REPORT OF PROCEEDINGS BEFORE

SELECT COMMITTEE ON THE PARTIAL DEFENCE OF PROVOCATION

INQUIRY INTO PARTIAL DEFENCE OF PROVOCATION

CORRECTED PROOF

At Sydney on Tuesday 28 August 2012

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The Committee met at 9.00 a.m.

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PRESENT

Reverend the Hon. F. J. 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 you to the first public hearing of the inquiry into the partial defence of provocation. This inquiry was established in June 2012 to inquire into the partial defence of provocation, which operates to reduce the charge of murder to a conviction for manslaughter. The Committee's terms of reference also require it to consider the adequacy of the defence of self-defence for victims of prolonged domestic and sexual violence as well as any other relevant matters.

Today we will hear from representatives from a range of legal services, advocacy groups and academics as well as from the Department of Family and Community Services and the Public Defender's Office. There will be two further days of public hearings, to be held tomorrow and on Friday 21 September, when the Committee will hear evidence from other 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. As chairman, I thank all our witnesses who are attending today.

The Committee has previously resolved to authorise the media to broadcast sound and video excerpts of its public proceedings. Copies of guidelines covering 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 the Committee, the media must take responsibility for what they publish and what interpretation is placed on anything said before the Committee.

Witnesses are advised that if there are any questions they are not able to answer today that they would like to be able to answer if they had more time or certain documents to hand, they are able to take the questions on notice and provide us with answers 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 if they should consider at any stage that their response to a particular question should be heard in private by the Committee, please state their reasons and the Committee will consider the request. I remind witnesses that the 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 the general issues of concern. I ask everyone to turn off their mobile phones for the duration of the hearing.

BETTY GREEN, Convenor, New South Wales Domestic Violence Coalition, sworn and examined:

JULIE STEWART, Secretary, New South Wales Domestic Violence Coalition, and

JANE WANGMANN, Member, New South Wales Domestic Violence Coalition, affirmed and examined:

CHAIR: Would any of you wish to make an opening statement to the Committee?

Ms GREEN: Yes, I would. In May 2006 the New South Wales Domestic Violence Coalition was founded by me and Joy Goodsell in response to the number of domestic homicides in the beginning of that year. The Domestic Violence Coalition has been active in advocating for systemic reform, in particular the campaign to establish a domestic violence and death review. The New South Wales Domestic Violence Coalition is unique in that over time its membership is broad, reflecting a range of services and agencies, domestic violence committees, like-minded individuals and the government and non-government sector, researchers, academics and, most importantly, women survivors of domestic violence. It operates largely from minimal membership fees and donations and receives funding of $1,000 made available to domestic violence committees in New South Wales. It is run by volunteers, there is no paid worker, and largely operates out of a home office.

We sincerely thank the select committee for the opportunity to provide a submission to the inquiry into the partial defence of provocation. For the purposes of our submission to the hearing today we have chosen to focus exclusively on the issues arising from criminal proceedings as a result of killings that occur on a background of domestic violence. We believe that killings on such a background of domestic violence are largely misunderstood, particularly when applying the partial defence of provocation. The research is clear regarding the reality of intimate partner homicide; that is, it is predominantly men who kill women and that those killings involving intimate partners have distinctly different dynamics from other homicides. The reasons men kill include revenge, jealousy and honour, and the killing is the culmination of an established history of violence escalating in frequency and severity.

These facts challenge the popular myths and misunderstandings the media and community may hold on making sense of intimate partner killings. Expressions such as "mind snap", "loss of control" and that the killing was "out of the blue" or "without warning" do not correlate with the reality of intimate partner homicides. We affirm our belief that the law pertaining to the partial defence of provocation is complex and we have approached the subject with some circumspection, primarily due to our concerns that proposed changes should not create unintended consequences to further disadvantage women as victims of killings or as defendants.

We believe New South Wales has a unique opportunity to put in place progressive reform to the law of homicide that better takes account of the circumstances in which women who have experienced prolonged intimate partner violence kill their male partner and to effectively counter the narratives that men have successfully raised when they kill women who are merely asserting their equality rights to separate from their partner and/or commence a new sexual relationship.

CHAIR: What is your policy position in regard to the partial defence of provocation: to retain it, scrap it or amend it?

Ms GREEN: Our position is it is a complex area of law. We believe that prior to abolition there may be a number of things that the Committee might consider. We particularly wanted to look at what the Victorian Government has done in terms of a social framework which requires the court to consider issues when a killing occurs on a background of domestic violence. What that does is that evidence of the history of the relationship and the violence within the relationship has to include the whole story. Our concern is what happens now is that the complete context of the dynamics of domestic violence is lost and it becomes what the woman did or did not do or did or did not say rather than the act of the killing itself and the context in which it was committed.

CHAIR: So you are favouring the Victorian model?

Dr WANGMANN: At this stage we are saying that we think provocation should be amended in a number of ways. One is that it should no longer be allowed to be relied on merely on the basis that the relationship has changed, whether that is about sexual infidelity or alleged sexual infidelity or the ending of a relationship. We have concerns that men seem to be able to continue to use provocation on that basis. It is simply about women's rights to equality, to change the relationship, to end the relationship and to do those

things. We also submit the provocation should no longer be available when there is a non-violent sexual advance. Whilst ultimately we have wider concerns about provocation, looking at the experience in Victoria and in the United Kingdom, we think it is not possible to simply abolish it because all we see are the same narratives being translated to another defence or another point in the process. It might shift to sentencing or it might shift to defensive homicide. This is much more an issue about legal culture than it is about simply amending the provisions.

The Hon. TREVOR KHAN: The concern with the Victorian experience, is it not, is that it introduced a new offence of defensive homicide and it seems that has been used by men in some instances in substitution for the provocation partial defence, is that right?

Dr WANGMANN: That is correct.

The Hon. TREVOR KHAN: The problem in Britain is a different problem. Britain went down the avenue you suggest, that is, to carve out or exclude certain forms of behaviour as justifying provocation. It would seem now that the courts have interpreted those sections in a way that allows that behaviour to be reintroduced if there is other provocative behaviour. That is right, is it not?

Dr WANGMANN: Yes. In relation to England one issue is that the amendments are so new that we do not yet know exactly how they will play out, although the most recent case we referred to in our submission indicates that it still continues to take place. My impression of the English amendments is that they are incredibly complex and they are focused on sexual infidelity rather than the Queensland approach, which is about changing the nature of the relationship, which I think is a broader view of the actions that have been deemed as provocative by women. Yes, I think there are two different things. The English approach, which I tend not to favour, has emphasised loss of control unduly in its approach.

The Hon. TREVOR KHAN: Returning to the Victorian instance, what the Victorian Parliament did was different from what the Victorian Law Reform Commission proposed, is it not?

Dr WANGMANN: I would need to take that question on notice. I am not sure of the detail of the exact way in which it took place.

The Hon. TREVOR KHAN: Will you have a look at it? I think you will find the Victorian Law Reform Commission essentially proposed that Parliament introduce a partial defence of excessive self-defence and that is not the approach that the Victorian Parliament took. Do I also take it that with the problems you perceive that you would agree that the Victorian Law Reform Commission identified the major problems with the partial defence of provocation?

Dr WANGMANN: Yes, I would agree with that. To further explain, our concerns are twofold. One is around circumstances where women are killed with a history of domestic violence. The other is circumstances where women themselves kill when there is a history of domestic violence. This is what makes it complex. Any change that we make might address one of those issues but disadvantage women in another respect. That is why we have taken this caution with provocation. There needs to be much more work and focus on self-defence for women. We believe there are more women who would fit within those circumstances than are currently necessarily being argued.

The Hon. TREVOR KHAN: Have you had the opportunity of looking at the submissions made by, for instance, Associate Professor Coss?

Dr WANGMANN: I am sorry, I had a problem with my computer yesterday afternoon. I attempted to download the submissions but they were not coming up so I have not had a chance to read the submissions in detail. I am happy to read it and provide you with some comments. I have read many of Graeme Coss's articles previously.

The Hon. TREVOR KHAN: We have all had a large amount of reading in recent times. Would you look at his proposals with regard to both what you can call the social framework evidence and with regard to amendments to self-defence, and more particularly excessive self-defence?

The Hon. DAVID CLARKE: Is there a specific model of the law in existence that you support or, if not, is there one that is nearest to what you are seeking?

Dr WANGMANN: I would suggest that there is not as yet a specific model and I think the main reason why I would suggest that is it is much more than simply legislative change. We can change the provisions—and I think you have seen great efforts, particularly in Victoria, to have progressive reform. But whilst legal culture accepts men's stories about provocative behaviour in the way that it does, then the amendments are going to continue not to deliver their promise.

The Hon. DAVID CLARKE: In specific terms, what do you suggest be done? You are talking in general terms. Can we try to be specific on this?

Dr WANGMANN: We submit that the social framework evidence is critical to changing the way in which we understand self-defence and any of the other partial defences that might be in operation, whether they are excessive self-defence or defensive homicide and so on. Without that social framework evidence, we do not understand either the position of the victim or the defendant, depending on what circumstance you are talking about. We have all given evidence to various domestic violence inquiries and we do seem to come back to the critical importance of legal education and community education. It needs to start in law schools about what we think is acceptable behaviour by men and women within the situation of domestic violence.

We need to have further professional education for defence lawyers—defence lawyers need to be well equipped to defend women on self-defence and not encourage them to accept a plea of manslaughter—and the prosecution needs to be equipped to counter arguments that defence solicitors might raise as provocative behaviour by men. In turn, we need to also ensure that there is adequate community education for jury members so that they are not persuaded that some of their stories about provocation are acceptable. The message that our criminal law sends about what is acceptable behaviour and what is not is incredibly important. It is this level of education we need, and probably the hardest thing to do is to get this education to be effective. We have talked about it for a number of years now, but we need to make a more concerted effort.

The Hon. DAVID CLARKE: We are talking about something specific and you are suggesting a response which is very general about education and so forth. Would you agree that that is your approach?

Dr WANGMANN: I think if we look at the experience in Victoria, where we have seen the arguments around provocation move from provocation to defensive homicide, it tells us that it is more than simply legislative change.

The Hon. HELEN WESTWOOD: Thank you for your submission, which I found very useful for our purposes. You referred in your submission and in your opening statement to the different circumstances, which you described as distinctly different, when men and women commit murder. Could you expand on that? I would also be interested if you could relate that to the social framework you have been talking about.

Ms GREEN: I think it goes back to the dynamics within an abusive relationship where we accept, after a great body of evidence, that the behaviour is both deliberate and intentional in terms of gaining control over another person. By its very operation of using tactics that maintain control, to then leap to a point where we are saying this person has lost control to kill just does not gel, it does not come together. Dobash and Dobash explain where we say that these acts are uncharacteristic.

In their research in speaking to men who have killed their intimate partner, the conclusion they came to was that these acts were actually characteristic of men who had used violence and continued to use violence in the relationship until the killing. That is why they are not out of the blue and they are not a loss of control. It is about revenge, it is about anger, it is about rage, and in some respects it makes the community and the rest of us feel comfortable to think that such brutal acts could be out of the blue when in fact they are not. It is very uncomfortable for us to even contemplate that somebody would commit such a brutal act with intention.

The Hon. HELEN WESTWOOD: There have been some recent cases where the general public, and certainly anyone I have spoken to, have been absolutely horrified that this murder is now treated as manslaughter and the result is that the person is jailed for six years—for really violent, brutal crimes. There is a history of domestic violence, yet in that case the jury found that the woman had provoked. I have read the judgement and, although I was not present during the court case and I have not read the transcripts, I am at a loss to understand how a jury could reach that decision. In the most recent case, I have yet to find anyone who thinks that that was a just outcome for the victim. There seems to be a real disparity between what the general

public thinks and the jury, who are supposed to be ordinary people, who have come to a decision that is really different from what the rest of us think. Do you have any explanation for that?

Ms GREEN: I have not read the transcripts, so I do not know if the full story of domestic violence was ever brought into the evidence there. I guess that is what we are saying with the social framework, that in a way it would make sure that the story of domestic violence was told, that the people in court and the jury would be, in a way, standing in her shoes. They would hear about the cumulative effect, including the psychological effects of violence on a person. They would hear about the social, cultural and economic factors that impact upon the person, and the general nature and dynamics of the relationship affected by domestic violence.

That would include the possible consequences of separation, and we know that there is a very significant body of research that continues to tell us that separation, impending separation, perceived separation, the period after separation, is incredibly dangerous for women. They are more likely to be killed at that time. We should not be then surprised when the argument is put forward as a defence of provocation that, "She said she was about to leave me". As a reasonable person, and I guess with the information and knowledge that I have, to me that is not a viable or relevant justification or excuse as to why that woman has been killed. Plus the psychological effects of violence. All of this information would have to come into court.

At the moment, from what I understand and as Dr Wangmann has said, how the cases are put forward and run, domestic violence may be completely invisible, so the victim's experience is invisible. It becomes her behaviour, what she did and what she said. I mentioned in our submission the research that Drs Dobash and Dobash did in speaking to men who had killed their partner, that invariably their story started with, "I only", or "If she had not". It becomes the focus of what the victim did or did not do, so the act itself and the responsibility for that act in terms of sitting with the perpetrator do not eventuate. As a best practice model, which we have used for over 30 years, the safety of women and victim is paramount and the perpetrators of violence are held to account. With the particular model that we have at the moment in how cases are run, the perpetrators are not being held to account.

The Hon. ADAM SEARLE: In regard to the social framework provisions in Victoria, how do you understand that they have worked in practice? Have they facilitated that sort of social history of domestic violence getting before a jury?

Ms GREEN: My understanding, and we spoke to the women in Victoria who were involved in the campaign there, is that the legislation did not just come in on its own. There was a comprehensive education program and package that targeted those particular areas that Dr Wangmann has spoken about before with the prosecution, the defences and judicial officers, so that everybody was very clear about what domestic violence is, how it works and how it operates within the context of a violent relationship. So it was done together. I guess what we are saying basically in our submission is rather than a surgical strike and just tinkering at the edges of the law, to actually look at it from a holistic point of view, what could be done for significant and lasting change, challenging the narratives of men who kill their intimate partners—and it is intimate partners where our focus is, that that is where we need to start.

Mr DAVID SHOEBRIDGE: The really difficult thing for me as I read through the papers is balancing those two points you talk about, being affronted by the way men use the defence of provocation and ensuring that women have a fair defence to run. One of the suggested ways through that is looking at classifying the conduct which can be relied upon for provocation and saying that the only conduct you can rely upon is unlawful or criminal conduct. Therefore, if a woman has been the subject of repeated assaults, she would be able to rely upon that because the provocative conduct was unlawful, whereas if the man is affronted by finding his partner in a relationship with another man, that is not unlawful and would not amount to provocation. I know that probably falls within the tinkering area, but in terms of advancing the law of provocation what do you think of that as a starting model?

Dr WANGMANN: I would need to consider it further. We are recommending that there are some changes at this stage.

The Hon. TREVOR KHAN: Your recommendation 7?

Dr WANGMANN: Yes.

The Hon. TREVOR KHAN: His is a broader proposal than your recommendation 7.

Dr WANGMANN: Yes, and I would need to think about that more. When we talk about a holistic approach and not just tinkering at the edges it is because we think that homicide needs to be looked at in its entirety, from charging through to sentencing, and to just slice off provocation means that thing. One of the attractive features about the English model, although I do acknowledge the comments about its complexity, is that it does specifically talk about a history of violence. The difficulty in just talking about unlawful conduct and criminal offences is that some of the behaviour that women encounter does not necessarily fit within those categories. They are domestic violence, or they might have taken place a long time ago, but there is something about his current behaviour that indicates that there is about to be something serious that happens.

Mr DAVID SHOEBRIDGE: Or the concern of criminal violence happening to you?

Dr WANGMANN: Yes, you need to be very careful about how you would word that, that it does not limit it too directly.

Mr DAVID SHOEBRIDGE: Another part of your concern is that if we do tighten up on the law of provocation those kinds of excuses for male violence will find an outlet in other areas, in self-defence or excessive self-defence or some other creative thing. What about a general set of principles that applied to all intimate relationship homicides that made it very clear that violence against women was not to be sanctioned in any way in the law and gave instructions to the courts about how to deal with violence towards women, as a general set of principles that applied to all defences and partial defences?

The Hon. TREVOR KHAN: I think the victim in *Crown v Green* would be a bit offended by that proposition that you put there.

Mr DAVID SHOEBRIDGE: But I was not asking the Hon. Trevor Khan.

CHAIR: Please allow the member to follow his own line of questioning.

Mr DAVID SHOEBRIDGE: So a general set of principles would apply.

Ms STEWART: But is that not what the social framework would do?

Mr DAVID SHOEBRIDGE: That is how you view the social framework, applying to all homicides involving intimate relationships?

Ms STEWART: Yes.

Dr WANGMANN: You could also investigate further and maybe ask some people in Queensland about the way in which their provision operates, where they limit the extent to which you can rely on things when it is a homicide that operates between two intimate partners. They have attempted to confine that. They are not particularly talking about women and so on but saying that if the homicide takes place within this type of relationship then we need to limit things.

Ms STEWART: I think the other thing is that in Queensland they have reversed the onus of proof so that the onus is not on the Crown to disprove that the behaviour of the victim was provocative; the onus of proof is on the defendant to show that the behaviour of the victim was provocative.

Mr DAVID SHOEBRIDGE: That puts an onus on women having to run the defence as well.

Ms STEWART: But they are dead, so—

Mr DAVID SHOEBRIDGE: No, but if they want to raise the defence.

Ms STEWART: Yes, if that is the reality.

CHAIR: In your submission your main recommendation for follow-up is to refer to the New South Wales Law Reform Commission and you are very critical—and I support what you are saying—that the law is prescribed by men, based on men's experiences, men's interpretation of the world, men's interests: it is biased

against women. You suggest referring it to a male-led New South Wales Law Reform Commission. Should we have a panel of female lawyers examining it in more detail? How do we get away from the bias?

Mr DAVID SHOEBRIDGE: That is our job.

CHAIR: Hopefully we will solve the problem in our Committee.

Dr WANGMANN: It is not about whether or not you are male or female. It is about whether or not you understand the way in which the law is constructed in a gendered way. So I do not think it necessarily matters whether the Law Reform Commission is headed by a male or not. I think that the Law Reform Commission currently has some wide experience, having had worked on the family violence inquiry so they can build on that experience. The reason why we have suggested it goes to the Law Reform Commission is, first, we think it is wider than simply provocation and, second, change means that we need to be very careful.

There have been substantial changes across a range of jurisdictions and we need some time in order to investigate them further, time in terms of people writing submissions and time in terms of your inquiry. There was one point I wanted to go back to a question from Mr David Shoebridge in relation to having some greater clarification around provocation, around whether or not there has been a criminal act or an illegal act. My concern is that you are talking about self-defence rather than provocation. I think we need to strengthen self-defence as an option for women.

CHAIR: You have made a good point that the social context seems to be closed off in the court. Who closes it off? Is it the failure on the part of the prosecution to bring that out or is the judge discouraging that background material being brought into the case?

Ms GREEN: It can be both. It could be the statement of facts. It could be the brief that has gone. It can happen at a number of areas. That is why we have said that in terms of the holistic review all those pieces need to be looked at. Whether it is the prosecution, the defence, police investigations—it is the whole lot.

Mr DAVID SHOEBRIDGE: The trial focuses on the murder and almost, if you like, in isolation to the whole history that happens before and the trial is structured to look at the murder.

Ms GREEN: It is entirely problematic.

The Hon. ADAM SEARLE: Just on the issue of potential tinkering, I note that in the defence of self-defence one of the things the jury must consider is the issue of reasonableness of the actions in the light of circumstances as perceived by the accused, and that is not a feature of provocation. There is no reasonableness test for the jury to consider. Do you think we should think about whether or not provocation should have a reasonableness element?

