been put on a panel, and used them to give responses to mocked-up trials. David Tate from the University of Western Sydney is very active in this area. I can provide contact details to the Committee, if that is useful.

The Hon. HELEN WESTWOOD: From that would the department look at those findings and either make some recommendations to the Attorney General or Parliament about ways in which we might be reforming the laws?

Ms MUSGRAVE: There is definitely ongoing work in relation to juries. It is an area that is very rarely off the agenda. A lot of the work to date has been in response to the previous Law Reform Commission report on juries; there were a number of amendments that flowed from that.

The Hon. TREVOR KHAN: Was that the reduction in the number of challenges?

Ms MUSGRAVE: There were a number of things: eligibility—I cannot remember now all the detail. But it is a standing body of work.

The Hon. TREVOR KHAN: Has there been any consideration given to the issues of gender balance on juries?

Ms MUSGRAVE: Not as far as I am aware.

Mr DAVID SHOEBRIDGE: What about on committees?

Ms MUSGRAVE: There may have been some public consideration or submissions made.

The Hon. TREVOR KHAN: I know the point.

Mr DAVID SHOEBRIDGE: I am only joking.

The Hon. TREVOR KHAN: I know you are. Can we deal with what I think is a reasonably—

Ms MUSGRAVE: No, there has not. The Law Reform Commission report looked at people with disabilities appearing on juries, but I cannot recall—that does not mean it was not looked at—any consideration of gender imbalance.

The Hon. TREVOR KHAN: It just surprises me in a way, knowing what we did, particularly when we had more challenges, in attempting to achieve a make-up of a jury. Gender issues often were quite important, we thought, in our, in a sense, pre-trial work. It strikes me strange that government has not become more alive to that.

Ms MUSGRAVE: I am not aware of any work. I suspect it may be that it is totally randomised. Once you have overcome the eligibility criteria and relevant people have been excluded, it is a random selection.

The Hon. TREVOR KHAN: It is until you then have three challenges.

CHAIR: Just to clarify your role: Where you sense there is a problem in the judicial system you ask the Attorney General to look at it or do you wait for him to tell you to look at it? How do you get started on some of these matters?

Ms MUSGRAVE: It is a fairly dynamic environment—that is probably the best answer I can give. Issues come up in a whole variety of ways.

CHAIR: So some of it starts from your end and some of it comes from his end?

The Hon. ADAM SEARLE: It is more like a tactical response group, Chair.

Ms MUSGRAVE: I will not answer that; it is not a question.

Mr DAVID SHOEBRIDGE: In terms of jury selection, there were some recent efforts to marginally expand the role and the scope of juries, but there is, amongst some academics and practitioners, criticism that juries tend to be skewed towards retired and other people who do not have a valid excuse to not attend; so you have, if you like, quite a relatively conservative subset on juries, on one view of it. Has there been any analysis by your department that looks at those kinds of critiques and looks at the make-up of juries?

Ms MUSGRAVE: A lot of that work was done in the Law Reform Commission report. The amendments have been fairly recent that looked at the eligibility criteria, and no work has been done since then.

Mr DAVID SHOEBRIDGE: Is there an intention to review or is there anything in place to review the outcomes of those changes?

Ms MUSGRAVE: I can get back to you on that. There may be a review provision in the amendments, but I would have to take that question on notice.

Mr DAVID SHOEBRIDGE: Putting to one side whether or not there is a legislative provision to review it, given how important juries are to the functioning of criminal justice in New South Wales, does your department have, if you like, an ongoing task of reviewing their make-up and their performance?

Ms MUSGRAVE: I am happy to take that on notice. I will have to get back to you.

CHAIR: Ms Musgrave, thank you very much for your attendance. We appreciate the time you have given to the Committee. We have some questions on notice and you have 21 days, if possible, to answer those questions.

Ms MUSGRAVE: Certainly. We will liaise with the Committee about some aspects.

(The witness withdrew)

(Short adjournment)

PHILLIP GIBSON, Solicitor, Law Society of New South Wales, and

DAVID PHILLIP GIDDY, Solicitor, Law Society of New South Wales, affirmed and examined:

CHAIR: Thank you for your attendance as witnesses today. We appreciate you giving us your valuable time. If there are questions asked of you that you would rather take on notice, please indicate that and you can have up to 21 days to answer. If at any stage you wish to give evidence in camera, we will consider that request and clear the room.

The Hon. HELEN WESTWOOD: I want to declare that I had engaged Mr Gibson for legal advice on a matter in the past, about 5½ years ago, not a current matter.

CHAIR: We will note that. Do you have an opening statement you wish to make?

Mr GIDDY: Not so much a formal read statement but perhaps it would be helpful for the Committee to appreciate what the general approach of the Law Society is to these types of issues. That is that we have an underpinning philosophy that options and discretion should be left as much as possible in the hands of the judiciary or, indeed, the community that might have to judge certain conduct and impose certain standards of conduct. We are always concerned when these sorts of options or discretions are taken away, either by prohibitive legislation or, in this case perhaps, by abolishing legislation.

The reality is that unlawful killing is a very difficult, controversial and emotional area. However, for many years New South Wales and Australia have acknowledged that there is available to the community—because, after all, the jury is the community—the opportunity to assess a person's conduct as less culpable than that of murder. The obvious examples of that are the voluntary manslaughter defences of abnormality of mind—diminished responsibility as we used to call it—excessive self-defence and provocation. The last two of those are particularly good examples of where the community, through the jury, has the opportunity to impose its own values on a given factual situation and, in the case of excessive self-defence, perhaps come to a determination that the accused believed that what they did was reasonable but it was not in fact reasonable. Similarly with provocation—and no doubt you have all read section 23 many times—again it is the community through the jury putting itself in the position of the ordinary person making a determination as to whether that conduct was sufficient to trigger the intent to cause grievous bodily harm or death.

It seems to us that this inquiry has to some extent overlapping issues that are not necessarily completely complementary. On the one hand, we have the Singh case. I remind you of that very true adage that bad cases make bad law. I do not know anything about the Singh case apart from what I have read, however it would appear to be a verdict that was unexpected in some quarters, but that is not necessarily a good reason to abolish the defence of self-defence.

The Hon. TREVOR KHAN: I do not think we are suggesting that.

CHAIR: Provocation.

Mr GIDDY: I am sorry, provocation. I do apologise for that. The other aspect of your inquiry appears to be the need to affirm in some way the community's capacity to judge women that respond to ongoing domestic violence more leniently by determining that a lesser charge might be available or, indeed, a complete defence. They are overlapping but they are not completely complementary of each other. Let us look at it from the point of view of even your own statistics. It would appear that many women have taken advantage of the opportunity to run provocation where they have killed a partner as a consequence of long-term domestic violence. It is not necessarily the case that excessive self-defence will be available to those women, and the Bar Association has given you some examples of that.

The other thing to bear in mind is that either men or women in long-term violent relationships are not the only circumstances in which provocation would be an entirely appropriate defence for the community to at least have available to it to utilise. That might be getting into the area of amending provocation as it is now drafted, bearing in mind that the 1982 legislation was designed to allow women in these circumstances to have the opportunity of having provocation made available to them. One of the ironies might well be if provocation was removed not only might the very women that legislation was designed to protect not have a defence available but a lot of other people in different circumstances would not have the defence available.

I understand there is a suggestion that words alone should not be sufficient to trigger provocation. Perhaps I will finish this opening by giving an example of a matter I had a number of years ago. I was contacted by a colleague who advised me that she in turn had been contacted by a colleague who was in a perilous domestic situation. The woman was intelligent, articulate and very scared. The man she was living with was high profile, intelligent and influential. It would appear he was a most unpleasant man. He was manipulative and very controlling. However, he had never been violent to her; there was no suggestion of violence. But, over a period of months—no doubt experience will allow you to understand this situation—he had effectively isolated her socially from her friends, had made her economically dependent on him and was becoming increasingly viperous in his communications with her.

A few days before Christmas I got a call from my colleague, who was very concerned that her friend was going to react violently, and the Christmas period was approaching. It turned out, fortunately, that my colleague was able to extract her friend from this situation. But let us assume that Christmas rolled around and the vitriol became overwhelming and this woman lashed out, say, with a knife. Assuming the defence of unlawful and dangerous act is not available, it is not self-defence and it is not excessive self-defence; it is classic provocation. So, bad cases make bad law.

The fundamental position we have is be very cautious before you take away a defence which, at the end of the day, is an opportunity for the community to impose its values. If you are contemplating doing it, we strongly recommend you refer it to the Law Reform Commission for a critical analysis. There are many unforeseen consequences of this type of action. If you are contemplating perhaps changing the test, again we would strongly urge you to consider referring it to the Law Reform Commission so that all those options can be looked at by people who are in a position to make detailed research. That is really what I wanted to say.

CHAIR: Mr Gibson, do you want to make any remarks?

Mr GIBSON: I do not need to add anything to Mr Giddy's comments.

CHAIR: In your submission you have made—or Justin Dowd has—large quotes from previous Law Reform Commission's investigations. We did have the current commissioner here today and apparently there has been some shift in the Law Reform Commission group that you may not be aware of saying that circumstances have changed, without being quite clear which particular circumstance.

The Hon. TREVOR KHAN: He was very helpful though.

CHAIR: He was, but it is not driving that policy position as it was previously.

Mr GIDDY: Without knowing what circumstances are being alluded to, it is a little difficult to answer that. Perhaps that comes back to basics. Yes, circumstances do change and there will always be a plethora of unpredictable circumstances that the community through the jury has to assess. That is why our starting point is to not take away options. It is very difficult to foresee the consequences that would flow, and it is very difficult to anticipate the type of circumstances that juries, of course, have to deal with in the future. By taking away options you are greatly restricting the opportunity for the community to impose its values.

The Hon. DAVID CLARKE: Mr Giddy, this Committee is here because there is a lot of anger out there in the community. It may be not justified but it might be—bad cases like Won and Singh and so forth that you would be familiar with. The submission from the Law Society does not suggest any changes at all—no tweaking, no adjustments—basically leave it as it is. I ask you to take this theoretical assumption. Say the decision was made by this Committee to keep the partial defence there but it wanted amendments. Has the Law Society considered what sorts of amendments? For instance, whether conduct that can be relied upon by an accused to plead provocation should be restricted to violent criminal activity as an example? First of all, has the Law Society considered any tweaking of this defence? If so, what avenues did you explore on that?

Mr GIDDY: No, we did not consider it directly in terms of what alternatives we would recommend, and we would be prepared to do that, if necessary. However, I think the example I gave you would be an apposite response to the suggestion that you were starting to formulate.

The Hon. HELEN WESTWOOD: What you have described is domestic violence in the definition.

Mr GIDDY: Again, I do not have a difficulty and I am sure the Law Society will not have a difficulty in contemplating alternative tests, but it is necessary to ensure that the tests leave open the practical options that can be made available to the community through the jury. That is the concern we have. That is a matter of analysis, and, with respect, that would be very much in the province of the Law Reform Commission because they have the facility and the research facilities to be able to anticipate, as best they can, the sort of circumstances to which the legislation might need to be applied.

The Hon. DAVID CLARKE: Except that the Law Society makes recommendations on a whole range of things to various committees.

The Hon. TREVOR KHAN: Normally they just say no.

The Hon. DAVID CLARKE: No, I do not think that is correct at all. Do you not think it would also come within your province, as it were, to consider this and to examine it?

Mr GIDDY: Yes.

The Hon. DAVID CLARKE: For instance, as an example, do you see this idea of restricting the defence being available to conduct that is violent criminal conduct?

Mr GIDDY: You have used the words "violent" and "criminal". As an example, no, I would have thought that that is probably too narrow because I do not think it would pick up the very example that I gave.

Mr DAVID SHOEBRIDGE: What if it also included domestic violence with a definition of domestic violence? That is what we are talking about, protecting battered women, but not allowing jealousy and infidelity to be used for provocation. That is the conversation.

Mr GIDDY: That appears to be the subtext. That is where I talked about overlapping, but not necessarily—

The Hon. TREVOR KHAN: It is not the subtext. Take it as the banner;

Mr GIDDY: They are not necessarily mutually exclusive, of course. They are overlapping but they do not necessarily fully complement each other. Our concern is not to protect. Obviously we want people in violent domestic relationships—however you want to define them—to have available to them options such as provocation. It would appear that there may have been a highly controversial verdict in the *Singh* matter.

The Hon. TREVOR KHAN: With respect, it is not just one verdict. Quite frankly, you can look at a whole series of these cases that have occurred across Australia—whether it be *Ramage*, *Keogh*—where verdicts have been delivered acquitting men of very serious violent murders—

Mr DAVID SHOEBRIDGE: Not acquitted.

The Hon. TREVOR KHAN: Acquitted of murder.

Mr DAVID SHOEBRIDGE: One.

CHAIR: Changed to manslaughter.

The Hon. TREVOR KHAN: —in circumstances where the provocation has been the breakdown of a relationship.

Mr GIDDY: And there have been many cases where women have had the benefit of exactly the same defence.

The Hon. TREVOR KHAN: Yes, I understand that, but you cannot say that *Singh* stands alone, because it does not.

Mr GIDDY: I am not suggesting *Singh* does stand alone, but when you look at the hundreds and hundreds of murder trials, the great majority of which are men, the number of times that the provocation defence is used by men against women is very small.

Mr DAVID SHOEBRIDGE: Do you think the emotional response to the end of a relationship, whether it is jealousy or anger, should be a sufficient basis for a man to get mitigation on plea and have it reduced from murder to manslaughter? Do you think that is a legitimate—

Mr GIDDY: Put as blandly as that, probably no.

Mr DAVID SHOEBRIDGE: Is that not one of the issues we are grappling with?

Mr GIDDY: Well, yes, but it is a complicated area. You have to know the full circumstances.

The Hon. DAVID CLARKE: Could the Law Society assist us by giving consideration to this issue? We have got a submission which says it is fine as it is.

The Hon. HELEN WESTWOOD: All is hunky-dory.

The Hon. DAVID CLARKE: If you are prepared to concede that this is an area that may well have to be looked at or should be looked at, can the Law Society assist this Committee by turning its attention to this issue and possibly making some recommendations as it has indeed done on other matters over the years?

Mr GIDDY: Yes.

The Hon. TREVOR KHAN: Indeed, it can work on the basis that—at least I will speak for me—the suggestion that we throw our hands up in the air because it is too hard and refer it off to the Law Reform Commission is not going to wash.

Mr GIBSON: Can I just clarify that what is being suggested is that you are not looking for an immediate response now, but you are asking if we can—

Mr DAVID SHOEBRIDGE: Absolutely.

Mr GIBSON: —in the future look at any recommendations and comment on them. Of course certainly we can.

Mr DAVID SHOEBRIDGE: Within the next 21 days.

The Hon. DAVID CLARKE: Indeed, not only look at recommendations from here, but come up with some recommendations—

The Hon. ADAM SEARLE: With respect, there is a prior issue.

The Hon. HELEN WESTWOOD: Some of the submissions we have received do have some reasonable recommendations or suggestions that this Committee should look at. One of them is looking at the social framework, that that be introduced at some point as—

The Hon. TREVOR KHAN: Section 9AH of the Victorian Crimes Act.

The Hon. HELEN WESTWOOD: Yes, section 9AH (3) of the Victorian Crimes Act.

The Hon. ADAM SEARLE: These are part of the provisions that were introduced into Victoria to ensure that social framework evidence about domestic violence was able to be given in criminal trials. Does the Law Society have any views about those sorts of provisions?

Mr GIDDY: I cannot speak now without having discussed it with the Law Society, but what Mr Clarke is pressing—

CHAIR: We put that question on notice to you.

Mr GIDDY: No, I do not think the Law Society can necessarily be expected to respond to this within 21 days. The harsh reality is that we are all practising solicitors; we work in the trenches. We try to deal with matters on a case-by-case basis and apply the law. You are the law-makers. What we are saying is that this really does require detailed and considered analysis.

Mr DAVID SHOEBRIDGE: The Law Society is being given the opportunity to respond on notice, if it wishes to do so, within the time frame that all other witnesses have, which is 21 days. If you need an extension, I am sure the Committee would consider that, but the opportunity is being given to the Law Society.

The Hon. DAVID CLARKE: I have a deep respect for the Law Society, and that is why I genuinely would like for this Committee to have the input of the Law Society. I would value its contribution.

Mr GIDDY: Our position is as has been put down here: we do not think it needs to be amended. If someone is proposing an amendment, we are prepared to consider it, contemplate it, and comment on it.

The Hon. TREVOR KHAN: I am not sure whether it is available now, but within a couple of hours there will be a transcript of Justice Woods's evidence to us today, which safely can be said not necessarily to embrace your recommendation of referring off to him. He has put—

Mr DAVID SHOEBRIDGE: Justice Woods indicated that the Law Reform Commission had two live and resource-intensive referrals that it was looking at.

Mr GIDDY: We are aware of those.

Mr DAVID SHOEBRIDGE: And it would be difficult within the context to also digest this as a referral.

Mr GIDDY: I accept that. Having spent a lot of yesterday with the Law Reform Commission, as we will be again next week, we are besieged with a number of inquiries and commissions in the work that it is doing.

CHAIR: It takes you away from the coalface.

Mr GIDDY: That is why we are so concerned about this—

Mr DAVID SHOEBRIDGE: We understand.

CHAIR: Mr MacDonald wishes to ask a question. He is sitting there patiently.

The Hon. SCOT MacDONALD: I think you have touched on it already, but it seems to me there are two aspects to it. There is the merit or otherwise of the partial defence, and you have got your views on that, but if that partial defence remains, there is still this issue of the sentencing. We have looked at cases where the sentence seems very low or not in tune with community values. The Law Reform Commission is looking at the sentencing. Does the Law Society have a view on that, or will it look at the sentencing?

Mr GIDDY: Certainly we are engaged in that process on a regular basis. As I said yesterday, we were appearing at a round table discussion with the Commission. This happened to be section 3A and some appellate aspects. Sentencing and the range of sentences is a controversial area, we accept that. One of the reasons manslaughter is not accompanied by a standard non-parole period is because it covers the full gamut. There have been 25-year sentences handed out for manslaughter; there have been bonds handed out for manslaughter. On numerous occasions, the sentences have been reviewed and we have always come to the view that because of the huge differences in circumstances, it is impossible to have a standard non-parole period, unlike murder of course.

The Hon. SCOT MacDONALD: That is not necessarily a bad thing, is it?

Mr GIDDY: No, it is a very good thing. It is leaving discretion and options available, in this case, to the judiciary.

Mr DAVID SHOEBRIDGE: In cases like *Singh* and others that many people see as a manifestly inadequate sentence, given the nature of the crime, one of the issues that arises in some of the submissions we have received is that one of the reasons is the dynamics of a plea of provocation in the criminal justice system, which is: charged with murder; a partial defence of provocation is put forward, which is not accepted by the prosecution, but at an earlier point there has been an indication of a willingness to plea to manslaughter on the basis of provocation; the provocation is ultimately made out or not refuted at trial.

Mr GIDDY: Yes.

Mr DAVID SHOEBRIDGE: Then when it comes to sentencing, instead of being sentenced for murder, the sentence is a sentence of manslaughter, but it also comes with a 25 per cent discount because the early plea was entered, in controversial circumstances, attached to the plea of provocation. There is, if you like, a double discount. There is the early plea discount and then the provocation.

The Hon. TREVOR KHAN: There is actually a third discount, David. That is, on sentence, the provocative conduct is taken into account because the Sentencing Act requires it to. You get the discount knocked down to manslaughter and it cascades.

Mr GIDDY: It is indicative of manslaughter so the discount comes off the conviction. I think it is a little disingenuous to say there is a double discount. The jury has heard the matter, the defence has been upheld and a person has been acquitted of murder and found guilty of manslaughter.

The Hon. TREVOR KHAN: The Crown has not proved its case beyond a reasonable doubt.

Mr DAVID SHOEBRIDGE: I am asking you to look beyond the form and get to the substance of what the issue is: highly controversial circumstances of the killing, a heavily contested plea of provocation, and you go from murder to a discounted manslaughter sentence. I am asking you to look beyond the form and accept the substance of it.

Mr GIDDY: That is another very good example of—I will not say babies and bath water, but many Committees and legislatures have considered whether there is a need for a discount for an early plea. There was enormous pressure coming from this Parliament to get early pleas. A consequence of that was the effect of a 25 per cent discount, as well as numerous other legislative changes, all of which we rode through. The reality is that if a person offers to plead guilty at an appropriate time, they are entitled to a discount that the courts have determined because there have been changes to the legislation.

Mr DAVID SHOEBRIDGE: I understand the individual decision-making which produces the outcome, but I wonder if that process is part of the reason why—leaving to one side the availability of provocation—there is community disquiet about the sentence.

Mr GIDDY: It may very well be the case. It might be that, from a community perspective, these sentences are too lenient. I cannot be critical of the process because it is part of a far larger picture. However, that really should be determined by appeals to the Court of Criminal Appeal. They can then re-determine the matter. They can take into account a number of issues to determine whether a sentence is manifestly lenient, apart from where there have been errors of law and then they can resentence. I know that sounds glib.

The Hon. TREVOR KHAN: With a discount.

Mr DAVID SHOEBRIDGE: They will go through the exact same process.

Mr GIDDY: Are you suggesting there should not be a discount if a person has agreed to plead early?

The Hon. TREVOR KHAN: We are not going to go there. We are going to deal with what—

Mr GIDDY: It is a far bigger issue.

The Hon. ADAM SEARLE: One of the issues that we obviously are wrestling with, leaving aside the adage that hard cases make bad law, leaving aside the circumstances of any particular case, one of the policy issues that we have to consider carefully is whether, in circumstances where men kill their intimate partners when they have not been subject to any threats of violence or threats to their personal safety, as a matter of

policy, should they have this defence available to them? That so-called loss of control, in circumstances where it seems to be about sexual jealousy, possessiveness, or some view that their partners are some kind of personal property seems to be the narrative that informs this kind of behaviour as a matter of policy whether these people should have those defences available at law. That is one of the things we are wrestling with.

Mr GIDDY: And I can understand that and one would like to think that community values would have shifted sufficiently so that juries, the community, when determining what the ordinary person would or would not do, would not be satisfied that the defence was made out. They appear to be from time to time being satisfied in circumstances where a lot of us would disagree with it.

The Hon. TREVOR KHAN: No. The Crown has not proved its case beyond reasonable doubt.

Mr GIDDY: Okay, then that area again is one that is very big.

The Hon. ADAM SEARLE: I come back to this question.

Mr GIDDY: Can I just finish? I am sorry. The problem you are starting to allude to there is: is it only women who should have that defence available? The example I used of a woman who had got a knife and stabbed this very unpleasant human being, should she not have the defence available? If you are going to make it gender based, if you are going to take away rights on the basis of gender, with respect, you are getting into a difficult area.

Mr DAVID SHOEBRIDGE: I do not think anyone has suggested crafting the law to be explicitly gender based but I think people are suggesting that the law needs to be crafted to take into account the gender reality.

The Hon. ADAM SEARLE: When the motivation is sexual jealousy or possessiveness.

Mr GIDDY: I accept the issue. It is a controversial issue. As I say, one would like to think that as a community we have evolved past those historical perspectives.

The Hon. ADAM SEARLE: It seems to me if there is a consensus that the community does not accept these behaviours as normal or acceptable, why should such a defence be available at law?

Mr GIBSON: Because I think the answer we keep coming back to often is that the decision on these matters at a trial are determined by the community, that is, the 12 representatives of the community, who we assume reflect the values of the general community.

The Hon. ADAM SEARLE: With respect, that is not really a proper answer in the sense that the jury is operating within the law as it currently is. The question for us is a policy question: In those circumstances or circumstances, irrespective of gender, where people lose self-control or act out of jealousy or possessiveness, should they have these defences available? It is profoundly troubling to me at least that these defences are available in those circumstances.

Mr GIDDY: It might well be that someone can craft an amendment which we would be only too pleased to contemplate, bearing in mind the need to be very cautious about throwing away rights that other people might need to justify them.

Mr DAVID SHOEBRIDGE: Every single witness—it does not matter which side of the debate they are on—talks about unintended consequences. Pushing on the law of provocation here might lead to unintended consequences in a series of other partial defences. Everyone has been aware of that.

Mr GIDDY: That is because history has shown so often the unintended consequences.

The Hon. SCOT MacDONALD: A few of the submissions and witnesses have recommended changing the onus of proof. As you say, you are at the coalface. How will that work?

The Hon. ADAM SEARLE: Given that the onus of proof is different in this situation to other partial defences, should they not be brought into line with each other?

Mr GIDDY: It is the same as excessive self-defence. I do not see how it is different. The Crown still carries the burden beyond reasonable doubt, as Mr Khan pointed out. That area is very easy to be critical of on a case-by-case basis but it is absolute bedrock stuff, the burden of proof and the standard of proof.

The Hon. SCOT MacDONALD: Stays with the Crown.

Mr GIDDY: It stays with the Crown and must always stay with the Crown.

Mr DAVID SHOEBRIDGE: Not always for defences though.

Mr GIDDY: No, there are defences that have to be run positively. For practical purposes, provocation—dock statements have gone. It is very difficult to run a provocation case without the client getting in the witness box.

The Hon. TREVOR KHAN: Mr Ramage did. He relied upon his ERISP.

Mr GIDDY: I accept that. I was just about to say unless there is a contemporaneous ERISP.

The Hon. TREVOR KHAN: Contemporaneous? He had been to his lawyer after having dinner—

Mr GIDDY: Again, that is a case which of itself might be the subject of community concern but proof beyond reasonable doubt is a much bigger area, with respect. Coming back to that issue we were talking about, the practical reality is with the great majority of cases you have to put your client in the witness box. I was brought up on the adage that you never put your client in the witness box, and the second lesson was you never put your client in the witness box and the third lesson was you never run alibi defence. They all come down to the same thing when you think them through. So you have to expose your client to cross-examination. Now one has to assume you have competent—and they are very competent—well-trained, experienced prosecutors who know exactly what the defence is and know how they will attack it and there are a whole lot of tactical ways you go about attacking a defence like that.

The Hon. SCOT MacDONALD: So you are saying that is unfair?

Mr GIDDY: No, I am saying that is fair. I am saying that it is fair that this person will have to get in the witness box and give evidence in order to get up on a provocation defence. That is the practical reality.

The Hon. TREVOR KHAN: That is an interesting concession.

The Hon. SCOT MacDONALD: I am still a bit confused by that. I am not a lawyer. I am not a solicitor. I am confused.

Mr DAVID SHOEBRIDGE: Is what you are putting that while it is not a matter of law that the defendant has to go in the witness box to explain the provocation, the practical reality as you see it from having run the cases is that if you want to make good the defence you almost inevitably put your client in the witness box?

Mr GIDDY: It is certainly an option that you would be looking at very carefully, unless there was compelling evidence in the Crown case or compelling evidence that you could extract from the Crown case or compelling evidence that you could call absent your client. You are talking about his state of mind.

Mr GIBSON: I think it is clear from some of the material that everyone has that one of the criticisms is that often the only evidence about what has happened comes from the accused and of course the person who could rebut it is unfortunately unable to.

The Hon. HELEN WESTWOOD: Going back to the principle of proof beyond reasonable doubt, in the end it seems to me—and like the Hon. Scot MacDonald I come to this as a non-lawyer—that the victim who is dead is put on trial for provoking her own murder. How then can you prove beyond reasonable doubt that she is guilty of that? In the end, when you accept that defence, she is guilty of provoking her own death.

Mr GIDDY: You keep saying "she". The reality is that there are male and female victims. There are cases where the judge will not even allow provocation to go to the jury.

Mr DAVID SHOEBRIDGE: They almost all get overturned on appeal.

Mr GIDDY: No. Stingel did not get overturned. The High Court said that the judge made the appropriate ruling and that is the leading case on it. Yes, that is a practical difficulty if you want to perceive it that way with our justice system.

CHAIR: It seems that the major change occurs when the murder charge is changed to manslaughter through this plea bargaining and the jury has no role in that. Should the jury have some role in saying, "We agree", that somehow they are involved in that decision and then they could reject—

Mr GIDDY: The bargaining decision?

CHAIR: Yes. They could reject it and say, "No, we reject lowering the charge from murder to manslaughter. We want to retain the original charge of murder."

Mr GIDDY: Usually the plea is accepted before the trial. That is, a defence will approach the prosecution, perhaps provide them with evidence that they would be able to call, perhaps not, perhaps point out the difficulties in their own case, the prosecution would consider it in a balanced way. There are obligations to consult relatives and a number of other people and then they would make a determination. Usually that determination is made pre-trial.

CHAIR: So the jury arrives at a manslaughter case?

Mr GIDDY: There will often not even be a jury. It would simply be listed for hearing for sentence on manslaughter.

Mr GIBSON: My more limited experience would be that it is rare for an acceptance of a lesser plea after a jury has been sworn in and the trial started.

Mr DAVID SHOEBRIDGE: In light of what you say is the practical reality that if you want to run these defences most of the time you have to put your client in the witness box—

Mr GIDDY: Every case is different.

Mr DAVID SHOEBRIDGE: I understand that. Given that many other defences require the defendant to prove their defence on the balance of probabilities, what is the intellectual opposition to requiring the proof of provocation from a defendant? What is the intellectual opposition, apart from history?

Mr GIDDY: You point out to me the cases where there is a reverse burden of proof.

Mr DAVID SHOEBRIDGE: If you want proof, well, self-defence ordinarily—

Mr GIDDY: No, self-defence is not.

The Hon. TREVOR KHAN: No, it is the old diminished responsibility.

Mr DAVID SHOEBRIDGE: Diminished responsibility.

Mr GIBSON: I am also trying to mentally list those matters where there is a burden shift and they are rare.

Mr GIDDY: Diminished is an example where it is in the area of expertise.

Mr DAVID SHOEBRIDGE: But you often find the two defences being run together, do you not?

Mr GIBSON: That is not my experience.

Mr GIDDY: No.

The Hon. TREVOR KHAN: In some of the drug matters there is a reversal. There is a shift there.

Mr DAVID SHOEBRIDGE: It has been a matter that has been discussed about the reverse onus but no-one has grappled with it in their oral evidence before us about the rationale for retaining the current situation and I would be pleased to hear from you.

Mr GIDDY: It is the rule of law.

Mr DAVID SHOEBRIDGE: But that is kind of like, it is as it is. I perfectly understand—

Mr GIDDY: It is the rule of law.

Mr GIBSON: It is one of the fundamental basic principles.

Mr DAVID SHOEBRIDGE: I understand that the prosecution needs to prove its case.

Mr GIDDY: Yes, beyond reasonable doubt. That is the rule of law. And I am trying not to be glib here. It is a very different issue when you start talking about burdens of proof and reversing burdens of proof.

The Hon. ADAM SEARLE: In some of the submissions and evidence before us there has been some criticism of the ordinary person test and I think the 1997 Law Reform Commission had something to say about it. Certainly Justice Wood this morning indicated that it was complicated and somewhat confusing for juries and perhaps should be removed. Notwithstanding that your primary position is do not do anything, what is the intellectual defence of retaining the ordinary person test?

Mr GIDDY: It is arguable that it has a capacity to confuse. It is different to the reasonableness test in excessive self-defence. Of interest, I was reading the new test that was proposed I think in your own papers, and one can see merit if we could have the opportunity to look at those things in detail. I suspect the ordinary person test is a product of the 1982 state of mind at the time, bearing in mind it was the intention of that legislation to open up to women who were in violent domestic relationships the opportunity to have the defence. Whether it is still the words that best encapsulate it, I accept the fact that that is an area that we could well look at productively but one would like to think in a fairly detailed way. Similarly with loss of control. I can understand an inquiry into whether those words were appropriate.

The Hon. ADAM SEARLE: And is it acceptable.

The Hon. HELEN WESTWOOD: The other evidence we have received or submissions have been made to us have suggested that those two principles cause confusion for juries, that they are quite complex concepts to put to them. Do you have a view on that?

Mr GIDDY: As a personal view, I could understand loss of control. That may mean different things to different people.

The Hon. ADAM SEARLE: Particularly—again, not wanting to dwell on any particular case—

The Hon. HELEN WESTWOOD: Loss of control with intent and then intent to.

Mr GIDDY: Exactly.

The Hon. ADAM SEARLE: The cases seem to indicate, at least when men kill their intimate partners, that there is a history of violence leading up to that but also even leading up to the event in question some element of premeditation. For example, in Keogh the accused attended the victim's place of work carrying a knife, and yet somehow the notion of loss of control was accepted. Notwithstanding that there is this notion of loss of control, the underlying social reality in jury deliberations seems to be that even where there is clear indications of premeditation they are prepared to embrace loss of control as a notion. Is that problematic?

Mr GIDDY: Yes.

Mr DAVID SHOEBRIDGE: Is some of the answer to that allowing the prosecution to put in the contextual evidence, the social framework evidence? Is some of the answer to that allowing greater capacity to

put in social framework evidence that puts the plea of provocation in context? So the jury is not limited to the instant where the women says to the husband, "I'm leaving, go and get stuffed." That is what the jury sees—a little snapshot. Is some of the answer maybe allowing more evidence to go in that explains the relationship, explains what happened within the context of the current law of provocation?

Mr GIDDY: If there is relevant evidence the Crown or the defence would no doubt be calling it. I know that is a glib answer. It would be difficult with respect for you to be looking at the admissibility of evidence in certain circumstances and being able to anticipate that they would cover all the recent circumstances. But as a matter of principle, yes, one could understand why the community would like to think that when making an assessment of this defence the community, through the jury, had available to it all the relevant evidence. As a matter of principle—

Mr GIBSON: What is relevant or not. You are saying: Why do we not open up the doors a bit and allow more in? The difficulty is—

Mr DAVID SHOEBRIDGE: Give a direction to say it is permissible to put that in context.

Mr GIBSON: The difficulty then is how long is a piece of string?

Mr DAVID SHOEBRIDGE: Thankfully we have judges and juries to determine the individual case.

CHAIR: It is a challenge how the law cannot treat male and female differently. In the first case the battered wife finally murders her husband and in the second case the battered wife is finally murdered. Is it possible for the law to treat that with some balance or offset—

Mr GIDDY: With respect, that was the very point I made at the start: they are overlapping but not necessarily complimentary.

The Hon. DAVID CLARKE: You correctly state that the jury is there to represent community standards, but the jury can only operate within the parameters of the law.

Mr GIDDY: Yes.

The Hon. DAVID CLARKE: We understand that. Maybe it is time that we look at that current law to see that it needs some adjusting to fit in with current community standards. You talk about cases such as Singh that happen once in a while but when they do happen there is enormous outrage. So maybe we need to change the parameters by adjusting the law to reflect those community standards and changed circumstances. Is that a reasonable proposition?

Mr GIDDY: It is not an unreasonable proposition.

The Hon. DAVID CLARKE: Do agree with that proposition?

Mr GIDDY: The law purports to do exactly that—that is why you have expressions like "ordinary person" and " reasonableness"—now whether that sufficiently encapsulates what you are saying, there is no reason why that should not be examined. That is what the law purports to do. If it is misapplied from time to time—and I am not saying it is; I do not know the facts in Singh, only cases I have been involved in—but that is what the law purports to do. It is not the law's fault that the community might from time to time reach a verdict that other people might disagree with. That is the difficulty.

Mr DAVID SHOEBRIDGE: Should the test be that people could lose self-control or even though a jury might think that could happen: an ordinary person could lose self-control—we understand that an ordinary person could lose self-control—but perhaps society thinks yes, they could but they really ought not and this is something that we do not think should be permitted to excuse the conduct even partially?

The Hon. HELEN WESTWOOD: It seems to be in conflict with everything else that we are saying as a society. Governments at all levels are talking about non-violent conflict resolution. We are running programs about it and we are telling people that violence is not a way to resolve your differences. Yet it does seem that in some of our laws it is actually excusing it and we are saying that extreme violence is justified.

Mr GIDDY: It is not excusing it; someone is found guilty of manslaughter.

The Hon. ADAM SEARLE: Okay, it is excusing it partially.

Mr GIDDY: Mr Shoebridge's point then might kick in. Perhaps the sentences are too light—I am not saying they are.

The Hon. TREVOR KHAN: No, no, there is—

Mr DAVID SHOEBRIDGE: I do not think Mr Giddy had quite finished his answer.

The Hon. TREVOR KHAN: Please go ahead.

Mr GIDDY: No, no.

The Hon. TREVOR KHAN: Can I ask you this? There has been around for some time proposals to exclude from provocation non-violent sexual advances. There have been amendments in the Northern Territory and the Australian Capital Territory relating to that. Does the Law Society have a view with regards to the justification of excluding non-violent sexual advances as an excuse in cases of provocation?

Mr GIDDY: No, it has not been. I assume you are talking about the old guardsman's defence—the Green case?

The Hon. TREVOR KHAN: Yes.

Mr GIDDY: Again, one would like to think that community values had reached a stage where those defences are not practicably runable. However, there would be no reason why one would not want to consider that, bearing in mind the unintended consequences. I know we keep saying it but your classic guardsman's defence—it is a long time since I have seen one but I do not spend all my time at Darlinghurst.

The Hon. TREVOR KHAN: Well, let us leave that alone.

Mr GIDDY: Except that is really what you are talking about there. After that it really does come down to whether you can be sure that people who should by any normal community standard have the defence available to them are going to be precluded from having it available. When you get into the area of non-violent it gets very tricky, like the example I gave earlier.

The Hon. TREVOR KHAN: I understand that is problematic but I invite the society to go away and consider the amendments that have been made in the Northern Territory and the Australian Capital Territory with regards to the exclusion of what is described as non-violent sexual advances. Perhaps you might like to put a response as to whether it is appropriate to exclude that style of conduct.

Mr GIDDY: I anticipate the response would be that it should be looked at very carefully and we would certainly consider it.

The Hon. TREVOR KHAN: That is an underwhelming response.

Mr GIDDY: We are not in a position to do the research; we are not in a position to be able to look at the consequences. I am certainly not here to tie the Law Society down to a position without having had the opportunity to be able to—

Mr DAVID SHOEBRIDGE: I think everyone understands that it is an enormously complicated task and part of what your submission is saying—if I understand it correctly—is that to properly understand the full consequences of having a push in one direction of the law you need to be absolutely comfortable that you have covered all of the potential ramifications, and that is a very difficult task to do.

The Hon. DAVID CLARKE: The idea would be to consider it and to come back with a view.

The Hon. ADAM SEARLE: I would also like the society to take on notice any views it has about the social framework evidentiary provisions in the Victorian legislation about permitting social context of domestic violence, mandating it to go into evidence, and the desirability of incorporating them in New South Wales.

The Hon. TREVOR KHAN: The submission of Mr Coss deals with the issue.

CHAIR: My concern is that once it goes from murder to manslaughter then you get a very low penalty. How can we keep it at murder—which the community regards it as in these different cases that have been mentioned—so that plea bargaining before the jury is appointed cannot water down the original charge from murder to manslaughter? It has to stay that the jury is considering a murder—for instance, a battered wife who is finally murdered. Is that physically possible in the law?

Mr GIDDY: I am sorry I was a little distracted there, Mr Chair.

The Hon. TREVOR KHAN: I am sorry about that.

CHAIR: It seems a major problem is that when they change the charge from murder to manslaughter then a lower penalty usually applies. The jury and the community see it as a murder and they cannot understand how that murder has now become manslaughter. Is there any way in the law we could recommend that it must stay at the original charge and you cannot do a plea bargain to bring it down to manslaughter?

Mr GIDDY: Abolish the defence is the only way you can do it. As long as a defence is available the prosecution have an obligation to contemplate whether they would accept a plea to it. If they do not accept a plea to it a jury determines the issue.

CHAIR: That is abolishing the defence of provocation.

Mr GIDDY: Yes.

CHAIR: That automatically would then stop it being reduced to manslaughter.

Mr GIDDY: Well if the defence is not there then there is no partial defence of provocation.

Mr DAVID SHOEBRIDGE: On different tack, we have had a number of submissions from a number of quarters say that women who are running the defence of provocation in a battered-wife-syndrome case and who may also have available a very viable self-defence argument, are being charged with murder and then facing the murder charge or make a plea on the basis of provocation to manslaughter because they are too afraid that their self defence argument may not succeed and therefore they will face a murder charge; whereas perhaps a more humane criminal justice system would see women being charged with manslaughter and being given the opportunity to then have a full running of their self-defence argument without facing the prospect of being sentenced for murder. Have you had any practical experience that might shed light on that?

Mr GIDDY: Practical no, but remember you have got excessive self-defence now as well—post those amendments after Zecevic.

Mr DAVID SHOEBRIDGE: The problem being that they are charged with murder and murder carries—

Mr GIDDY: A 20-year standard non-parole period.

Mr DAVID SHOEBRIDGE: We can get you manslaughter if you take this deal, if they accept the plea of provocation, and women often quite emotionally battered will take manslaughter; whereas a more humane system might charge them with manslaughter and let them have their day in court on self-defence.

The Hon. TREVOR KHAN: Perhaps you could ask the question: Would you put in a no bill on the murder charge, trying to alert the prosecution that there is an appropriate way of proceeding?

Mr GIBSON: Mr Shoebridge's question seems to be aimed, unless I have got it wrong, at the discretion of what that person is charged with.

Mr DAVID SHOEBRIDGE: Probably the more discretion in how the Director of Public Prosecutions and the police charge. Have you any thoughts on that?

Mr GIBSON: Well—

Mr GIDDY: Well overcharging is not something that is not, how shall I say—

Mr GIBSON: Uncommon.

Mr GIDDY: —uncommon and some cynics would suggest that overcharging might in part be to rattle people's confidence enough to accept a compromise. On occasions there is a justifiable criticism that overcharging is designed to take a person to trial to extract a compromise from a verdict. All those tactical issues are matters that might best be taken up with the Crown. Certainly overcharging is something that is concerning us and tactically it is a very difficult position for the defence to be in. It is all very well to tell your client that you are confident that they will succeed in a defence but—

Mr GIBSON: I would agree that having someone who has come from the background of a violent relationship charged with a serious offence and to then face a serious criminal trial is a very difficult thing. I have acted for someone in that position and it is very difficult.

Mr DAVID SHOEBRIDGE: Do you have any view on how that dynamic operates with your clients? I mean with the pressure they are under in those circumstances.

The Hon. TREVOR KHAN: They are probably refused bail so you are seeing them through the bars for a start.

Mr GIBSON: That was not my experience. I think all I can say is that I agree it is difficult thing but the issue of the right charge is something that is determined by the Crown.

Mr GIDDY: If a person was charged with manslaughter they could go to trial and run self-defence.

Mr DAVID SHOEBRIDGE: Absolutely.

Mr GIDDY: But how can you mandate the Crown to charge a person with a lesser offence if they feel that murder is the offence that a person should be charged with?

Mr DAVID SHOEBRIDGE: If there was a body of concern out there that women are being charged with murder in those circumstances when practitioners in the field thought that a far more humane system would have them being charged with manslaughter and being able to run their defence, then that might be something this committee would look at.

The Hon. SCOT MacDONALD: How do you do that without all the facts?

Mr DAVID SHOEBRIDGE: We ask the Director of Public Prosecutions.

Mr GIDDY: It is a prosecutorial discretion issue. It is difficult for us to comment on except to say that—

Mr DAVID SHOEBRIDGE: Overcharging is a concern.

Mr GIDDY: —overcharging is always a concern, particularly if there is a suspicion that there is a tactical decision behind it.

CHAIR: I suppose there is no historical precedent for a gender-based law—

The Hon. HELEN WESTWOOD: Historically there has been.

CHAIR:—where we can favour the battered wife?

Mr GIBSON: I think historically there have been but they have all been changed for very good reason.

Mr GIDDY: That was why the 1992 amendment came in—it was not an amendment, the rewrite. It may well be too dated but—

CHAIR: It was intended to help females but it is used by the males?

Mr GIDDY: Yes. But again, be a bit cautious about that. Your own stats point out that far more women are availing themselves of this defence than are men; and far more men are charged with murder than are women.

The Hon. HELEN WESTWOOD: That is because they are far more violent; the stats are there.

Mr GIDDY: I accept that. But as soon as we get into gender—

The Hon. HELEN WESTWOOD: The history of the matter before us is that men are putting in for men.

Mr GIDDY: And far more men murder men than murder women.

The Hon. HELEN WESTWOOD: Yes, absolutely. I agree they are victims of male violence.

CHAIR: Are there any further questions?

Mr DAVID SHOEBRIDGE: We may well have a small deliberation after this and put some further questions to the Law Society. I would hope that if the Law Society is of the view that they require more than 21 days to respond, we would be willing to listen.

CHAIR: We will be giving you some questions on notice; and hopefully you can answer those in 21 days.

The Hon. HELEN WESTWOOD: There is a community expectation that this Committee will do something. I am certainly sensing that. There is a great amount of interest in the matter that is before this inquiry, both in the media and out in the community. I think it is not an option to do nothing.

Mr GIDDY: We gathered that.

The Hon. HELEN WESTWOOD: So it would be really great if we could get some suggestions from you on the matters that have been proposed.

Mr GIDDY: But we would strongly urge you to think very long and hard before you abolish the defence.

The Hon. HELEN WESTWOOD: We hear that. And you are not the only ones that have said that; there is no doubt about that. We appreciate your giving us your views.

CHAIR: We thank you very much for giving us your valuable time.

(The witnesses withdrew)

STEPHEN ODGERS, Barrister and Chair of the Criminal Law Committee of the NSW Bar Association and

JOHN STRATTON, Public Defender and Member of the Criminal Law Committee, NSW Bar Association, affirmed and examined, and

CHRISSA LOUKAS, Public Defender and Member of the Bar Council, NSW Bar Association, sworn and examined:

CHAIR: The Committee thanks Mr Stephen Odgers, Mr John Stratton and Ms Chrissa Loukas for agreeing to attend its inquiry as witness from the NSW Bar Association. We know you are very busy, and we appreciate the time you have given us. At any point in your evidence you are asked questions that you would rather take on notice, you have that right to do that. The Committee may have some questions on notice after your presentation, and you have 21 days in which to answer those questions. If at any point you wish to give evidence in camera, you have the right to ask the Committee to do so. Do any of the witnesses wish to make an opening statement?

Mr ODGERS: It is proposed that I will lead off, and hopefully talk for about 10 or 15 minutes; Mr Stratton then hopes to say something; and Ms Loukas also hopes to say something. We appreciate that there are many questions, and we appreciate that there are many issues, but we think it might be helpful if we just talk relatively, unhindered, for 15 or 20 minutes, and then turn to questions, if that is all right. Obviously, we will be attempting to address some of the issues. We fully understand that there is great complexity to this issue. One last point I would make by way of introduction is that our primary focus has been on the question of whether the partial defence of provocation should be abolished. We have not primarily focussed on reform of it; that is clearly an issue that this Committee is looking at. We will be seeking an opportunity to take advantage of the 21 days and respond to some suggestions, although we will attempt to some extent to deal with those matters.

I personally propose to respond to what I understand to be the major criticisms of the defence. I am going to use submission No. 34, made by the Office of the Director of Public Prosecutions as the framework to that. It might be helpful if those of you who have that submission could turn to it, because it has a number of dot points which seem to usefully summarise many of the criticisms, which would bear not only on the question of its abolition but also on its reform.

In its submission at page 2 the Office has a number of dot points, and those are the dot points which I am responding to. The first is that the defence is illogical. It is suggested that there is an inconsistency between the idea of loss of control and forming an intention to kill. There is no inconsistency. If there was complete loss of control, that would be a complete defence because you would be in a state of automatism. Provocation is a significant loss of control without being completely unable to control yourself, and therefore it is quite logical to combine a situation where you significantly lose your control and form an intention to kill or cause grievous bodily harm. So I reject the suggestion of a lack of illogicality.