CHAIR: We will give you some more questions on notice.

Dr WANGMANN: We can probably take that on notice.

CHAIR: Take the question on notice. I have more questions. We will put those on notice and you can reply to them and if you want to add additional material, like an additional submission, after being here today, we are very happy for you to do that. I had one thought. I know we are focusing on some of the very serious brutal murders of women. We do not want to go so far where that defence could be useful in some female cases where they have murdered a very brutal, violence husband. So if it swings too far one way, could that be a disadvantage to some women?

Ms GREEN: I guess with the scheme of the social framework, in the experience of the defendant, that information would still have to be available to the court as to what that full context was so it would work. I guess we believe that it would work for the defendant, whether that was a male or a female, the story of domestic violence if that is what is being alleged. If the killing is on a background of domestic violence, then the story of domestic violence must be visible and made available to the court.

CHAIR: Sadly our time has expired.

Mr DAVID SHOEBRIDGE: Can I ask one more question?

CHAIR: Put it on notice.

Mr DAVID SHOEBRIDGE: It is about the fact that women find themselves up on murder charges and put a plea to manslaughter, which is part of what your primary concern is, and they do not get to run the self-defence argument because they are so scared of a murder charge. Is part of your recommendation looking at encouraging the prosecution to charge for manslaughter and allow self-defence to be run?

Ms STEWART: Yes, that is one option. But the other is the way defence lawyers handle their clients.

Mr DAVID SHOEBRIDGE: As the Hon. Trevor Khan says, I am not quite sure how to do that.

CHAIR: Perhaps you can draft that as a question on notice in more detail.

(The witnesses withdrew)

HELEN RACHEL CAMPBELL, Executive Officer, Women's Legal Services New South Wales, affirmed and examined:

CHAIR: I must advise you that any question you are not able to answer today but you would like to answer later if you had more time, you can take that question on notice. Also, witnesses, members and their staff are advised that any messages should be delivered through the attendants or the Committee clerks. You also have the right, if you wish, to give evidence or part of your evidence in camera with no members of the public present. I remind witnesses that the freedom afforded witnesses by parliamentary privilege is not intended to provide an opportunity to make adverse reflections about specific individuals, et cetera. Mobile phones must be turned off. Would you like to make an opening statement?

Ms CAMPBELL: Thank you for giving us the opportunity to appear before you today. Women's Legal Services New South Wales is a community legal centre that aims to achieve justice in a just legal system for women in New South Wales. We do that by seeking to promote women's human rights and redress inequalities experienced by women. We are greatly concerned by the continuing high rates of violence against women in Australia today and the key cause of that is discrimination and inequality. We welcome an inquiry into the issue of the partial defence of provocation and the adequacy of self-defence for victims of violence. We believe that the complex question of the operation of these defences needs to be seen in context. We believe it illuminates the failure of the Government and our society generally to eliminate violence against women.

That women lose their lives at the hands of violent intimate partners—in 2007-08, 80 per cent of intimate partner homicides involved women victims—or those women who feel they have no choice to protect the lives of themselves and their children but to kill their partners, these are signs that we as a society are failing to address this serious human rights abuse. We believe that there is an inherent gender bias in the law and it is most pronounced in the areas of provocation and self-defence. Both defences were designed by males for males, in the case of provocation as a means of excusing and legitimising male honour—this was developed at a time when the mandatory sentence for murder was the death penalty, so there was considerable pressure on the system to find a way out of that—and in the case of self-defence, to address the fight scenario, the kill or be killed routine, the pub brawl, if you like.

So what we have seen as a result of that history is a gender bias which is operating simultaneously in two directions. Men who kill their partners have a murder charge reduced to manslaughter because they can persuade a jury that they were so overcome by jealousy, loss of honour, loss of control that they had no capacity to control themselves and therefore killed their partner. Conversely we are looking at women who kill their partners after experiencing long and serious domestic violence, are convicted of murder or, as we heard in earlier evidence, plead guilty to manslaughter due to feeling unable to persuade a jury that killing their partner was actually an act of self-defence.

We are also concerned that the law of provocation is used to reduce the consequences of the extreme violence perpetrated by men who kill their female partners in jealousy or rage. As we have seen in the recent matter of the Singh case, the more extreme the violence, the greater likelihood of providing a loss of control scenario. While this defence of provocation is deeply flawed and problematic, it is also often the only defence available to women victims of violence who ultimately kill their partner because of the inadequacies of the laws of self-defence that are not inclusive of something that happens other than a fight scenario. It is due to this inadequacy of the law of self-defence and the need for a cultural change that we are calling for a series of things to be done, including education of police, legal practitioners and the community generally about the nature and dynamics of relationships affected by family violence, including the possible consequences of separation from the abuser and how this should be considered in the context of self-defence.

The admissibility of social framework evidence in the context of intimate partner homicides is also essential, and we look to Victoria as an example of how this can be legislated. But changes to the law itself will not be enough. We also need that cultural and attitudinal change. The other barriers to accessing the defence of self-defence in circumstances where a woman kills her violent intimate partner include the reluctance, or apparent reluctance—we do not know—on the part of defence practitioners to run the defence of self-defence, possibly because if it is a charge of murder the risk is of going down for murder rather than accepting the plea for manslaughter and possibly seeing that as being a benefit with a reduction in sentence for that plea. Whereas in some of the cases we have looked at in preparation for this you could see that there is a possibility that in fact an acquittal would have been the outcome.

What we are looking at recommending here is a phased approach to the abolition of the partial defence of provocation. We would like to start with an immediate abolition of the defence of provocation in particular circumstances, including those particular changing relationships such as an indication of separation, an attempt to leave or sexual jealousy. We also recommend the abolition of the partial defence of provocation in situations of non-violent homosexual sexual advance. The continuing of such a defence is just discrimination. Significantly, there also needs to be a more comprehensive inquiry into all of the defences to homicide in New South Wales. There have been such inquiries in other jurisdictions—Victoria, Western Australia, New Zealand, and the United Kingdom. There was one here in 1997 but we note that in their more recent submission to this inquiry the New South Wales Law Reform Commission is saying that they no longer have the same views as they had in their 1997 report. Therefore, this is a good time to ask them to go back and do again a comprehensive and holistic inquiry into all the defences to homicide. So a good start.

The Hon. SCOT MacDONALD: I want to come back to your gender bias. There was similar sort of evidence from the previous witnesses, and I think I understand that. But my understanding of how these trials are played out is that they are still before a jury. Even if we change the law and we abolished provocation tomorrow, you would still appear before a jury; it does not matter if it is self-defence or murder. How do you overcome that gender bias if you are still appearing before a jury, which I guess is supposed to be representative of society and all its biases?

Ms CAMPBELL: That is right and as legislators you would know that if only it was that easy that you could just pass a law and everybody's behaviour changed accordingly, we might not even need to have so many courts. Of course, there are a number of things that occur together or in sequence that result in changes in the way we act collectively as a society and that occurs in the minds of juries as much as anywhere else. So leadership by way of making statements at a legislative level is an important component of that.

I am sure the day they passed a law that made wearing seatbelts compulsory did not automatically make everybody put their seatbelts on, but I think down the track we can look back and be proud that we took that step even though we knew we would not automatically have everybody hearts and minds with us. Similarly, on these more serious issues such as those we are discussing today, we no longer settle our disputes by duelling. Again, abolition by legislation might have been one part of that but down the track we have also changed our expectations of our behaviour.

The Hon. SCOT MacDONALD: We can make those legislative changes, we can improve self-defence and we can take account more of the history of the relationship and all those sort of things but you will still be required to appear before a jury and the jury will determine whether there was provocation—whether that provocation might be in downgrading the charge to manslaughter or in the sentencing. Will anything change?

Ms CAMPBELL: One of the things we can do as part of the sorts of changes we are considering at this inquiry is to look at whether we can ensure that as part of these reforms the jury gets a better look at the whole picture. Where we can see that such murders are not necessarily in isolation but may be a culmination of a pattern of behaviour, we may need to look at more detail about the history of the relationship as a whole and focus on that total social context. The Victorians have gone some way towards trying to include that approach; probably it is too recent a change for us to draw any great conclusions from it. Conversely, we can say that there is no reason at this stage to say that is not worth giving it a try.

The Hon. DAVID CLARKE: Is there a specific model existing in law which comes close to your approach?

Ms CAMPBELL: Sadly, no. There is no one particular model that we can see that we would be confident in saying: This one has got it right, we will do this one.

The Hon. DAVID CLARKE: Or comes close?

Ms CAMPBELL: Or even comes close. It is complex. That is why we have said it is not just about provocation, it is also about self defence. We probably need to look at both of those in the context of all defences.

The Hon. TREVOR KHAN: Your proposal, I take it, would exclude certain behaviours?

Ms CAMPBELL: Yes.

The Hon. TREVOR KHAN: So-called provocative conduct that arises in the context of intimate relationships, is that right?

Ms CAMPBELL: That is a good first step. There are some things that we can pretty well draw the line at: "I killed her because I was very upset." It is hard to imagine killing someone when one was not upset really, unless it was an accident. Is it ever okay to kill someone because one is upset at the time and, in particular, because she has said she is going to leave them? I think we could probably say that was what was so outrageous about that particular case. I think generally the community went, "No, that is not an okay reason to kill someone."

The Hon. TREVOR KHAN: The Committee has been referred to the decision—in submission No. 26—to the Victorian case of *R. v Dincer*. That case involved a father who killed his daughter in outrage at her provocative conduct—the daughter had entered into a relationship with someone not of their faith. Under your proposal, whether it would work or not, you have essentially got an honour killing and the accused would not be excluded from running, whether successful or not, provocation in that circumstance.

Ms CAMPBELL: I think that is right and that is why we have said that there are some behaviours that we could say as a first step definitely, but that we need as part of this phased approach to bring in a more thorough consideration of the whole range of those defences. I think that is a good example of where we might want to have a more nuanced outcome. That is why we are saying we need the Law Reform Commission to have another look at it. The answer is not simple.

The Hon. TREVOR KHAN: The Victorian Law Reform Commission looked at it, did it not?

Ms CAMPBELL: We can do better than the Victorians.

The Hon. TREVOR KHAN: Your proposal relates to also excluding what we call the non-violent sexual advance. I am interested in the context of "non-violent". What if the person allegedly making the sexual advance does it in the context of hugging the eventual accused or perhaps grabbing the eventual accused on the bottom? How do you deal with the context of non-violent where there is some not particularly aggressive but nevertheless deliberate—

The Hon. Adam Searle: Common law assault.

The Hon. TREVOR KHAN: —common law assault involved in the approach.

Ms CAMPBELL: I agree with you. Again, that is why we have said there is not a simple answer and we do need to take a considered look at all those sorts of issues. It is probably going to be that you cannot draft an abstract set of rules that covers every possible kind of human behaviour, which is why we will always have a case that does not quite fit—

The Hon. TREVOR KHAN: But does that not lead to the conclusion that the only way really to proceed is essentially the Victorian model of abolishing provocation?

Ms CAMPBELL: I think that is probably where we want to get to; we are just suggesting that there needs to be a phased approach to get there.

The Hon. ADAM SEARLE: Provocation, as I understand it, has the possibility of cumulative events leading up to the person being provoked whereas self-defence, as I read it, does not. Is that an area where perhaps the Committee should consider that there needs to be changes to improve the accessibility of self-defence?

Ms CAMPBELL: I think that is right. I have spent some time considering whether even self-defence is an appropriate one for the woman who is the victim of the years of domestic violence of such an extreme nature as to be akin to being a prisoner who is being tortured and to have to come to a state of mind where one believes that the only way out is to kill the torturer. The evidence shows us that where there is a better framework around that woman for ways of escape, the rate of such killings reduces. So is it not so much a self-defence as a form of self-delusion to come to the belief that that is the only way out? I do not know the answer to that question—and

I suspect as lawyers we should not try and be psychologists. But it does lead us to conclude that the constraints on the way that self-defence is formulated are not really adequate to take into account the scenario of the woman who is the victim of long-term and extreme domestic violence.

The Hon. ADAM SEARLE: That is why I raise the issue about whether self-defence itself may need to be recast. The Australian Law Reform Commission and the New South Wales Law Reform Commission have jointly suggested that rather than the notion of domestic violence we need to have a broader concept of family violence—for example, if you are going to have the social framework provisions they should extend to so-called family violence rather than just domestic violence. Do you think that would be a useful adjunct to any phased changes to the law in this area?

Ms CAMPBELL: Again, I think that is why we need to take a big look at all the defences, particularly those issues around provocation and self-defence. I might add that I think it is also worth revisiting the concept of whether there really is such a thing as battered woman's syndrome and whether we think that is appropriate or whether that in itself is just entrenching another kind of stereotype.

The Hon. ADAM SEARLE: That is why I have not asked about that.

Ms CAMPBELL: I think that is why we say that where we want to get to is the abolition of provocation, where we want to get to is some changes to self-defence and maybe in the context of looking more broadly at all the defences and all the kinds of relationships.

The Hon. ADAM SEARLE: In self-defence there is an aspect of "reasonableness" as part of the concept but that does not exist for provocation, and perhaps male accused may be the beneficiary of that. Do you have any views about whether or not to invoke the self-defence of provocation, then the jury should have to consider the reasonableness of the accused's actions?

Ms CAMPBELL: Coming back to what I said earlier, the starting point is that it is never reasonable to kill somebody and I would have thought that the exception to that really should be cast fairly narrowly. One of the problems is that when one of the parties is deceased one cannot get the full story. I think that is why trying to put any kind of layering on it might be problematic.

The Hon. HELEN WESTWOOD: I want to explore how the defence of self-defence can be strengthened. The well-known case of Catherine Smith comes to mind—indeed, she gave evidence before the recent domestic violence inquiry—she was charged with attempted murder and defended that charge on the basis of self-defence, which led to the perpetrator being charged. The perpetrator is now serving time for the historic incidents of domestic violence upon her. I am wondering why self-defence is used successfully in a case such as that, yet we do not see it in cases where women murder their abusive partners? I am also wondering why you think it is not being used?

Ms CAMPBELL: It is impossible to tell. The research that we have done is included in our submission but the question as to what extent and what sort of advice women are getting from their legal advisers about pleading to manslaughter in a circumstance where they could have successfully defended a charge of murder we can only speculate about. Again, it may well be that the powers of the Law Reform Commission and the resources it has available may enable some further consideration of what is going on inside those conversations. I do not know what I would do if I had the choice of going through a trial and maybe being convicted of murder or copping the plea to manslaughter and having those matters put in mitigation and hoping that I got a lesser sentence as a result. I do not know. It may be if we go through a law reform process and we change expectations and attitudes about what we think would be a fair outcome then that would also change the approach that such women when accused would take.

The Hon. HELEN WESTWOOD: Is that why you make the recommendation for a transparent process in plea bargaining?

Ms CAMPBELL: I think it is very important, particularly in terms of the public's perception of the fairness of the legal process, that these matters are open to public scrutiny and that the full facts are made available as part of that process so that the seriousness of some offences is not minimised. That can lead to a feeling of a lack of a fully fair outcome.

The Hon. HELEN WESTWOOD: Another recommendation included in the submissions to the Committee is that we look at the reforms in Queensland, which included the reverse of the onus of proof. Do you have a view about that?

Ms CAMPBELL: I do not personally. I have to confess that I am not myself the author of the submission. My wonderful principal solicitor and law reform coordinator, who are currently attending a conference in Adelaide and could not appear before the Committee today, did the actual think work on it. I would like to take that question on notice and consult them about that.

Mr DAVID SHOEBRIDGE: You basically suggest that there should be a list of prescribed conduct that cannot be relied upon for provocation?

Ms CAMPBELL: For starters, yes.

Mr DAVID SHOEBRIDGE: Even in the course of this short hearing the Hon. Trevor Khan has pointed out another one we could tack on: honour killing. Does that show that perhaps that list of prescribed exclusions might be the wrong way of approaching it? Perhaps we should be looking at limiting the conduct that can be relied upon for provocation in a positive way and say: only X conduct can be relied up for provocation?

Ms CAMPBELL: We are not saying in our submission that that is the final answer; we are just saying that that is a place to start as part of a phased approach and that we need to work through that. We may find that there is a wider class of activities or circumstances that we could put beyond the pale.

Mr DAVID SHOEBRIDGE: What about the concept of saying that the only provocative conduct that can be relied upon for the defence of provocation is conduct that is of a violent and criminal nature?

Ms CAMPBELL: That is one approach that should be investigated further.

Mr DAVID SHOEBRIDGE: You say that perhaps we should be getting to the end point of abolishing the partial defence of provocation entirely. There is a class of women who might be disadvantaged by that—women who have not necessarily been the subject of physical violence or been faced with an imminent threat to their personal safety but are living in an utterly oppressive relationship—being belittled by their partner, being told they are worthless, being told they cannot leave—and are the subject of ongoing, if you like, mental assaults from a domineering partner, and in those circumstances may lash out and kill their partner. Would those be circumstances in which you think provocation might be an appropriate relief valve in the legal system?

Ms CAMPBELL: As I have said, we have recommended its abolition in the context of review of self-defence to look more closely at those kinds of circumstances. The proposition you put, absent anything else, that we might consider qualifies as violence for the purpose of invoking self-defence would require the retention of provocation for that exception. I am not convinced that retaining that part of the law of provocation would be an appropriate way of dealing with it. But, again, I think that is one of the reasons it would be appropriate to get the Law Reform Commission to have a good hard look at it.

Mr DAVID SHOEBRIDGE: One thing mentioned in your submission and in a number of other submissions is that women are not availing themselves of the defence of self-defence because they are copping a plea of manslaughter to avoid a murder charge. One thing that your submission says is that we should look at prosecutorial guidelines. Can you flesh that out a little more?

Ms CAMPBELL: One of the queries we have raised is why, in those circumstances, women are being charged with murder where one might have thought they would have been offered manslaughter in the first place if the full context had been known and taken into account. As part of a whole range of reforms—not only reforms to the face of the law but to the whole culture in the legal system—those are things that could also be changed.

Mr DAVID SHOEBRIDGE: Could you require the prosecution, in circumstances where the killing happened in an intimate relationship, to actively consider manslaughter as a viable charge? And if so, how would you go about doing that?

Ms CAMPBELL: I might have to take that question on notice.

CHAIR: You are very critical in your submission about the use of the term "loss of control", which you say has long been a requirement in New South Wales law. How do we get rid of that phrase? Are you saying it is often used?

Ms CAMPBELL: It is almost an insult to an adult male in full possession of his faculties, is it not, to suggest that there is inherent in his nature something which, in some sort of circumstances, means he cannot control himself. I would have thought it a hallmark of our civilisation that we all regard ourselves as being able to control ourselves. We need to advance both the legal reform and the culture in which such things take place, to where we should be proud of being people who do not lose control.

CHAIR: We have already heard comments that people are very surprised by some decisions that juries are making. Is there, then, some problem in the construction of the jury system? In these cases, should we have 50 per cent females and 50 per cent males, or 75 per cent female and 25 per cent males? Or should we not touch the system? How do we get the right decisions from juries?

Ms CAMPBELL: I have not come prepared to answer that question today. I may need to take some time to consider it further.

CHAIR: You can take that question on notice.

Ms CAMPBELL: There is no need to get biologically essentialist. I think gender might be a necessary but not a sufficient condition for having a properly fair system. The involvement of a jury is, of course, one of the hallmarks of our legal system of which we are justly, in many ways, very proud. It is a tradition that I think we would hesitate to be quick to dispose of.

CHAIR: The problem is that males on the jury may be more sympathetic to the male in some of these cases.

Ms CAMPBELL: I do not think we need to speculate or generalise.

CHAIR: I thank you very much for appearing before the Committee today. We appreciate your attendance and the great detail in your submission, produced by your colleague. Would you express our thanks to Janet for her work?

Ms CAMPBELL: I shall.

(The witness withdrew)

JOHN McKENZIE, Chief Legal Officer, Aboriginal Legal Service, affirmed and examined:

CHAIR: The Committee thanks you, Mr McKenzie, for your attendance today. We understand that Mr Phil Naden is unable to be here today. There may be some questions that you are unable to answer today. If so, you may simply say that you will take those on notice and afford us replies in due course. After your attendance, there may be further questions sent to you. You may add any additional material to your answers and a supplementary submission, if you wish, after being here today.

The Hon. SCOT MacDONALD: Chair, could I confirm that there is no submission from the Aboriginal Legal Service?

Mr McKENZIE: No, there is not.

CHAIR: Do you wish to make an opening statement?

Mr McKENZIE: Just a brief one, thank you, Chair. Firstly, I want to apologise that our Chief Executive Officer, Mr Phil Naden, was unable to make it today. He has been called to an urgent matter in our Dubbo office and is unable to attend. So please accept his apologies for that. Secondly, there is no written submission from us at this stage. We are certainly keeping an eye on this. Really, the general message that I wish to give on behalf of the Aboriginal Legal Service today is to urge caution in approaching this whole topic. We are extremely concerned about the continuing, and perhaps the rising, levels of domestic and family violence within our Aboriginal communities and families. We certainly recognise that Aboriginal women probably are the most likely to be victims of family violence of any group of society. We also recognise though that Aboriginal people make up an increasingly disproportionate number of people in our jails, and that includes not only the males but, of more concern at the moment, the females.

The Aboriginal women prison population is growing at a far greater rate than the rate of Aboriginal male imprisonment. I checked the figures yesterday. The current percentage of all female prisoners in New South Wales who are Aboriginal is just on 29 per cent. If you compare that to the 2 per cent of the population, one starts to get the level of crisis that I believe we have in this regard. To be complete, the Aboriginal male imprisonment rate is around the order of 22 per cent of the total population—so still very serious, but not at the same extent of over-representation as the Aboriginal women prisoners are. I make that point because it is not my intention to come along here today and say do one thing or the other. My intention is to say: Please, in whatever is being considered to be done, take very serious regard of whatever ramifications those steps may have on the Aboriginal community.

That is because it is our experience that most, if not all, criminal law initiatives that are introduced, usually for very good stated reasons, have a very pernicious effect of rebounding in a most disadvantageous way on the Aboriginal community of this State. That applies to everything from the progressive tightening of the Bail Act which has resulted in more than one-third of our imprisoned clientele being Aboriginal. It relates to things such as the introduction of the standard non-parole periods within the sentencing regime. Again, the Aboriginal offenders have been very disproportionately disadvantaged by how that has worked out on the ground. Our latest concern, quite frankly, is the proposal—which has been put very recently—that the right to silence is going to be changed in some material way. We see as a very direct result of any such move, unless it is done extremely carefully, many more vulnerable Aboriginal people ending up in jail.

So my real message here today is to urge great caution upon the Committee in whatever recommendations might be made, because time and again over the 32 years that I have been involved with the Aboriginal Legal Service I have seen what, on the headline account, may be an extremely worthwhile, sincere and well-intentioned reform of the criminal justice system, has again and again worked out on the ground to result in more Aboriginal people becoming involved in the criminal justice system, and particularly in the imprisonment system at an alarming rate.

In relation to just one recent case of ours from earlier this year, a case from up in the New England district, an Aboriginal woman who was our client was charged with the murder of the de facto spouse of her mother. She was an adult daughter of the mother. That mother had been the subject of very serious and ongoing physical violence from that male de facto partner. The adult daughter happened to be visiting one time—well aware of the background of what had happened in the past—and was in the kitchen during a verbal argument between the mother and her de facto. There were words given by the de facto. There was not any real physical

interaction such as would even bring the self-defence consideration into play. But the adult daughter, being very well aware of the very long history of domestic violence perpetrated upon her own mother, picked up a kitchen knife which was to hand and stabbed and fatally wounded the de facto.

We were able to achieve an outcome of manslaughter in relation to that Aboriginal woman, even though she was charged with murder and stood trial for murder, only on the basis of the availability of the provocation provision as it now stands. Having said that, I do not want it to be thought that we are saying do not change it at all. We are very well aware of the fact that there are a large number of Aboriginal women who have been killed, whether or not by their intimate partners or other members of the family. So I think family violence is a better description to be using in dealing with these things. I simply raise that on the basis that it does not always work against women who have been domestically abused for some time.

I know that there have been some law changes in Victoria. I know that Victoria has effectively removed the partial defence of provocation. However, I am aware of some recent, fairly expert commentary to the effect that the main beneficiaries of the new law in Victoria of defensive homicide, which was brought in as a replacement, if you like, of the provocation provision, have to a very great extent been male defendants whose deceased victims were also male. That does not appear to me to be getting to the situation of achieving the outcomes, benefits or protections that I think the Committee here, and no doubt the committee of similar nature in Victoria, were striving to achieve. The point of raising that is that it is simply such a complex and finely composed function of our society and the criminal courts, especially at the senior level, that I urge the Legislature to be extremely careful in proceeding because unintended consequences are rife in this area.

CHAIR: Thank you again for appearing before the Committee. Have you noticed any trend in the Aboriginal community of using the law of provocation to a higher degree than in the non-Aboriginal community? In other words, are there special cultural aspects within the Aboriginal community?

Mr McKENZIE: Not to a higher extent; I would not say that. The way I would approach that question is this: It is certainly my experience and, indeed, the experience of many experienced people in the criminal justice system, that on the whole when you get into a situation that leads to a domestic-related homicide, there is very little forethought about the consequences on the part of the aggressive party. As our Chief Justice said only a couple of weeks ago, the whole notion that in that pressure-cooker, emotionally charged situation—I do not mean to excuse anyone but that is simply the description of what is going on when homicides occur—just about the last thought is, "How long will I serve if I do this?" It is simply not within the person's contemplation at all. Although general deterrence as a sentencing principle is important, it certainly seems to us that it has been well and truly over-emphasised in the past decade or so in the New South Wales criminal courts, and all to very little avail. As study after study has shown, the potential length of incarceration plays almost no part whatsoever in the perpetrator's decision whether to do it or not to do it. As has been shown by the Bureau of Crime Statistics and Research people, they are more worried about being apprehended, not where it will lead down the track.

In relation to Aboriginal people, there is certainly the possibility that provocation might be raised where there has been serious racial abuse. It may have got to someone so much that that may form a very Aboriginal perspective or possibility. The partial defence of provocation might well come into play in that case. We have certainly had a number of cases along those lines. It has the ability to be used in that way in a way that self-defence cannot. Self-defence is dealing with the very temporal connection and real possibility of physical harm, whereas a long period of insidious racial vilification can build up in a person's head such that they may also lose real self-control. They are still guilty of a crime, but not to the seriousness of murder.

The Hon. TREVOR KHAN: I am interested in a particular scenario. The picture you paint in the case of racial vilification is that there is in a sense an excuse that allows for the downgrading of an offence from murder to manslaughter. What of the circumstance where an old man has lived with his wife for 50 years and she is dying a terrible death from cancer and he kills her? He does not have an excuse, does he?

Mr McKENZIE: No.

The Hon. TREVOR KHAN: He is guilty of murder. In all of the cases that you refer to where provocation is run, one of the essential elements that must be proved by the Crown is the intention to kill, cause grievous bodily harm or reckless indifference.

Mr McKENZIE: Yes.

The Hon. TREVOR KHAN: In all the cases we are dealing with there was an actual intentional killing.

Mr McKENZIE: Yes.

The Hon. TREVOR KHAN: And the ones where we currently provide an excuse of provocation are those where a person—normally a male given the statistics—says they became so enraged that they formed an intention to kill; is that right?

Mr McKENZIE: No, not so enraged that they formed an intention to kill. It would be more accurate to say that they were reckless as to the result of their actions.

Mr DAVID SHOEBRIDGE: Either.

Mr McKENZIE: Yes.

CHAIR: Loss of control.

Mr McKENZIE: Yes.

The Hon. TREVOR KHAN: According to Ramage it cannot be recklessness. In that case the sentencing remarks referred to the fact that the woman was punched to the ground and then, having been punched to the ground, was strangled.

Mr McKENZIE: Yes.

The Hon. TREVOR KHAN: Yet, we provide for him an excuse to murder. Do you think the community as a whole might find that now to be discomforting, to say the least?

Mr McKENZIE: Yes, I accept that entirely. But I think that the community would find the great majority of matters that go before the highest criminal courts quite discomforting when realising the reality of what happens in a number of people's lives within society. So I do not find that unusual.

The Hon. TREVOR KHAN: Apart from the issue of general deterrence, the sentencing, or the conviction of people, has an educative effect, does it not? Is that right?

Mr McKENZIE: I think it has somewhat of an educative effect. However, I do not think it has any educative effect by way of preventing potential killers.

The Hon. TREVOR KHAN: That is slightly different from the general deterrence issue.

Mr McKENZIE: Sure.

The Hon. TREVOR KHAN: There is a necessity, is there not, for the Legislature and the courts to ensure that the outcomes provide a degree of comfort to the community?

Mr McKENZIE: Yes. That is certainly part of the brief of our whole court system.

The Hon. TREVOR KHAN: The problem with outcomes like Singh, Ramage and Whan is that they actually cause a deterioration in faith in the system, do they not?

Mr McKENZIE: That certainly appears to be the effect. There is a large responsibility here on very irresponsible reporting of what goes on in criminal court cases. As a number of studies have shown, where the public is given the detailed facts of what happened in a case, there is a far greater level of acceptance of appropriate sentencing and appropriate charge finding than in the present context where headlines blast certain extreme situations of a case and leave out many of the important details. That is a real problem. How do you improve the reporting of it to the public? That is a very difficult question, but we must work on it. It is my experience that once people become involved in the criminal justice system for the first time—whether or not a member of their family is involved—they form an entirely different view about the general appropriateness of the system.

The Hon. TREVOR KHAN: Having worked in the criminal justice system for some 25 years, I will end by asking whether you have read the sentencing remarks in Singh, Ramage and Whan? If you have not, I invite you to do so.

Mr McKENZIE: Yes.

The Hon. DAVID CLARKE: Your message today is that we proceed with caution. I hope we would do that in any event. However, if you mean in regard to changes, can you be more specific as to any changes that you would like to see considered?

Mr DAVID SHOEBRIDGE: Or avoided.

The Hon. DAVID CLARKE: The Committee has to deal with specific things. Can you put anything specific to us on behalf of those you represent today?

Mr McKENZIE: From a cultural point of view, the great majority of Aboriginal accused, and most particularly Aboriginal women accused of murdering their assailant, have a cultural background whereby they feel they have immediately done the wrong thing in the sense that they have taken someone's life. They have a very inbuilt attitude that they must be a bad person because of that. They are then very easily led and susceptible to suggestion, persuasion and pressure and from investigators of the incident to say what they think the investigators want them to say. That sort of vulnerability in relation to the questioning and answering and the ability to reserve their statements, if you like, until they have had time to get advice and to look at it in a more dispassionate way is an issue. That is a very important thing for Aboriginal accused. On the whole, they feel completely ostracised and oppressed the minute they enter the criminal justice system, and that begins with the very first contact with a police officer.

The Hon. ADAM SEARLE: The Committee has been provided with material that suggests that is even where there is the prospect for an accused to rely on self-defence and for various reasons it is not raised during the trial process. Has your service experienced that? If so, what are the barriers to an accused in the circumstances of intimate partner homicide using self-defence? What are the obstacles that you have experienced?

Mr McKENZIE: What we have to do to look at this accurately is to understand that we are talking about the difference between murder and manslaughter. It has already been raised that in a number of less serious charges the defence of self-defence is run on a more regular basis. To begin with, murder is the highest and most serious charge on our books. If one is convicted the sentencing judge has very little room to move to take into account any of the subjective circumstances of the accused person. I say that in comparison to manslaughter.

The Hon. TREVOR KHAN: Yes. There is no standard non-parole.

Mr DAVID SHOEBRIDGE: It is much more circumscribed.

Mr McKENZIE: That is part of the reason that upon legal advice many accused of murder will take that option rather than fighting out the charge on the basis of self-defence. It must also be said that usually from our point of view in order to establish a defence of self-defence almost invariably the accused person must take the witness box and give their version of the story, which is quite correct. However, they are then open to cross-examination by prosecution lawyers. That is a hugely scary prospect for Aboriginal people. They feel they are going to be made fun of, looked down upon for being less educated, less intelligent and, if you like, less white. They feel they have very little chance with juries that most often have no or perhaps only one or two Aboriginal members and therefore their personal situation will not be explained. It is on that basis that we find that a number of our clients—even if they are given the advice that self-defence is there to be run but this is what is involved to establish it—will instruct us that there is no way they will take that risk.

The Hon. ADAM SEARLE: There is no dock statement available.

Mr McKENZIE: No.

The Hon. HELEN WESTWOOD: You referred earlier to the increase in Aboriginal women as a proportion of the female prison population. Is that due to women being perpetrators of domestic violence?

Mr McKENZIE: A small proportion. Most of those women have themselves been victims of very serious abuse, often from childhood. Most of that has happened in the context of some substance abuse—alcohol or other drugs. I do not want that to be taken as painting them as being deliberately aggressively violent in that way, although at times they may well be. However, I make the point that there have been an increasing number of convictions of Aboriginal women for family violence related offences, and we are seeing them end up in jail.

The Hon. HELEN WESTWOOD: You may be aware that another parliamentary inquiry investigated domestic violence and specifically looked at the increase in the number of women as perpetrators. We found that it was more about the capacity of the investigating officers to correctly identify the primary aggressor at the time. I am interested to know whether that is the same in this situation. The other picture that you are painting seems to be inconsistent with the general population. Where provocation is used as a defence in the murder of intimate partners, in the majority of cases it involves men who murder women. Is that not the case in the Aboriginal community where murder takes place between intimate partners? Is it that more women are murdering men?

Mr McKENZIE: No, not more than men.

The Hon. HELEN WESTWOOD: The focus of what you said seemed to me to be painting a picture that it was more likely that it is women who are murdering men and I just found that difficult to believe.

Mr McKENZIE: No. What I am saying is that for that number of women—smaller than the number of men who kill their intimate partners—but for that number of women who do so and have very detailed and long-lasting histories of being the victims of family violence, the provocation is assisting them. That is what I am saying at this stage, and I do not want them to be left out so that we find that a woman in New England in 12 months time, if there is a law change, has no realistic way of having what she did downgraded to manslaughter. That is my concern.

The Hon. HELEN WESTWOOD: What about those Aboriginal women who are murdered by their intimate partners where the intimate partner uses provocation as a defence? Does the service have a view about those cases? Does the victim receive justice? One of the things we have received in other submissions is the way in which it is used as an excuse; the woman is then characterised as though she is to blame for the murder. Has that been an issue that you have identified?

Mr DAVID SHOEBRIDGE: And she is not there to defend herself at the trial.

Mr McKENZIE: No, that is right, because she cannot—quite rightly so. I think you need to take a step back here. In a criminal case, especially a murder case, the State is charging a person with the unlawful and intentional killing of another. You talk about justice for the victims. I agree, I do not think there is any justice for victims; I do not think that is what our criminal justice system effects at all. I think what it does is to try and find some balance between the enormity of what has happened and what the wrongdoer has done and a punishment for that person whilst taking into account all of the other surrounding circumstances that society thinks right, and most definitely there are some people who should be locked away for a long, long period of time.

I suppose my point is that I do not want a new law to be rigid so that the subjective circumstances of offenders who come before them is in any way lessened or narrowed, because that sort of a general approach of rigidity, as I have mentioned in relation to the bail laws over the last 10 to 15 years, the standard non-parole period, the possibility of the right to silence going, they all have the effect of, without any intention, rebounding on Aboriginal people. Rigidity is the enemy of the Aboriginal person when you get to the pointy end of the court case.

The Hon. HELEN WESTWOOD: You talked earlier about shame for victims and so on. It seems to me in the discussion we have that the victims are often left out, because surely there is also shame for the family of the victim when she then is characterised as a bad person, sexually promiscuous, unjust or unfair. Surely there is some shame associated with that for the family of the victim, as we say, who is not here to actually defend herself or to tell the whole story.

Mr McKENZIE: Yes, I agree entirely. Within the Aboriginal culture within some families there is shame that their family member was killed by a partner who was supposed to be loving and protecting of them, and there is shame simply on the whole matter of being involved in it from the start. So there is shame every way you look in these tragic situations for the Aboriginal people involved.

Mr DAVID SHOEBRIDGE: In terms of the kind of case that you have posited within the Aboriginal community of a woman killing a man because of the history and cultural aspects and the difficulty of running a self-defence in those cases, we had a submission from the Wirringa Baiya Aboriginal Legal Service that spoke about social framework evidence. They were suggesting that there should be a specific provision for Aboriginal women to lead evidence of, in their words, "the additional burdens an Aboriginal woman carries, including significant social and economic disadvantage; community and family pressure not to report the violence or leave the relationship; and the systemic value of government agencies such as police to respond and assist an Aboriginal woman when she did dare report the violence". Do you have any views about that proposition?

Mr McKENZIE: I absolutely understand the concerns and viewpoint that proposal comes from as an experienced criminal lawyer and fearful that, once again, it may be used and implemented in a way that will rebound upon Aboriginal people, or perhaps in that case what you may well find then is various arguments going on as to who is an Aboriginal woman. If you are going to have a clause like that within such an important fundamental part of the criminal law that applies differently to Aboriginal women or Aboriginal people at all as opposed to others, I think that there is going to be a great deal of community concern in relation to there being not the same law.

Mr DAVID SHOEBRIDGE: What about that provision applying generally?

Mr McKENZIE: I think that is a much better idea to contemplate, because I think the minute you start making laws on this level that will apply to one group of people and not to others I think you have got real problems.

Mr DAVID SHOEBRIDGE: I will just ask you then about the merits of that provision generally.

Mr McKENZIE: I think that could be good if that could be effected across the board, yes.

CHAIR: We will have to conclude there; our time has sadly expired. We thank you very much for your attendance. We do have questions on notice, which we will send to you and you can answer the questions where possible and add any additional submission or material after being here today.

(The witness withdrew)

(Short adjournment)

MARK JOHN MURDOCH, Assistant Commissioner, NSW Police Force, sworn and examined:

CHAIR: If at any stage during your evidence you wish to answer questions in private, we will clear the room. You have that right. If there are any questions we ask that you are not able to answer today you can take them on notice and send a reply in due course. Do you wish to make an opening statement?

Mr MURDOCH: I do. The NSW Police Force has provided a written submission, I believe, to the inquiry in which we have stated our position, which is in brief—

The Hon. ADAM SEARLE: When did you send the written submission?

Mr MURDOCH: I cannot tell you that. My understanding is a written submission has been provided.

CHAIR: Do you have a copy of it with you today?

Mr MURDOCH: I have.

CHAIR: Can you leave that copy with us today before you leave?

Mr MURDOCH: I can make those arrangements, yes.

CHAIR: Please proceed.

Mr MURDOCH: In brief, our position on provocation is the elements of the defence be retained in their current forms. Words and gestures alone should not be sufficient to make out defence of provocation. The police suggest a new provision be inserted in section 23 of the Crimes Act that repeated instances of violence against the same person occurring immediately before the act or omission causing death or at any previous time may count as provocation. This may extend the availability of this defence to an accused who has been the victim of repeated domestic and family violence at the hands of the deceased.