Secondly, it is said that there is an inherent gender bias in the defence. Nothing in the formulation of the defence involves gender bias. Whatever the reasons for the creation of the defence some centuries ago, those are irrelevant given changes that have been made to the defence over the years, and the fact that a significant number of women rely on it. One of the changes, of course, was to take away the requirement of a close temporal nexus between the provocation and the loss of control. That was designed to make it easier for women to take advantage of it. The fact is that a lot do.

It may be said that loss of control is more common with men. Does that mean that the law is biased because of that? I query that. More importantly, would that justify abolishing a defence which some women do take advantage of for very good reasons? Perhaps we might expand the defence to make it easier for women to take advantage of it. That might be done, for example, by removing the loss of control requirement and just retaining the objective test. I am not suggesting that; I am merely pointing out that concerns about the way it operates in practice certainly are not met, certainly not logically met, by abolishing the defence.

The third dot point refers to suggestions that the defence is fabricated, concocted or exaggerated. I am surprised that that argument is advanced by the Director of Public Prosecutions to support abolition of the defence. You do not remove a defence because of the possibility that juries have made a mistake about the facts of a particular case; or that they have been, to use the euphemism, conned by the accused. On that logic, you would not have juries deciding guilt or innocence in criminal trials because they might make a mistake; you

would have judges doing that, or DPPs. The point is we have juries for good reasons; juries are an important part of our criminal justice system. We do have a system that is designed to avoid convicting those who are not guilty, and it errs in that direction; it is better that 10 guilty men or women go free than one innocent person be convicted. Of course, we are not even talking about acquittal here; we are talking about producing an offence with a maximum penalty of life to an offence with a maximum penalty of 25 years.

The point I am making is that if there are concerns, and legitimate concerns, about the defence not being misused, you improve the process; you do not remove the defence. There have been a number of things that have improved the process over the years. The abolition of the dock statement has already been mentioned. It is much easier in New South Wales in 2012 to get in a history of domestic violence than it was 20 years ago. The Evidence Act 1995 allows in what is called relationship evidence; and it allows in tendency evidence if it is sufficiently probative. What might have been the position in Victoria in 2008, before the Evidence Act came in, is essentially irrelevant because the Evidence Act now applies there as well. The point I am making is that procedures can be changed to make it easier for juries to determine properly what the facts are.

Another, last example is if an accused does not go in the witness box in a provocation case. That is one of the classic situations where a judge would be entitled to suggest to a jury the possibility of an adverse inference. In cases where a victim is not present because they are dead, and only the accused knows what happened, the High Court has held that in those circumstances it may be appropriate to draw an adverse inference from the failure of the accused to testify. These are all examples of situations where procedures have changed which reduce the risk of a defence being fabricated.

The fourth dot point says that we do not need this defence anymore because murder is no longer the subject of a mandatory sentence. But, on that basis, we would not have manslaughter; we would simply have murder, and we would say we can appropriately sentence from zero to life imprisonment. We certainly would not have partial defences of excessive self-defence or diminished responsibility. The real question is a policy question: Do we believe that there is an appropriate distinction between manslaughter and murder? Do we believe that there are circumstances in which it should be manslaughter, not murder, even though there was an intention to kill or an intention to cause grievous bodily harm? Do we believe that it is a significantly less culpable situation where the defender has, one, lost control, significantly lost control, and an ordinary person in that situation could have formed an intention to kill or cause grievous bodily harm? That, of course, is the critical question. The Bar Association's position is that there is a significantly reduced culpability in that latter situation, and that is why the defence should not be abolished.

The fifth dot point suggests that the rationale of the defence is unclear. It has to be understood that it is not suggested that provocation justifies a killing. No-one suggests that. It is not the law. Nor does it excuse the killing. That is not the law. It is not like duress, where it is an excuse. This is not a defence. Nor does it condone violence. What it is saying is that it is not murder; it is not a crime punishable by a maximum penalty of life imprisonment; it is a crime, a very serious crime, punishable by a maximum penalty of 25 years. What is commonly said is that it is a concession to ordinary human frailty. That is, from my perspective, the best way of understanding this defence. It is not saying you are excusing it; it is not condoning violence. It is saying that there is a significantly different level of culpability in this offender than in a person who is appropriately described as a murderer.

Can sentencing adequately deal with this issue? The answer we would give is no. Firstly, it would be decided by judges, not juries. Obviously, sentencing is by judges. Judges are likely to have a very different view of what an ordinary person might do than would a jury. The jury is much better placed to be able to make an assessment about what ordinary people might do, and to act on that. It is odd that the Office of the Director of Public Prosecutions wants to take away this power from juries, because I remember vividly the Office opposing trial by judge alone. This is a situation where the Director of Public Prosecutions is saying, "No, we do not trust juries to be able to handle this." I would submit there is no good reason not to trust juries, at least if we get the procedures right, which is an issue I have already addressed.

More importantly, if we do just rely on sentencing, apart from judges having a different view from jurors about what ordinary people think, judges will be inclined to take the view that it is no excuse at all, not even mitigating—partly because, if it has been abolished, judges will read that as a signal that this is not conduct which should be regarded as mitigating. But they will also take the view that they want to deter a loss of control and resulting violence. Judges love the idea of general deterrence—not all of them; the Chief Justice has recognised that general deterrence has limited effectiveness. But many do, and they would no doubt take the view that they should impose very harsh sentences in order to discourage men in particular from losing control

and being violent. That has been the Victorian experience; there, sentences have substantially increased for people who might otherwise have been sentenced for manslaughter; and it is likely that sentences would very substantially increased in New South Wales if this defence was abolished.

The sixth dot point talks about whether or not this defence is acceptable. The office says that it is unacceptable. We would query that. Even if an ordinary person could have done the same thing, should we say that it is to be treated as murder? There seems to be a tendency to focus on one part of the defence or the other part. They both require loss of control and an ordinary person could have done essentially the same thing. Is it inconsistent with contemporary values and views to say that that person should not be treated as a murderer? Where is the evidence for that? Who says community values are inconsistent with what I will call limited concession to ordinary human frailty, reducing it to a crime with a penalty of 25 years' imprisonment?

I accept that some cases might seem unacceptable in the Committee's eyes, particularly those that tend to be in the past. In my view, non-violent homosexual advance is very unlikely to succeed in New South Wales in 2012. Why? Because community attitudes have changed. They have changed from 200 years ago when calling a man a rogue would have been a justification for the defence of provocation. If you responded violently to a man impugning your honour a jury would not acquit a murderer in that situation. I suspect strongly that they would not acquit of murder in the case of non-violent homosexual advances. Juries reflect changes in community attitudes. That is why we have them and we should continue to trust them to do that. It is also said that the defence is anomalous because it applies only to the offence of murder. It is not anomalous because the vast majority of offences do not have different grades. We do have different grades of homicide for very good reasons. There is an important distinction between murder and manslaughter. This reduces it from one grade to another and allows juries to decide whether or not a person is appropriately to be characterised as a murderer or someone guilty of manslaughter.

It is said that the law is complicated and that juries find it difficult to understand. We do not accept that that is necessarily the case. The Privy Council in 2005 considered that it was overstated to suggest that juries found it difficult, but concluded that it was a matter of presentation rather than substance. At the end of the day, I submit that the defence would be made out if it is reasonably possible that the accused lost control and that an ordinary person in the same situation as that accused could himself or herself have lost control and formed an intention to cause at least grievous bodily harm. That is not a particularly difficult concept to convey and we are not persuaded that juries are unable to understand it.

This Committee has raised many issues—questions of limiting the defence, burden of standard of proof, admissibility of evidence, directions to juries, sentencing law and prosecutorial discretion. These are all in themselves very large issues and we would need days and not hours to discuss the ins and outs. Our view has been that the complexities of this issue require a reference to the Law Reform Commission. I understand that the commissioner has indicated that there may be some resources issues. We would say that the answer to that is to provide more resources to allow the matter to be properly dealt with. With respect, the complexity of the various matters I have referred to are such that we would strongly recommend this Committee not, even with the best of intentions, make changes to the law in those areas without very, very careful consideration.

Mr STRATTON: I am here in my capacity as a member of the Criminal Law Committee of the Bar Association. My practice is very largely appearing for people charged with murder, many of whom are women. I am one of the authors of the Bar Association's written submissions to the Committee. Those written submissions have attempted to demonstrate that there is a group of women who kill a partner in a situation of domestic violence who currently would have available to them a defence of provocation, but if that defence were removed they would be convicted of murder. The size of that group is quite significant. The Law Reform Commission review showed that the number of people who successfully rely on the defence of provocation is pretty much evenly divided between men and women.

The limited evidence of the effect of the abolition of the defence of provocation in places such as Victoria tends to show that there have been two effects. One is that fewer people, in particular women, have been able to rely successfully on the expanded defence of self-defence and those who do have tended to receive longer sentences than they would have under the previous regime. I agree with Mr Giddy's comment in evidence before the Committee that hard cases such as Singh have the potential to make bad law. It is submitted that the briefing paper summary of the facts in Singh is incomplete. For example, it does not refer to the fact that part of the defence case was that there was in a sense third-party provocation on the part of the deceased's parents and a threat on the part of the deceased to keep Mr Singh's parents' life savings, which had been in effect invested with in Mr Singh and his wife.

I understand the Committee is considering limiting provocation to violent criminal conduct. There are at least two potential problems with that. One of the cases that is referred to in the written submissions is a case in which I appeared—the case of Mrs Duncan. Mrs Duncan was an Aboriginal woman in a violent domestic relationship. The triggering event in that case was simply that her partner pulled her out of bed and knocked her over. So, the extent of actual violence on the night was very limited. However, she knew from the history of violence in the relationship what to expect thereafter. At that point she killed him with a single stab wound. If the defence of provocation were removed, she would not have self-defence available to her in my view because it could not be argued that it was a reasonable response. The second problem is that depending on the case sometimes it is submitted that words alone should reduce murder to manslaughter. Another case in which I was involved was the case of Weatherall. I can provide the details to the Committee if that would be of assistance.

The Hon. ADAM SEARLE: Yes, please.

Mr STRATTON: The triggering act was that as Mrs Weatherall put her daughters to bed they revealed that her partner had again begun molesting them. She tucked them into bed and drove, taking a knife with her, to a nearby hotel and stabbed her partner to death. As it happened, she was unable to rely on provocation as a defence but ended up with manslaughter by way of substantial impairment. That is the sort of situation where it is submitted that there still needs to be some sort of partial defence to cover cases of that kind.

Ms LOUKAS: I am here as a barrister, a public defender and a member of Bar Council. I was also defence counsel who appeared for Chamanjot Singh at his trial. Obviously I cannot comment specifically on the Singh case. That is contrary to the bar rules—neither the barrister nor the Crown prosecutor can comment specifically on the case. However, I have been asked to be here and I am here in no uncertain terms to support the New South Wales Bar Association's submission and the submission made by the New South Wales Public Defenders Office. I believe the Committee heard from Ms Yehia yesterday.

CHAIR: Yes. She was very good.

Ms LOUKAS: I want to make three points. First, provocation is not a male defence or a female defence—it is a human defence. Abolishing provocation—and I think this has been noted by all of you around the table—will create unintended negative consequences for women defendants. That has clearly been the case. You will make the situation worse for battered women. I think the submissions from the New South Wales Bar Association and from the Public Defenders Office have made that clear. For battered women to who kill their male partners the situation will be worse if the Committee recommends the abolition of provocation.

I appear for both men and women and I believe in equality before the law, and that is part of the reason I am here. I understand that Professor Julie Stubbs appeared before the Committee yesterday. Professor Stubbs has undertaken a very clear, incisive and intelligent analysis of the question of unintended negative consequences. New Zealand abolished provocation and it is very clear that more battered women defendants are being convicted of murder rather than manslaughter and that they are receiving harsher sentences. The Victorian legislation is now subject to further review because it has not worked as intended. Please do not look at this in sexist terms as a male defence or a female defence because abolition can lead only to a worse situation for battered women who have been abused by their male partners and finally snap and kill them.

The second point is that the law has to be able to make distinctions between murder and manslaughter—between killing in cold blood and in the heat of passion or under provocation. The law makes hard calls. To be a judge or to be involved in the legal process is certainly no instant passport to popularity. We know that. Applying principle is not always popular, but it is correct, it is right and it is just. That is what this Committee must do. We must make distinctions in the law about the worst category—coldblooded killing, assassinations, political assassinations and, for example, the actions of someone like Breivik in Norway. We have to be able to make distinctions between murder and manslaughter. To take away discretion in that regard is unacceptable.

My third and most important point relates to juries. The community is directly involved in our system of justice because we have juries. We have 12 people drawn from the community who hear the facts, and who hear all the facts. We have a system of justice of which we can be proud. I am a fervent supporter of the community's involvement in our system of justice through juries. I say that not only as a defence barrister but also as someone who has been an acting Crown prosecutor and an acting judge and as someone who has worked in the international criminal courts in The Hague. The issue here is that juries make their decisions on the

evidence and only the evidence. Juries do not make their decisions based on prejudice—they are told not to. Nor do they make their decisions based on assumptions or stereotypes. Nor do they make their decisions on the basis of some three-line summary in a newspaper or a 10-line summary of a case in a briefing paper. I can only assume that everybody here has read the entire transcript in Singh. As I have said, I cannot make a comment about Singh, but, of course, a fully informed parliamentary committee would not base its opinions merely on summaries but would look at the entire transcript.

Mr DAVID SHOEBRIDGE: Your assumption will be wrong; I have not read the whole transcript in Singh—just to clarify that.

The Hon. TREVOR KHAN: And, frankly, to suggest it is bordering on the offensive. You know we would not.

Ms LOUKAS: No, I did not know that.

The Hon. TREVOR KHAN: What we certainly have access to are the reasons for sentence, for instance. But if what you are going to suggest is that on any committee in dealing with matters of this nature, or any other matter, that we would go to the full transcript of hearing, you are beyond the realm of sensible.

The Hon. ADAM SEARLE: We might. If we had ready access we would. The point is that we do not have ready access, but if someone could provide us with access I, for one, would be very interested.

Ms LOUKAS: I understand that the academic Kate Fitz-Gibbon gained access to the transcript, so I assumed this committee would have the transcript. I certainly did not make that suggestion on any other basis other than I know that the transcript has been made available and to make this point: I am all for informed public debate, as is every member of this committee, and I respect what the committee is doing, but I am also saying that the issue is that the jury had all the evidence, so let us respect the jury—and I cannot talk about the case, let us be very clear about that. What I am standing up for here is the jury system and what I am standing up for is informed public debate and I am also standing up for informed commentary and I do not want the jury system to be undermined.

The Hon. ADAM SEARLE: I do not think we have got any proposal before us to limit or reduce the role of juries and I do not think any of us would be considering that.

Mr ODGERS: Abolishing the defence, with respect, would do that.

The Hon. SCOT MacDONALD: I do not think that is right. We have had proposals to take the culpability out of the hands of a jury and leave it with the judge.

CHAIR: Just to clarify that: You are saying that probably through the public lack of knowledge that you have and the jury had, that has given a false impression of that case and caused some of that public reaction?

Ms LOUKAS: Indeed, and I think that is a very important point that has to be made.

The Hon. TREVOR KHAN: Is the jury involved in considering provocation in attempted murder, conspiracy to murder?

Mr STRATTON: No. That defence is not available.

Ms LOUKAS: It is not available. It is only available for murder/manslaughter.

The Hon. TREVOR KHAN: So that in the case of conspiracy to murder or attempted murder the issue of provocation, if it were appropriate, would be dealt with on sentence?

Mr ODGERS: As would excessive self-defence, as would diminished responsibility.

The Hon. TREVOR KHAN: So that what we are talking about is the jury being engaged in considering a partial defence in respect of one offence and one offence alone? So that when you talk about, in a

sense, undermining the jury system, this, could I suggest to you, almost could be described as an anomaly in terms of it being left to the jury?

Ms LOUKAS: No, I would not describe it that way, but I will just finish my opening remarks and then we can throw it open to questions.

The Hon. TREVOR KHAN: My mistake; I thought you had finished.

Ms LOUKAS: No. I make this point, and I want to finish on this point, and that is about trust in our system of justice, and these were comments made by our Chief Justice at the opening of law term ceremony this year, Chief Justice Bathurst—and I think this goes to when this committee is talking about public outrage and matters of that sort, it is very important to look at the research into this issue. There was a groundbreaking 2010 study that used jurors to investigate what informed members of the public really think about sentences. Before their trials jurors were asked about sentencing in general terms and most said they thought sentences were too lenient. However, after sitting through the trial and sentencing submissions they were asked to give an appropriate sentence for the offender. Most gave more lenient sentences than the judge and 90 per cent thought the judge's sentence was within a fair range.

So the study shows that when people are given the facts, most people think that judges actually get it right. I refer you to that speech from 30 January 2012 that footnotes all the research that was undertaken in relation to actual juries and their impressions of the system. The other point that was made in the speech—again based on research—is this: Studies have shown that confidence levels in the justice system are higher in people who have had recent contact with the courts or justice departments and highest in those who have actually participated in court processes or as jury members. The experience of sitting on a jury has been shown to improve an individual's confidence in the criminal justice system significantly and almost universally.

So when people are presented with the facts people generally get it right—that is the bottom line about juries and that is the bottom line about not basing ideas of perceived public outrage on the basis of a three-line summary in a newspaper, because we all know that—whether as lawyers or as politicians—nobody in this room would want themselves to be judged on uninformed commentary rather than evidence in any regard. What I have to say is that the best thing this committee can do is refer this matter to the Law Reform Commission for a full examination of the issue. But the worst thing this committee can do is abolish the defence of provocation, because that has unintended negative consequences for female defendants who are battered women and who ultimately kill their partners.

Mr DAVID SHOEBRIDGE: I have not heard anyone in the committee, so far, moving necessarily to abolish the defence of provocation for battered women.

Ms LOUKAS: It is within your terms of reference, of course.

Mr DAVID SHOEBRIDGE: We have not discussed it.

CHAIR: Do not commit the committee to a position at this stage.

Mr DAVID SHOEBRIDGE: The issue is, for me, as I said, is crafting—

The Hon. TREVOR KHAN: I do not think you have to justify yourself, David, I really do not.

Mr DAVID SHOEBRIDGE: —crafting the law so that it protects all the cases that Mr Stratton puts forward—those cases absolutely being protected and allowing battered women to run the defence, but perhaps addressing the fact that jealousy and infidelity and relationship break-up is not a justification to give a partial defence, and coming up with that. I know you have put a submission about abolition or not abolition, but that distinction is one that, for me, I am having trouble with.

Mr STRATTON: That would be preferable. The law is already that a mere confession of adultery of itself does not constitute provocation. There are plenty of cases that say that. I, speaking for myself, could not see a problem with incorporating that into the statute. But the problem is if the other approach is taken of limiting provocation to violent criminal conduct then you do run the risk of depriving the group of women—

Mr DAVID SHOEBRIDGE: Where a significant element in the history involves that violent criminal conduct, or domestic violence more broadly.

The Hon. ADAM SEARLE: Family violence, as defined in the joint ALRC and Law Reform Commission report.

Mr DAVID SHOEBRIDGE: That had to be part of the provocative conduct—not immediately contemporaneous but part of the history of provocative conduct.

CHAIR: We will try to avoid having a running argument.

The Hon. HELEN WESTWOOD: As a continuation of that theme: A case comes to mind of Catherine Smith, who was charged with attempted murder—a well-known case of a woman who had been a long-term victim of horrendous physical and sexual abuse. She could not claim provocation as a defence. She used self-defence as a defence but her threat was not immediate at that time of the murder. Why cannot we develop laws that would allow women who have murdered violent partners to also use the defence of self-defence? I find it hard to believe that in 2012 we are incapable of writing laws that would allow that.

Mr ODGERS: Sorry, is the question for attempted murder?

The Hon. HELEN WESTWOOD: No. In Catherine Smith's case it was attempted murder and she used self-defence as a defence successfully. Clearly I am not a lawyer and I do not understand what then is so different about the charge of murder in a case where—

Mr ODGERS: Because we do not have an offence of attempted manslaughter, is the short answer. We do have an offence of manslaughter reduced from murder but we do not have a similar gradation with attempted murder; it just does not exist. We could create it—there would be nothing to prevent us creating such a gradation.

The Hon. HELEN WESTWOOD: She used self-defence successfully and was found not guilty of that charge. I do not understand why the same principle would not apply in a case where a woman did murder, where the murder was successful and her violent partner died, because there was no immediate violent incident to that murder.

Mr STRATTON: That is why in the submission I took the committee to cases such as Hill and Russell. They were cases where the defendant was not successful in self-defence, and the practical problem tends to be that women in these relationships of violence very often, obviously, with a male partner who is physically dominating, and the woman responding to a history of being knocked around in order to equalise things, might resort to a weapon. Self-defence as currently framed makes it difficult for someone who has, in effect, raised the stakes by taking to a weapon, let alone a gun, for that matter.

The Hon. HELEN WESTWOOD: That is very common; that is what women do. In those cases women rarely commit murder by frenzied attacks of 22 stab wounds; they usually use a weapon and it is once or twice. That is what we have seen so far. I am at a loss to understand why we could not amend our existing laws for the defence of self-defence to take account of those special circumstances. We have got submissions that talk about the social framework being introduced.

Mr STRATTON: It is difficult to say that using a lethal weapon could be regarded as a reasonable response to a threat from the person. The other thing is that very often women who kill their partners do so when the partner is in a relatively vulnerable state, such as asleep or intoxicated. So it makes it even more difficult to rely on self-defence, however framed, as being a defence.

Mr ODGERS: I am not sure where the logic of your point goes. There is a partial defence to murder of excessive self-defence. If a woman acts unreasonably—let us say a woman for the purposes of argument—but does so believing that what they did was necessary in their own defence or in the defence of others; that would be murder reduced to manslaughter—it will be available. The question before the committee is: What about the cases where that is not available, because she actually did not act out of some belief that it was necessary for self-defence or defence of another but she acted because she had reached the end of her tether and she just basically lost it and was not acting in defence but was provoked? The answer is, of course, you would want that woman to have the option of having murder reduced to manslaughter.

That is why this defence should not be abolished—first point—and, secondly, you have to ask: what is the appropriate principle here: The principle is that if the jury—we think it is the jury should be the ones who determine this—accepts that an ordinary person in her position might have done the same thing, then that person should not be guilty of murder. That is a good principle; it should be maintained.

Ms LOUKAS: If I could make two points in relation to the questions asked by Mr David Shoebridge and by the Hon. Helen Westwood. The situation, for example, of a woman who, while there has been no criminal conduct as such by the man, a woman who has been subject to verbal abuse and humiliation for many years—her self-esteem lowered, her money controlled, controlling behaviour on the part of a man—and who finally snaps and loses it, that woman should have provocation available to her but there would not be criminal conduct behind it. So you need to look at examples of that sort.

The Hon. HELEN WESTWOOD: That is self-defence. That behaviour you describe, in the definition that is self-defence.

The Hon. ADAM SEARLE: Would not all of these concerns be met if the partial defence of provocation was limited to circumstances where the provocative conduct is either serious violent acts or domestic and family violence, as defined?

Mr DAVID SHOEBRIDGE: Contains that, not limited to it.

Ms LOUKAS: Yes, I understand what you are saying. They cannot be the only criteria. One point I have to make is if this inquiry is not minded to refer this to the Law Reform Commission, which I think is the optimum solution, with greater resources going to the Law Reform Commission, to look at these issues which you have quite clearly identified in respect of female defendants and in respect of the use of self-defence and excessive self-defence and evidentiary provisions and proper evidence being taken into account in relation to these matters, the way to deal with it if you do not want to refer it to the Law Reform Commission, which is the optimum—

The Hon. TREVOR KHAN: Take that as read.