There are some well-known cases and I want to talk specifically about domestic violence, although I am happy to take questions on other matters. Apart from my day job of being a region commander, I am also the NSW Police Force corporate spokesman for domestic violence and family, which is our largest volume of crime by far. Daylight is second. In terms of the recent and well-known domestic events which have ended up in the death of women at the hands of their intimate partners, the matters of Singh and Kathleen Smith are amongst the most well-known. In the matter of Singh the male, the accused, killed his wife by cutting her throat with a box cutter after she verbally assaulted him—or verbally insulted him, I beg your pardon. The matter of Kathleen Smith is a long-term victim of repeated domestic abuse and while Smith did not eventually kill her partner she was charged with attempted murder after a long term of abuse.

Our concerns are that the circumstances of domestic violence victims are better understood. Their circumstances are catered for, I suppose, by the amendment I have proposed, or the NSW Police Force has proposed, to section 23. Victims who report for the first time or who disclose domestic violence for the first time, on average, have been victims of domestic abuse on 24 prior occasions. So the first-time victim is anything but a first-time victim. The victim who discloses does so after a lot of soul-searching and reflection upon their personal circumstances, particularly where children are involved and, on occasions, in very severe instances of repeated domestic abuse.

Victims will take the step of essentially killing or be killed, that is what it essentially boils down to. If they do not take that first step or if they do not take on the role of being the aggressor, in an instant they will be the victim. The way things have been portrayed in the case of Ramage in the Victorian jurisdiction and Stephens in New South Wales, the long-time victim of domestic violence has ended up dead at the hands of their intimate partner—Ramage and Stephens—and those who are best known for the victim essentially being blamed for the conduct of the accused. I suppose it gets back to the saying dead men tell no tales. The victim who is deceased cannot jump into the witness box in defence of their actions. We have to get over the historical context of the partial defence of provocation to have it amended to manslaughter, which dates from the seventeenth century—different times, different social standards. We no longer have those standards. Provocation can be seen, if you like, as a gendered application of the law and we need to get over it. Our laws need to reflect the social norms of today, not the seventeenth century.

One last thing I would say is we are seeing increasing numbers of women being charged with domestic violence offences by police. This is certainly not self-defence but it is a matter of some victims having to take action to prevent themselves becoming victims. There are also instances where a woman will act in self-defence of herself or her children against domestic abuse, but on investigation by the police it is essentially where the level of force exerted by the victim may be in excess of that displayed or exerted by the long-term abuser. It is a very complex social issue. I do not envy your task but I encourage you to find a solution.

CHAIR: So you see self-defence as being important? Do you want the partial defence of provocation to be retained? I think you have said so?

Mr MURDOCH: Yes. We are not making any opinion in relation to self-defence. It would be our submission that self-defence should reflect the law. It is not necessary to be interfered with. But the amendment I have mentioned to section 23, we would be recommending you give that serious consideration.

The Hon. SCOT MacDONALD: When these cases get before the courts do you have a sense of the jury's capacity to understand the complexity of them? First of all, why there might be a plea bargain of the partial defence and then the directions to go down that path? Do you think the common man sitting on the jury has the capacity to understand what your prosecutor is asking them to do or the defence is trying to carry?

Mr MURDOCH: From my own experience and from what I have read and heard from very experienced police I have spoken to, no. This whole area of provocation is a difficult one for the layman to grasp. I think, given that the partial defence dates back to the seventeenth century, there is a mountain of legal precedents as to what constitutes provocation and what it is not, and while the law is applied in accordance with that precedence we need to take notice of that. I think it becomes more and more complicated for the layman to understand, juries to understand, particularly male juries. I think men come in with a built-in bias, if you like. They are more accepting of an explanation of provocation from a male accused, in my view, and we need to take that subjectivity out of the question if we can and make this a more objective one where the rules are very explicitly stated and the directions given the jury are more explicitly stated.

The Hon. DAVID CLARKE: Do you believe that conduct relied upon by an accused as amounting to provocation should be restricted to criminal conduct?

Mr MURDOCH: What I am suggesting is that words alone should not amount to provocation—no matter the intensity, veracity or malice of the words. Again it is the old sticks and stones are not going to hurt you. If the criminal conduct is physical assault, or they apprehend physical assault, that needs to be foremost in the jurors' minds on the back of instructions given to them by the judge. Words alone should not be able to constitute or raise the prospect of partial defence being applied; it needs to be something more than that.

The Hon. DAVID CLARKE: The conduct relied upon may be adultery. Are you saying that there are situations where the conduct is not criminal and that should be sufficient grounds for provocation?

Mr MURDOCH: No, I am not suggesting it is words or adultery. For goodness sake, we are living in the twenty-first century now. I am not about to sit here and give the Committee my views on social standards, but I would like to think that in the twenty-first century we are beyond the fact that if adultery occurs in a marriage or between intimate partners—that is not of itself sufficient reason to take someone's life.

The Hon. DAVID CLARKE: That is why I am asking do you believe the conduct relied upon should be restricted to criminal conduct?

Mr MURDOCH: Yes.

The Hon. DAVID CLARKE: You do?

Mr MURDOCH: Yes.

The Hon. ADAM SEARLE: We have received a submission from the sister of the deceased in the Singh matter wherein she said quite plainly that a number of matters raised by the defendant leading to exculpatory circumstances were not tested. For example, he alleged that conversations were had and there was evidence available that would rebut that, but that evidence was not brought before the court, according to her. Is

that a feature of criminal prosecutions in these areas, that all of the available evidence is not always given or able to be given for various reasons, so that the jury may not have the full picture?

Mr MURDOCH: On occasions, yes.

The Hon. ADAM SEARLE: What steps should be taken, in your view, to ensure that juries get the full picture?

Mr MURDOCH: I know that in other States of Australia there is the reverse onus. If an accused wants to raise the defence of provocation the onus becomes one for the accused to prove that they were provoked as opposed to the prosecution having to prove that they were not provoked. I would think that that is probably an option available to the Committee, to follow the lead of Victoria, I think where that applies—

The Hon. TREVOR KHAN: Queensland.

Mr MURDOCH: Queensland, where the onus is reversed. Of course, dead mean don't tell tales.

The Hon. ADAM SEARLE: Or women.

Mr MURDOCH: Or women. The prosecution cannot be briefed or instructed by the deceased, so the accused on many occasions, you would think, could say what they like because they know there is no rebuttal. If they are half smart in their defence, as perpetrators are—they are intelligent, they are cunning, they are calculating—they would have a defence sorted before they jumped in the witness box or even gave their views from the Bar table, but they would have something sorted that they knew would be difficult to rebut.

The Hon. ADAM SEARLE: In many cases—I think one figure we have seen is 86 per cent of cases—there is a prior history of violence by the accused against the deceased.

Mr MURDOCH: Yes.

The Hon. ADAM SEARLE: Are there other mechanisms that we should be looking at that would enable your organisation to deal with offenders in a domestic violence situation, prior to it escalating towards homicide, that are not currently available?

Mr MURDOCH: The sixty-four thousand dollar question. I wish I had the answer to that. A lot of the time in those 86 per cent of cases where there has been a history of violence prior to the death of the victim those prior acts are not reported to the police. We do not know about them. You would have heard—I have seen the people who appeared before the Committee earlier today and they would have spoken, I have no doubt—about the reasons why women report and do not disclose. They are good and valid reasons for victims, which are relevant to them at the time. It takes a catalyst. Everyone is different, but everyone has a trigger point at which time they are not going to cop it anymore and they will come forward and report.

Unfortunately, for a lot of women who wind up homicide victims, they have not disclosed to the police and unless they do—we are not clairvoyant—we do not know. I would like to think that the response arrangements we have in place and the way we deal with repeat victims, and particularly repeat offenders, is adequate in how we protect and support victims. Is it perfect? Far from it. As the Hon. Helen Westwood would know because we had this conversation I think in a prior parliamentary inquiry, our response is not perfect. It is pretty good, but it is not perfect.

The Hon. HELEN WESTWOOD: I wanted to ask about the use of self-defence as a defence to the charge of murder in cases against women where women have murdered their intimate partner after a history of domestic violence. We have had a number of submissions suggesting that that be strengthened, as it has been in other jurisdictions. Does the force have a view about that? Another thing that has been drawn to our attention in submissions is the fact that it is not always used. There are often cases where it would seem to be an adequate defence to a charge of murder, there is evidence, and yet it is not used and the women end up opting for the lesser charge of manslaughter on the basis of provocation. I am wondering if you have a view or any knowledge of that?

Mr MURDOCH: No, I do not, and I do not know that I am qualified to answer that question. I think it is more one for our legally qualified friends to answer. I think it would depend on the instructions that the

accused provides to their legal representative and the strategy that the legal representative decides to employ on the back of those instructions. I do not feel qualified to answer that question, I am sorry.

Mr DAVID SHOEBRIDGE: If a woman is in the situation of killing or being killed, or responding to a long history of domestic violence and kills, why is that woman being charged with murder under the current system, or alternatively, in the case of Smith, charged with attempted murder? What are the instructions in place that lead to a murder charge being laid by the prosecuting authorities?

Mr MURDOCH: We need to deal with the facts as we find them. If the police turn up at a domestic incident where one person is dead and the other person is standing there with a knife in their hand and they have been stabbed, and they make admissions to the effect that "I was provoked", or "He came at me", or whatever, "and I stabbed him to protect myself", or "I've just had a gutful and I had to get in first", so it is kill or be killed, if the defence of self-defence is made out, it is incumbent on police to initiate proceedings. That is the beauty of the system under which we work. We are the gatherer of facts. We place the evidence before the courts and the courts interpret and determine the law. That is a role for the courts. It is not up to us to make decisions about guilt or innocence.

If we have a sufficiency of evidence where we have in our minds made out a case for the prosecution, we will act. I suppose the role of the courts is to fill the void. For us to have sufficient to arrest a person, we must have reasonable cause to suspect an offence has been committed. To convict someone, the test is beyond reasonable doubt. There is a big void that needs to be filled between reasonable cause to suspect an offence has been committed and beyond reasonable doubt. Our investigation will attempt to fill that void and the evidence provided needs to be that which exculpates the accused person and that which inculpates the accused person. I think it would be dangerous ground for the Committee to make a recommendation to give or cast some responsibility onto the police to make those sorts of decisions. We would really be dabbling in the realms of the court.

Mr DAVID SHOEBRIDGE: A number of submissions have made the point quite powerfully that once a woman is charged with murder in those circumstances, they often do not run the defence of self-defence, although it would have been available to them, I guess, because they are so frightened, quite rightly, of being found guilty of murder that they take a plea bargain and take a plea of manslaughter. We are not finding instances where women are going to jail for extended periods of time with a conviction of manslaughter when if they had run their self-defence case they might not have been convicted at all. That starts at the time of the charge and at the time of the police investigation. Do you have any view about that?

Mr MURDOCH: Yes, I understand that. I have heard that.

Mr DAVID SHOEBRIDGE: We have had many submissions.

Mr MURDOCH: I have heard that argument before. What I would say is in terms of our investigation and with any homicide investigation— there is no more serious crime on our statutes than homicide—we have a very experienced and professional body of people who do every homicide—our homicide squad—and they are aware of the self-defence aspects of the self-defence defence, if you like. They will investigate that matter to either support or rebut the claims by the accused. It is difficult for me to generalise because every case needs to be assessed on its merits, and I am not trying to dodge the issue. I have great sympathy for victims of domestic violence. But I think it depends on what the arrested person tells the police at the time, whether they adhere to their right to silence or whether they provide their domestic history. It is just too hard to generalise.

Mr DAVID SHOEBRIDGE: The issue seems to be that the domestic history is given a long way down the track of the investigation which can result in a person being prosecuted for murder. I do not think it is a simple case of saying, "We'll just leave it up to the courts" because the facts of the charge and the circumstances of the investigations largely determine the outcome in the courts. How can we as a Committee grapple with that?

Mr MURDOCH: Again I think it gets back to what I said before to Mr Searle that a lot of the times, particularly in these higher end matters where a charge of murder is preferred, the victims are not known to us. They may have been long-time victims. So it is difficult for us to provide a substantive history of domestic violence if it is not reported.

Mr DAVID SHOEBRIDGE: Are the police not asking the right questions in that initial investigation or any other questions?

Mr MURDOCH: I am pretty sure we are.

CHAIR: Mr Shoebridge, you cannot have a discussion.

The Hon. HELEN WESTWOOD: To continue on from that, the briefing that the police prepare for the prosecutor, you talked today about the police being aware of the social circumstances and the facts of domestic violence. Do the people who prepare these briefings have the same knowledge and do they know the social framework in which domestic violence takes place when they are preparing these briefings?

Mr MURDOCH: I wish I could say they do but I am not confident that they have that, and that probably gets to Mr Shoebridge's point. I could not sit here with any degree of confidence and say they have that high level of understanding.

CHAIR: Are there times when police have prepared the briefing and when the case has gone to the Director of Public Prosecutions [DPP] and the DPP has changed the charge?

Mr MURDOCH: I am not aware of that. I could not tell you.

The Hon. TREVOR KHAN: It would be the case if you deal with this normal domestic violence—if I can describe it as normal—but the circumstance where you come upon a death in a domestic relationship, the accused is likely to be charged certainly on the day, is that right?

Mr MURDOCH: By and large, yes.

The Hon. TREVOR KHAN: And the issue of bail will have to be determined essentially on the day.

Mr MURDOCH: Yes.

The Hon. TREVOR KHAN: But the preparation of the brief in a serious case of murder may well take weeks or months, might it not?

Mr MURDOCH: Yes.

The Hon. TREVOR KHAN: So the assessment Mr Shoebridge asks with regard to the determination of the appropriate charge often cannot be done unless there has been a full accumulation of the evidence upon which the DPP will make the assessment as to the appropriate way to proceed, is that right?

Mr MURDOCH: That is right.

The Hon. TREVOR KHAN: If you were to charge that person with the wrong charge on the night, the police would be subject to all sorts of criticism that they have held their hand essentially. That is the difficulty that you face, is it not?

Mr MURDOCH: I would not put it in that way but if there is sufficient evidence to make out a substantive offence on the night or on the day, we will charge with that substantive offence. Just because we charge at the end of the investigation and the DPP gets to assess the sufficiency of the evidence, there is no requirement for the DPP to proceed; they can withdraw if they think there is no prospect of conviction.

CHAIR: We have to conclude there. Thank you for your information and your submission.

(The witness withdrew)

DEAN PRICE, Committee Member, New South Wales Gay and Lesbian Rights Lobby, and

JUSTIN KOONIN, Co-convenor, New South Wales Gay and Lesbian Rights Lobby, affirmed and examined, and,

CLARE JOBSON, Principal Solicitor, Inner City Legal Centre, and

CRAIG MULVEY, Co-chair, Inner City Legal Centre Board, sworn and examined:

CHAIR: Do you wish to make an opening statement?

Ms JOBSON: Thank you for the opportunity to speak today and to make submissions to your inquiry. Inner City Legal Centre is a generalist community legal centre which services socially and economically disadvantaged people in the inner-city region. We additionally run a speciality lesbian, gay, bisexual, transgender and intersex service and that is a speciality service. Our clientele includes women and same-sex partners who have been experiencing domestic violence. It is our submission that the partial defence of provocation should be abolished, as has occurred in the Victorian and Tasmanian jurisdictions. Our alternative submission is that it be reformed in line with the Australian Capital Territory and Northern Territory jurisdictions to exclude its usage as a gay panic defence.

We submit that provocation has historically been a gender biased defence allowing males who murder in domestic violence or in gay panic situations to be afforded a more lenient sentence in what they felt was reasonable circumstances, such as male offenders killing their female partners or male rivals or in response to a perceived homophobic threat. We submit that the test for provocation is outdated and does not conform with modern society values. I refer to Justice Kirby's comments in the case of Green that society is not so homophobic as to form the intent to kill or to inflict grievous bodily harm.

Furthermore, we submit that self-defence needs to be reformed in two ways, having regard to those who finally have killed in self-defence or defence of their children or other family members after years of prolonged domestic violence that has been perpetrated upon them or their children. We submit that New South Wales should adopt a similar approach to Victoria, where the defence of defensive homicide has been implemented since 2005—there is quite a substantive section in the Crimes Act, section 9AH, which refers to the reasonable grounds in which those circumstances are taken into consideration—and also exclude the use of self-defence and excessive self-defence in non-violent advances. We believe that the written statements that we have provided to the inquiry are well balanced to address the very broad issues of our clientele.

CHAIR: Does anyone else wish to make an opening statement?

Dr KOONIN: Thank you for the opportunity to appear before this inquiry. The Gay and Lesbian Lobby has chosen to focus its submission on the use of the partial defence of provocation in cases of a non-violent sexual advance and in particular on the so-called homosexual advance defence. We acknowledge that impetus for this inquiry was the verdict in the case of Singh and the subsequent community outcry and that the issues around provocation are broader than just homosexual advance defence, but this is the matter on which we feel we can give the most informed opinion. It is also the issue of greatest concern to the people we represent.

Our position comes from a belief that a non-violent sexual advance should never by itself form the basis for a partial defence against murder, regardless of the sex or gender or sexuality of the people involved. In practice, the defence has only ever applied in the case of a non-violent advance from a male to another male. As we know, it has been applied 11 times between 1990 and 2004. It has never been applied to an advance from a male to a female or from a female to a male, and nor should it be. What we are seeking is an end to the differential treatment to gay males in the legal system which has otherwise delivered inequality.

We acknowledge with respect the diversity of opinions on homosexuality held by members of this Committee and, indeed, in the broader community. The question that needs to be addressed, however, is not whether each of us as individuals approves of homosexuality. The question that needs to be addressed is whether a non-violent sexual advance is so grave and abhorrent an offence that the hypothetical ordinary person in the position of the accused would have been induced to form an intent to kill or to commit grievous bodily harm. It is difficult to see how that is the case today if, indeed, it ever was. A society which is close to providing

legislative equality for gay and lesbian people and in which, I think it is fair to say, most people accept gay and lesbian people as equals, is not a society in which the ordinary person would be driven to kill by an unwanted, non-violent sexual advance. Whether the situation should best be remedied by amending section 23 to exclude its use in the case of a non-violent sexual advance or by repealing section 23 in its entirety is outside our area of expertise.

Clearly, the latter recommendation would have consequences for other defences to murder, especially with regard to situations of long-term domestic violence. Regardless of how it is done, we encourage this inquiry to follow the lead of Tasmania, Victoria, the Australian Capital Territory and the Northern Territory in abolishing this archaic defence. On the subject of other defences to murder we would also like to raise the issue of non-violent sexual advance forming the basis of a defence to murder under defences other than provocation, in particular the use of excessive self-defence under section 421—for example, in the case of the killing of Gerard Fleming. A repeal of section 23 may not be enough on its own to prevent non-violent sexual advance from forming the basis of a defence against murder. There was widespread community concern over the leniency of the sentence given to the killer of Gerard Fleming. We would encourage the Committee to consider this issue, again with careful consideration of the impact that any changes may have on victims of domestic violence. This inquiry is a long-awaited opportunity to bring an Act drafted at the turn of the twentieth century into line with community expectations in the twenty-first century and we look forward to recommendations for much-needed reform.

The Hon. DAVID CLARKE: Dr Koonin, do you believe that conduct relied upon by an accused as amounting to provocation should be restricted to criminal conduct or even serious criminal conduct?

Dr KOONIN: What we are suggesting is that non-violent sexual advance should be excluded from use as a defence by itself of provocation. I suppose the implication would be that non-violent sexual advance is not something illegal, but exactly what the definition of an assault is I had better leave to the legal experts on my left—I am not a lawyer.

The Hon. DAVID CLARKE: Is there any particular jurisdiction around where you see the existing law on this issue is one that you would be supportive of?