The Hon. ADAM SEARLE: I think what the Bar Association can take as read is that even if we were minded to refer it to the Law Reform Commission that would not be as a substitute to us making our own recommendations.

Ms LOUKAS: All right, I am glad to hear that. There are two points that have to be made in relation to that. Here I express a view that is a matter that has or had been conceded by Ms Yehia yesterday that if you were to substitute into the legislation a non-violent homosexual advance—

The Hon. TREVOR KHAN: No, non-violent sexual advance. It is not limited to gay issues.

CHAIR: Let the witness give her answer.

Ms LOUKAS: You may create a situation that makes it difficult for women to rely on that in certain situations, so you need to look at that. That is not an uncomplicated scenario you are putting forth there. Let us leave that aside for a second. It is a matter worth considering, and that is the point I am making. Secondly, the other point is, and this is consistent with the law as it currently stands, sexual infidelity or confessions of adultery in and of themselves cannot be the only basis for provocation.

CHAIR: I have a general question: You talk about that particular case. Some of the public outrage was because of the low sentence in that case. What was the final sentence of the judge?

Ms LOUKAS: Eight years with a six-year non-parole period, after which Mr Singh will be deported to India.

CHAIR: The six years, was that a result of submissions by you and the Crown in opposite directions, you for a lower sentence, the Crown a higher sentence?

Ms LOUKAS: What occurred was both the Crown and I—and again, I really should not be commenting on the case but this is generally what happens in a sentencing proceedings—provide the court with previous examples. The law relies on precedent, on previous cases, to ensure that sentences are within what we call the appropriate range. So, it is consistent with past cases.

CHAIR: So both sides would quote those precedents and the judge then makes a decision?

Ms LOUKAS: Indeed.

The Hon. HELEN WESTWOOD: I just wanted to ask Mr Odgers something to clarify his response. The scenario you just gave, I thought in that case that diminished responsibility was something that could be used as a defence?

The Hon. ADAM SEARLE: Substantial impairment of the mind.

The Hon. HELEN WESTWOOD: Substantial impairment of the mind, sorry.

Mr ODGERS: In my experience there usually has to be some kind of psychiatric condition present. You might get a psychiatrist to come along and say there was. The Crown might get another one. You certainly would not have any confidence that it would succeed. It also raises the thorny issue of the onus and standard of proof problem. I appreciate an issue before you is a suggestion that the onus should be changed for provocation but with diminished you have to establish that you were suffering from diminished.

The Hon. SCOT MacDONALD: You make a comment that when people become aware of the facts they give a lot more understandable rational sentencing. I do not think anybody would disagree with that, otherwise we would not need of Parliaments, we could run the country out of a radio station. The second thing is, the Hon. Helen Westwood asked along the lines and I wanted to follow, you mentioned earlier you looked at the United Kingdom, New Zealand and you may have mentioned Canada, or that may have been the other witness. You really feel you cannot amend, improve or adapt self-defence to the extent that it would take up those situations, particularly the battered women?

Mr STRATTON: That has been the experience. In particular, the evidence coming from Victoria is that even the people who supported the changes to the legislation are saying that it is problematic and in particular this group of vulnerable women who kill are not successfully able to rely on the defence.

The Hon. SCOT MacDONALD: No matter what change we make?

Mr STRATTON: And those who do, it is a lose-lose.

CHAIR: Both for male and female?

Mr STRATTON: I think that is so, yes.

The Hon. TREVOR KHAN: Part of my question arises out of submissions, amongst others, of costs and the suggestion of allowing in family relationship evidence, essentially, family violence evidence under 9AH. Would you be able to take away the opportunity of looking at the proposal to introduce the equivalent of 9AH and whether it is necessary in the light of the indication you have already given that it is covered by relationship evidence?

Mr ODGERS: I have no doubt whatsoever that almost all of it would come in under the current evidence law.

The Hon. TREVOR KHAN: Let us concentrate on the word "almost". Would you look at 9AH and if you are confident that 9AH is unnecessary I think we would all be appreciative of that.

Mr ODGERS: We will take that on notice.

Mr STRATTON: We are happy to do that. There is a case called Wilson, a High Court case which, years ago, set the standard in about 1970, that in effect in murder cases the whole thing gets in. It is not an asymmetrical system. In both cases the material about violence and relationships gets in.

Mr ODGERS: May I ask for clarification, maybe no-one knows the answer to this. When was 9AH enacted?

The Hon. HELEN WESTWOOD: In 2004.

Mr ODGERS: There are four years before the Evidence Act 2008 was introduced.

The Hon. TREVOR KHAN: I was alive to the point you are making.

Mr DAVID SHOEBRIDGE: And the public defender who gave evidence yesterday said she had never had any difficulty getting material in.

The Hon. TREVOR KHAN: Can I go to another point, and that is you have referred to the adverse inference, that is Weissensteiner and Azzopardi. Are you able to point to any cases since Azzopardi where an adverse inference direction has been given in a provocation case?

Mr ODGERS: I cannot.

Mr STRATTON: No.

The Hon. TREVOR KHAN: I think it is a matter relevant. If you look at the case of Ramage, including the sentencing remarks as opposed to the transcript of evidence, it would seem that Mr Ramage did not give evidence at trial. Rather, he relied upon his ERISP, which of course are quite useful sometimes, but Mr Ramage was an upper middle-class businessman who ran successfully provocation involving the bludgeoning and strangling of his wife, yet he did not give evidence at trial. I am personally disturbed by that. You might look at whether your views as to whether an adverse inference direction would have been available in that style of case.

Mr ODGERS: It is true to say that the courts have traditionally been very hesitant to draw adverse inferences from silence. As you know, Weissensteiner is the leading authority, which suggests that one case where it is permissible is where only the accused knows what happened. There are complications when you have an account in the form of a record of interview. That would not preclude a Weissensteiner but some conservative judges might be a bit nervous about inviting an adverse inference in that situation. I could not take it higher than that.

The Hon. TREVOR KHAN: I am interested in these cases because so many of these cases involve only the accused and the deceased being present, yet it does not seem that adverse inference directions are being given, and that disturbs me.

Mr STRATTON: In my experience it is pretty unusual in a provocation case for the accused not to give evidence.

Mr ODGERS: That is true. I think it is a point to be made that while Ramage was a particular case, in the vast majority of cases, certainly the ones where provocation succeeds, the accused as a practical matter would have to go into the box.

Ms LOUKAS: Ramage was an unusual case in that regard.

CHAIR: To clarify another point, your suggestion that we should look at the transcripts of that case and we would see how it was handled. There has been criticism from the relatives that a lot of evidence was not heard in that case. You are suggesting to us that if we read the transcript we will see that it did cover—

The Hon. ADAM SEARLE: I think she is suggesting we would see what was before the jury.

Reverend the Hon. FRED NILE: That is what I am asking now. We would see that that information was communicated to the jury?

The Hon. ADAM SEARLE: With respect, chair, I do not think she said that.

Ms LOUKAS: It is important to understand that I am constrained here.

The Hon. HELEN WESTWOOD: We appreciate that.

Mr ODGERS: Can I just make two points about that. It is very important to keep two things very separate. One is did the jury get the whole story, were they misled, was an error made by the jury, was there really premeditation, was their loss of control? They are factual questions which do not bear on the legitimacy of the defence. There is a completely separate question, assuming the jury got it right, is this something that should be available to reduce murder to manslaughter? They are separate issues.

Mr DAVID SHOEBRIDGE: That is the point really in large part the Bar Association submission does not address, other than in so far as it addresses the battered women having the availability of the defence. I do not see a rationed, reasoned defence for men applying the defence of provocation in cases of jealousy and relationship breakdown. If there is a rational argument to support it, I would be interested to see it.

Mr ODGERS: What you are raising is a qualification to the defence, as I explained in the beginning, and our approach is the abolition. We have also said we will respond within 21 days to specific reform proposals.

The Hon. ADAM SEARLE: Just on that, I would like the| Bar's response to three matters. What the Bar has to say about why should the defence of provocation not be limited to those circumstances of serious or violent criminal acts or domestic and family violence only, limiting it to those two categories? Whether the ordinary person test should be removed as Justice Wood has suggested in his evidence this morning—and we can provide you with the transcript of his evidence—and three, and I understand this is an important point in the criminal law, why should the onus of proof not shift when provocation is raised as a defence?

The Hon. TREVOR KHAN: Can you add five, pre-trial disclosure?

The Hon. ADAM SEARLE: They will see that in Justice Wood's suggestions. We would welcome the Bar's response to each of those proposals. I understand these are complex matters and I am not expecting an answer in the next 30 seconds.

Mr DAVID SHOEBRIDGE: The other option might be to consider if the change was made about the provocative conduct that can be relied upon, you make that change and then review these other aspects in light of anything that happens? Those thoughts from the Bar Association would be fruitful in my mind.

Mr ODGERS: We will try to respond. Can I just give you one quick oral response? I am repeating myself but I am going to do it. I really think there is a tendency to undercut the significance of the requirement that the jury is satisfied that an ordinary person in the position of the accused could have lost control and formed a similar intention to kill or cause grievous bodily harm. At the end of the day, our principled defence of this partial defence is based on that and we would oppose any suggestion that that should be removed because it is that which ensures you are meeting community standards. Because it is ultimately the jury saying an ordinary person could have done the same thing. If that is the situation, it is not appropriate to call it murder.

My answer to you is that that is the safeguard. You may well be right that it is inappropriate that this defence be available to a person where there is no domestic violence or whatever, but we would say the answer to that is that jury is reflecting community standards and would make a determination whether an ordinary person confronted by the same situation might have formed such an intention to kill or cause grievous bodily harm. If the answer is no, the defence will fail.

The Hon. ADAM SEARLE: There is a policy question for us, even if that is the jury or societal position, whether as a matter of policy, not law, that is acceptable.

Mr ODGERS: Quite. I understand that, and I am strongly asserting to you that it is entirely appropriate as a matter of policy that it not be murder if—

The Hon. TREVOR KHAN: We might have to agree to disagree.

CHAIR: Another point to clarify is that some of the witnesses have said we should have an amendment to require families and social framework evidence to be included in the case. Do you see any reason for that?

The Hon. ADAM SEARLE: He has already addressed that by saying under the Evidence Act it should be able to get in, but the Bar Association is going to respond to that.

Mr ODGERS: We will respond to that.

CHAIR: The last two amendments have been recommendations.

Mr DAVID SHOEBRIDGE: Helen has another question that she has been trying to ask.

The Hon. HELEN WESTWOOD: You have talked about community values. My question is not to Ms Loukas, because I am going to talk about the *Singh* matter. You said that you think homosexual advance would be unlikely to succeed because community values are such that the jury would reflect those.

Mr ODGERS: We would say that an ordinary person confronted by that would not do that.

The Hon. HELEN WESTWOOD: I put to you that the community is reflecting back that they think, in this case, the jury got it wrong. Do you not think we have an obligation to examine that and understand whether or not the jury did get it wrong, and, if they did, what we need to do about it?

Mr ODGERS: You have been invited to engage in that very task. It has been suggested to you that the public may not have been fully informed about the evidence and the facts in that case.

The Hon. TREVOR KHAN: We could look at *Keogh* and *Ramage* and a whole series of cases. All of them are bad.

CHAIR: We have reached the conclusion of our allocated time. I know that the lawyers would like to keep discussing these questions for hours, but we have limited time for our inquiry. I thank you again for your appearance and for sharing. I thank you, particularly, Ms Loukas, for agreeing to attend as a witness, having been involved in some of those cases. I appreciate the position you are in.

Ms LOUKAS: Thank you, Chair.

Mr STRATTON: Thank you for giving us the opportunity to talk to you.

Ms LOUKAS: We appreciate the opportunity.

(The witnesses withdrew)

(Luncheon adjournment)

LLOYD ADAM BABB, SC, Director of Public Prosecutions, Office of the Director of Public Prosecutions, Level 19, 175 Liverpool Street, Sydney, sworn and examined:

CHAIR: During the hearing if there are any questions that are asked of you where you need time to consider them, you can take the question on notice and supply us with a response within 21 days.

Mr BABB: Thank you. I understand that.

CHAIR: If at any stage you wish to have the room cleared and give evidence in camera, you have the right to request that as well.

Mr BABB: Thank you.

CHAIR: Do you wish to make an opening statement?

Mr BABB: Yes. As the Director of Public Prosecutions for New South Wales I am in charge of an organisation of more than 300 lawyers who prosecute all the serious crimes in this State. My office prosecutes 70 to 90 homicides or homicide trials per year. In addition, my office prosecutes serious offences arising out of domestic violence which are charged as attempted murder, assaults of varying degrees of severity and offences including kidnapping. In 2010-11 the witness assistance service for my office provided services to 318 complainants who complained of domestic violence assaults, mainly in relation to higher court proceedings.

I am well acquainted with the large volume of work created from law reform commissions around Australia and from other common law countries in relation to the issues raised before this inquiry. I have previously worked as the Director of the Criminal Law Review Division of the Attorney General's Department, which is the department that looks into law reform in relation to the criminal law. I have also worked as a Crown prosecutor prosecuting murder charges where the partial defence of provocation has arisen in those murder charges. I was a Crown prosecutor in the matter of Katarzynski, which is one of the lead authorities in the State on the defence of self-defence.

The written submission that was put in on behalf of my office reflects the view of many of the prosecutors within my office. We have a system where we put on the intranet within the office inquiries such as these and ask for feedback from members of staff, and I look at all that material and take it into account in supplying submissions to these sorts of inquiries. My personal view is now, and has been since I carefully considered questions of partial defences as the Director of the Criminal Law Review Division, that the defence of provocation should be abolished in the State of New South Wales. The mains reasons why I hold that view are that in my view when an intentional killing has taken place and there is no defence of self-defence available, I believe that matter should be dealt with as a murder and not as a manslaughter.

I consider that provocation is really a question that goes to culpability and that factors affecting culpability should be dealt with on sentence rather than reducing a charge of murder to manslaughter. Dealing with the issue of provocation on sentence, in my view, provides sufficient flexibility within the sentencing process for the appropriate sentence to be imposed, and it is appropriate in my view that a sentencing judge consider whether or not to take into account provocation in determining what the sentence should be and that they would do so where it was appropriate and they would not do so where it was not appropriate.

In my view there is no good reason why people who kill in the heat of passion should not be convicted of murder as opposed to those who approach it in a more premeditated way. To me, there is a lack of logic in the partial defence of provocation because it requires an accused person to have lost control such that they form an intention to inflict grievous bodily harm or to kill, and that to me does not sound logic. Another problem with the defence, in my view, is that it creates a culture of blaming the victim and I think there is a real perception that sometimes the blame is manufactured because there is no-one there to refute it. I also think that when one looks at the direction that is given to the jury in relation to provocation the ordinary person tests that the jury are directed on are complex and confusing. I have brought with me a copy of the suggested bench book directions so that that can be before the Committee. I hand that over now.

I will wrap up. Of course, the inquiry looks at the second really important question of what about those in a domestic violence situation who kill as a result of long periods of domestic violence. I should say in terms of my opening that I agree with the Victorian Law Reform Commission, first, that you need to be careful that

such instances are covered by the law of self-defence and that we are able to adequately take into account a woman's experiences of violence or a man in a domestic relations experience of violence, but it may be necessary to reform the rules of evidence and consider the scope of the defence of self-defence in order to do that in terms of what is currently in the Crimes Act. That did result in the addition in Victoria of section 9AH, as you know—and it was in the briefing paper to this Committee. I have carefully looked at section 9AH and I think there is some real merit in something along those lines to ensure that self-defence in the domestic situation can be recognised. If provocation was abolished I would recommend that something along those lines was looked at.

CHAIR: You are supporting basically the Victorian approach in regard to this.

Mr BABB: Yes.

CHAIR: Have you had an opportunity to study the impact of those changes in Victoria?

Mr BABB: No, I have not. I am aware from reading written submissions that were put in before this Committee, in particular Julie Stubbs' submission and the briefing report, that there is some question as to, as I understood it from their submissions, whether that 9AH provision is being used inappropriately but I have not studied it.

CHAIR: Basically whether the original objectives are being achieved—

Mr BABB: Exactly.

CHAIR: —and apparently there are longer sentences now for both males and females as a result of those changes. Are you aware of that?

Mr BABB: I am not entirely aware of it, no.

The Hon. SCOT MacDONALD: We have polar opposite to what we had from the previous witness.

The Hon. TREVOR KHAN: That is hardly surprising.

The Hon. SCOT MacDONALD: Particularly that point about, you said that it is illogical to require a person to lose self-control and then act with intent. We have previous people say that that is not illogical. Can you talk a little more about that? I am not someone who works in that field so I just want to get to the bottom of that a bit more.

Mr BABB: The main point I think I make is that if a loss of control is what it is and it is something done in the heat of passion, that is something that goes to culpability as opposed to changing the very nature of the crime, changing it from murder to manslaughter. I just do not see that in any way it is logical that it becomes a different crime in and of itself because you act in the heat of passion.

The Hon. SCOT MacDONALD: So a hot-blooded killer is no different to a cold-blooded killer at the end of the day.

Mr BABB: It certainly can be but I would expect that it would be taken into account on sentence. Generally, premeditation is something that makes a murder more serious and lack of premeditation is taken into account on sentence. Currently section 21A (3) provides that provocation is a matter that mitigates a sentence and that is in relation to every other crime except for murder because we use provocation in this special way in relation to murder.

The Hon. SCOT MacDONALD: I will finish with the other point that appealed to me at least. At the moment culpability is considered by the jury, whereas if we go down your track culpability is only considered by the judge. So you are taking it out of the hands of the community. There seemed to be some suggestion that if it was left with just the judge to look at the mitigating factors you will end up with longer sentences. Are you comfortable with that, that it is taken outside the jury?

Mr BABB: In relation to provocation I am a staunch admirer and proponent of the jury system and the jury system would, of course, remain; it would simply not be an issue in a trial that would be determined by a jury.

The Hon. DAVID CLARKE: Assume for a moment that the partial defence of provocation remained. Do you believe that conduct that can be relied upon by an accused to plead the partial defence of provocation should be restricted to violent criminal conduct? Would that be another means of dealing with this issue?

Mr BABB: I am not sure. In a sense I think my primary position would remain the same: it is preferable to abolish provocation, but that is not the only possible limitation that one could have on it. We know that other States—for example, Queensland—have limited the type of relationships that can relate to provocation as well. Certainly if you were going to maintain the defence there would be possibilities for reining it in.

The Hon. DAVID CLARKE: Abolition is one way but this could be another way that we put limitations on it.

Mr BABB: It certainly could.

The Hon. DAVID CLARKE: That may very well deal with the sorts of results we have had in some of the cases that have caused the outrage and the concern in the community that has led to this Committee being established.

Mr BABB: In a sense I have put my arguments and I do not necessarily agree that reining it in, in certain ways, deals with all the arguments that I have put but it could deal with some of them.

The Hon. DAVID CLARKE: What other arguments come to mind?

Mr BABB: I do not think that reining it in in that way deals with my primary argument that really something going to culpability, which is distinguishing between something in the heat of passion as opposed to premeditated, is something that should properly be dealt with on sentence as opposed to changing the nature of the conviction.

The Hon. TREVOR KHAN: I take it you have had all ever say no it the opportunity of looking at the Bar Association submission?

Mr BABB: Yes. I do not have it in front of me but I have read it.

The Hon. TREVOR KHAN: It is not a memory test. Could I invite you at a later stage to look at the three cases that have been put forward in that submission as justifying the retention of provocation, and more particularly the essential argument that self-defence would not have provided a suitable defence for each of those accused? I am particularly interested in your comments about *R v Duncan.*

Mr BABB: I would be happy to do that.

The Hon. TREVOR KHAN: That is the primary matter I seek to raise with you.

CHAIR: Let the witness answer the question.

Mr DAVID SHOEBRIDGE: He said he will.

Mr BABB: I thought you were inviting me to go away and look at it. That is what I will do, Mr Chair. I think it is appropriate to look at it in that way.

CHAIR: You can take the question on notice.

Mr BABB: Yes, I will.

The Hon. TREVOR KHAN: A suggestion has been made by someone with a passable knowledge of the Evidence Act: Mr Odgers, that tendency and relationship evidence would be sufficient to cover I think

essentially most of the section 9AH subsections that are proposed. Do you have a view as to whether the current Evidence Act provides an appropriate armoury for defence counsel to adduce evidence of family relationship and the contextual evidence as to family violence?

Mr BABB: I think that is possible but it is not certain because we have not in a sense run many cases in terms of self defence as opposed to provocation or diminished responsibility in this area. But I think it is possible. I only raise it as a possibility that change would be required. At the time of introducing section 9AH the Victorians did not have the Uniform Evidence Act and they now do.

The Hon. TREVOR KHAN: As has been pointed out to us today.

Mr BABB: I must say that certainly one would think that a lot of that material would be able to be adduced using tendency and coincidence or some other provisions of the Evidence Act.

The Hon. TREVOR KHAN: Justice Wood was before us this morning and he made some suggestions—I will come back to one in particular in due course—but one of those was with regards to pre-trial disclosure in circumstances where provocation is to be relied upon. Assuming that the Committee was attracted by that proposal, what would be the nature of the pre-trial disclosure that would be appropriate in your view? I must say that I did not put this to the Bar Association, which I assume would have a different view about the nature of that pre-trial disclosure. Do you have a view?

Mr BABB: In my view were we to go down that route disclosure of reliance upon the defence would be necessary, disclosure of the nature of the evidence sought to be adduced would be necessary and disclosure of the names of witnesses.

Mr DAVID SHOEBRIDGE: The same as alibis.

Mr BABB: Yes, very similar.

The Hon. TREVOR KHAN: In that regard I am interested in what the penalty for non-pre-trial disclosure is?

Mr BABB: There are penalties provided in the Criminal Procedure Act; however, in reality it is very difficult to enforce penalties in a criminal trial. Once a criminal trial has started my experience has been that breach of provisions such as the alibi provisions might lead to a short adjournment to enable the Crown to scurry and try and meet the case, but it very rarely leads to any penalties—for example, exclusion of the defence entirely, which is a penalty provided by the Act. The reasons for that are because that may lead to an appeal point later on, it may lead to some unfairness to an accused person in excluding a defence that may have been available. That is one of the real difficulties with pre-trial disclosure provisions. If the provisions are there and not followed and the penalties cannot really be applied then often the pre-trial disclosure may be ineffective.

The Hon. TREVOR KHAN: My final point relates to the events of *R v Ramage*. Mr Ramage, being an upper middle-class businessman, did not give evidence and was successful in running provocation. There has been some discussion with some of the witnesses this morning with regards to that. I ask your view as to whether essentially the making of a direction with regards to adverse inference is appropriately available in circumstances where a partial defence of provocation or the like is raised.

Mr BABB: That is something that I have not considered in this context. I do not know that I am in a position to answer that. Could I take that question on notice?

The Hon. TREVOR KHAN: You would like to take away and have a bit of a think about it?

Mr BABB: Yes, thank you.

CHAIR: Just to clarify the position you have adopted, would that be now reflective of the Government's position? Have you discussed this with the Attorney General?

Mr BABB: No, I have discussed this with no-one except for staff within my office and it is in no way reflective of the position of anyone outside that office and not reflective in terms of the evidence I have given today of anyone's view except for mine.

The Hon. TREVOR KHAN: You being an independent officeholder?

Mr BABB: Exactly.

The Hon. HELEN WESTWOOD: If I could go to the situation for women who are victims of long-term domestic violence and who murder their intimate partners. The Committee has been warned by many of people who have appeared before it and also in submissions that if we abolish provocation—even if the Committee tinkers with it—it could be disadvantaging those women and ensuring that they end up in jail for much longer periods. Do you think there is a way that the law of self-defence can be amended to take account of all those situations, particularly for women who murder a violent partner but not at the time of the violent incident?

Mr BABB: That is really the reason why I looked at section 9AH and the sections around that section in the Victorian material. I think with careful consideration self-defence can apply in situations where women have been the victims of domestic violence and kill as a result.

The Hon. HELEN WESTWOOD: The Committee has also received evidence around current cases where women have opted for the defence of provocation rather than self-defence. We have asked the police why that has been the case in terms of police collecting the evidence at the time and preparing a brief to go to the prosecutor. Do you have any understanding of how those briefings are prepared and why women are advised to look at provocation as a defence rather than self-defence, and why they are not charged with manslaughter initially?

Mr BABB: No, I know every case is individual and I certainly do not have any real idea of what instructions had been given and what advice had been given in particular cases—to answer the first part of your question. I could speculate that one difficulty with self-defence is a belief that you need immediacy of threat in order to reliance of defence. That is something that I think the Victorians have tried to deal with in their partial defence and full defences, as they have framed it.

The Hon. ADAM SEARLE: So widening the current self-defence to include a broader range of circumstances—no immediacy.

Mr BABB: I would limit it to domestic situations. The second part, in terms of the prosecution and whether sometimes we proceed with murder matters when it would be more appropriate to take a plea to manslaughter, I can only speak for myself and what I have done since being the Director. I would look carefully at the available evidence and assess it and not run a murder matter where I had formed the view that a matter was properly to be dealt with as a manslaughter matter.

The Hon. ADAM SEARLE: Does your office have a written policy about evaluating those matters and what criteria you would apply in evaluating what charges were appropriate?

Mr BABB: Really our general prosecution guidelines apply, which state as a fundamental principle that there needs to be reasonable prospects of conviction in relation to the charge that runs and that in plea negotiations—

The Hon. ADAM SEARLE: Just pausing there, the Committee has had a number of submissions and evidence before it that there are a number of cases where apparently the factual material was strongly suggestive that there would be available at least an arguable case as to self-defence but that the defendant pleads guilty to manslaughter rather than risk a conviction for murder. Sometimes this is agreed to by the prosecutor, we are told, and the material is suggestive of this situation working an injustice to female defendants who may well have a complete defence but, because they are not willing to take the risk of a murder conviction, or maybe for some other reason that we do not know, they do not proceed with that. Are you aware of that concern or phenomenon?

Mr BABB: I can only speak from matters that I have dealt with. I am not aware of specific instances.

The Hon. ADAM SEARLE: So you do not have within your guidelines a specific guideline that deals with the issue of whether or not a charge of murder or manslaughter in domestic homicide should be evaluated?

Mr BABB: No. I do not think that we should have. I think the appropriate guidelines are the ones in terms of decisions to prosecute and decisions about accepting pleas.

The Hon. ADAM SEARLE: Just pausing there. You say in your submission there is an inherent gender bias in the provocation defence and that it is unjust in its application. Is that not strongly suggestive of the need for you as the independent prosecutor to have a specific policy to carefully evaluate these matters to determine what is the appropriate charge in a particular matter? Is that not something you should look at?

Mr BABB: I would do that on the basis of my current guidelines: reasonable prospect of conviction, and accepting a plea where that plea would enable the true objective criminality and subject features of the case to be taken into account on sentence. So I do not need a separate guideline to take into account the intricacies of the law in this regard.

The Hon. ADAM SEARLE: Despite accepting an inherent gender bias as part of the law, you do not see that maybe the sensitivities around this require a particularly careful look to make sure defendants are not being disadvantaged?

Mr BABB: No, I don't. The gender bias I was referring to there was really something that I believe the provocation springs from. I think it sprang from a more masculine view of what amounted to provocation; it sprang from an age of duels and protecting your honour in a male way. I think in lots of the cases that still get run it is more about things done in the name of honour than something that is truly a feature that should change a matter from murder to manslaughter.

CHAIR: If provocation was abolished, would there then be more or less cases changed from murder to manslaughter, or would more cases remain as a murder charge?

Mr BABB: There would probably be more murder convictions in what I consider would be appropriate cases—those cases where there should be a conviction for murder, and any issue of provocation could be taken into account in the sentencing process.

CHAIR: So you would not accept a plea bargain to reduce it to manslaughter?

Mr BABB: I would consider whether the other partial defences were still available. There is still self-defence and substantial impairment. Those are two other ways in which a charge of murder can be reduced to manslaughter, even though you have formed the intention to kill or inflict grievous bodily harm.

Mr DAVID SHOEBRIDGE: Mr Babb, when you review the cases that Mr Khan referred to you from the Bar Association submission, could you also have a look at each of those cases of Hill, Russell and Duncan, and have a look at the matter of *R v Burke*, and consider whether or not it was appropriate that the prosecution prefer a charge of murder in those cases, because each of those cases springs from a woman killing the partner after a long period of domestic violence, quite extreme domestic violence, yet they find themselves facing a murder charge, and without any special consideration about their domestic circumstances, it would appear, from the Office of the Director of Public Prosecutions. Is that right?

Mr BABB: I would have to take that question on notice.

Mr DAVID SHOEBRIDGE: Could you address it on notice?

Mr BABB: Certainly.

Mr DAVID SHOEBRIDGE: Because this is on the concept of overcharging. Yes, there may be evidence that might enable a conviction of murder. If that is the beginning and the end of the consideration in these domestic violence response cases, well then you might be putting women, quite often fragile and damaged women, in the situation where they cop a plea on manslaughter because they are too scared to run their defence of self-defence. You do not see that that might be a systemic problem?

Mr BABB: Could you repeat the question?

Mr DAVID SHOEBRIDGE: You have a woman who has been charged with murder and potentially has gone through quite horrific circumstances in a domestic relationship, psychologically and physically

bruising. She is then brought before police and admits to having killed the spouse. She is charged with murder, because she admits to killing the spouse, and the facts would make out a case for murder. But, if the prosecution was to look at not just that there was evidence that would satisfy a charge of murder but also go beyond your prosecutorial guidelines and look at the domestic context of it, surely there should be scope in your guidelines to consider that domestic context and allow for a charge of manslaughter so that self-defence could be run.

Mr BABB: There is scope, and I would consider all the material that is available to me. I do not consider in isolation that material which favours the most serious charge. I consider the whole of the material in determining whether there are reasonable prospects of conviction on the whole of the material; and then, further, whether there are discretionary reasons why a prosecution should not proceed.

Mr DAVID SHOEBRIDGE: It is those discretionary reasons that I did not hear earlier. How do you take on board those discretionary considerations, and do you have a particular framework in which to look at these domestic violence instances, because they seem to me to be a quite difficult and special case?

Mr BABB: In each instance I would look at all the material that is available to me, and determine what is the appropriate charge. And I would take into account the very factors that you are referring to, if they are available to me.

Mr DAVID SHOEBRIDGE: Do you take into account the fact that once you prefer a charge of murder in those kinds of cases you are very likely going to be precluding some meritorious cases of self-defence from being run because there will such a strong temptation to take a plea on manslaughter? Do you take that into account?

Mr BABB: You will have to repeat that question. Do I take into account—

Mr DAVID SHOEBRIDGE: The impact of a charge of murder in those circumstances, and how it may well discourage a battered woman from running the defence of self-defence because they cop a plea on manslaughter. Do you take that into account?

Mr BABB: When I am considering what charges should proceed, or what plea should proceed, or whether to terminate proceedings I consider the available evidence.

Mr DAVID SHOEBRIDGE: Your preferred position is to abolish the defence of provocation, and to then allow many of these cases to be addressed under a defence of self-defence or excessive self-defence, is that right?

Mr BABB: Yes. I beg your pardon.

Mr DAVID SHOEBRIDGE: Or one other existing defence.

Mr BABB: Or perhaps they would be dealt with as murder matters because self-defence was not available at all. Many provocation cases have no element of self-defence whatsoever; they are provocation by word or conduct that is in no way physically threatening.

Mr DAVID SHOEBRIDGE: I understand that. But what about instances that might be excluded from such an approach? I can think of a woman who was told by her children that her partner had serially sexually abused the children. She then picks up a knife and goes from that place to where her partner or ex-partner is, and, hours later, having premeditated, stabs the spouse to death. That would not get up with self-defence; and it likely would not get up with a diminished responsibility charge. On your scenario, that woman would face a charge of murder without the defence of provocation. Do you think that is fair?

Mr BABB: There are two things there. Self-defence extends to defence of another, so—

The Hon. ADAM SEARLE: Even prospective.

Mr DAVID SHOEBRIDGE: These are adult children who say that there has been a long period of sexual abuse and, "I'm just telling you about it now, Mum."

Mr BABB: If they are adult children and the mother is told about it, then the appropriate thing to do is to go to the police and have it dealt with as a prosecution in the normal system. And if it does lead to a conviction for murder because it is, as you describe it, a premeditated act, then the impact of that extreme provocation would be a very powerful mitigating feature, and you might end up with a sentence something similar to a manslaughter sentence because of the extreme provocation in that case.

Mr DAVID SHOEBRIDGE: But do you not see a difference in culpability between that offence and say a contract killing or some other absolutely premeditated emotionless murder; that the law should not have some gradations to allow for that, not to be dealt with entirely as self-defence and therefore a complete defence, but to acknowledge there is less culpability in those kinds of circumstances through provocation?

Mr BABB: The law does have that ability. I see them as being very different in terms of culpability, and the law would acknowledge that in the sentence that would be imposed.

Mr DAVID SHOEBRIDGE: They would all be convicted of murder.

The Hon. ADAM SEARLE: We are talking about more than sentence; we are talking about the nature of the offence that you are convicted of. You would accept there is a large moral difference between murder versus any other form of unlawful homicide, that more moral opprobrium attaches to a conviction for murder.

Mr BABB: Yes.

Mr DAVID SHOEBRIDGE: And with the way the sentencing restrictions on murder are, as I understand it, the standard sentence is 25 years for murder and a minimum non-parole period of 20 years. That is the kind of average for murder.

The Hon. TREVOR KHAN: That is not correct.

The Hon. ADAM SEARLE: It is 16 to 17 for the non-parole period.

Mr DAVID SHOEBRIDGE: And manslaughter is between 7 and 4½. This is the standard sentence we are seeing delivered, through the statistics. So, if you are going to put those kinds of women into the category of murder, they are almost certainly going to get a significantly stiffer sentence than they would get under the current law, would they not?

Mr BABB: No, not necessarily.

The Hon. ADAM SEARLE: On page 4 of your submission you talk about abolishing provocation and then changing the scope of the defence of self-defence.

Mr BABB: Yes.

The Hon. ADAM SEARLE: In what particular ways would you envisage the self-defence scope being widened to ensure that, if provocation were abolished, female defendants in situations of domestic violence are not disadvantaged by that abolition? I am thinking of a situation in a different context to an English case of this nature, where a person was the victim of a sexual assault, and then subsequent taunting, and it was the taunting in combination with what had happened that led to the death of the victim. In a situation like that, there would be no question of self-defence, as we understand it.

Mr BABB: No.

The Hon. ADAM SEARLE: In that case, provocation was successfully invoked to reduce the charge of murder to manslaughter. What would you do to make sure a defence of self-defence was available in that situation, or do you think it should not be?

Mr BABB: I think it should not be.

Mr DAVID SHOEBRIDGE: It would be just plain murder, as with other murders, undifferentiated in terms of charge and offence.

The Hon. TREVOR KHAN: It covers such a huge range.

The Hon. ADAM SEARLE: The Director has not actually answered the question.

Mr BABB: I think I have answered your question.

The Hon. ADAM SEARLE: You think it should be murder in those circumstances?

Mr BABB: Yes, I do, in those circumstances. It does not properly fit within self-defence.

The Hon. ADAM SEARLE: No.

Mr BABB: But again, it is my view that murder covers a spectrum of matters of varying culpability down to something that is seen as being at the low end of the scale, as opposed to something that is worse case; and we can discuss various examples of things that would see murder at the low end of the scale.

The Hon. TREVOR KHAN: Mercy killings.

Mr BABB: Mercy killings, which again there is a good explanation for, and that explanation can be given and taken into account in a full and proper way in sentence.

The Hon. ADAM SEARLE: In the short time you have been Director, have you personally reviewed the prosecution guidelines, or made any changes to them?

Mr BABB: No, I have not. But I am in the process of reviewing them, and intend to make some changes to them.

The Hon. ADAM SEARLE: And you are not persuaded that you should maybe have a close look about whether or not domestic homicide requires particularly careful attention?

Mr BABB: No, I am not as yet. But I will go away and reflect on it. But, as a general view, I like the idea of the guidelines applying to all matters, as opposed to breaking them up into specific guidelines in very specific circumstances, because I think there are problems with that.

Mr DAVID SHOEBRIDGE: We have different evidentiary provisions for sexual assault cases and the like. The law does need to consider some of these crimes with refined and different tools, does it not?

Mr BABB: It does.

Mr DAVID SHOEBRIDGE: Why should the prosecution guidelines be different?

Mr BABB: I would consider them in a refined and subtle way.

The Hon. ADAM SEARLE: The prosecution guidelines specifically deal with young offenders, mental health issues and unrepresented accused persons. Those sorts of categories are presently singled out for special attention in the guidelines.

Mr BABB: But they are types of large groups of offenders as opposed to specific crimes.

The Hon. HELEN WESTWOOD: If we were of a mind to retain provocation as a defence but to propose that the Parliament amend it, one of the things that I have questioned is the complexity that juries are then faced with in determining matters. We have heard evidence from a number of witnesses that they think it is the complexity of particularly the defence of provocation that may lead to some outcomes that seem completely out of step with what the community expects. Do you have a view about the complexity that juries must understand and come to grips with? If we do recommend that the defence of provocation be amended, are there some areas in which we should be mindful of the way that we expand it?

Mr BABB: I do have a view. I handed over the bench book suggested direction earlier, which I think demonstrates how complex and confusing the ordinary person tests are that are applied to provocation. In terms of the second part of the question, I think it was—

The Hon. HELEN WESTWOOD: If the Committee recommends that it be amended yet again, are we complicating it further or is there a risk that we will complicate it further? What then can we do about ensuring that juries are able to come to grips with the complexities of the principles behind that defence of provocation?

Mr BABB: It is a difficult question to answer in the abstract.

The Hon. HELEN WESTWOOD: Fair enough.

Mr BABB: In looking across the provocation defence as it applies in common law jurisdictions generally, I have not seen one that I think is necessarily obviously simpler and more readily understandable than the statutory formulation that we have in New South Wales. It is in a sense inherent in the partial defence itself—the complexity and the confusion that arise from it.

CHAIR: If the Committee recommended the abolition of the partial defence of provocation, would you agree to a trial period of, say, two years, to take account of the fears of the lawyers who think it will bring about some problems or disasters?

Mr BABB: No. There is sufficient material available to make a decision rather than to implement a trial period.

Mr DAVID SHOEBRIDGE: I do not think I have ever seen that in criminal law.

The Hon. ADAM SEARLE: A trial period in criminal law is a novel suggestion.

The Hon. HELEN WESTWOOD: I see lots of frowns in the public gallery.

The Hon. TREVOR KHAN: They have been frowning all day.

CHAIR: I am an innovator.

The Hon. ADAM SEARLE: One possible reform concept would be to limit provocation to circumstances where the provoking act or acts were serious violent criminal acts or acts constituting domestic or family violence.

Mr DAVID SHOEBRIDGE: Where they are a significant element.

The Hon. ADAM SEARLE: I am suggesting limiting it to those two, full stop. Would that be an improvement in the current state of the law of provocation?

Mr BABB: I think it would.

The Hon. ADAM SEARLE: I am happy for you to take this question on notice. If the Committee were minded to recommend abolition, what specific changes would you envisage would be necessary to the self-defence defence? The Committee is interested to hear what you believe would be required to offset any potential disadvantages.

Mr BABB: I think I have answered that in that I have put forward roughly what was introduced in Victoria.

The Hon. ADAM SEARLE: I am satisfied with that answer.

Mr BABB: I did look at the various options before making that suggestion.

Mr DAVID SHOEBRIDGE: One of the reasons you give for abolishing provocation is that it is anomalous because it applies only to the offence of murder. In respect of other offences it is a matter to be taken into account on sentence. Is not one of the reasons it is there that the same facts for murder can also be viewed slightly differently with the charge of manslaughter? It is that dichotomy between murder and manslaughter that you do not find on common assault or most other criminal offences that explains the role of provocation, is it not?

Mr BABB: With respect, I think it is explainable because of the historical background—where it came from and where it originated—rather than it being something that distinguishes it from any other offence. Within all types of assaults there are gradations of culpability. That remains with an infliction of grievous bodily harm in the same way that it does with an infliction of death.

Mr DAVID SHOEBRIDGE: But there is no alternative for infliction of grievous bodily harm. If the facts are made out, it is the infliction of grievous bodily harm. However, we have that dichotomy between murder and manslaughter and provocation is one way of differentiating. Do you accept that it is not necessarily anomalous, or that it may be anomalous because the dichotomy between murder and manslaughter is anomalous?

Mr BABB: No, I do not. The reason we have that distinction in relation to partial defence is that where you intend to kill or inflict grievous bodily harm is limited to three categories only. The third category—that is, provocation—in my view is a historical artefact as opposed to a logical and coherent separation.

Mr DAVID SHOEBRIDGE: I have been trying to work out exactly what you mean in one other part of your submission. On page two you put the main arguments in support of abolition. The second dot point refers to inherent gender bias and you state:

> Developments to expand the defence to accommodate women and the battered women's syndrome may be criticised for forcing women to adopt a passive and stereotyped image in order to utilise the defence.

Do you have any examples or evidentiary material to suggest that women have been staying in these kinds of relationships in a passive way in order to utilise that defence?

Mr BABB: No, that is not what I was trying to get at.

The Hon. TREVOR KHAN: Nor do I think that is an accurate interpretation.

Mr DAVID SHOEBRIDGE: I wondered what it was. I do not know what he means by that and that is why I am asking.

Mr BABB: I was trying to get to the fact that I think that the battered wife syndrome is psychologising a much more complicated problem. It is more complicated than just ideas of passivity. It is a very complicated relationship and I was trying to point out that it does not neatly fit.

Mr DAVID SHOEBRIDGE: But how does allowing women in those kinds of situations to avail themselves of a defence of provocation in any way encourage a passive or stereotyped image? I do not understand.

The Hon. ADAM SEARLE: I think what the director—

Mr DAVID SHOEBRIDGE: I am trying to find out from the director.

Mr BABB: I was saying that I think the creation of the term "battered wife syndrome" has that effect. I was not suggesting in any way that it was creating behaviours on the part of women. I was just saying it is using a term to psychologise a very complicated situation.

The Hon. ADAM SEARLE: You are saying that it is not the proper way to view the phenomenon?

Mr BABB: Yes.

The Hon. HELEN WESTWOOD: The Victorian to model allows the social framework to be introduced. I assume that is what you are referring to.

Mr BABB: Yes, I was trying to get at things along those lines. What we are really looking at is evidence that fully explains the circumstances that are faced and why the action occurred.

The Hon. TREVOR KHAN: I anticipate that in due course you will be provided with a copy of the evidence given by Justice Wood this morning.

Mr BABB: Good.

The Hon. TREVOR KHAN: I will summarise it by saying that he suggests that an appropriate way to proceed would be to retain provocation but with significant amendments to the defence. He also raised a number of other things, and I have dealt with some of them. However, he also suggested that if it were retained it would be appropriate to reverse the onus with regard to the defence, referring to the fact that that has occurred in Queensland. What is your view of that approach?

Mr BABB: I would agree.

The Hon. TREVOR KHAN: That would then mean that that defence—what I will describe as diminished responsibility—has a reverse onus. Is that right?

Mr BABB: Yes.

The Hon. TREVOR KHAN: But that is not the case with self-defence.

Mr BABB: No, it is not.

The Hon. TREVOR KHAN: Can that create some difficulties where you have defences that have different onuses applying in a trial?

Mr BABB: It may do. In some ways I maintain my view that it would be better to abolish this particular partial defence.

The Hon. TREVOR KHAN: I think we can take that as read.

Mr DAVID SHOEBRIDGE: Assuming that we do not accept a bleach approach to the defence—that is, entirely obliterate it.

The Hon. TREVOR KHAN: No.

Mr DAVID SHOEBRIDGE: What are your thoughts about the onus?

CHAIR: Please let the Hon. Trevor Khan ask his questions.

Mr BABB: I think that it would be appropriate to put the onus on the person raising the partial defence to get over some of the things that have been raised by Mr Khan. There is the idea that it can be raised somehow on the evidence but you do not give any evidence about it and the fact that you lost control, and it is then put to the jury to try to work it out.

CHAIR: Before you were appointed as director you were obviously a lawyer. Did you serve as a defence lawyer?

Mr BABB: Yes.

CHAIR: Defence lawyers have strongly supported the idea of retaining the defence of provocation.

Mr BABB: I worked as a defence lawyer in private practice.

CHAIR: Did you use the defence of provocation?

Mr BABB: No, I have never defended someone where the defence of provocation was raised.

CHAIR: Reading your arguments, you seem to have a very strong objection to this defence because it is ancient.

Mr BABB: As a lawyer, I respect the common law and the impact and passage of time. The point I was making in relation to the partial defence of provocation was that I think its ancient heritage means that it has

come from a different basis or community perspective and that there were different reasons for it in those times. It came out of a culture of duels and honour and protecting one's honour. But also at a time when the penalty for murder was death and this element of mercy could not be given in terms of sentence and so needed to be given by moving the particular offence out of that category where death would follow.

CHAIR: That has been the main reason given to us for the introduction of the partial defence of provocation, because the judges asked for an alternative when they did not want to hang people. It was not so much duelling and those issues you mentioned but the death sentence.

Mr DAVID SHOEBRIDGE: You said that you would support pre-trial notification being given about a partial defence of provocation. Do you know of any instances where the prosecution was taken unawares by a partial defence of provocation and where that was an issue in practice?

Mr BABB: Yes.

Mr DAVID SHOEBRIDGE: Could you advise the committee, either now or take it on notice, what they would be?

Mr BABB: It would be difficult for me to talk about other people's experiences.

The Hon. ADAM SEARLE: Perhaps you could ask the Crown Prosecutors about what their experience might be.

Mr DAVID SHOEBRIDGE: We would be interested in the experience of your officers.

Mr BABB: I would be happy to do that.

CHAIR: Take that one on notice. Thank you very much for your attendance today.

(The witness withdrew)

JASPREET KAUR, Sister of Manpreet Kaur, affirmed and examined:

MARTHA MAREE JABOUR, Executive Director, Homicide Victims Support Group (Australia) Incorporated, sworn and examined:

CHAIR: I extend to you a very warm welcome to our public hearing. Thank you for coming in and being willing to give evidence to help us in investigating this issue and making recommendations to the Parliament, which may or may not become law; it is up to the Parliament how it responds to our report. At some stage during the hearing there may be questions asked of you and you are not sure of the answer. You can take those questions on notice and let us know within 21 days what your thoughts were about those questions. I need to remind all witnesses that 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, to speak about general issues of concern. So you can speak in general terms about lawyers without being specific.

Mr DAVID SHOEBRIDGE: Some of the evidence can be taken in camera. If the witnesses would like that to be done they can ask the committee and we will consider it.

CHAIR: The committee can consider your request, and that means we clear the room of any members of the public so we only have committee members present. We always give witnesses an opportunity to make a statement before the members of the committee ask questions. Would you like to make an opening statement?

Ms JABOUR: Firstly, I would like to say thank you for giving us the opportunity to come and present this afternoon before the committee. I have to say from the outset that this has been a very difficult and emotional subject to, one, research and, two, put a submission around. So from the start I would like to thank our pro bono lawyers Henry Davis York, and in particular Jillian Mitford-Burgess, who helped us put the submission together. As you will hear this afternoon, the emotion is about the fact that the Homicide Victims Support Group was set up in 1993 after the murder of Ebony Simpson in 1992, and Reverend Nile and his late wife, Elaine, were very great supporters of the formation of the Homicide Victims Support Group in its infancy.