Dr KOONIN: We are supportive of the changes that were made in the Australian Capital Territory and the Northern Territory. The Committee has the exact wording—it is also in the Inner City Legal Centre [ICLC] submission—and there the wording of "non-violent sexual advance" was used, so we would support that.

The Hon. SCOT MacDONALD: If we abolish provocation we seem to struggle with self-defence, whether in Victoria or the United Kingdom, and that necessarily will mean that someone will be up on a murder charge—they will not have the option of a manslaughter charge partial defence of provocation. Are you satisfied in your minds that the abolishing of provocation will usually lead to the charge of murder and, I would think, would end up with longer sentences? Are you happy in your minds that that could be one of the consequences of abolishing provocation?

Ms JOBSON: If provocation was to be totally abolished in New South Wales in combination with reforming the current self-defence and excessive self-defence defences or in the alternative the introduction of sections similar to those introduced in Victoria in 2005 of defensive homicide—I think it is described in that jurisdiction—I do agree it is problematic that you do face a head sentence of murder and not manslaughter. I do not think in the circumstances of people who have been the victims of extreme, prolonged domestic violence that provocation has been successfully raised in that venue to afford them protection.

The Hon. SCOT MacDONALD: I interrupt you there. Some are of the view that that is not such a bad thing because it can be accommodated in the sentencing and therefore one might get a more appropriate sentence, if you like. I am not satisfied in my mind that that is such a good thing because you have the more serious charge—for the rest of your life you are a murderer, not the committer of manslaughter. How do you feel about that?

Ms JOBSON: Perhaps I can take that question on advisement and provide you with a response.

Mr MULVEY: I would just comment that with the appropriate amendments to defences, and as we have seen in the Victorian regime, they have included in a number of their defences domestic violence issues which go to reasonable grounds of someone's self-control or why they are acting out of self-control, with those

safeguards, as well as principles in sentencing, that would safeguard any potential problem that you raise in terms of being faced with a murder charge. One will be faced with a murder charge, however, that can be dealt with in other parts of the legislation to reduce the sentencing or effect of the particular charge itself. If we are just giving it the title of "murder" as against "manslaughter" there is that problem, but if you have the safeguards that flow on in the legislation so you amending it to—

The Hon. SCOT MacDONALD: Around self-defence.

Mr MULVEY: —self-defence and perhaps the introduction as the Victorians have done with their domestic homicide that would address the problem.

The Hon. DAVID CLARKE: I wish to ask Mr Mulvey or Ms Jobson a question that I asked of Dr Koonin: Do you believe that conduct relied upon by an accused as amounting to provocation should be restricted to criminal conduct or even serious criminal conduct?

Ms JOBSON: I think it should be a proportional response. So if someone has been provoked by someone threatening their life or wielding a—

The Hon. DAVID CLARKE: That would be criminal conduct, but what about in the situation where someone felt provoked because their partner was involved in adultery?

Ms JOBSON: Adultery is no longer a criminal offence.

The Hon. DAVID CLARKE: That is my point.

Ms JOBSON: No, I do not feel that is a proportionate response.

The Hon. DAVID CLARKE: Do you believe that the conduct that can be relied upon for the defence of provocation should be restricted to criminal conduct or even serious criminal conduct?

Ms JOBSON: Yes.

CHAIR: In your submission you say: "Almost all cases of gay panic occur where there are no witnesses or surveillance … and this means that the accused's evidence is often difficult to test in court." That is another reason for your position in abolishing the partial defence of provocation.

Ms JOBSON: It is hard for a deceased victim to provide evidence of their conduct. As is the case of someone who has been killed in a fit of rage because they have engaged in an affair; they are not afforded the opportunity to provide their version of events.

The Hon. TREVOR KHAN: I am interested in the wording—it appears on page 7 of your submission—used in the Australian Capital Territory and the Northern Territory relating to non-violent sexual advance. My concern regards carve out of behaviour.

Mr David Shoebridge: Where do you stop?

The Hon. TREVOR KHAN: That is the issue. What happens in the circumstances where instead of being strictly a non-violent sexual advance, the non-violent sexual advance is accompanied by the placing of a hand upon a leg, the grabbing of a buttock or essentially a common assault. Under that wording, it would seem to me that once you have a degree of physical conduct the excluded conduct under that section is then in?

Mr MULVEY: The part that has been quoted in the submission specifically relates to non-violent sexual conduct itself will be excluded—

CHAIR: So it is only verbal.

Mr MULVEY: That is right. When you look at the legislation in its whole in the Australian Capital Territory Act and the Northern Territory Act it actually states that that conduct by itself will be excluded, but if you have any other conduct the non-violent sexual conduct can be then considered in conjunction with other conduct.

The Hon. TREVOR KHAN: That is the essential problem. That is what has happened in the United Kingdom: by carving out specific areas in so many cases there is some further small amount of conduct that then brings in the previously excluded conduct. If you have the grabbing of a buttock associated with the sexual advance then the murder that follows is really no different in culpability from one where there was not a grab on the butt or the thigh. I simply ask whether that is the way to proceed with this problem.

Mr MULVEY: Could we take that point on notice and respond to you?

The Hon. TREVOR KHAN: Yes.

The Hon. HELEN WESTWOOD: I am interested in whether or not you hold a view on why juries have been willing to accept homosexual advance as provocation. As a woman there have been many times when sexual advances have been made towards me by men and I do not usually respond by murdering them—whether I was 13, 20, 30 or whatever. I am always flabbergasted when the response by a male to another male making a sexual advance towards them is to murder, beat, strangle, stab them and that is seen as justified. Do you have a view as to why juries are willing to accept and reinforce that as a justification for murder?

Ms JOBSON: We would submit that the historic background in provocation is very archaic, for want of a better word. You are correct, and it is part of our submission: females who have been the victims of unwanted sexual harassment and advances, et cetera, have not responded by killing the other party.

Dr KOONIN: Firstly, there is a precedent, because it has happened many times before: as we heard, 11 times between 1990 and 2004. Juries feel less abashed about using a homosexual advance defence. Secondly, although many people would not regard it as a valid defence, that does not prevent individuals from having different views, even individual jury members or individual judges. So the problem of leaving it to judicial discretion is that that there are those individual variations, and that would be remedied by a change to the law which would make self-defence in that circumstance impossible.

CHAIR: Certain terminology keeps occurring, such as loss of control in cases of males and females, and in the cases of homosexuals gay panic. Is the term "gay panic" actually used in the courts as a defence?

Dr KOONIN: We would consider the homosexual advance defence and gay panic defence as synonymous. Exactly what is being used in the terminology of each of the decisions I am not sure.

Mr PRICE: My understanding of the terminology around the homosexual advance defence was that it was created by the Attorneys General, who were looking at the use of the partial defence of provocation in instances—

The Hon. ADAM SEARLE: It was already in usage before then, I can assure you.

Mr DAVID SHOEBRIDGE: You are treating them as synonymous though.

Dr KOONIN: Yes, absolutely. It's something that has happened, but it is just a broad term that we use to refer to all of those cases, in a series of different situations but in that sort of general way.

CHAIR: Is it a label that is used outside the court more than in the court?

Dr KOONIN: Yes.

The Hon. ADAM SEARLE: If the Committee were not persuaded that provocation should be abolished, but rather that the defence should be amended in some way, we have noted in self-defence there is an objective element that the jury is required to consider about whether or not the actions of the accused were reasonable, even in the light of things as they understood them. But there is no such requirement for the defence of provocation. In your opinion, should there be a requirement that to invoke provocation successfully the jury should consider the reasonableness of the actions of the accused? I am happy for you to take the question on notice if you do not have a ready response. I direct the question to Ms Jobson as well.

Ms JOBSON: I was not sure, but I thought it had been directed to my friend.

Dr KOONIN: Certainly, that was the outcome of the 1998 working party; and I think that that was part of the reason for the recommendation of the working party not to touch self-defence but to amend provocation. But, as we saw in the Gillies case, an objective test may not provide by itself the backstop, I think was the word used, or some word like that. So something needs to be exclusively excluded from the legislation.

The Hon. DAVID CLARKE: Dr Koonin, why should not your recommendation apply regardless of same-sex or different-sex advances?

Dr KOONIN: I agree with you. Our recommendation was phrased in terms of same-sex advances. In practical terms, if it said that no non-violent sexual advance should be grounds for the use of the partial defence of provocation, we would be equally happy. That was the effect of the words I used in my introductory remark; we do not think that a non-violent sexual advance should be grounds for a defence, whether it is a man and a man, a man and a woman, or a woman and a woman. In practice this defence has only ever been applied to an advance from one male to another male, and it is that differential treatment that we are seeking to end.

The Hon. DAVID CLARKE: So what I suggested there is getting more to the point of what you were getting at in your recommendation?

Dr KOONIN: Correct.

Mr DAVID SHOEBRIDGE: One of the matters that I personally am grappling with is that, if we start amending the law of provocation, most people in the community are offended by adultery being raised as a partial defence to murder—or jealousy, or just verbal exchanges being raised as a partial defence. But if we start a list of exclusions, and say this is conduct you cannot rely upon in terms of provocation, the question is: Where do we end? Personally, I think it would include honour killings and all sorts of other conduct. Would we be better off trying to grapple with conduct that we think would permit a plea of provocation to be raised? Do we say, as the Hon. David Clarke said, the conduct has to be criminal?

Ms JOBSON: And proportionate as a reasonable response.

Mr DAVID SHOEBRIDGE: I am not saying that is the beginning and end of it. But, as a starting point, looking at what conduct you allow to raise a plea of provocation, should we as a society be saying, "If you want to justify even in a partial way your killing of somebody, what provoked you has to be unlawful."?

Mr MULVEY: That is certainly sensible. But could we take that question on notice, because it is a matter that we have not addressed in our submissions, and it is one I would like to address in further submissions.

Mr DAVID SHOEBRIDGE: In fact, I would ask that you both take it on notice. There is another issue raised in the submission of the Inner City Legal Centre, which recommends:

> That reform is made to the defences to murder to take into account circumstances of domestic violence suffered by the accused…

Are you talking there about that social framework evidence, so that you permit a defendant to bring before the court evidence that goes well beyond the instance of the killing but explains the domestic history, and you proactively permit that evidence to be brought before the court? Is that what you are getting at?

Ms JOBSON: Quite often, people who have been victims of prolonged domestic violence either have not reported to police or have had obstruction in reporting to police.

Mr DAVID SHOEBRIDGE: The police say that often the first report is after 24 instances of domestic violence. That is what the police say as well. Are you saying that that evidence should be able to be brought by a defendant before the court?

Ms JOBSON: I agree that the evidence of prolonged violence that has been inflicted upon the person should be considered, yes.

Mr DAVID SHOEBRIDGE: Should that be in all defences where the killing has happened in an intimate domestic relationship or family relationship?

Ms JOBSON: Yes, I think it should.

The Hon. HELEN WESTWOOD: One of our witnesses spoke about the reforms in Victoria, and argued that now in the case of a male murdering a male that defence of self-defence is being used.

The Hon. TREVOR KHAN: He is wrong.

The Hon. HELEN WESTWOOD: I was not familiar with that.

The Hon. TREVOR KHAN: It was a female victim, and domestic homicide is being used in that respect. He is just wrong.

The Hon. HELEN WESTWOOD: Thank you for that.

Ms JOBSON: I was puzzled.

The Hon. HELEN WESTWOOD: I was surprised too. I thought you might have observed that as well, or had read the literature, because I had not. So I was a bit puzzled about that response. Because it was in Victoria, I was not familiar with it. But my colleague has answered that question. I do not know whether you have read the submission of the NSW Beat Project, but one of its suggestions is mandating jury warnings for hate-related crimes and sentencing enhancements. Have you considered that, or have you any thoughts on it?

Ms JOBSON: What format would the warnings take? I am sorry, I have not read their submission.

The Hon. HELEN WESTWOOD: They do not give great detail, but I was wondering whether you have a view on that. One of the things that the Committee has been hearing is that juries are making findings that the broader community seems to be at a loss to understand; that their decisions do not reflect the values and attitudes of the general public; that 12 ordinary people have decided that the person is either guilty or not guilty of the charge.

Ms JOBSON: If I could take that question on notice, so that I can read those submissions and provide a response.

CHAIR: What happens now is that the murder charge is dropped back to manslaughter, the jury finds the person guilty, and a six-year sentence is imposed. If there is no provision for manslaughter, where there is no provocation and the charge is murder, are you concerned that juries may be more reluctant to find the person guilty of murder and therefore acquit the person? We seem to have a problem with juries' decisions in recent cases.

The Hon. ADAM SEARLE: It is not a problem with the law; it is a problem with the jury.

Ms JOBSON: The evidence still has to be tested beyond reasonable doubt.

Dr KOONIN: Reverend Nile, if I am right, I think you are suggesting that manslaughter is a kind of halfway house which allows juries to find some conviction if not acquittal. Is that the suggestion?

CHAIR: Yes. And if we do not have that provision, it would be a murder charge, and the juries might then be more reluctant to find the person guilty, thinking the person will be in jail for many years and so on. The unintended consequence is one of the effects when you change the law.

Dr KOONIN: Correct.

Mr DAVID SHOEBRIDGE: Have any of you turned your minds to the way the plea of provocation works in practice, where the defendant basically gets a double discount? For example, in a homosexual advance defence, the defendant is charged with murder and early on tells the prosecution they would be willing to plead to manslaughter on the basis of provocation, and the prosecution will not accept the plea of manslaughter and they go to trial; then the defence is upheld, the person is convicted of manslaughter and gets a double discount on the penalty: one, because it is no longer murder, because they are being sentenced for manslaughter; but they also get the benefit of a 25 per cent discount on sentence because they have indicated an early plea to manslaughter. If you like, is it one of the reasons that sentences are so poorly reflecting community attitudes that there is that double discount?

Ms JOBSON: Yes.

Dr KOONIN: Yes.

Mr DAVID SHOEBRIDGE: Can you suggest a way in which this Committee could address that?

Mr MULVEY: Put more money into justice and funding courts. From a social point of view, it just seems to be a cost-cutting mechanism to obtain an early plea and get a discount, in order to save time in courts. I know courts are busy, and resources are limited, but if we are talking about murder as opposed to manslaughter and people's lives, are we talking about the cost of that or the social utility?

The Hon. TREVOR KHAN: Isn't there another alternative—that, in sentencing, you exclude the availability of the discount for an early plea where it relates to reliance upon a partial defence of provocation?

Mr MULVEY: Yes, certainly.

CHAIR: To my mind, it is whether we get the law to be more black and white, and to state that there is never justification or excuse for murdering another person.

Mr DAVID SHOEBRIDGE: But there clearly is on occasion; self-defence is broadly community accepted.

Ms JOBSON: If someone's life is threatened directly or whatever.

CHAIR: It is accepted as self-defence then.

The Hon. ADAM SEARLE: And abnormality of mind.

Mr DAVID SHOEBRIDGE: Could you take on notice the issue of the double discounts and how, if at all, the law could respond to that?

Ms JOBSON: Yes.

Mr DAVID SHOEBRIDGE: Beyond just more courts. Perhaps you could take into account some of the valid rationales that the system has for wanting an early guilty plea, including allowing victims and family victims to avoid going through the trauma of a trial.

The Hon. HELEN WESTWOOD: I have a dumb non-lawyer question.

Ms JOBSON: No question is dumb.

The Hon. HELEN WESTWOOD: How can we have the voice of the victim heard in these days? It seems to me that the jury does not hear the victim's story, regardless of whether we are talking about men who are murdered because they have made an advance, or it is put to the jury that they have, or women who are murdered by their violent partner. Their story does not seem to be told. The jury and the judge do not hear from them. It seems that no-one is advocating on their behalf to ensure justice for them even though they are dead. What can we do rectify that, or is the victim not entitled to have their voice heard once they are gone?

Ms JOBSON: That is a relatively curly question in that you would expect the investigating police and the subsequent Director of Public Prosecutions prosecutor to provide the evidence to speak for the victim. Whether or not that translates in a courtroom when you are testing the elements of an offence based on the available evidence to the court is another issue.

Mr DAVID SHOEBRIDGE: But if there is no onus on the defence to put the defence of partial defence of provocation, there is no opportunity for the prosecution to put rebuttal evidence. Is that part of the problem?

The Hon. TREVOR KHAN: I can suggest another scenario. In sexual assault matters there is a prescription of the evidence that can be adduced by the defence relating to prior sexual conduct by the victim

and clearly the victim is still alive and is cross-examined, but questions going to prior sexual history are excluded. If provocation is retained, have you considered whether there should be exclusions as to the evidence that can be adduced by the defence relating, for instance, to the prior sexual history of the victim and whether that overcomes some of the problems that have arisen, for instance, in Ramage and to a lesser extent in Singh in regard to the victimisation or the traducing of the character of the deceased?

Mr MULVEY: That would be sensible.

Ms JOBSON: Yes, that would be sensible.

The Hon. TREVOR KHAN: That obviously applies in Green as well.

CHAIR: Thank you for attending and lodging your submissions, which were very informative.

(The witnesses withdrew)

MAURA CLARE BOLAND, Deputy Director General, Strategy and Policy, Department of Family and Community Services; affirmed and examined:

ALISON JANE FRAME, Executive Director, Women NSW, Department of Family and Community Services, sworn and examined:

CHAIR: Thank you for appearing before this inquiry. We appreciate your giving us your time. If there are any questions asked by members of the Committee that you do not wish to or cannot answer today you can provide an answer on notice. Answers to questions on notice should be provided within 21 days. The Committee may also send you further questions after today's hearing and they should also be answered within 21 days. If at any point you would like to give evidence in camera, please indicate that and the Committee will consider your request. Do you wish to make an opening statement?

Ms BOLAND: We thank the Committee for the opportunity to give evidence on this important issue. The impact of the operation of the partial defence of provocation in the context of domestic violence homicide cases has particular significance from a women's portfolio perspective. That is the aspect particularly inside the purview of the Department of Family and Community Services. I emphasise that we are not legal experts and we will not be speaking from that perspective. We do not have specific views on the most appropriate means of protecting women. However, the overwhelming concern to the department, and particularly to Women NSW, is that any protections that are currently afforded to women who have experienced domestic violence are continued into the future and, ideally, enhanced where that is possible.

With regard to women and violence, we believe there are two significant intersections for the partial defence of provocation. The first is the most obvious; that is, where women who have experienced what is often systemic and prolonged control, violence or abuse have retaliated against the perpetrator and have relied on the partial defence as a means of commuting the sentence. I am sure that will be the primary focus. However, the second is where men have used this defence after killing women and similarly have been successful in gaining a reduced sentence. While we cannot make any observations about the appropriateness of that, we observe that both aspects of protection against women are important. We need to be confident that the defence is used to protect women who have experienced prolonged and potentially unimaginable horrors and not by men who may on the spur of the moment do something that they regard as being provocation. It is important that the justice system as a whole is able to respond to both those circumstances proportionately.

CHAIR: The Department of Family and Community Services has not made a written submission. Does it intend to do so?

Ms BOLAND: The decision about a written submission was with the Department of Premier and Cabinet.

Mr DAVID SHOEBRIDGE: You said in your opening statement that there are two limbs for the Committee to consider: women as perpetrators of violence and the capacity to run a provocation defence in those circumstances and women as victims of violence and the violence that they have suffered not being reflected in the judicial system because men rely on the defence of provocation. Given the way women are being treated in the justice system, are they suffering more broadly because men are using the defence of provocation rather than women benefiting from using it?

Ms BOLAND: In responding to that question I refer to a report from the New South Wales Judicial Commission between 1990 and 2004, which you may have reviewed or may not have had the chance to examine. That report found that during that 14-year period there were 11 male offenders who successfully relied on provocation in the context of infidelity or the breakdown of an intimate relationship and a further five men who used it in domestic violence cases. There were 11 male offenders who relied on provocation in the context of an alleged homosexual advance, at least in a couple of cases those advances not being violent. There were only 10 cases where a woman who killed her husband after a history of physical abuse relied on provocation. It would appear that more men than women are relying on the defence.

Mr DAVID SHOEBRIDGE: Does the department have any view about enabling the courts to look at the whole history that a woman may have suffered in terms of domestic violence when a woman is on trial for murder or manslaughter? It is often called the social framework evidence.

Ms BOLAND: Absolutely. We would be of a view that domestic violence is very complex. The circumstances that go into it, the psychological aspects and the impact that that has more broadly all pull together to make a very complex environment in which a woman, particularly—we will assume that we are talking primarily about women at the moment—is operating. It is important to bring as rounded a body of evidence as possible if we are looking at what has happened that may have provoked a women to kill a man after a prolonged period to understand the complete circumstances of domestic violence. The understanding of the courts, judges, lawyers and so on is also really important. It is important that they understand all of the factors that may be at play and be able to bring those factors into the evidence appropriately.

Mr DAVID SHOEBRIDGE: When you say "courts" and "lawyers", does the problem not begin earlier than that in terms of the prosecution and the police investigation? We are seeing women often going to court facing a murder charge in circumstances where there may well be extremely valid arguments to say that the charge preferred should be manslaughter so that women can run a self-defence argument? Otherwise, if they are facing a murder charge they often will be pressured to agree to a plea of manslaughter and never get to run the self-defence argument.

The Hon. TREVOR KHAN: I do not think that is a correct depiction of the law for the witnesses, who have already said that they are not lawyers. If you are charged with murder you can run self-defence.

Mr DAVID SHOEBRIDGE: Yes, but you may accept a plea of manslaughter in lieu of running self-defence and not get the chance to run—

The Hon. TREVOR KHAN: But that is not the proposition you put to the witnesses.

Mr DAVID SHOEBRIDGE: That is the point.

CHAIR: We do not want to get into the legal ins and outs of this. The witnesses have said that they are not lawyers.

Mr DAVID SHOEBRIDGE: Should we be looking beyond the courts? Should we be looking at the gathering of evidence and the forming of the prosecution case so that the proper charge is preferred?

Ms BOLAND: The observation I was going to make in response is that I think we are going to the fundamentals of our legal system, the way it is structured at the moment and the separation of the process of charging from the process that goes on in the judicial system. I do not think we are equipped to comment on that. I do think there is a much more fundamental issue about how the legal system operates. If we are looking at how we pull together the most effective suite of measures we can for women, irrespective of whether we preserve or remove partial provocation, we must look at everything that is there.

Self-defence appears to be effective in some circumstances at the moment and, as you say, offers a full defence rather than a partial defence, and that appears to be effective. I would also observe that women's lobby groups particularly tell us that some women accept pleas as a way of avoiding having to give evidence. Their argument is that a woman who has experienced sustained abuse will not want to relive that in court, and so any means that are possible of avoiding giving evidence will be done, even if that means that they serve a charge, we have been told. So I cannot make any observations about that, but I guess that just completely reinforces that. We need to think about the complete package and how when somebody has experienced this kind of systemic and ongoing abuse we really can afford them the protection that they need.

CHAIR: In your role as head of Women NSW are you getting much feedback from women in the community about this issue of retaining partial defence of provocation and so on in view of these recent court cases?

Ms FRAME: No, we are not. We do have regular consultations with our consultative group that the Minister attends, the Premier's Council for Preventing Violence Against Women, which consists of representatives of the sector who raise issues with us from time to time and will draw our attention to something that they want us to consider. But, no, I cannot say that we have received systemic lobbying.

CHAIR: They have not been raising this issue in view of these recent court cases?

Ms FRAME: No, they have not.

CHAIR: You may not have had a meeting since the court case then?

Ms FRAME: No, we have. We have had several meetings, and we talk all the time about domestic violence and what we can do to improve our responses. We are leading the development of a New South Wales government response to domestic and family violence through a new framework that is being developed, led by Minister Goward. So we are talking a lot about aspects of the service response. It may just well be that, as my colleague has outlined, because there are so many aspects in the legal system here that maybe those issues are being raised more by the same stakeholders with Attorney General representatives from that department rather than with us in Women NSW.

CHAIR: So you have no views from Women NSW on retaining a partial defence of provocation?

Ms FRAME: No, not on retaining. Our view is that—and it goes further to what you were asking earlier—whatever approach is adopted we will be advocating strongly for that context of domestic and family violence and what you talked about in terms of that dynamic that exists. We will lobby extensively to make sure that that is considered and that it is able to be considered whether there is a provocation defence or not.

Mr DAVID SHOEBRIDGE: Social framework evidence.

CHAIR: What is the terminology you use to describe that information?

Ms FRAME: We just talk about the cumulative impacts of domestic and family violence—that sustained dynamic. We would always work to ensure that whatever changes or whether the current approach was kept in place that we were advocating always to make sure that that was able to be considered, and it is a unique dynamic and it requires specific consideration.

The Hon. SCOT MacDONALD: We have heard a couple of times that quite often the police do not hear about domestic violence until the twenty-fourth time or something like that and therefore that makes it difficult to put up self-defence, it makes it difficult to put up provocation. So the inference of that, in my mind, is that people do not like approaching the police, women do not like approaching the police. I am trying to understand why that is. The second thing I would like to ask is, whether it is the case or not the case or whether it is valid or not, is there some other mechanism we could have where people would feel comfortable approaching if not the police then someone else, that that history, the prolonged domestic violence, does get recorded? It might not necessarily mean a charge every time or it might not mean that someone is embroiled in the courts and everything that that entails, but within facts is there some means where women would feel comfortable recording their experiences? I am not putting this very well. I suppose, domestic violence over a long period of time can be small things, it can be big things and, like you say, it can be cumulative.

The Hon. ADAM SEARLE: How can we increase reporting?

The Hon. SCOT MacDONALD: Yes. I mean, I do not like walking into a police station. I can understand people's reluctance to walk into a police station or to pick up the phone, but is there some mechanism you can think of where people could record their experiences?

Ms BOLAND: An initial observation: People do not just talk about domestic violence with the police—and I think you are right, and Alison can talk about the specifics of why people might feel uncomfortable doing that; there are also other ways of having domestic violence recognised. For example, Health does screening with pregnant women. It asks a couple of questions and it is able, quite successfully, to elicit that domestic violence has been going on and so there is a medical record of it. It is not necessarily referred to the police but there is a medical record there. Sometimes people disclose to their GP that they have been experiencing domestic violence. I know that the police have had online reporting available so that people do not have to actually go there and be visible. That has been relatively successful as well. So there has been a little bit of exploration of different ways of having domestic violence identified without a report to the police. But I think there are many reasons why people do not feel comfortable.

The Hon. TREVOR KHAN: There have been instances where child welfare proceedings have been taken where the substantive issue has been domestic violence within the home. Is there a possibility that where child welfare proceedings are taken essentially on that ground that that may explain why some women do not report—they are obviously frightened for themselves but they are frightened about losing their children?

Ms BOLAND: I could only put myself into their shoes and try to play that out, and if I were in that situation, yes, I imagine that would be a motivating force, potentially, for me.

The Hon. ADAM SEARLE: Your agency is the applicant in care protection matters. Do you have any experience of that being a factor, or if you do not personally perhaps you could take it on notice, because we would be very interested?

Ms BOLAND: We would be happy to take that one on notice.

Ms FRAME: Can I just add further to your question earlier, I think the number one reason why women would be reluctant to report—certainly one of the biggest—is, as Ms Boland has referred to, their fears for their safety, and that goes to their safety regardless of whether they leave or stay. They might have difficulty assessing options as to whether they can safely leave or not and staying is also dangerous and can be incredibly dangerous. So that is the biggest or one of the biggest factors as to why women might be reluctant to come forward and report to the police.

My colleague and I have only this morning visited a support service in the Family Court where women provide support to women who are involved in Family Court proceedings, and there are obviously commonplace examples on a daily basis where the perpetrator is in the court to intimidate them and to continue to perpetuate that cycle of fear and make it much more difficult for women to exercise their autonomy and make the decisions about what might be the best action for them to take. So that all goes to how complicated it is—and I am sure you can appreciate that. These situations can be sustained for a very long period of time and it is very difficult for people to make a decision that does not have ramifications on an ongoing basis for them.

The Hon. HELEN WESTWOOD: The domestic violence death review team, are you receiving reports from that team and do you know where it is up to in terms of its report?

Ms FRAME: I had a briefing with the coordinator of that team maybe about two months ago. So, yes, we are engaged with that team. They are undertaking some quite extensive analysis of domestic violence deaths in New South Wales. As I understand it, they have not released any report as yet.

Mr DAVID SHOEBRIDGE: Could you ask them if they have some preliminary material that they could provide to the committee, because clearly that kind of material, even on a preliminary basis, might be of assistance to our deliberations?

Ms FRAME: Certainly, we can take that up and ask them.

The Hon. HELEN WESTWOOD: I wanted to put to you some of the submissions that have been made to us from the New South Wales domestic violence committee. In their submission they say, "Historically the law has been prescribed by men based on men's experiences and men's interpretation of the world and in men's interests". In the Women's Legal Services submission they say, "The issue that is before the committee highlights the pronounced value of the government and our society generally to eliminate violence against women and requires a holistic and sustained approach". They further argue that the "partial defence of provocation is deeply flawed, anachronistic and gender-biased". I know that you are the agency that has been charged with the responsibility for developing the Government's domestic violence framework. I am just wondering, given the work you have been doing, do you have any response to those comments that we have received in those submissions?

Ms BOLAND: If we could respond factually to that rather than emotively, because I think there were two elements there: one was a factual element and one was an emotive one. As I said, I am not a lawyer. Some of my policy staff who happen to have a legal background tell me that the origins of the partial defence of provocation go well back to when there was a mandatory death sentence for murder and that it was a mitigating factor then. They tell me that it also goes back to when males basically had women who were chattels and it goes to that time of defending one and so on. So it is linked to that. My best understanding is that historically it does connect to that, but, as I say, I am speaking hearsay when I say that.

I think it still leaves us, though, with the opening statement that it is important that we think about the range of responses that we have to it. One could imagine that maybe this could be useful into the future, but it may require some other things accompanying it. It may be that if you eventually recommend to remove it that

you still need a suite of other things going into it. We need to look at the range of defences that are available and to make sure that they are complementary and that they do not have those kinds of perverse outcomes, but also the education that the people who are participating in the system receive, the social expectations in there and some of the evidence that is pulled in.

I am conscious that Victoria did revoke the partial defence of provocation in recent years and introduced a different form of legislation—I think it was defensive homicide. I am also conscious that in the early years it was used more often by men than it was by women and that it did not actually serve to protect women in a couple of cases. That appeared to be what it was designed to do. I do not know whether, in fact, there was more complexity to those cases than is available publicly or whether the law did not quite do what it was intending to do, but I think that it is tricky to look at this in isolation; I think you have to look at the surrounding circumstances.

CHAIR: That is why we are concerned about any recommendations we make, that they do not have unintended consequences.

Mr DAVID SHOEBRIDGE: Is it appropriate for us to consider maybe an overarching principle that applies to all the full and partial defences to homicide, that the law must not sanction violence against women, and have an overarching principle that applies to all of the defences that particularly picks up the need to not condone in whole or in part violence against women?

Ms BOLAND: Again, without responding to whether that is an appropriate finding for you, I am thinking back to the domestic and family violence framework that we are putting together at the moment and the underlying principle of that is that we as part of a government system and we as part of society should not condone violence and we should not inadvertently permit that or find defences that encourage it or at least diminish the impact of that. So I think something along those lines would be in keeping with the spirit of a domestic and family violence framework.

Ms FRAME: If I could just add to your comment earlier as well, certainly the statistics that Ms Boland recounted about the use of the provocation defence indicate that whilst it is effectively used by some women as a defence in response to protracted domestic and family violence situations it is also, as she pointed out, used successfully by men to result in a reduction in sentence for very violent acts against women. So, conversely, it could be seen to exacerbate the risk to women in providing some diminution in sentence, some option for a reduction in sentencing associated with a very violent crime against women. So, it offers protection and, conversely, could be seen to be exacerbating risks at the same time. Numbers have demonstrated that there are examples on both sides of that. Certainly, whatever changes are contemplated or whether the defence stays, we will be looking to advocate to achieve greater nuancing wherever possible to try to diminish those risks to women and increase their personal safety.

The Hon. TREVOR KHAN: I wonder how you can talk about nuancing in cases like Singh. I really have difficulty was an argument about nuancing. A woman has her throat repeatedly cut. We know that the objective evidence from outside that flat was that she was pleading for her life. That man left her bleeding to death on the floor and took a bus to Melbourne.

The Hon. ADAM SEARLE: But did the jury get to know about it?

The Hon. TREVOR KHAN: That we do not know at this stage. But surely the signal of that to the wider community, when that man is only convicted of manslaughter, is a signal that condones the most brutal of violence against women.

The Hon. HELEN WESTWOOD: And violence against her ending a relationship.

CHAIR: A six-year sentence.

The Hon. TREVOR KHAN: I would like an answer.

Ms FRAME: That is one of the examples I was referring to where it could be seen to exacerbate the risk to women. People will see that and read about that in the papers and see where the defence was used successfully in that case.

The Hon. HELEN WESTWOOD: Talking about risk, I am sure your work has identified the same as the domestic violence inquiry; that is, that there are points in women's lives at which they are most at risk of violence from their partner, and it is when they are ending a relationship. Yet, it seems our courts are reinforcing the view that that is okay, that is an excuse. If you are going to exercise your human rights to end your relationship or express your sexuality as a human being, one of the consequences of that might be that you just get murdered. That concerns me. You are from the New South Wales government department that is charged with developing policy and legislative responses that address women's needs. What is your response to that?

CHAIR: You can take that question on notice if you wish.

Ms FRAME: We are not here today to put a position about whether the defence should be retained or abolished. We have made clear that we will look wherever we can to increase protections afforded to women. There are clearly examples where, with greater education and focus on issues and the ability to take into consideration the dynamic of domestic and family violence, we can improve protections to women, and that is our fundamental and number one concern.

Mr DAVID SHOEBRIDGE: When we are talking about stiffer sentences for male perpetrators, do you have any evidence that stiffer sentences are protecting women or would protect women, or is it more a signal to the community? You may not be in a position to answer it, but I would appreciate your response to that. Very often the discussion about protecting women assumes stiffer sentences will protect women yet analysis from the Bureau of Crime Statistics and Research seems to suggest not. So, are we talking about protecting women or should we be focusing our attention and appropriate signal to the community that expresses our outrage about what occurred?

Ms BOLAND: We obviously have access to the same research from the Bureau of Crime Statistics and Research. I do not think we have any definitive evidence about that. That research is contributing to the debate. I talked briefly about the intent of the domestic and family framework to change the way we are viewing domestic violence. Domestic violence is the result of social attitudes. It is the result of things we all bring to it. It is influenced by the legal system, it is influenced by social expectations and all of those things. One of the things we are trying to achieve with this is to have a strong emphasis on perpetrator and accountability, to make sure perpetrators are held to account appropriately and that those signals to the community are broadly that this is not acceptable, that it is just not acceptable to commit domestic violence. When your mate does it, it is not okay. When you hear reference to it, it is not okay. Just because it is domestic does not mean it is okay.

We are also interested in how that translates back through the whole of the system and how we can use that to connect to prevention and early intervention so we can avert this from happening. Obviously we want faster responses and good joined up responses when women experienced violence but we would like to see it eliminated. So, we are trying to currently piece together the influence of sentencing back on some of the prevention and early intervention. It is important to signal to the community that it is not acceptable to commit domestic violence.

(Witnesses withdrew)

(Luncheon adjournment)

KATE FITZ-GIBBON, Lecturer in Criminology, Deakin University, sworn and examined:

CHAIR: There may be some questions during the hearing that you may not wish to answer or need more time to answer. You can simply say, "I will take those on notice", and we will give you 21 days to respond. After the hearing, some members may have further questions. We will send those to you and would appreciate your cooperation in answering those, subject to your time availability.

Dr FITZ-GIBBON: That sounds fine.

CHAIR: If at any point you would rather give evidence in camera, with no-one in the public gallery, we are happy for you to raise that with us. Do you wish to make an opening statement?

Dr FITZ-GIBBON: Yes, I will make a brief one. First, I would like to thank the Committee for inviting me here today to be involved in this hearing. Over the past three years I have conducted research aimed at examining how governments, law reform bodies and legislative councils would solve this problem that has been posed by provocation. It is certainly something that has emerged as a problem in many jurisdictions. As part of my own research, I examined the reform responses that we implemented in Victoria in 2005 and also more recently in Britain in October 2010. A key part of it was that I wanted to look at a jurisdiction that still had provocation, to see how big the problem was and whether we should be responding to it the way we were, so I looked at New South Wales and examined the operation of provocation in New South Wales since 2005. As part of that I conducted an analysis of all the cases where it had been successfully used and was lucky enough to conduct interviews with 29 members of the New South Wales criminal justice system. That was a range of judges, members of the Office of the Director of Public Prosecutions and current practising defence counsel.

From that research I have come to the conclusion and would recommend to the council that the partial defence of provocation should be abolished in New South Wales. There are two key reasons that I have come to this conclusion. Firstly, that the successful use of provocation by men who kill female intimate partners, most commonly within the context of infidelity or alleged relationship separation, is highly problematic and it is completely out of kilter with community views of acceptable and unacceptable male violence. There is a concern that the acceptance of the provocation defence in these cases can be seen as a legal legitimisation of lethal male domestic violence.

The second key reason is that, by its very design, provocation encourages the mobilisation and creation of a narrative that blames the victim. In the way it is designed, that is almost unavoidable in a contested trial. It is highly problematic and it leaves people wondering whether it is the victim or the offender that is on trial. Also there is obviously an inability in these cases for the victims to defend themselves, so it does prioritise the events put forward by the offender. I appreciate that a key argument against provocation being abolished is that it is needed to provide somewhat of a safety net for people who kill in response to prolonged family violence and I do think it is really important that safeguards are put in place for those types of homicides. However, I would argue that retaining provocation to capture those cases is not wise and that the council should rather look to better structure the defence of self-defence so that it captures the cases that it really should, and that the genuine cases of self-defence receive self-defence, not this halfway house of provocation.

CHAIR: Were you doing that research as directed by the university?

Dr FITZ-GIBBON: No, it was my own project for my doctoral research.

CHAIR: For your doctorate?

Dr FITZ-GIBBON: Yes.

CHAIR: Are copies of that available?

Dr FITZ-GIBBON: Yes, I would be happy to provide you with some copies of it and flag relevant parts so that you are not wading through it.

CHAIR: Thank you, that would be very helpful to us.

Dr FITZ-GIBBON: Definitely.

CHAIR: That would be the most recent research on the issue?

Dr FITZ-GIBBON: Yes, it ended up being quite timely.

The Hon. DAVID CLARKE: When you are dealing with provocation and self-defence, provocation is an entirely different thing from self-defence—they are two different things.

Dr FITZ-GIBBON: Yes.

The Hon. DAVID CLARKE: I think you were here earlier when I asked some of the other witnesses and now want to ask you, if the decision were made to keep the partial defence of provocation, do you believe that conduct relied upon by an accused as amounting to provocation should be restricted to criminal conduct or even serious criminal conduct? Would that be a way forward?