The group was set up to support families of homicide, to provide counselling and to provide advocacy on their behalf. Sadly, in New South Wales we are now supporting well over 3,000 families of homicide. In New South Wales a murder is committed every three days, and the majority of those murders are domestic murders. So from our perspective there are murders that can be prevented if the proper resources and infrastructure were put into place before they occurred. I speak today on behalf of family members who have been aggrieved and further victimised by this very archaic rule—the partial defence of provocation. The defence makes no sense to many of the family members who are subjected to it.

As has already been given in evidence by the Director of Public Prosecutions, the victim is very often blamed for the crime caused, and by causing another human being to lose so much control that they have no option but to cause more grief, more trauma and to victimise them in a way that they kill them. The victim, after their death, their character, their morals, their beliefs, are all being questioned and are all being tainted, and this, we feel, is very unfair on the victim who does not have a voice and on the family that is left behind. Very often these attacks are very brutal and prolonged in their actions. One has to ask for how long does someone lose so much control that they attack a person that causes them a death, and that is purely because of the fact that they have been injured by words or by a gesture?

Some might say that in some cultures in religion they condone murder on the basis that that insult or provocation relates to the culture or that religion. We say the law must not favour cultural or religious factors in our country. We as a society cannot encourage others to go down this path and say that if you lose control within our community that by using extensive force and violence leading to the death that the courts will be lenient. We in no way condone people taking the law into their own hands, no matter what the circumstances are. We believe that there are structures and systems in place that if there are people aggrieved by being attacked or harassed by another person that they can do something about it, which could lead to that person still being alive and they not being in jail.

One of the hardest things, I think, for family members to accept when going through the court process is that it is the word of the accused that is heard in the court; the victim has no say because that victim has been killed. So who represents that victim? Who represents their word? Who gives their story? When we are looking

at the partial defence of provocation it is only one word that we hear and not the word of the victim. If the victim was still alive of course they can give their version of events and the consequences would be different. We say there is no excuse for taking the life of another human being.

Sentencing for the crime of murder versus manslaughter is another very concerning issue, especially where provocation has been taken into account. The maximum penalty that people can receive for murder is life and, as already we have heard, a standard non-parole period is 20 years with very often people getting 20 with 25 on top, and that is what we have seen the trend being since standard non-parole periods have come into effect. For manslaughter the maximum is 25 years. I have been the Executive Director of the Homicide Victims Support Group and I have rarely seen this sentence creep anywhere near that figure; it has never been given. Probably the most I have seen is about 14 years on top for manslaughter.

As an organisation we say that people have choices and we have to be made responsible for our actions. We are asking that the partial defence of provocation be abolished and that it can be taken into consideration as a mitigating factor when the judge is sentencing an accused person who has been found guilty. As I have already said, I have been in this job for 19 years and I have come across a lot of families who have felt the pain, the grief, the trauma of murder, and whilst we all have occupations that we are experts at I always say before parliamentary inquiries or others that the most important people that we can hear from are the people who are hurt by the laws of this country the most, and those people are, sadly, people like Jaspreet. So at this point I will pause and hand over to Jaspreet to tell you about her sister and about the traumas of them having to endure the result of the partial defence of provocation, being the end result in their matter.

Ms KAUR: Thank you for giving me this opportunity. I would like to say something about my sister. My sister was a very charming and kind girl and she was very good in nature. I think she never hurt someone in her 29 years life. In the end, as were her human rights, she just got dead by her husband. My case was covered under provocation but I do not think it was covered under provocation because the jury and the judge accepted everything that the offender said in the court. He said, "I was out of my mind. I do not know what I did, what happened with me last night". But if the deceased is not alive how come you just believe only the offender's statement, what he said in the court?

The jury believed everything what he said, the judge believed everything what he said in the court. If he says something you just need to get evidence, you have to prove everything what he said. Without deceased you just believe only he was out of his mind so how come this case covered under provocation because the deceased is not alive and you do not know what happened in the room. Just two of them were at that time in the room, no other person was there, and they just believe what he said. He said, "I was out of my mind", but while he was doing that he was killing my sister, and the neighbours of my sister's house, they were knocking the door and they said, "Chamanjot, please open the door", and from inside Chamanjot said, "Brother, I will open the door within one or two minutes." So, how come he is out of his mind? If the person is out of his mind how come he speak, how come he can say anything? After he did this incident, after two or three minutes, he opened the door and he run away. While he run away he have passport. After that from behind his house there was a big park. He called his mother. He talked about 200 minutes. How come he was out of his mind?

He withdrew money from different ATMs the day before this happened. Why he did? Because something in his mind, he is going to do something maybe today or tonight? So how are you saying this is a case of provocation and a person is out of his mind? How come jury accept everything? Why judge never thinks about victim's family. They always think about offender, what he did. He said he did not have any criminal record before. That does not matter if he did not have any criminal record before, he just give only six-year sentence. The maximum sentence is written 25 years in the law books, but in my age I never heard anybody get 25 years, only six to 10 years. After finished my case I talk with the Crown prosecutor. I said we have 28 days, we can re-appeal in this case because everything accepted what he said without any proof, without any evidence. He said we cannot re-appeal because this is our range of sentence. If it is written 25 years, why they are saying the range is between six and 10 years. This is what I am saying.

I believe the provocation law makes job worthless for everyone because the defence lawyer gets very easy job with a case of provocation. They know if the offender will say in the court, "I was out of my mind and I don't know what happened at that time," that is easy for the jury, that is easy for the judge, it is easy for everyone because they will say okay, the person was out of his mind. We do not know what happened on that day. I just want to say all this. This is not a provocation. You need to look up all and everything. You need to look up to find out each and every evidence. You have to prove everything, show everything in front of jury and in front of judge so that we can get a good result in the end. That is what I want to say.

CHAIR: Thank you again for coming to our hearing. I know it is stressful and emotional when it involves evidence about your own sister. We thank you for coming.

The Hon. HELEN WESTWOOD: I am not sure whether either you, Ms Kaur or Ms Jabour, has had the opportunity to read any of the submissions to the inquiry. A range of options has been suggested to us from abolishing provocation as a defence through to perhaps reforming it, and a colleague, the Hon. David Clarke, has even suggested excluding some particular categories such as violent criminal offences where provocation can be used as a defence. Have you thought about that at all?

Ms JABOUR: We have thought about it and it is certainly something we debated as an organisation. I have looked at some of the other submissions and tried to get an idea of the balance. I think with the system we have, we have enough checks and balances in place to allow for other defences. We would like the partial defence of provocation abolished in total and that it is left up to the judge to take it into consideration when sentencing. In our submission we put an alternative, that is, we put the onus back on to the accused person to prove the provocation, as Jaspreet was saying, because it is only a one-sided story we get to hear. But our main preference would be to abolish the whole defence of provocation.

The Hon. ADAM SEARLE: We have had evidence and submissions before the Committee that indicate that women who have been subject to prolonged family and domestic abuse at the hands of their partner are able to use provocation as a partial defence in some cases where other defences such as self-defence do not arise on the factual material. If the partial defence of provocation were to be abolished, these women would be facing charges of murder and they would not be able to pray in aid that defence. Do you think that is a fair outcome where women have been the victims of prolonged domestic abuse and then at some point just cannot take it anymore? Do you think that is murder?

Ms JABOUR: That is where I guess my evidence will be different to others. I am the head of an organisation that looks after family members of victims of murder. Some of those families are in the Homicide Victims Support Group where it has got too much and the person has killed the other person. We do not condone those actions. We cannot accept that people should take the law into their own hands at all, even if they are battered wives. I think also in the earlier evidence we heard evidence that there might be over charging. I would like to think when all of the facts are put before the police or before the Director of Public Prosecutions all of that is taken into consideration, that long history of domestic violence and abuse, and maybe the charge is a little bit too high and should not be murder to start off with, it should be manslaughter. I think perhaps that is where the system could be looked at a bit more rather than just saying we should have it there for some defences and not others.

The Hon. ADAM SEARLE: If there is no defence available, if provocation did not exist, it would have to be murder in all those cases, would it not, where women who have been repeatedly abused by their partners physically and emotionally and feel they have no other option, or they may be doing it because their safety or the safety of their children is at risk but there is no immediate threat. That is why self-defence may not be available. So, if there is no immediate threat, at the moment they have as an alternative provocation but if that was not available they would be facing convictions for murder. Do you accept that is a difficult policy issue?

Ms JABOUR: It is difficult, but if there was no immediate threat why is the last resort to kill the person?

The Hon. ADAM SEARLE: Because when they wake up there might be a threat. There may be a whole history. But even the prosecutor would not have much of a discretion if the facts were uncontested that there was a killing.

Ms JABOUR: I think that is a difficult concept for us as an organisation to take on board. That is someone felt they were being threatened or there is a perceived threat, that they would kill somebody because there is a perceived threat. It is a bit like when we are supporting families. I can tell you, of the 3,000-odd families that we have in the group, they could easily say I was provoked by the fact that this person killed my child. We are not going out there saying to people yes, they did provoke you by killing your child so therefore there is a perceived threat, kill them. We cannot as an organisation condone that or accept it as part of this community. If there is a perceived threat, for every action there is a reaction and the reaction could be that you go and seek help. As the director earlier said, you report it to the authorities, which we have done and we

encourage people to do, rather than take the law into their own hands. Otherwise we are going to be going backwards in time where we say there is a perceived threat, it is okay to attack that person.

The Hon. ADAM SEARLE: I think members of this Committee would be very loath to recommend a course of action that might lead more women suffering domestic abuse to face charges or convictions of murder as opposed to manslaughter. So, you accept that is a significant public policy issue we have to wrestle with? It is not clear cut?

Ms JABOUR: It is not clear cut.

The Hon. ADAM SEARLE: Because there are two different categories of accused?

Ms JABOUR: Absolutely. I think perhaps that is where some parts of the law should be changed or looked at to accommodate for those types of incidents. But to say leave it just for those cases, I cannot say we would agree with that.

CHAIR: You are saying there is no excuse for one human being murdering another human being no matter how much they are unhappy or provoked?

Ms JABOUR: Absolutely.

CHAIR: They should take other steps?

Ms JABOUR: Absolutely.

CHAIR: If we give people the right to kill other people, that will always continue, people will think that is my option?

Ms JABOUR: You would hate to think that is the last option for people or an option they could take on board. As a society I think we encourage children in schools not to bully, people in the workplace not to bully, so why can we not continue with that? We are trying to break down a lot of social issues as they are now. If someone bullies you, it is okay to punch them because you are provoked by their bullying, we cannot accept that behaviour.

CHAIR: You say the battered wife should leave?

Ms JABOUR: The battered wife should leave. I understand that sometimes it can be very difficult for battered wives to leave. If it was a case that she had enough, picked up a knife and stabbed her attacker in some way, once again I go back to the charging. Maybe it is an overcharge when the police charge with murder but once again it is looking at all of the facts. I think the Director of Public Prosecutions probably is the best person to look at those facts when the brief is all put before him and his office. With that, we see it, a lot of our family members get very frustrated when the director looks at a murder charge which is then agreed to by the Crown and by the defence that it be downgraded to manslaughter. Families are quite frustrated about it but when it is explained to them what that all means, the victim's families are accepting of it. They may not like it but they are accepting of it. I think we have enough filters in place to combat the battered wife who may be charged with murder but will not necessarily be convicted of murder.

The Hon. DAVID CLARKE: There are different levels of culpability, are there not?

Ms JABOUR: There are.

The Hon. DAVID CLARKE: A murder that is premeditated and planned and something that is done in a moment of passion, and that is why there is some suggestion that we restrict the conduct that can be relied upon by an accused only to those cases where there is conduct which is violent criminal conduct.

Ms JABOUR: Yes.

The Hon. DAVID CLARKE: That would distinguish the battered wives, so the sort of situations that have arisen and the outrage that has occurred that has led to the setting up of this Committee—understandably

so—those situations would not arise again? Do you think that might be a way we can explore so we can get justice right across the board?

Ms JABOUR: I do really think it is worth exploring. Also on that point, a judge has the scope to sentence accordingly, so a judge does not to have hand down a huge sentence for the battered wife. A judge can direct a jury to make a certain finding as well. Although an accused has been charged with murder and is then being prosecuted for murder, we have seen many a judge direct a jury to bring back a verdict that is different to the charge that has been preferred by the Director of Public Prosecutions. There are lots of checks and balances, but certainly—

The Hon. DAVID CLARKE: This is one way, is it not?

Ms JABOUR: Yes, it is one way.

The Hon. DAVID CLARKE: It is worthwhile exploring, is it not?

Ms JABOUR: I agree.

The Hon. SCOT MacDONALD: I want to ask you about that part of your submission. You talk about community expectations. On page 2, you state that the rationale behind the partial defence of provocation is out of touch with community expectations and that society does not accept that violence with intent to kill is the appropriate response to provocative behaviour. We have what seems to me to be a robust jury system. Even if the jurors are only spectators, they are involved in that bargaining and then they hear all the facts.

The Hon. TREVOR KHAN: Or do not.

The Hon. SCOT MacDONALD: They should hear all the facts. Why do you not trust the jury of the day? I am not trying to be provocative. I am sorry for using that word. We have members of the community who hold the current community values there and they sit through the whole expanse of the trial and they hear the best presentations. If they come to the view that the lesser charge of manslaughter is appropriate, and they are comfortable with that and they convict at that level, why is that a problem?

Ms JABOUR: There are a couple of reasons. We are in favour of the jury system as an organisation, although sometimes we find that some juries do not understand the evidence that has been put before them as it becomes more and more complicated. Jurors do not understand forensic evidence or really complicated evidence that might be put before them and they do not ask questions about it. In a recent murder trial, which was a domestic homicide, the jury were asked to put themselves in the place of the accused person, and if you are being asked to put yourself in that position, you are drawing on your own morals, your own beliefs in order to give a verdict that is supposed to be black and white and is supposed to be about the law and the law that is presented, so we do have some concerns with jurors not quite understanding what their role is, but also not understanding the evidence that has been put before them. We would like to see a system where perhaps it is a little bit easier for jurors to carry out their role.

CHAIR: Ms Kaur, I wish to clarify something with you. Looking at you, you are obviously a very gentle person. I assume your sister was similar?

Ms KAUR: We looked like twins.

CHAIR: Will you describe her to us.

Ms KAUR: My sister, yes. In my culture, there is Sikh religion, our religion. That is a very good religion. We looked like twins; everyone said that to us. We grew up together in India, we studied together in India. She was just four years older than me but she was very good in nature. My mother passed away in 2005 and my two elder sisters were married at that time. I have one younger brother. My sister took over responsibility for our house. She looked after me, my father, and my brother. She was very kind and she never hurt anyone.

After her marriage, she had a very bad experience in her life. She was always crying after her marriage. That is why last time she thought, "I cannot cope with this man." Several times I told her, "Just leave this person. This is not for you." She always said, "No, he is my husband. Probably one day he will be a very good

man. One day he will understand the relationship of a husband and a wife." She had so many bad experiences with him.

If she was not good in nature or not kind in behaviour—she probably left him first or second time when he beat her, but she always thought, "No, he is my husband. What will my family think if I leave him? What will happen with my family? They will not believe what happened to me." Last night when I heard about this incident, I know what a shock it was for me. She was a really charming girl. She always had a smile on her face.

I want to say one more thing about my sister's human rights. No-one has a right to kill someone. If she thought to leave him, she had a right to leave him. If Chamanjot had some problems with her, he can go to the police station straightaway to say to them, "I have a problem with my wife." He can say to my parents, "I am not happy with my wife." He can talk with his parents, "I am not happy with her." But he does not have the right to kill her.

In this case, he slit my sister's throat eight times. You cannot say it is manslaughter. In manslaughter you can hit once or twice, not eight times. My sister had more than 22 cuts on her body as was in the doctor's statement, which I heard in the courtroom. He said it was self-defence; she was trying to save herself. Chamanjot locked the door. There was nothing in her hand, so how come this case was a provocation case? If you are not happy with each other, you can leave each other but you cannot take someone's life. Everyone has their own life, has their own systems to live by, but you cannot take someone's life. That is what I want to say about her. I did not get good justice—nothing.

CHAIR: If I sum that up, you would say you do not believe your sister could have provoked him to do those things to her?

Ms KAUR: I cannot. I want to say that if she provoked him, why did she not leave him the first or second time? He beat her once or twice in Sydney. I saw her. I met her at that time. I said to her, "Let us go to the police station and lodge a complaint." Why did she not do it that time? Why did she think he is her husband and he will be a good man one day? He said she had had an affair with someone. I want to say, where is the evidence of that affair? Where is the proof? Nothing was proved in court. I asked the Crown Prosecutor and detectives, "Did you find anything from Manpreet's phone record?" If she had an affair, she would have talked to that guy on the phone. They said, "No, we do not have any records from her phone calls. We did not find the guy." Chamanjot said the guy is in Sydney, so if he is in Sydney, why could the detectives not find him? That is what they said. It did not prove anything. Nothing. They just believed what the offender said. They accepted all the lies.

CHAIR: Thank you very much.

The Hon. SCOT MacDONALD: Chair, I am reluctant to rehear the trial. I do not feel it is my role to rehear the trial.

Mr DAVID SHOEBRIDGE: I did have a question.

CHAIR: I am trying to understand the sister's personality, who she was.

Mr DAVID SHOEBRIDGE: Ms Kaur, one thing that I would be interested to hear from you about is how you felt as a family member during the trial, hearing the way your sister was portrayed in the trial. Tell me what support you got from the prosecutors and what was your experience of that?

The Hon. SCOT MacDONALD: Is this in our terms of reference?

Mr DAVID SHOEBRIDGE: I think it absolutely is.

The Hon. SCOT MacDONALD: I am not so sure.

CHAIR: We want to see how the defence of provocation works and the impact it has on the people involved.

Mr DAVID SHOEBRIDGE: We have had a number of expert witnesses say from an academic point of view that often it feels as though the victim is on trial and that those closely associated to the victim feel it is

more a trial about the victim than it is a trial about the accused. I am asking this witness, having been through the process, how she felt about that.

The Hon. SCOT MacDONALD: Chair, can we have a break to talk about this? I am uncomfortable with where this is going.

CHAIR: We only have a few minutes to go. I do not want to adjourn right now. Ms Kaur can give an answer. Do you feel you were treated properly or not?

Ms KAUR: I want to say that from the very first day the Crown Prosecutor said to me that the outcome will definitely be murder—from the very first day. I asked them several times. I went to the trial every day. I did not miss even one day. From the very first day I got this answer: "Definitely the man will get murder." Several times I said to him, "We need to prove this. We need to prove this." He just accepted everything, but nothing was proved. That is what I want to say.

The Hon. HELEN WESTWOOD: Ms Jabour, you have talked about the experience that families have described to you. Ms Kaur, you have talked about feeling that the jury did not have all of the evidence presented to them that you thought was relevant. Ms Jabour, is that something you will hear about from other families in similar cases, particularly where provocation is used as a defence? If they are reporting that they do not feel that all of the evidence is available to the jury, do you have any sense of what prevents the whole evidence being presented to the jury?

Ms JABOUR: We hear it all the time. Family members in the group make comment that when people swear an oath to tell the truth, the whole truth and nothing but the truth, they are a little bit hamstrung by the fact that they would like to say a whole lot more but cannot because they are either asked not to say it or not go near that evidence. Not all of the evidence is always presented before a court. The legal reasons for that are very much agreed to by the Crown and the defence long before it even comes to court. For family members it is a very frustrating part of the process.

The Hon. TREVOR KHAN: It is artificial.

Ms JABOUR: It is artificial to them. When it comes to the law being black and white, I agree, there may be good reason for it but it is artificial, so when you are asked to swear an oath to tell the truth, the whole truth and nothing but the truth, a lot of it is held back.

CHAIR: There is an opportunity for victims' statements. Is that valuable—

Ms JABOUR: Victim impact statements?

CHAIR: Yes, victim impact statements.

Ms JABOUR: They are very valuable for families to give, but that is after the conviction. In cases of homicide, they are not taken into consideration in sentencing. As an organisation, we believe that the position should remain that they are not taken into consideration as part of the sentencing process. It is a very empowering opportunity for family members to describe their loved one and to talk about the impact of the murder on them and their family. Reverend Nile, until you asked Jaspreet earlier to describe her sister, nobody would have known what Manpreet's personality was like and how much she was loved. For family members, that is a very important part of the process.

CHAIR: Did you have a victim impact statement?

Ms KAUR: Yes.

CHAIR: You were able to give one?

Ms KAUR: I gave in my father and my sister from back in India; they also gave.

Mr DAVID SHOEBRIDGE: Tragic cases like happened to Manpreet are appalling and I think many people are troubled by how provocation is used in those circumstances. But there is often so little that separates the two ways provocation is being used. The same history can often have a woman involved in long-time

domestic violence; as Jaspreet said about her sister, she feels unable to leave, feels culturally bound or otherwise bound to the relationship and stays in the relationship, tragically sometimes until she is killed by the partner. Yet almost that exact same history might see the woman actually broken in that relationship and strike out and kill the partner, perhaps when the partner is intoxicated. Provocation works against the interests of the woman's memory and the family in the first case. But can it act for the interests of the woman and the family in the second case? I heard what you said before about provocation and wanting to abolish it. Do you accept there are valid arguments for keeping it around in that second case?

Ms JABOUR: I cannot accept that there are valid reasons for keeping it around in that second case but I do believe that there are other areas that can be explored that will capture a protection for those women.

Mr DAVID SHOEBRIDGE: They need to be protected one way or another.

Ms JABOUR: They have to be protected one way or the other but I do not think keeping the partial defence of provocation is the way to do it.

CHAIR: That concludes our allocated time. Thank you for coming and sharing your stories and for the work you do in helping those families who have lost a loved one through a murder.

Ms JABOUR: Thank you for giving us the opportunity. It has been really important.

(Short adjournment)

PHILIP RONALD CLEARY, affirmed and examined:

CHAIR: Thank you for agreeing to come and give evidence. I know you have had a long-term interest in this issue, so we look forward to hearing your evidence. If there are any questions that are asked where you would rather take them on notice to give you more time to consider them, please use that right. I need to remind you, even though you have been a member of Parliament, 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. After the hearing some members may have questions they would like to send to you on notice, and you have 21 days to answer those. Please state your job title or description.

Mr CLEARY: I am self-employed in communications and related affairs, and I am representing myself.

CHAIR: Do you wish to make an opening statement?

Mr CLEARY: Yes, I will, thank you. The first thing I should say is that I am the brother of a murdered girl or woman—she was 25 years of age. Twenty-five years ago, on 26 August, she was stabbed to death as she parked her car outside her place of work. That resulted in a provocation defence and a manslaughter verdict and a sentence of three years and 11 months in jail. But I do want to make it exceedingly clear that because you have an emotional connection with such a question, as in being a brother, does not mean you cannot talk objectively about the question. It annoys me that some people at law try to claim that anyone who approaches the question passionately has lost their mind or is not able to articulate the problems with the kind of clarity that they allegedly do. I think I note that the DPP is not here and the Crown prosecutor is not here. I would have preferred that they were here to hear what I had to say.

I have spent a lot of time criticising DPPs and Crown prosecutors and defence barristers and I am not about to stop. I was sued for defamation two years ago for my book *Getting Away with Murder*, which dealt with the murder of Julie Ramage. We continue to hear spurious arguments about the provocation defence. The DPP said it is an ancient law. Well, it is not really an ancient law. It is a patriarchal law that would have its place in the 1940s and 1950s in Australia. It probably reflects attitudes prior to the women's movement that are not ancient. Equally, it is in existence today and its narratives continue to be accepted by juries, by judges, and aggravated by defence lawyers. Are those people acting out of ancient law or contemporary misogyny?

This inquiry cannot afford to ignore the misogyny of the provocation law. If you conclude that you must abolish the law, then I think you need to be extremely cautious because it is easy to abolish the law and have what we now have in Victoria, which is a defensive homicide law that is now used by men. And it is used with the concurrence of judges and with the concurrence of defence lawyers and sometimes the prosecution. We allow forms of argument and narratives in our courtrooms that we should not tolerate in a civilised society. How could we have allowed a defence of provocation in *R v Singh*, the case you have just heard Jaspreet talk about? How could a civilised jury conclude that that man was guilty only of manslaughter?