Dr FITZ-GIBBON: It is interesting. I obviously heard that being asked this morning and it did strike me probably as one of the better proposals I have heard. Certainly of all the proposals to retain provocation and put some limitation on it, I would say that seems like the most sensible one. I went back through some of the cases that have happened in Victoria since it being abolished to consider where it would have fallen if we had taken that approach in Victoria. In the case of *Regina v Middendorp* in 2010, where Luke Middendorp killed his girlfriend, Jade Bownds, he alleged that she came at him with a knife and that he was responding excessively to that, so I wonder whether that type of case would still fall under that. Other than that, certainly if you retain provocation, that seems like quite a sensible approach. My only concern is in making any exclusions. As we have seen in the United Kingdom experience, it seems to progress in a different way and obviously you cannot anticipate what the unintended consequences of that would be.

The Hon. DAVID CLARKE: That is the case with any law.

Dr FITZ-GIBBON: Of course, yes.

The Hon. DAVID CLARKE: We just have to deal with it as it comes and put in place the best parameters that we can.

Dr FITZ-GIBBON: Yes, and I do think that, as far as putting in place parameters, that does seem like a very good option.

The Hon. SCOT MacDONALD: I want to ask you a question similar to one I asked the Assistant Commissioner of Police about complexity. I think I read in your submission that there was concern that it was too complex for juries. I struggle with this. I guess it is complex, but what part of the law is not complex? I am concerned that we are rejecting provocation because it is hard—and it is hard—but all of these defences seem to me not easy, whatever self-defence or murder is thrown up. Is it really your view that it is too complex? Is that an insurmountable problem, or maybe something we can address by guidance or some better guidelines? Can you expand on that a little?

Dr FITZ-GIBBON: Yes, that was something that emerged a lot from the interviews that I conducted. A lot of legal counsel said that every time they had a provocation case they themselves were having to go back and in their own mind work it out, and they could not understand how a jury was going to be expected to do that. That was something that a lot of prosecutors, defence counsel, and even judges in giving their directions seem to be very aware of. Perhaps all areas of law are complex. I think the reason why I find it so concerning in provocation is the reflection of a lot of the people I interviewed, and looking at my own research, that potentially the consequence of that is that juries might just be taking a halfway house and perhaps a compromised verdict. They are being given a range of options. They are told that there is the option of murder, there is the option of manslaughter, there is also the option of manslaughter by reason of provocation and then, if you do not find that, there is the option of self-defence, and perhaps juries are going, "We're getting so much here, let's just go in the midway with provocation". That was certainly a concern that came out of it. I would think that if the decision is to retain provocation, simplifying it would need to be a priority.

The Hon. DAVID CLARKE: If we go down the pathway that I raised, separating criminal conduct, what is the downside? It would allow us to retain the stronger and better arguments for keeping the defence of

provocation and it would get rid of all those cases that you are talking about that there is community outrage about?

Dr FITZ-GIBBON: Yes, it would certainly minimise the infidelity and relationship separation cases.

The Hon. DAVID CLARKE: What would be the downside?

Dr FITZ-GIBBON: I think you would want to make sure that the applicability in those cases was something that was being made by judges, not by members of the jury, whether you put in a judicial check at the start of the trial or prehearing where the judge decides whether provocation can be raised. I think that would be very important rather than it being given as a direction to the jury for them to decide.

The Hon. DAVID CLARKE: Why should we do that? Why should we leave that with the judge when in so many other instances matters are left to the jury and explained to the jury by the judge?

Dr FITZ-GIBBON: I think we ask too much of juries. The verdicts we are seeing in cases like Singh, if you look at community outrage—that is not the view in the community of acceptable and unacceptable violence. Obviously I have not spoken to any members of the jury, but my only way of understanding that in my mind is that they must have gone for the compromise option because so much was given to them.

The Hon. DAVID CLARKE: If we took the principle that you have just raised, we would be taking a lot of decisions away from the jury, would we not?

Dr FITZ-GIBBON: Yes, most certainly. It is hard. Our system rests on the fact of the jury verdict and it is really important, but I think, wherever possible, to simplify it needs to be a priority if it was brought in with that provision.

The Hon. DAVID CLARKE: But that problem that you raise is a problem right across the board of juries understanding issues explained to them by judges. That is a problem faced in many different situations; it is not an issue of particular concern in relation to the defence of provocation if we separate those matters dealing with criminal conduct, specifically serious criminal conduct.

Dr FITZ-GIBBON: I do not think it comes up in that, but other jurisdictions do have a much simpler approach to categorising homicide offences. If you go as simple as Tasmania, they do not have any partial defences and your jury is only being directed on self-defence, manslaughter and murder. That is a more simple approach, whether or not it is the right approach. New South Wales still retains quite a few partial defences and wherever possible—I am certainly not saying there is a complete solution—simplifying it should be a consideration.

The Hon. DAVID CLARKE: Setting aside the concern that you have which applies in a lot of situations, what other reasons would you put forward for us not proceeding down the path I have raised to what you are suggesting? Why would that not get more or less the same result, but allow the defence of provocation to be there on those issues where there is stronger and better basis for it?

Dr FITZ-GIBBON: We would probably need to see examples of the types of cases you would hope would be fitting within that that you would be worried would get a murder conviction otherwise, but I think my concern is—

The Hon. DAVID CLARKE: Can you think of any?

Dr FITZ-GIBBON: My concern is if that is being put in predominantly for victims of prolonged family violence who cannot access the complete self-defence. Should we then not be looking at the complete self-defence and making sure that the genuine cases fall within that, not keeping a halfway house that can be used in practices such as plea bargaining to avoid going to trial?

The Hon. TREVOR KHAN: If what provocative conduct is would justify using a partial defence of provocation, would it not cover most of the violent conduct matters that would otherwise fall within self-defence?

Dr FITZ-GIBBON: Yes, it would.

The Hon. TREVOR KHAN: Apart from that, it would allow you to take into account criminal offences which are seriously indictable, like some very serious company frauds, so that you could use provocation in the case of a very serious company fraud but you would not be able to use it in cases of adultery. That would make no sense at all, would it?

Dr FITZ-GIBBON: No, most definitely not.

Mr DAVID SHOEBRIDGE: Or you could limit it to crimes of violence?

Dr FITZ-GIBBON: Yes.

The Hon. TREVOR KHAN: And then you have self-defence.

The Hon. ADAM SEARLE: All of this sounds like it is making the law a lot more complicated.

Dr FITZ-GIBBON: My concern would be that if it was just being limited to crimes of violence that are unlawful, then I would suggest if you started to look at those cases I would be questioning why those people were not granted a complete defence of self-defence.

The Hon. SCOT MacDONALD: As I am growing to understand, the problem we have is that a lot of the history does not come to the surface until it is too late. We have many incidents, small, large, mental, physical abuse, whatever; it does not come to the attention of the authorities until there has been a serious crime so self-defence seems very wanting to me.

Dr FITZ-GIBBON: It is. I think it is very difficult and it is certainly not an area I have looked a huge amount into. My focus has been on provocation. But I do know certainly since Victoria, for example, brought in a wider range of evidentiary laws so that more of that family violence evidence can come in, they have found that in certain cases, in three of the cases they have had so far, they have not proceeded through to trial because the prosecution has appreciated that with that evidence being able to be presented in court you will no longer be able to get a conviction for manslaughter or for provocation.

This is anecdotal so I am not sure how relevant it is but I spoke to a colleague in Queensland about the effects of the Queensland reforms. I was asking her what is falling into that partial defence of the abusive relationship defence. Interestingly, she said because now you can bring in so much more of the family violence evidence, because of what came in with those reforms, you no longer need that defence because for the first time self-defence is working. So perhaps if we look at how we can bring in this evidence, then perhaps we do not need this halfway house because we can start to get those full stories. I know it is incredibly hard because you do have the difficulty that the victim is not there to speak for themselves.

The Hon. DAVID CLARKE: We accept the halfway house. We have one side supporting this partial defence of provocation, very eminent legal authorities, so there is substantial evidence there. What you are proposing is not a self-obvious fact to everybody. There is substantial legal authority to support that.

Dr FITZ-GIBBON: Most definitely.

The Hon. DAVID CLARKE: That is why I am putting to you the proposition that I did and I am trying to explore what is the substantial downside to what I have raised with you. I would like to hear any arguments that you can put forward against that proposition which I have put on the table.

Dr FITZ-GIBBON: As I said before, in terms of retaining provocation I think the suggestion of a way to exclude certain cases from it, I think that is a really good way forward and I would definitely favour that over something like Britain's experience where they expressly excluded sexual infidelity. You can see from the initial case of Clinton that is already starting to come back in. So I think that is really problematic as I think it would just be about making sure that those reforms are crafted and designed in a way that you shut off those loopholes for it to extend out as much as possible.

The Hon. DAVID CLARKE: But that could be done, could it not?

Dr FITZ-GIBBON: I think it definitely could be because I think you go in—New South Wales does have the benefit of looking at the consequences that have come out of a lot of jurisdictions recently which have grappled with this problem, and I think if we can learn from their experience it is to make sure that whatever is put in place is tight and that some of those unintended consequences are minimised at the outset.

CHAIR: You actually went to the United Kingdom and investigated the law?

Dr FITZ-GIBBON: I did, yes.

CHAIR: What were the main lessons you learned from that?

Dr FITZ-GIBBON: I did my interviews in 2010 and 2011 in the United Kingdom; it was very soon after the reforms were implemented, so it was not yet evident in case law. I was more interested in speaking with judges in the United Kingdom and practising counsel to find out what their opinions of it were. The United Kingdom obviously brought in the new partial defence of loss of control, and most people seemed to believe there had just been a rebranding for kind of the public purpose of saying, "We've abolished provocation" because there was quite a public outcry to provocation. So not many people saw it as a significant difference, and most of the counsel or judges I spoke to suspected that it would operate in nearly the same way.

CHAIR: Do they use the words "loss of control"?

Dr FITZ-GIBBON: It is the partial defence of loss of control.

The Hon. ADAM SEARLE: You said earlier that the social framework evidence that had come in, I think you were saying in Queensland—

Dr FITZ-GIBBON: Yes.

The Hon. ADAM SEARLE: —was producing some positive results. What do you know of the experience in Victoria? Has it been useful and should we try it here?

Dr FITZ-GIBBON: Certainly looking at the evidence around family violence is central to anything—

The Hon. ADAM SEARLE: Making sure that is admissible.

Dr FITZ-GIBBON: Yes, I think definitely. As multiple people will tell you and as a lot of the legal authorities around self-defence will tell you, one of the biggest fights you have in those cases is bringing in that evidence and that is central to any claims. But I think in Victoria obviously they took that different approach to bring in the offence of defensive homicide and that has certainly presented its own difficulties and that definitely would not be something I would recommend for New South Wales.

The Hon. ADAM SEARLE: In terms of potential abolition of the partial defence of provocation, if we were minded to embrace that to any degree, should we only abolish it in the circumstances of domestic and family violence or should it be an across-the-board abolition?

Dr FITZ-GIBBON: Certainly there are not many circumstances outside of domestic and family that you would keep it for. I think that the strongest arguments for it are in the cases of male-perpetrated intimate partner homicides, but there are also cases where males have killed males that are very concerning as well, even though they do not raise—

The Hon. TREVOR KHAN: What about the British case of Camplin? That was the boy—I forget how old he was; 15 or something like that—who was sexually assaulted by an older man, the older man having sexually assaulted him then laughed at the boy, the boy became enraged and killed the older man. He got off on provocation.

Dr FITZ-GIBBON: Yes. There is a similar case in Victoria with defensive homicide.

The Hon. TREVOR KHAN: On appeal, it was reduced to manslaughter.

Dr FITZ-GIBBON: That is certainly a case that would fall within the provisions if you put in for unlawful—

The Hon. TREVOR KHAN: But we are talking about in the context of abolishing it.

The Hon. ADAM SEARLE: That is not self-defence. That is because it is after the fact.

The Hon. TREVOR KHAN: It is after the event. It is out of rage, the belittling that occurred.

CHAIR: Have you finished your question?

The Hon. ADAM SEARLE: Yes, but it was very useful.

Dr FITZ-GIBBON: If you look at the extent to which provocation reduces a sentence obviously for murder, especially in New South Wales where there are standard non-parole periods, down to manslaughter, I wonder—and it was part of the submission that if you abolish provocation what will be essential is bringing in some key sentencing guidelines. From that I think you would look back over perhaps the last five, 10 or even 15 years of cases and you would identify the key scenarios of which drawing from other jurisdictions that might be one and you would create a clear sentencing guideline of the mitigation that should occur in that case.

Similarly, you would have a very clear guideline on something like adultery or infidelity, relationship separation, that provocation should not be considered a mitigating factor so that you do not then have that narrative transferred into sentencing. So it might be that it is a collection of five sentencing judgements based on these cases which we worry are no longer going to be coming out in provocation and they will be coming out in murder instead. This is the direction that the counsel took and it is part of that legal education. This is how we think they should be approached in the period post abolition.

CHAIR: What about the negative side? If it is abolished it will not be able to be used by women who are being battered and so on who are driven to the point where they kill their husband or the male.

Dr FITZ-GIBBON: I think that is also part of the task of this Committee. As I said, I am not as familiar with self-defence but I think the task is to make sure that self-defence is working in a way that those cases get captured so those women do not have to go for that halfway house as provocation. So they can get the complete defence of self-defence because I do not think that provocation is always the correct categorisation for those cases.

CHAIR: Does self-defence require a threat to her life, just bashing her?

Dr FITZ-GIBBON: It would but if you remove things like the immediacy requirement and you add in—the United Kingdom, for example, the loss of control partial defence also added in fear as something that should be considered. So if you add in fear as a qualifying trigger, that you can believe your life is under threat, if you are under fear of that and the history of violence would justify that fear, then that might be a way to capture more of those cases in self-defence.

The Hon. HELEN WESTWOOD: Did you look at many cases where women murdered an abusive partner? Did you have a look at enough of them to be able to come to some conclusions about them?

Dr FITZ-GIBBON: There certainly were not a huge amount. Obviously men kill at a far higher rate than females so there were not a huge amount in my sample over the five years that I did in New South Wales. The two cases I did have were Chant in 2009 and Russell in 2006.

The Hon. HELEN WESTWOOD: One of the things that has come to us in evidence is that women end up using provocation as a defence rather than self-defence. That has to do with the way that the case is prepared, the briefings that are provided from the police to the prosecutors. Were you able to formulate any views on that in the work that you have done thus far?

Dr FITZ-GIBBON: No. It did not emerge as a key area that I was looking at predominantly just because it was not key in the cases. So naturally from where I was looking at in the cases I did end up having quite a focus on male-perpetrated homicides in this context. But I do think that if you were to abolish

provocation it is central to look at that, and I think that comes out as a key problem. Categorising those cases and them not fitting within self-defence does happen at an early stage as well.

The Hon. HELEN WESTWOOD: Another area in your submission that interested me and is something that has been raised with me by others who have an interest in this issue is the complexity for juries and jurors and their inability to understand what is being put to them or the legally technical aspects of the defence of provocation. Other than abolition, do you think there is anything that we can do, or perhaps have you seen any other jurisdictions where they have dealt with that better, where jurors are better informed? Whether it is during the case or perhaps through education, jurors come to grips with the complexity of it and make decisions or judgements that you think are in keeping with the community's views?

Dr FITZ-GIBBON: It was something that came out in Victoria and England as well, so it certainly was not something that was unique to New South Wales. Certainly around the offence of defensive homicide and around the partial defence of loss of control, stakeholders felt similar complexity in those. It is important that if provocation is retained and a restriction is put in like unlawful conduct, either members of this Committee or someone else that you could appoint actually considers how that will be drafted before it is put in. I know part of the Victorian experience was that the offence of defensive homicide was recommended and no-one had yet thought out what would be the judicial directions on that. So then the person tasked with doing that knew how complicated they were but that was after it had already been brought in so there was little you could do then. So I would think that drafting those directions to the jury and drafting how the jury will be instructed should be central to the recommendation of the reforms.

Mr DAVID SHOEBRIDGE: In terms of the simple dichotomy of abolishing the defence of provocation and then, if you like, loading up self-defence to cover the gaps, have you thought about some of the procedural differences between the way the two defences are run and how particularly vulnerable, abused, fragile women might actually want to take advantage of the procedures available in running the defence of provocation as opposed to self-defence, meaning they do not have to get in the witness box and they do not have to face cross-examination? Have you considered that?

Dr FITZ-GIBBON: I think there are certainly concerns there and even hearing from some of the other evidence this morning, there are certainly advantages to being able to plead to an offence that sits in the midway, rather than have to fight to not get murder. I wonder—and this is certainly not something that I have looked into a lot and it is just off the top of my head—whether there is something within excessive self-defence that can be included if there is still going to be that option as well, rather than having to keep provocation, which has so many recognised limitations.

Mr DAVID SHOEBRIDGE: But if you were to limit provocation to applying only where the provoking conduct was violent criminal activity or violent unlawful activity, but you were to leave it on the statute books, you may well have a number of circumstances where women, after an abusive relationship, feel they simply cannot confront going into the witness box and being cross-examined and attacked about their conduct and they might legitimately want to avail themselves of the defence of provocation so as to avoid that and avoid the enormously confronting circumstance. Do you think there is a valid argument for keeping a limited form of provocation in those cases?

Dr FITZ-GIBBON: Two things come to mind. Firstly, I wonder, if you did bring in some of these kind of wider evidence reforms, whether more of those cases would not proceed through to trial. So with those cases where you have particularly vulnerable women, perhaps they would not be going to trial because there would be an appreciation of the evidence that could be brought in to show that history of family violence. There have been two cases in Victoria since the reforms where that has been the case: where the charges have been withdrawn at an early stage because of the appreciation now under the new Evidence Act of how much more evidence you can bring in. Where it is there, I think certainly there is an argument to keep it for that. I suppose my only concern is that already I can see from Victoria since 2005 at least one case that could get in under that, which has been widely criticised in Victoria as a provocation case: Middendorf. I would just be worried about the other cases that could get in.

Mr DAVID SHOEBRIDGE: But you would not do it alone. You would have it sit side by side, I would imagine if you were doing reform, the social framework evidence also being available in the self-defences. It is a dichotomy, is it not?

Dr FITZ-GIBBON: Yes, I think so. I think definitely it could be implemented together but my hope would be if you could get the social evidence framework correct then perhaps you would not need that halfway house any more.

The Hon. TREVOR KHAN: Do you have any statistics that identify how many accused in provocation cases have actually not given evidence? We know Mr Ramage did not give evidence. But do we know in terms of the scenario that is painted of women being frightened as to whether there is any actual empirical evidence to support that proposition?

Dr FITZ-GIBBON: I do not know that. I do have a catalogue of the cases I would be happy to look through and find out for you.

The Hon. TREVOR KHAN: Indeed, if we reverse the onus, so that we replace the onus in provocation—that has been one of the suggestions—that would increase the prospect of people giving evidence in those circumstances, would it not?

Dr FITZ-GIBBON: I think certainly a lot of the cases are resolved by plea, so a lot of them do not go through to trial—certainly the two cases since 2005 in New South Wales were resolved by plea. But I would be happy to look and find out for you which offenders gave evidence otherwise.

The Hon. HELEN WESTWOOD: The issue of the onus of proof has been recommended to the Committee in some of the submissions. Do you think there would have been a different outcome in the Middendorf case had the onus of proof been reversed in that case or is it too hard to tell?

Dr FITZ-GIBBON: I think I would probably hold off making a judgement on that but I do certainly think that if provocation is to be retained then that is a good step to reverse that.

The Hon. ADAM SEARLE: In Middendorf, if my memory serves me correctly, the deceased actually had wounds to her back.

Dr FITZ-GIBBON: He stabbed her in the back.

The Hon. ADAM SEARLE: He claimed he acted in self-defence when she came at him, yet the objective evidence was that she was killed by wounds to her back.

The Hon. TREVOR KHAN: And she died outside—

The Hon. ADAM SEARLE: In the street.

The Hon. TREVOR KHAN: —and he made disparaging remarks about her.