It is not simply about confusion about the ordinary man test that we end up with barbaric outcomes; it is because of the vilification of women at the hands of defence lawyers. What relevance did it have in *R v Dincer* that Zerrin Dincer, who was stabbed by her stepfather at 16 years of age, was a virgin or might have been a virgin? What was the relevance of Colin Lovitt, the barrister, asking whether Zerrin Dincer was a virgin? What was the relevance of Phillip Dunn, in *R v Ramage*, asking whether Julie Ramage had a tampon in situ? What was the relevance of that? We know what the relevance is. Let me move to *R v Keogh*?

What was the relevance of Bob Kent, now deceased, saying this, "We would submit it is a proper and valid argument to say it is relevant to know that the person who is deceased in this case was an attractive woman both in face and body and was in fact the wife of the deceased"—I think they got that wrong; I have "the deceased man" but it should be "the accused man"—"and that in those circumstances a juror might say, 'I am prepared to say that an ordinary man in this man's situation may well have lost control and acted in that way. The photos show she is somebody whom we could well understand him to have a great passion for'."

Those words belong to Bob Kent in his submission to have nude photos of Christine Boyce presented to the jury. This is 1988-89. It is not Taliban-held Afghanistan. It is Australia. Think about the logic for those photographs being submitted to the jury. We know why. The point is to diminish the character of the woman, to

show her as a whore, a harlot and a deceptive character. Who would do the wrong thing by the man in her life? It did not matter that the photos were probably taken for him. Was there outrage or an outburst in the media about that evidence? No way.

So my fundamental point is that the defence of provocation is not conceptually flawed necessarily. It is flawed because of the misogynist narratives that are allowed in the courtroom and the misogynist narratives enable juries to consider the woman as being blameworthy and having brought about her own murder. Is it not remarkable that we have *R v Singh* on the tongues of people in New South Wales today, 25 years after Peter Keogh stabbed my sister to death as she parked her car outside the kindergarten where she worked? And he was granted a provocation defence. He gave unsworn evidence. Ramage gave no evidence. Other people have given sworn evidence and gone the same way as Keogh and Ramage.

I heard the comment "upper class" about Ramage. He did baths, I think—produced baths. He was not an educated, intelligent, urbane man. He was just a businessman. He lived in Balwyn, but he was more middle class than Peter Keogh, a lump and proletarian thug. Yes, he was but at one end the working class thug was found not guilty of murder and at the other end the middle class millionaire was found not guilty of murder due to provocation. And all the cases in between. So I will finish on this point. It is fundamentally a human rights question. Let us get our heads around the fact that it is about human rights. Forget the nonsense and the spurious arguments about how we can deal with provocation—can we abolish it and then deal with it in sentencing?

When I say "spurious arguments" I mean to the extent that it is as if that is the only solution. We need to start with the proposition that provocation is a problem because of how we have let it develop. That is the problem. So in a way I am implying that the way to solve it might be to retain the defence of provocation but enshrine the human rights of women, and men—but it is invariably about women—in the defence of provocation, and then force your urbane, learned, civilised gentlemen judges to say to a wife killer, "You are not entitled to a defence of provocation because your actions are not that of a civilised, normal human being, ordinary man, and they are in contradiction of the human rights of a woman as per Australian law."

In *R v Parsons* in 1997 three judges on appeal ruled that the Supreme Court judge was correct in denying Parsons a defence of provocation. One of the judges on the appeal court was Justice George Hampel. In 1989 he ruled that Peter Keogh should be entitled to a defence of provocation—again, the man who murdered my sister. So entitled to a defence of provocation in my sister's case but not entitled to a defence of provocation—as in the killer Parson's—in *R v Parsons*. Angela Parsons was killed outside the Family Court at Dandenong; make of it what you will. The facts are that judges can put an end to the provocation farce but we need to help them along the way by forms of legislation that restrict the application of provocation.

I say finally that the New South Wales Parliament has an opportunity to do something radical in affirming the human rights of women. You can do what the Victorian Parliament failed to do, in that the Victorian Parliament failed to grasp what was the fundamental problem of provocation. It implied it was about women being reduced to possessions but it did nothing to stop that continuing. Under the defensive homicide law the same narratives have been run in a series of cases that have resulted in not guilty to murder to killer men. My last point is that the New South Wales Parliament has an opportunity to do something radical in affirming the human rights of women.

CHAIR: You mentioned a case about photographs and so on; would not a judge normally say they were not relevant and not allow them to be presented in the court?

Mr CLEARY: Mr Nile that is a very important point. It is so significant, is it not? You would have thought so. Do you know that the Crown Prosecutor in that case decided against opposing it at the last instance. He said he was opposed to the submission of the photographs, then he buckled and accepted them under persuasion by Bob Kent—Bob Kent is deceased so I cannot be sued for defamation if I say anything wrong here or outside.

The Hon. TREVOR KHAN: You cannot anyway.

Mr CLEARY: Anyway I am under privilege here; I will be careful anyway—Mr Nile, I did take note of what you said I should not say at the start of your introduction. But the point is that it illustrates the extent to which lawyers will go in a provocation defence to get a man off. You have heard Jaspreet talk about—her sister was saintly. Let's face it, how could you possible conclude that she did something provocative and if she did would that justify him doing what he did? Yet a court says that.

Just to finish that point on *R v Kent*, I was absolutely astounded that a judge would believe that those photos were relevant. The judge went on to say that, of course, she was working as a sex worker or prostitute so the photos could do no more harm to her standing than what had already been established in court—as in, she is a prostitute. In recent times there was a case where there was outroaring about a judge saying that a prostitute was less likely to suffer in a rape than a chaste women. These are the kind of undercurrents. Am I saying it simply about the judges? No, it is about the context in which the judges operate. But it is also sometimes about judges.

The Hon. DAVID CLARKE: Mr Cleary, you are put in charge of drafting the legislation. In specific terms what are you going to put in it?

Mr CLEARY: I will give you the concept, you give me the lawmaker. You know that lawmakers have the expertise. I could show you what house I like and you can draft it for me. But I would say this to you, we would work on some protocols and some definitions about the fundamental human rights that cannot be contravened in our society and we can embed them in law. So infidelity should not be considered, words should not be considered—I am not the only person to have put that. Of course that was put in a Victorian Law Reform Commission submission back in early 2004, so there is a precedent for that. I have no doubt that lawyers could construct a law accordingly. But I do say there are two points that are critical—

CHAIR: But you want to keep the defence of provocation?

Mr CLEARY: Mr Nile, what I am saying is that I do not want to say conclusively keep it or conclusively do not keep it. I am probably leaning towards keeping it but only if the changes are made to the law to enshrine the human rights of women. Mr Clarke, I understand the point that we would need to be clear about what key principles we enshrine. I do not for a minute suggest that that is not complex; I know it is complex.

The Hon. DAVID CLARKE: What about starting with violent criminal conduct? Would it be a starting point that the defence would only be available in response to conduct which was violent criminal conduct?

Mr CLEARY: I think that would be one of the principles that would be contained without a doubt. There would be a number of principles and that one would surely be absolutely such a fait accompli really.

The Hon. DAVID CLARKE: That is one, but what are the principles come to mind?

Mr CLEARY: On an evidentiary—

The Hon. DAVID CLARKE: You could not rely on words.

Mr CLEARY: No, you cannot rely on words and you cannot rely on infidelity.

The Hon. ADAM SEARLE: Even threatening words—namely, words such as "I will kill you"?

Mr CLEARY: Sorry my mistake, I am thinking about the woman and you are thinking about the man. I am thinking, of course, we need to protect the rights of men. I have heard from the victims group too and I appreciate the view about the sanctity of life. We do not want to be here trying to find ways of making it easy for people to kill other people. Let us accept that we also want to change the way that people perceive the question of violence in society. The courts are one part of it and that narrative has a capacity through osmosis to infiltrate the community. On the question of threatening words, I think you would have to say that threatening words might begin to be the basis of some kind of argument about a loss of control.

The Hon. DAVID CLARKE: Say, insulting words?

Mr CLEARY: No, insulting words cannot be a defence for provocation.

The Hon. DAVID CLARKE: That is what I am saying. So these are things that could not be relied upon. Infidelity could not be relied upon?

Mr CLEARY: No.

The Hon. DAVID CLARKE: Insulting words could not be relied upon?

Mr CLEARY: Yes.

The Hon. DAVID CLARKE: What else comes to mind?

Mr CLEARY: If you look at the history of the killing of women, in just about every case of the killing of a woman by an intimate partner it revolves around the notion that the woman might leave the relationship or is expressing a desire to leave the relationship. So when people say it is about words and a person responds and says, "No, it is never about words", I say, "Yes, it is about words." It is words like "I want to leave you", it is words like "I am not happy with the way you are treating me". I will bet that is what was at the bottom of *R v Singh*—that Manpreet Singh would have been saying to her man, "I am not happy with you and I am thinking of leaving you." So the kind of words that would be applicable to men in wife-killing cases can be defined I think, and that would be part of the process. Again, David, it is a starting point—I am sorry, have I got that wrong? Trevor, am I supposed to say "the honourable"?

The Hon. TREVOR KHAN: No, I am just not that familiar with him myself.

Mr CLEARY: Okay. Rather than sort of document the specifics I think we need to go to the concept and that is that we want to rule out the kinds of arguments that have been used. Then how do we establish what I call protocols, in the first instance, which become embedded in law?

The Hon. DAVID CLARKE: But I am inviting you to give those concepts.

Mr CLEARY: Alright.

Mr DAVID SHOEBRIDGE: He did.

Mr CLEARY: I did so infidelity, words—we could have a debate about threatening words but then threatening words could end up in a self-defence argument rather than a provocation argument.

Mr DAVID SHOEBRIDGE: Mere words.

Mr CLEARY: That is right: mere words. What are the mere words? So infidelity, mere words—

The Hon. DAVID CLARKE: And on the other side the defence would be available in respect to serious violent criminal conduct. Are there any other categories that you could allow the defence of provocation to apply to?

Mr CLEARY: Menstruation would be ruled out.

The Hon. DAVID CLARKE: Instead of the exceptions, what are some of the inclusions?

Mr CLEARY: Menstruation would be ruled out.

The Hon. DAVID CLARKE: What else would you rule in?

Mr CLEARY: Provocation is supposedly around a loss of control as applicable to the ordinary man. I think a society can quite clearly work out what that means. I mean an accidental hitting of someone and them hitting their head is not the same as the provocation murder—I was only talking to Kate Fitz-Gibbon about this matter before. In provocation you establish all the features of murder and then you ameliorate the crime by way of the partial defence. The intent is there in the murder. There are other mechanisms in the law to deal with variations on this but when it comes to the provocation—the biggest issue in provocation is not about man versus man, it is about man versus woman. As I have said a number of times, once you rule out the infidelity question, the talk of maybe leaving, the words about the performance of the male in bed and related matters, then you will denude the provocation case so much that a killer man, who is killing in a way that we consider barbaric and not consistent with an ordinary man, will be denied that defence.

The Hon. DAVID CLARKE: That is the ruling out; let us talk about the ruling in. You have heard the expression: the devil is in the detail. Let us get to detail. What other things would you rule in as grounds for provocation?

Mr CLEARY: You have heard them all before. What do you need me to track you through? I got home and I found a man assaulting my—

Mr DAVID SHOEBRIDGE: No. Not the things that you would not want people to raise as provocation, you would want those all excluded—

Mr CLEARY: You are asking me the ones you would rule in?

The Hon. DAVID CLARKE: Yes.

Mr CLEARY: Well I have said you have tracked through those, have you not?

The Hon. DAVID CLARKE: I started with violent criminal conduct.

Mr CLEARY: Yes.

The Hon. DAVID CLARKE: Are there any others that you would add to that list? You can take the question on notice.

Mr CLEARY: I will give you an example. Over the journey people from various settings, those who have defended provocation, defence lawyers defending provocation have a raft of questions or propositions that they put. They use the one that you come home and you find your child being assaulted by someone. Of course people would say they could understand that raising the question of provocation. Could I understand that? Yes I could. So I can imagine a range of areas, which I would rather take on notice than try to track through all the things I have heard of over the journey

The Hon. DAVID CLARKE: That is all under violent criminal conduct?

Mr CLEARY: Yes.

The Hon. DAVID CLARKE: Can you think of anything else outside violent criminal conduct that comes to mind that you would rule in?

CHAIR: The witness can take that question on notice.

Mr CLEARY: Give me a chance to imagine it. I see the point. I am just thinking that if you look at the history of the killings you can see the kinds of arguments that have been forged and you would need to address those through the law. But it is a reasonable point to say that what will happen is that if you address the law you will find other arguments and that is kind of true. It just means you have got to keep reforming the law and I do not think you would get it right, Mr Nile, in the first instance anyway.

CHAIR: The argument you have put up reminds me of what happens with women who have been raped. They are nervous about going to court because they turn from being the person who was raped, the victim, to the case then focusing on their life, their previous sex life and so on. The same applies to the victim who is now dead, as you said when speaking about the earlier examples, with the focus being on her behaviour and attitude when she is no longer here to defend herself.

Mr CLEARY: It is so true. I have written about this many times: rape cases going back in time. I wrote in my book about the killing of my sister, a case in 1959-60 where a judge, at the end, even though the men had been found guilty of rape, said, "There is a lesson in this for girls not to be out at night," my words, not his, something like in a precocious manner, but I think it went more like having fun.

CHAIR: She deserved it?

Mr CLEARY: Yes. The culture of provocation is about women deserving what they get; that women are extremely provocative; that women challenge men. It is a deeper question for us, and one that informs us

when we explore the way provocation has been applied. Defence lawyers, again and again, will try to say that the jury was confused. But let us think about that for a minute. Imagine you are on the jury and the judge says, as in *R v Singh*, "You must consider provocation; provocation is a live issue here, and t you must consider whether this ordinary man in front of you might have lost control and done what he did." It is a circular argument: of course he did that, he did kill; and even though he killed he was allowed provocation. So the circular argument goes around. And the jury is driven down a path. Those kinds of statements are made in so many cases. In my submission I alerted you to some of the statements by judges and the kind of interpretation of a crime that diminished the rights of a woman.

In my sister's case the judge said that it was not prejudicial to the accused, to the killer, for the jury to hear that he had gone to the kindergarten, barged in, and was angry because, the judge said, that was just part of normal behaviour. We do not consider that normal behaviour: a man barging in at a kindergarten, demanding to see his estranged girlfriend, and being angry. This man murdered her a month later. Yet the judge was telling the lawyer in discussion before it went to the jury that this was not prejudicial. Can you see the paradox? It should have been prejudicial; it should have been an example of his propensity for violence.

Throughout the narratives judges get caught up in repeating orthodoxy, precedent after precedent; and unless you break the precedent we just get this continuum. Just on that point, for example, in *R v Yasso*, judge Vincent, a staunch anti-provocation man, dissented from the decision of the appeal court in the Yasso case. He stabbed the woman to death and the judge did not allow provocation. Justice Charles ruled it should go back as a provocation defence, and Justice Vincent dissented. My question is: How is it, if the law is so particular and definite, that Justice Vincent said there is no provocation, and another judge says there is provocation? What was going wrong? Is it not about subjective values of judges? Is it about the red letter of the law? I think it is about attitudes that have been embedded in the courtrooms and in the courtroom narratives. That might sound repetitive, but I do think that is the issue.

The Hon. HELEN WESTWOOD: Mr Cleary, the Victorian laws have been amended. We have had evidence about the social framework being considered for inclusion. Are you saying that that is now being used to men's advantage? Is that the element of the law that you think is now actually working in favour of men and against women?

Mr CLEARY: Helen, I am saying that, without a doubt. And not only am I saying it as a warrior on the question; the Liberal Government is saying the same. But they have concluded that the defensive homicide law is compromised and must be modified. That is their conclusion. I had a meeting with them a few weeks ago. If I could give you an example of three distinct cases in recent times, and they have probably been spoken about in this inquiry already: Grimmett, Sherna and Middendorp. Middendorp, only up the road from where I live in Brunswick, stabs a girl in the back four times. I mean, how does he get found not guilty of murder? It is because she is a troubled girl—verbatim language—because women are like that? I quoted Helen Garner's writings in *Joe Cinque's Consolation*, which dealt with the demonising of women and played around with the provocation myth. Those three cases were run under defensive homicide in Victoria, and men have been found not guilty of murder.

In the Grimmett case, the woman met a bloke in a pub; she went back to the house; we think they had sex, but she is not there to tell us exactly what happened; we think that maybe she said to him, "Will you stay the night?" and he said, "No; I've got to go home." And she said, "But you can't go home; you told me you're separated from your wife." He said, "No, I wasn't telling you the truth." She allegedly slaps his face. He strangles her. Not guilty to murder. How many cases do our defence lawyers need to see before they conclude that the law is misogynist? It is farcical. In the case of *R v Sherna*, a bloke comes homes, the dog barks; he pulls a cord off the back of the door and strangles her. He goes out drinking, visits a prostitute, buries her in the backyard. Not guilty to murder. Oh, he didn't form intent, they said. I watched the case. Kate has written about it. We went into the courtroom. It was a provocation defence. It was talked about again and again, how she had cuckolded him all his life, and on this final night the mouse roared—the mouse, the bloke, roared, after his wife came home belittling him. So Middendorp, Sherna and Grimmett were without provocation, but they got provocation verdicts and provocation narratives.

Mr DAVID SHOEBRIDGE: Mr Cleary, we have been constantly told to be careful about unintended consequences, and how difficult this area is. Could I ask you to turn your mind back to when you heard about the Victorian reforms and you saw that they were going to go through? Were you of the view at that time that they were going to improve matters?

Mr CLEARY: Well, I have to honestly say that I am on the record—and you can find it on the web somewhere to verify it.

Mr DAVID SHOEBRIDGE: I do not need to do that. But did you believe they were going to improve matters?

Mr CLEARY: In a way, I am kind of—I was going to say proud, but I do not mean it that way; I cannot think of the right word. The truth is that I did raise reservations about it. I did that because I said it is the narrative problem, it is the courtroom evidence problem. So, yes, David, I did say this does not mean the end of the problem, and that is a lesson for us sitting here today.

Mr DAVID SHOEBRIDGE: We have had a number of people cautioning the Committee not to jump in and do things, to be extra careful about abolishing provocation because there will be unintended consequences; that domestic or defensive homicide had unintended consequences when it was intended to do good. Should we err on the side of not taking action now and referring it off to the Law Reform Commission or someone else far more lengthy and full-blown consideration; or, as you see it, should we be trying to do what we can to improve it?

Mr CLEARY: In an ideal world, I would love this inquiry to say that the provocation law as it is constructed and as it is applied in the courts of Australia is an act of barbarity and is misogynist; and to conclude that the human rights of women must be affirmed in any changes to the law. If that is the starting proposition for you, I do not mind if you take a while. I do not think you should go back to the Law Reform Commission report; you do not need to do that. The people in the Parliament have enough knowledge, and you have heard and seen enough to say that this law is either done with or it is going to be retained but in a new form, and that whatever law replaces it is in a new form but it is based on that fundamental principle.

The Hon. TREVOR KHAN: He did not agree with your proposition.

Mr DAVID SHOEBRIDGE: It was not a proposition; it was a question. Did you want to add other gloss, Trevor? The other question is about a set of principles. If we come up with a set of principles that we think would work and help inform the use of the defence of provocation, should those principles be applied to other defences and partial defences?

Mr CLEARY: I think you have got to sit in a room with the red letter men and women with their pencils and their legal documents, but we do not let them drive the argument anymore. I think you drive the argument. And let's face it, Trevor—and I don't know what was going on over here—but, Trevor, parliaments make laws. You have no problem making laws. You bring in the lawyers to assist you in the making of the law. You start from a proper concept, a concept around justice, or about the free market, or about rights in other Territories, and then you bring the lawyers in to do the work for you. I say we must get the principles right. What we got wrong in Victoria is that they did not embed the principles in the new legislation; and there is a lesson for us and a precedent that we can build on. So I think, David, if you are saying proceed cautiously, I think that is fine. But I respectfully say you do not have to go back to a Law Reform Commission report or a Law Reform Commission; we can move on and say: here are some fundamental principles. Aren't constitutions built around fundamental principles anyway? I know constitutions get compromised; everything gets comprised to a degree. But I think we should embed some principles as a starting point for a change of the law.

CHAIR: Mr McDonald has a question.

Mr DAVID SHOEBRIDGE: A bill of rights perhaps.

The Hon. SCOT MacDONALD: I am sorry to interrupt the thing between Trevor and Dave. I am not sure what went on there.

Mr CLEARY: I have just worked it out: its Greens and Nationals.

The Hon. HELEN WESTWOOD: No; it is duelling lawyers, and who can see highest up the legal wall. It has been going on all through the inquiry.

Mr CLEARY: Oh, so we have got a couple of them in the room? How silly of me. I was thinking we were back in the old Parliament of plumbers and all the rest of it.

The Hon. SCOT MacDONALD: Mr Cleary, thank you for coming up from Victoria. I hear the frustration in your voice. You obviously have a very personal experience. You have a big distrust of juries and some distrust of judges—although sometimes you say the judges are the people we will rely on. So how do we get beyond this misogynist problem that we have and you keep pointing to? Can I say that we are hopeful we would not now have the experiences that we had 15, 20 or 25 years ago, that we are evolving, but also acknowledging the standards and values in a jury may always be a little bit behind what a good person out there would think. How can you enshrine that in legislation? We have a lag between what we all think is the right thing and our thinking that the jury is a little bit behind. Do you see where I am coming from?

Mr CLEARY: Yes, I do. I will answer your question, Scot. I am not expressing frustration. I am expressing a strong view about what I see in the law. I am critiquing the law. I am not sitting here like a victim. I lost a sister, but today I am not a victim. Well, I can be, but that is for me to contemplate privately. I am talking to you as a considered person: I have a degree in political science, I have written three books, I have been in the Federal Parliament, and I have played football. So I have done everything. Let us be clear about this: I am putting a considered view about the situation.

Keep this in mind. We are a lot further ahead than we were 25 years ago when my sister was murdered. Here we are talking about the matter in a way that we did not talk about it 25 years ago. The Victorian Government at least said, "We've got to abolish the law." The starting point was right: that there was a problem at law. This Parliament has now moved on and is re-investigating the law. We should be comfortable and happy that we are doing this. There will be challenges ahead for us. Fine—that is what a civilised society grapples with, especially at law. Look at tax law. You build tax law, and the smart-arse lawyers start finding a way to get around the tax law. So it is not smooth sailing here. But I tell you what: we are in a far better place than we were 25 years ago, and I am glad to see it. I am glad that we are actually grappling with what we should do.

Again, am I totally frustrated with juries? No, juries sometimes get it right. But I do say respectfully to juries that I can understand how they fail when they get those narratives in the courtroom that allow defence lawyers to say the things they do. Do members think that Philip Dunn in *R v Ramage* should be able to ask whether a woman had a tampon in situ? Do we believe that? Cut it out. Have it discussed without a jury. Sorry, Mr Dunn, that will not be allowed as evidence. Start working on serious questions about a woman's rights. What did she say? She said, "I might leave you." Are we going to use that, Mr Defence Counsel, as an argument for the provocation murder? Rule it out and say that there are things that precede that human right. We can do these things. We have a list of laws that affirm your rights; there are anti-harassment laws and anti-discrimination laws. Why can we not have anti-killing laws?

Mr DAVID SHOEBRIDGE: Where someone is exercising their lawful rights, you cannot rely on that for provocation?

Mr CLEARY: That is right. Again, Felicity Stewart and Arie Freiberg's paper, which I cite, states that if you are exercising your lawful equality rights that cannot be used against you. How could a parliament not condemn that—a parliament made of up of a variety of politicians? Does not the average Liberal believe in a person's human rights? Is that not the foundation of liberalism? Yet, when it comes to a woman killed in the family home by her killer husband, she has no rights. She cannot say, "I am going to leave you"; she cannot say, "I have left you." She cannot be Vicki Cleary parking her car at the kindergarten at 8.10 a.m. on 26 August without somehow bringing on a provocation defence? Forget the spurious legal arguments. It is so obvious that something is wrong, and that something is that we have denied women their human rights in our courtrooms. Rectify it. Get the smart lawyers in and drive them down the path to find a way to do that.

CHAIR: Thank you very much for appearing before the Committee and for providing your evidence. You are not frustrated.

Mr CLEARY: Not at all.

CHAIR: You simply have strong convictions.

Mr CLEARY: It is very nice to have caught up with you, Fred.

(The witness withdrew)

THOMAS CROFTS, Associate Professor, Sydney Law School, University of Sydney, affirmed and examined:

ARLIE LOUGHNAN, Associate Dean and Senior Lecturer, Sydney Law School University of Sydney, sworn and examined:

CHAIR: Thank you for appearing before this inquiry. If you cannot answer a question you can take it on notice and if you wish to give evidence in camera the Committee will consider your request. Do you wish to make an opening statement?

Dr LOUGHNAN: Thank you for the opportunity. As the Committee would be aware from our submission, we are taking an unusual line in that we are advocating retention of the defence, albeit in an amended form. We understand, at least in the context of the academic debate, that that is relatively unusual. However, we see a role for provocation, albeit in an amended form.

CHAIR: What are the proposed amendments?

Dr LOUGHNAN: There is a summary of the proposed amendments on the first page of our submission. However, we are happy to take the Committee through them. We are motivated by consideration of the defence of provocation in other jurisdictions, and we have studied them as closely as we can to work out what is good about it and what is not so good. After that study we formulated an amended defence where we see the value of provocation retained but reformed in the form of express exclusions about what can constitute a trigger instance for provocation in order to exclude what we have described as the normatively indefensible or undesirable cases from the remit of provocation as it operates.

Mr DAVID SHOEBRIDGE: Your drafting comes from that exclusionary model where you allow the existing defence and then exclude some of the more offensive conduct—that is, response to infidelity, words alone and the like. The Hon. David Clarke and others have repeatedly raised the prospect of limiting what can amount to provocative conduct. The conduct must involve some criminal violence or some significant element of family violence as broadly understood. That would probably have the same effect as ruling out as suggested in your model.

The Hon. DAVID CLARKE: These are very narrow exclusions. What about if I feel aggrieved because I think someone has cheated me in business?

Dr CROFTS: We would not necessarily need that.

The Hon. DAVID CLARKE: There are things done that constitute infidelity, but it does not come into that area. There are non-violent sexual advances.

Dr CROFTS: Would an ordinary person respond in that way to those things? They do not necessarily need cutting out straightaway because an ordinary person would not respond in that way.

The Hon. DAVID CLARKE: If I have just lost $2 million—

The Hon. ADAM SEARLE: Or preselection.

The Hon. DAVID CLARKE: But I have never lost a preselection.

Dr CROFTS: There is a model for that approach.

The Hon. DAVID CLARKE: There is a lot that perhaps should be excluded from being able to be relied upon for the defence, but it is not included in your recommendations. I am raising that for your comment.

CHAIR: These are some of the points you are making, but there are other considerations.

Dr CROFTS: Yes, there are.

The Hon. DAVID CLARKE: Are they in this document?

Dr CROFTS: There is a model for that approach. It exists in Queensland and Western Australia as a full defence to an assault or an assault-based offence. There is some discussion because the provisions expressly require a wrongful act or insult and say that a lawful act cannot amount to provocation in relation to a provocation to an assault. There is a lot of discussion about what that actually means and the courts have read that down to say that "lawful" means positively deemed lawful. For example, a person acting in self-defence, because that is deemed lawful, cannot be provocative. There is a model for doing that, but it would virtually extinguish provocation if we were to say that it could only be in response to a criminal act. There is some debate about whether that could be widened to say it is wrong in civil law, for example, a tort. However, that would be problematic.

Mr DAVID SHOEBRIDGE: What about a pattern of conduct that included elements of that that would allow most battered wife cases to be run as provocation? I am referring to a pattern of conduct which included that. The final straw that breaks the camel's back might be an insult, but it is in the context of domestic violence.

Dr CROFTS: That is why we have the overriding provision, which is the same as the provision in the Queensland model, including the words "except in extreme and unusual circumstances". That could be modified to refer to a pattern of behaviour. We added that provision to indicate that there could be situations involving words in combination with something else. Words on their own generally should not be allowed to be provocative, but there may be situations where words combined with something else could be. That was a concern in Queensland when the reforms were introduced; that is, you could not always foresee the situations in which they could be combined with other factors.

CHAIR: Do you think the Committee should look at the Queensland model?

Dr CROFTS: It is not a bad starting point.

The Hon. TREVOR KHAN: Not the English model?

Dr LOUGHNAN: Both. We have hedged our bets in the submission because we wanted the Committee to have some of the other alternatives before it. We put forward both and did not nail our colours to the mast with regard to which would be preferable.

The Hon. HELEN WESTWOOD: Reference has been made to the ending of a relationship. We talk about words alone. A women leaving is an action and perhaps on the way out she says, "I am leaving you", and then smashes his favourite piece of art. That is not words alone. I can imagine some very clever defence lawyer then using that.

Dr CROFTS: We said words or acts. The Queensland model provides that words or acts which indicate an ending or a changing of the relationship or which are taken to indicate an end or change cannot be used as a basis for provocation. The Queensland model clearly excludes that. Two things have happened with the Queensland model. They have narrowed the cases in which men can claim provocation in traditional situations and widened the situations in which women can argue provocation.

Mr DAVID SHOEBRIDGE: But the words might simply be spoken in the context of an ending of a relationship. The wife might just say "Fuck you"—pardon the language—to her husband in the course of ending a relationship. They may not necessarily be about the ending of the relationship.

Dr CROFTS: You could sort that out by referring to the context.

The Hon. ADAM SEARLE: This is the potential difficulty of having exclusions. You might have a list of things but another case might throw up another formulation or aspect that has not previously occurred. Would it not be better to define what can constitute provocation rather than have a list of exclusions?

Dr LOUGHNAN: We were motivated to follow the exclusions line because we felt that given the way in which provocation works in relation to an ordinary person what would be important in the development of the law would be the exclusions of cases that are normatively not defensible; that is, the exclusion of cases that should not be able to give rise to provocation as a trigger instance. The task of enumerating what it would be that would be grounds for trigger incidents would be much harder. It would also be one that would potentially suffer from the same limitation; that is, it would be impossible to imagine all fact scenarios that could be raised.

Truth is stranger than fiction. Unfortunately, any defence reformulated along those lines would possibly suffer from that same problem.

The Hon. ADAM SEARLE: What about the ordinary person test? We have heard some evidence that it is quite a complex defence and that juries might be confused or uncertain about the ordinary person. Is it an ordinary person in western society? Should it be the ordinary person reflecting their particular background? What if there is an ethnically diverse jury? Who is the ordinary person? Is it the same ordinary person for all of them or is it a series of different ordinary persons? Justice Wood, the chair of the Law Reform Commission, suggested that perhaps it should be removed and replaced with something different. Do you have any views about that?

Dr LOUGHNAN: We have noted that the formulation of "ordinary person" has suffered from problems. That is, it has been difficult in the formulation of provocation that we have here and in the jurisdictions of England and Wales to limit and circumscribe what it is that can be the basis for relevant characteristics that would go to the ordinary person for the purposes of the test. That has given rise to difficulties in directions to juries and concerns about whether juries understand the difference between the different limbs of the test. Our feeling was that because we are looking to excuse—I think it is acceptable to say that—rather than to justify the kind of behaviour that is use of lethal violence in circumstance of provocation, circumscribing the ordinary person might limit the ways in which that sort of concession to human frailty may work.

If we are partially, and it is only partially, excusing defendants who raise provocation where a jury has been satisfied to the requisite standard that that is appropriate, we are doing something that is a reflection of social norms, as uncomfortable as that sometimes may well be. So the task of retaining the ordinary person and using exclusion so that the defence is more circumscribed than it is at the moment we see as a valid consideration for the committee to have before it in order to allow the defence to be retained but not to work in a way that is, I think we could all acknowledge, fairly egregious in certain circumstances.

The Hon. ADAM SEARLE: The issue of onus has also been raised. Obviously the prosecution bears the onus of proving its case beyond reasonable doubt, but, as I understand, even where provocation is raised as a partial defence, it is still the role of the prosecution to disprove or to exclude the possibility of provocation. Of course, just logically that may be not just hard but impossible to do, particularly where all of the facts and circumstances said to constitute the provocation are known only to the defendant and perhaps a deceased person. There is just no conceivable way the prosecution could displace that onus, and that may explain some of the strange outcomes that seem to be discordant or seem to be causing concern. Do you think the onus should shift to the defendant to prove on the balance of probabilities that they were provoked?

Dr LOUGHNAN: We shied away from dealing with this issue in our submission.

The Hon. ADAM SEARLE: I noticed that, which is why I am asking the question.

Dr LOUGHNAN: I think the onus of proof issue has caused significant problems and I think that that could well explain some of the slightly more—

The Hon. ADAM SEARLE: Particularly if the defendant chooses not to give evidence, if they rely on their recorded interview. They do not give evidence, their evidence is not tested and the only other person who could lead rebuttal evidence is deceased—it is just not possible for the prosecution to do that.

Dr LOUGHNAN: I think that the consideration for us in our submission was that reversing the onus is a step that should be taken very carefully and that is because, unfortunately, there is a tendency to do that in recent legislation and it is not without its consequences. If the committee was minded to recommend something along those lines then the defence of provocation would be looking a little bit more like the defence of substantial impairment and that may well be a decision that the committee takes or a recommendation that you take. I suppose we would suggest—bearing in mind the history of the provocation defence, its origins in the common law of a very long time ago, and if there was a mind to, for example, use the onus to circumscribe the defence or perhaps to make it more difficult to raise the defence—that that be done in a quite considered way about where and when and who gets to rely on provocation, because, of course, if the onus is reversed it is also more difficult for those defendants whom we would say should be able to raise provocation, such as a person who has responded to abuse over a long period of time with a final outlet of violence.

CHAIR: Would you agree that the defence of provocation was justified in the Singh case then? Do you support its use? You are supporting its retention.

Mr DAVID SHOEBRIDGE: Their model would exclude it.

Dr LOUGHNAN: Yes, in that context. Our model would not have allowed provocation to be left to the jury in that case.

CHAIR: Have you studied some of these cases or have you observed any cases?

Dr LOUGHNAN: We have studied cases, yes—the reported judgements.

The Hon. HELEN WESTWOOD: Can I just ask you again on the issue of onus of proof—that appeals to me being reversed—on the basis that, I will use the Singh case or even Ramage, in the end when the provocation defence is used the deceased is the one, it seems to me, who is on trial; she is being trialled for being guilty or she provoked her own murder. If you accept provocation then it seems that yes we found her guilty of provoking her own murder or causing her own murder, and I know that is a very simplistic layperson's interpretation but it does seem to me that that is what it is. So why should not the onus of proof be reversed in that the accused has to prove that she provoked them?

Dr CROFTS: It would be a similar issue with self-defence as well. We do not talk about this in self-defence as victim-blaming, but in self-defence scenarios often there will only be two people as well and you have got nothing to go on other than they said "that person attacked me". So in a sense it is not just provocation where this could happen, and I think it would set a dangerous precedent if we start reversing the onus on defences. The starting point is, of course, that we are innocent until proven guilty and that is why we have a standard that the prosecution has got to disprove any defence that we raise.

I think we are focused on the situation that we might eliminate a provocation case being raised but also for amending how the provocation test operates. We are sort of dealing with it at both ends. Even though we do not exclude all cases—going back to what you are asking about what exclusions might we provide—it does not automatically mean just because it can go to the jury that it will be accepted that it was a case of provocation. A lot of times these things will be kicked out because we would say that an ordinary person would not have reacted in that way.

Mr DAVID SHOEBRIDGE: In the context of the onus, if the defendant does not give evidence and they are the only person who would know, there can be an inference drawn against them for failure to give evidence. Have you had a look at how it operates in practice?

Dr LOUGHNAN: I do not think we could comment on that. I would add from my own studies that the value of the ordinary person standard—and I think it is important to remember that the justification that is offered, the explanation that is offered for the reverse onus in relation to substantial impairment is that the ingredients of that defence are uniquely within the province of the accused—that is the standard justification, that something like the psychological status of a person, unless they are willing to submit to evaluation by the Crown's experts, is something that would remain opaque to the jury. Provocation which is constructed as a reference to an ordinary person is not the same in that regard; it does have that inbuilt safeguard and we are, through the defence of provocation, constructing this person as an ordinary person in abnormal or not ordinary circumstances.

I think the important thing to remember is that that structure indicates that we are all equally capable of evaluating that person as laypeople sitting on a jury because we are asking ourselves how that person's actions compare with those of the ordinary person. That is meant to be a safeguard in the law in that not ordinary reactions are meant to be excluded.

The Hon. TREVOR KHAN: Could I go to a different issue? I cannot remember the name of the case; it is a recent English case. Is it Clinton? The implications of Clinton in terms of the exclusionary model. Let me take a sort of *R v Green* scenario. We all talk about non-violent sexual advances but my concern is that in so many cases in a strict sense it will not be a non-violent sexual advance, it will be an advance which involves a grope of some sort or another, which is, indeed, a common assault, a violent act, even though it might be of a very small nature. Is there a way of constructing an outcome so that instead of the Clinton exercise where the evidence then goes in the, we will call it, the sort of violent sexual advance, that the only evidence that goes in is

the evidence of the grope as opposed to the grope together with the words or whatever that relate to the sexual advance? I am thinking in terms of the circumstances of the exclusion of evidence in sexual assault cases, for instance, relating to prior sexual history and the like, that it is artificially taken away from the jury so that parts of ERISPs and the like are excluded before the jury gets to see it. Does that make sense?

Dr LOUGHNAN: I would have two responses: one would be that the history of the way which provocation has been dealt with in the England/Wales context is different enough from ours that it is particularly relevant, I think, to the issue of when it gets left to the jury. I think there have been particular problems about the sort of standard of evidence that has been considered sufficient to leave the defence to the jury and judges have felt, so the reports say, unable to withdraw it from the jury, and I think that is a very particular context which, hopefully, is not necessarily the case here.

The second point relates to the issue about the difference between a defence and an offence. In the case of an offence where for our wider policy objectives we see fit to exclude certain kinds of evidence that could be prejudicial in certain ways in relation to the construction of gender and power dynamics in contexts such as sexual assault, it is quite different to where we are interested in providing scope for the defence for a particular individual who has been charged with an offence. I would suggest, in responding to your question now, that there is an important difference there and that we should be quite careful about the same restrictions applying in relation to defences as we might see fit in relation to offences.

The Hon. TREVOR KHAN: Let me put this to you as best as I can understand it: In the Singh case there is a suggestion that in addition to all the other matters, that she said she was going to leave and whatever else, that purportedly I think it is being said that she also said she is going to keep the money in the bank account. So that is not a threat relating to the end of a relationship—

Dr CROFTS: But it is in the context of a domestic relationship.

The Hon. TREVOR KHAN: I understand that—

Dr CROFTS: Which would be excluded under our model.

The Hon. TREVOR KHAN: Is that right?

Dr CROFTS: Yes, anything that is said to end or change the nature of a relationship. I mean it would change the nature of the relationship, would it not, if it was in the context of "I'm leaving you".

Mr DAVID SHOEBRIDGE: What about, "I'm going to take your kids from you and you will never see them again"?

Dr CROFTS: It would be in the context of a domestic relationship.

Mr DAVID SHOEBRIDGE: It would be excluded as well?

Dr CROFTS: Yes.

The Hon. HELEN WESTWOOD: We have heard quite a bit of evidence about the complexity of the defence of provocation as it exists in New South Wales and there is a question whether or not some juries find it too complex and that leads to judgements that seem to be completely out of step with what the community would expect. Do you have a view on that and, secondly, if we amend the provocation defence how do we do it so that it does not make it even more complex and then lead to further confusion?

Dr LOUGHNAN: I think in relation to juries we would have one point to say right up-front and very clearly, which is that we think that the controversy that attaches to a number of these cases, the high-profile incidences and uses of provocation, are a reason to keep provocation in the hands of the jury. We think that there is a significant legitimacy issue in relation to these kinds of defences and that lay evaluation plays a very important role in our system legitimating potentially controversial partial defences such as provocation or, indeed, other defences.

The second point we would say is that there are two approaches to minimising the complexity of provocation for the purposes of the jury: one is to exclude matters from their purview at all so that they never

hear about the matters, which I think perhaps was what was being suggested earlier; and the other is to simplify directions given to juries and the formulation of the defence in order to ensure that it is possible to give a simple or straightforward direction to a jury on the point. We would say that our model would not necessarily exclude the latter, even though our model is based on the former, which is that leaving certain matters with the jury to the exclusion of things that we would say are relatively not defensible uses of provocation but equally could go along with a much more straightforward kind of formulation of the defence would ensure that references to the ordinary person et cetera are comprehensible to a jury in a way that is meaningful.

Dr CROFTS: I also just wanted to follow up on the point that often the arguments are that if we get rid of provocation it will be relevant sentencing. Following on this point that it should be kept with the jury, Jenny Morgan argued that giving these matters to the sentencing judge rather than the jury does not necessarily mean that we are ending the misogyny that is going on in these trials, because we will not see that anymore. If it is a part of the sentencing process it is not as transparent as saying this was provocation or this was not provocation. So I think it is a really important point that if we do think provocation should be relevant to sentencing then I think it should be relevant right up-front to whether a person gets convicted of murder or manslaughter.

CHAIR: During our hearings we have had evidence from the Director of Public Prosecutions who took a very strong stand on the abolition of the defence of provocation. You do not know all the detail but if you could take on notice his submission and make a response, because he gives all the arguments as to why it should be abolished. If you could respond to his arguments that could help us.

Dr CROFTS: He argued for abolition?

CHAIR: He is arguing for the abolition very strongly and giving a whole lot of reasons for it to be abolished.

Dr CROFTS: He is wrong. That is the answer.

Mr DAVID SHOEBRIDGE: If we were to adopt an exclusionary model and exclude certain conduct from being raised as provocation as a partial defence, should we also exclude it from being raised in provocation in sentencing? Otherwise will we just see it moved downstream?

Dr CROFTS: I think that is the danger. In Victoria we have seen provocation shift to other defences and there is a danger they will shift substantial impairment. I think these claims, the danger is they will be less transparent. Juries might feel compassion and it might show in different ways. Perhaps they will come back, and instead of a murder conviction saying why they did not form the intention to kill. We do not know what juries will do.

The Hon. TREVOR KHAN: That points to the lack of transparency in the process now. We do not know half the time how juries come to a decision.

Dr CROFTS: No.

Mr DAVID SHOEBRIDGE: Should we also consider dealing with it in sentencing or is it enough to say that if it has been excluded from the partial defence then it is less offensive for these matters to be considered within the context of a sentence of murder?

Dr LOUGHNAN: I think there is a big difference between allowing provocation to be the basis of the defence and therefore to go to conviction and culpability as opposed to being one ingredient in a really complex facts scenario that the judge is assessing at the point of sentencing. Of course we must remember, as per section 21A of the Crimes (Sentencing Procedure) Act, provocation is relevant as a mitigating factor beyond murder.

Dr CROFTS: Also if we think it is relevant I believe it should be reflected in the label of the offence. Labels are incredibly important in criminal law. Criminal law is stigmatising. If we think a person deserves some sort of reduced sentence because they are less culpable, that should be reflected in what they are called.

The Hon. ADAM SEARLE: And the converse is true also.

Dr CROFTS: Yes. The main attack on provocation tends to come from cases of domestic violence but equally we should not forget that there may be cases where a person has been abused emotionally. Self-defence will not be available, the only defence they might have is provocation. Again, if we think they deserve a reduced stigma for what they did, that should be reflected in the label, not just in the sentence that they get.

The Hon. HELEN WESTWOOD: If I can again go back to the issue of juries and the complexity. This morning Justice Wood talked about two areas. One, the ordinary person and the other was the loss of self-control and forming an intent. Do you have a view about those two elements of law?

Dr CROFTS: The loss of self-control is problematic in that it is not actually a complete loss of self-control. We are talking automatism. The argument is more that they are unable to control themselves.

Dr LOUGHNAN: To take your second point first, in relation to loss of self-control, it would have to be acknowledged that this is a relatively recent development—if we speak in historical terms—in the law of provocation. It suffers from a little bit of lack of clarity around what might be meant. Nonetheless, it has been subject to quite a number of high-level judicial treatments now and we can be fairly confident that there is a ground to be struck by what we are calling loss of self-control. It probably would be possible to say, and we say this in our submission, that that now represents the core of the defence of provocation. It has moved away from being justifactory as it was in its origins and is now excusatory on the basis that the defendant was in this state at the relevant time, the time of the offence.

CHAIR: Another way of saying diminished responsibility?

Dr LOUGHNAN: It is certainly excusatory. I think to the extent that we have moved away from saying that anger should be privileged in some way as an emotional response to a threat or a perceived provocation, we would certainly subscribe to the fact that we think provocation is now excusatory. To take your point about the ordinary person, I think our view would be the relevance of this component of the test is essential in that it asks the jury members to think about ordinary commonsensical standards of self-control and that element, albeit perhaps imperfectly expressed in an idea of ordinariness, is both partly descriptive and partly normative. It is describing what should be not uncommon as a state of being. Equally it is describing what we value, which is that we value a kind of rationality and calmness associated with responding to perceived provocation. So, that ordinary person standard, properly understood, serves quite an important role in the defence. It is what legitimates the comparison of this person who appears before the court arguing for clemency and of the ordinary person who is not present in the court and who has not had to raise provocation in response to a perceived slight.

Mr DAVID SHOEBRIDGE: Justice Wood was proposing a different test. Bowdlerising what he said, it was that the defence can lie where the provocation of the accused, taking into account all of his or her characteristics and circumstances was such as to warrant the liability or the culpability of the accused being reduced from murder to manslaughter.

Dr CROFTS: That is substantial impairment. We talked about this today.

Mr DAVID SHOEBRIDGE: What do you think of that?

Dr LOUGHNAN: We quite like it. Even though it was not what we proposed.

Dr CROFTS: Even though it was not what we proposed, while we were teaching substantial impairment of mind we came to the realisation that that is an overriding moral judgement as to whether the person does deserve this. The way substantial impairment of mind operates, even if you satisfy all the criteria, an overriding judgement is made. You might have had substantial impairment of mind but you do not deserve a reduction in your culpability.

Mr DAVID SHOEBRIDGE: But that raises a kind of moral question, a value question to the jury, does it not?

Dr CROFTS: Yes.

CHAIR: Justice Wood said there had been a change. He accepted there had been a change from when it was recommended by the Law Reform Commission. He said he was not clear as to where it was going.

Dr LOUGHNAN: Right. We noticed the reference to that formulation in the Law Reform Commission's discussion of this earlier. We note in relation to substantial impairment, it has a particular value which is that it says this person may have produced psychiatric or psychological evidence to support their specificity in this circumstance but regardless of that kind of clinical picture there is an evaluative assessment going on and that is crucial. That is about the deserved nature of the partial defence. It is important to remember that that evaluation, made overt in substantial impairment as it exists at the moment, is crucial to the legitimacy of the successful use of the defence.

Mr DAVID SHOEBRIDGE: That sort of tortuous view about a partial loss of control and a forming of intention is allowing the jury to judge what happened.

Dr CROFTS: Yes.

Dr LOUGHNAN: Sure.

(The witnesses withdrew)

(The Committee adjourned at 5.22 p.m.)