The Hon. ADAM SEARLE: Based on my knowledge of the law in Victoria—which is pretty sketchy—it seems incredible that such an outcome could have occurred, other than to suggest that it was a jury decision and that unpredictable element of the complexity of the jury putting themselves into the position perhaps of the defendant and deciding for themselves—

The Hon. DAVID CLARKE: But those two things are not consistent: pleading self-defence and then an injury to the back.

The Hon. ADAM SEARLE: It suggests that the deceased was running away at the time.

Dr FITZ-GIBBON: The evidence was that Jade Bownds—

Mr DAVID SHOEBRIDGE: I suppose the question is: Do you have any observations given that dialogue?

Dr FITZ-GIBBON: Certainly in the Middendorf case it was alleged that the victim Jade Bownds had been coming at the offender with a knife and there were four fatal wounds to her back. There was certainly a lot of questions being raised over the fact that it was a 95-kilogram male and a 50-kilogram female and how that had not been able to be resolved in another way and then the very disparaging remarks made as she was dying

outside were quite concerning. I think that case played out like a provocation case. There was a lot of discussion about Ms Bownds' drug history, there was a lot of discussion about her bringing another man back to the house and certainly within the context of the Victorian reforms it seems like a typical Ramage-provocation style.

The Hon. ADAM SEARLE: Just like nothing had changed.

Dr FITZ-GIBBON: It did. It is only one in five years—it is nearly seven years now—which is important to note but it was very concerning.

CHAIR: The footnote on the bottom of page 5 of your submission states: "See Fitz-Gibbon (2012a) for a more detailed analysis of the successful use of provocation in *Stevens and Williams*." Is that another document?

Dr FITZ-GIBBON: That is a copy of an article that I wrote recently. I had previously passed that on to Vanessa but I would be happy to do that again.

CHAIR: So you are not arguing in favour of provocation but you are saying it has been used successfully by these males in a number of cases?

Dr FITZ-GIBBON: Yes, there I have been looking at where it has been used successfully by men who have killed intimate partners and also by men who have killed other men.

Mr DAVID SHOEBRIDGE: If we abolish provocation and we then expand self-defence, are you not troubled that there might be a whole series of cases that will not amount to self defence? Trevor Khan gave an example about the sexual assault on a minor being followed by belittling statements which led to the killing. But we can think of many examples like that which would not amount to self-defence. Are you suggesting we should broaden self-defence to pick up those kinds of circumstances?

Dr FITZ-GIBBON: I suppose it would be a question of whether you broaden self-defence to pick that up or whether you make a direction to be able to step away from the standard non-parole period in murder for those cases.

The Hon. TREVOR KHAN: Which you can.

Dr FITZ-GIBBON: Yes. So New South Wales is fortunate; you do not have a mandatory life sentence for murder. So there is discretion in sentencing in murder. I think in some of these cases the full range of discretion should be used rather than keeping a partial defence, which is widely recognised as being problematic.

The Hon. ADAM SEARLE: Although there is discretion in sentencing, including for murder, the fact is once there is a murder conviction the highest level of moral opprobrium attaches to it and even the minimum freight for a murder conviction is much higher than for manslaughter—

Dr FITZ-GIBBON: Under current practices.

The Hon. ADAM SEARLE: I understand that but I would be very concerned if we moved to a situation where there was only, if you like, a conviction of homicide and then it was all just a question of weight in sentencing. I think one of the good things about our system is that the worst kind of homicide is called murder, which has a certain moral opprobrium, and there are a range of categories where there is still unlawful homicide but it is less than murder.

The Hon. TREVOR KHAN: Then how do you deal with the mercy killing?

The Hon. ADAM SEARLE: That is not yet dealt with adequately in the law at all.

Dr FITZ-GIBBON: The mercy killings and honour killings and things like the sexual assault responding, in provocation they are cases that come up. I think certainly honour killings was something that England had to grapple with as that was falling within provocation and part of their new reforms was to try and step away from that. I think mercy killings are something that all jurisdictions are starting to look towards and it is a very difficult thing to grapple with, but they are not cases that come up in the majority—the mercy killing

case or the case where someone has been sexually assaulted and responded with provoked violence. So I think in those exceptional cases you do have the wide range of discretion in murder. Those people are, unfortunately, then labelled as a murderer but you can make it very clear in the sentencing judgement and in the time imposed that it was considered a lesser culpable form of murder. In the other cases there is intent and murder recognises that.

The Hon. SCOT MacDONALD: One of the things I really do not understand—you have included it in your submission and I think a couple of others had similar sorts of comments—is that provocation partly legitimises lethal violence usually by males. Our crime statistics, except for one or two categories, are generally going in the right direction, so why do we have a society that seems to have a better understanding that it is not right to assault someone or to break into a car, it is not right to do all those sorts of things, yet you and others are saying that there is an acceptance out there that lethal violence, usually by a male on a female, has some sort of legitimacy? Having said that, to a large extent the policeman probably backed you up but I do not understand it.

Dr FITZ-GIBBON: I think it is through the narratives that we allow in those cases and in part of its design that you start blaming the victim for the fact that they have been killed for violence. I think through things like the Singh case in the wider public it then comes out that this man is not a murderer—our courts have said that this man is not a murderer. I think that is where the concern is, that through this type of avenue of provocation where you do get discussions of a woman's sexual history, of her reasons for wanting to leave it—essentially exercising her human rights—and in things like the well-publicised Ramage case where you had a discussion about whether the victim had her period at the time or not, things like that legitimise the violence that has been acted upon these women. It does not provide a condemnation of that violence; it provides an avenue through which it can be understood. One of the biggest problems I have with provocation is that it does allow those narratives to become privileged by the law.

The Hon. ADAM SEARLE: There is also violence against the families through that trial process.

Dr FITZ-GIBBON: Definitely.

The Hon. SCOT MacDONALD: You see a link between this avenue of provocation and rising domestic violence. When every other sort of crime in our society seems to be going down largely, domestic violence is going up?

Mr DAVID SHOEBRIDGE: I do not think it has ever been characterised as "rising" domestic violence; just an unacceptable level of domestic violence.

The Hon. SCOT MacDONALD: The policeman said it is rising.

Dr FITZ-GIBBON: I certainly would not say that I think it is directly linked to people then perpetrating that. What I think is that it gives the wrong view to the community of what our justice system considers acceptable and unacceptable violence.

CHAIR: There is an increase in domestic violence.

The Hon. SCOT MacDONALD: That is what I understood, unless I misunderstood.

The Hon. ADAM SEARLE: Perhaps we could put some questions on notice to the police about that because that is a very important thing that we need to understand.

Mr DAVID SHOEBRIDGE: There is also the observer phenomenon: if you are looking more closely at it and putting more resources into it—

The Hon. ADAM SEARLE: You see it more often.

Mr DAVID SHOEBRIDGE: In order to address some of those systemic issues, which have been in the law for centuries, what about the concept of a set of principles that judges are directed to whenever a defence, partial or whole defence, involving family violence is raised—and those principles would include statements about not condoning male violence on women—being put into the Crimes Act? Can you see how that might operate?

Dr FITZ-GIBBON: I think that would certainly be a good step forward and probably regardless of what happens around provocation that would be a good implementation. My concern would be that that does not apply to juries. So if provocation is still there then there is still that risk that it can still be accepted in cases where we are not quite sure why—like the Singh case—it seems completely out of kilter yet it has been a jury verdict. And also how would that apply at the level of prosecutorial decision-making and prosecutors deciding whether or not to accept a plea to provocation?

The Hon. TREVOR KHAN: And it would not help Mr Gillies getting stabbed in the face by Mr Green?

Dr FITZ-GIBBON: No.

The Hon. TREVOR KHAN: They were not in a domestic relationship.

The Hon. HELEN WESTWOOD: In the last couple of paragraphs of your submission you say that you interviewed defence counsel throughout New South Wales and the majority of those defence counsel oppose the abolition of provocation.

The Hon. TREVOR KHAN: Of course we did.

The Hon. HELEN WESTWOOD: Did they give reasons or do you have a view as to why they are opposed to it?

Dr FITZ-GIBBON: I was very lucky to have quite in-depth conversations with a lot of defence counsel in New South Wales. Certainly for a lot of them they did not see provocation as a problem. A lot of the participants were actually surprised that I was even asking them about provocation because they did not understand why it was an issue. Perhaps now, with all the attention around the Singh case, that would be different. Part of my concern was that I felt you needed something like Victoria had Ramage. Unfortunately, that is probably what has happened in New South Wales: you needed a case that so obviously showed that there was something wrong with provocation. I do wonder if doing those interviews now the responses would be a little bit different. Because the biggest thing seemed to be at the time that the majority of defence counsel did not see provocation as problematic but, at the same time, recognised in a lot of cases that it did allow the victim to be put on trial when I asked them that.

The Hon. HELEN WESTWOOD: One of the other things I find amazing is that the first thing usually raised by the practitioners in our criminal justice system—usually by men—is about women who murder their abusive husbands and yet the evidence shows that is not the majority of cases. I am surprised that they seem to be so blind to the reality of the way in which provocation is used.

Dr FITZ-GIBBON: That has been my concern: If you look at the majority of cases, to me they should be characterised as murders; they have an intent to kill and they have an unacceptable reason for thinking that they can do so. That is why I think it should be abolished.

Mr DAVID SHOEBRIDGE: And they use the exceptional case in which a woman has applied the defence in order to legitimise a whole raft of male violence.

Dr FITZ-GIBBON: Yes. And that has been my concern: How big a risk must we take, and how much effort must we put into keeping provocation for those one-off cases, those two cases in five years? That it is operating on a year-by-year basis is highly concerning.

The Hon. TREVOR KHAN: There is a subset that none of us has talked about up until this point, and that is what you could describe as the male-on-male violence; but it is not the male-on-male violence in terms of the Green circumstance. It is the Won circumstance, that is, the husband who kills the new lover because of the actions of the estranged wife and the lover. That is right, isn't it?

Dr FITZ-GIBBON: Yes, you had that one recently. You also had that in Goundar a few years ago, in 2010 I think.

The Hon. ADAM SEARLE: Where she lured the victim to the house.

Dr FITZ-GIBBON: Yes, where she brought him to the house. He was waiting in the cupboard, and he jumps out and killed the victim, his friend and the wife's new partner, and was able to argue provocation on the basis that he only intended to ever surprise and confront them, and that his desire to kill him came at the last minute.

The Hon. TREVOR KHAN: Indeed, there was a case many years ago, when I think I was at law school, I think in Morwell, where the husband crept into the house and beat the wife and lover, who was in a different bedroom, to death. That was, again, a case that was run on the basis of provocation. Those are cases that do not fit within the criteria of a simple domestic violence circumstance.

Dr FITZ-GIBBON: At the same time you have also got cases of two acquaintance males who, in a situation of alcohol-fuelled violence and insult, or a punch to the head, respond by lethal violence. Those cases seemed so much worse because of the alcohol and those people arguing provocation as well. Certainly, in Victoria, through the defence of homicide, they have been able to argue the defence of homicide. If you put together those three situations in which male perpetrators use it—that is the majority—I suggest in any of those cases it should be murder.

Mr DAVID SHOEBRIDGE: But limiting the scope of the provocative conduct to something that is unlawful or criminal would solve all of those circumstances; as opposed to infidelity, unfaithfulness or all those circumstances that have just been the subject of discussion.

Dr FITZ-GIBBON: Certainly, you would lose those domestic ones. You could still potentially have some of the alcohol-fuelled fights as assaults.

The Hon. SCOT MacDONALD: Going back to Singh: Singh was convicted of manslaughter. The community angst seems to be around the shortness of the sentence, six years. But, as I understand it, there were two large discounts that reduced that sentence. Is the problem in the sentencing, or is there a manifest problem in the availability of manslaughter?

Dr FITZ-GIBBON: There are two things. Firstly, I think the sentence is completely inadequate. But I think the bigger concern in that case was that members of the victim's family had to sit through the victim's life being pulled apart and her being blamed for the violence that was perpetrated against her; and that is essentially what I think the provocation defence allows defence counsel and people to do, that is, to prove their own case they naturally have to blacken the character of the victim. That is what happened in that case, and that is where a lot of the outrage has been. You get legitimisation of the domestic violence in thinking that, "We think it's wrong, we've given you manslaughter, but we didn't give you murder because the victim did this". I do not think she did anything that justified what happened to her.

The Hon. SCOT MacDONALD: If we were able to rewind time and he got 12 or 14 years, there would still be the fundamental problem of pulling apart the victims, who cannot defend themselves?

Dr FITZ-GIBBON: Yes. In a murder trial she would not have been able to be treated like that.

CHAIR: Dr Fitz-Gibbon, thank you very much for your expert testimony.

(The witness withdrew)

(Short adjournment)

JULIE STUBBS, Professor, Faculty of Law, University of New South Wales, affirmed and examined:

CHAIR: Thank you very much for appearing before this inquiry. The Committee appreciates your expert knowledge. If there are questions asked that you cannot answer in detail, you can take them on notice and at the end of the hearing the Committee may send you additional questions on notice, both of which should be answered in 21 days. If you would rather give your evidence in camera, please indicate that and the Committee will consider your request. Do you wish to make an opening statement?

Professor STUBBS: Thank you for the invitation to appear. I have undertaken research around domestic violence and some research concerning domestic violence-related homicides over the past 20 or more years. However, I make it clear to the Committee that I am a criminologist and not a lawyer. The partial defence of provocation is, of course, controversial and there is significant public disquiet, and I agree that there is good reason for that disquiet. However, the abolition of the partial defence may not achieve its desired objectives or may be associated with unintended negative consequences. For instance, the kinds of damaging victim-blaming narratives that many of us would seek to exclude by abolishing the partial defence could re-emerge at sentencing and people who have a well-founded argument that their resort to homicide should be seen as less culpable than murder—such as some battered women who resort to homicide in desperate circumstances—will be convicted of murder and receive much longer sentences than is currently the case.

My research with colleagues found that over the past decade 24 battered women were charged with homicide offences in New South Wales and about two-thirds of them pleaded guilty to manslaughter, mostly on the basis of a partial defence such as provocation. What will happen to those cases in the absence of a partial defence of provocation is unclear. However, if the Crown is less willing to accept a plea to manslaughter, more of those women may be going to trial for murder.

Sentencing issues also need to be given really careful consideration in any proposed reform. As noted by the Victorian Sentencing Advisory Council, there is a real risk that flaws in the partial defence of provocation could be transferred to the sentencing domain. There is currently little in the sentencing law or theory to guide us in how provocation would play out in sentencing and without the development of a framework on provocation in sentencing it is very possible that the intended reforms could be undermined. It is not easy simply to adapt the framework that the Victorian Sentencing Advisory Council is developing because we have a distinctive approach to sentencing in New South Wales in some ways; that is, we have a standard minimum non-parole period of 20 years for murder or 25 years for some specified categories of victims.

In my submission I draw attention to two studies undertaken by the New South Wales Judicial Commission that show that following the introduction of the standard minimum non-parole period in 2003, 100 per cent of people convicted of murder in New South Wales received a prison sentence. By contrast, several women convicted of manslaughter had received a non-custodial sentence and others had received short sentences. Thus, a battered woman convicted of murder who prior to the abolition of provocation may have been found guilty or have pleaded guilty to manslaughter on the basis of provocation is likely to attract a substantially longer sentence. That would be an undesirable outcome.

The laws of homicide defences, partial defences, sentencing and the rules of evidence intersect and change in one area is likely to have implications for other areas. The issues before the Committee are complex and reforms in other jurisdictions have taken diverse directions, and the emerging evidence suggests that they have not always achieved their objectives. This reinforces the fact that achieving effective law reform in this area is challenging. Because of that complexity, I have recommended in my submission that the matters be referred to the New South Wales Law Reform Commission for a comprehensive review.

CHAIR: Your two recommendations are that the issue be referred to the Law Reform Commission and that the partial defence of provocation should be retained.

Professor STUBBS: That is correct.

The Hon. DAVID CLARKE: What about restricting the conduct that can be relied upon to establish provocation to criminal conduct or even serious criminal conduct? Would that be another way forward that would deal with some of these outrageous cases that people rely upon to seek the abolition of this defence?

Professor STUBBS: Without really careful drafting, it might achieve the purpose of excluding circumstances of men who rely on provocation to diminish or to make more justifiable their own violent behaviour. However, it could also unintentionally preclude some battered women from relying on it. One of the difficulties we have in ensuring that a battered woman receives fair treatment before the court is ensuring that the court understands the full range of evidence that might be relevant. For instance, it may be that in the absence of a really comprehensive understanding of history that the woman is responding to, what she seemed to be responding to in the immediate incident might not be criminal or unlawful behaviour and it might be rendered down to something trivial.

The Hon. DAVID CLARKE: Are you talking about a battered wife being in that situation because of a non-criminal activity?

Professor STUBBS: No, I am saying that there is a risk if we do not have a full appreciation of the history of the relationship that—

The Hon. TREVOR KHAN: The social framework?

The Hon. ADAM SEARLE: In Victoria they have the concept of the social framework.

Mr DAVID SHOEBRIDGE: What if it were in conjunction with the admissibility of social framework evidence?

The Hon. ADAM SEARLE: And perhaps the expansion—

CHAIR: The witness wants to give an example.

The Hon. HELEN WESTWOOD: Perhaps Professor Stubbs should be allowed to answer.

Professor STUBBS: In my submission I gave as an example the case of Bradley, which was a Victorian case from a few years ago. Because the court did not give full weight to the full history of the relationship, what they saw as important in the lead-up to the homicide that she committed was an insult directed towards her by her partner. If we look only at the insult, it does not seem significant nor does it easily go to the argument put that her culpability should be reduced. However, if we had a more appropriate understanding it would be different. So, yes, social framework evidence could do that. Again it would need to be very carefully crafted.

CHAIR: What was the insult?

Professor STUBBS: I think he called her a dog.

Mr DAVID SHOEBRIDGE: It was a verbal insult.

Professor STUBBS: Yes, it was a verbal insult. It was words to the effect, "You are a dog."

CHAIR: It was not racist?

Professor STUBBS: In that case, no. However, there was a terrible, long history of domestic violence. That was not put to the jury in the terms of self-defence. It was asked to look at the insult as a vehicle for provocation.

The Hon. DAVID CLARKE: If we could get that social framework right, would that not be the way to go because it would deal with these outrageous cases that aroused public concern. Why would that not be the way to go? You recommend that a committee recommend that something go off to another committee. I do not know that I am enthralled by making that sort of recommendation.

Professor STUBBS: I understand that the Committee would perhaps feel less than satisfied with that outcome. The Law Reform Commission is currently looking at sentencing, and the issue of standard minimum non-parole periods in particular, and its interim report has been released in the past couple of days. The complexity of the sentencing issues as they intersect with this are currently subject to review. It would seem that while that review is going on the commission would be well placed to take this matter on board as well.

The Hon. TREVOR KHAN: No.

The Hon. ADAM SEARLE: We may disagree.

The Hon. DAVID CLARKE: But you agree that there is outrage.

Professor STUBBS: I agree.

The Hon. DAVID CLARKE: And rightfully so?

Professor STUBBS: Yes.

The Hon. DAVID CLARKE: If we proceeded down this pathway subject to getting the social framework right and included, why would we not go in that direction? Can you think of any other reasons why we should not have this defence in only the most serious situations of criminal behaviour?

Professor STUBBS: I guess I would want to be confident that the drafting would not preclude cases that are currently being dealt with.

The Hon. TREVOR KHAN: So would we.

Mr DAVID SHOEBRIDGE: What about if we got away from the immediacy, which seems to be some of the problem in terms of women being able to run a full defence of provocation? The courts seem to want immediacy between the conduct and the killing. If we can get away from that with the social framework evidence and include more of the history, would that allay some of your concerns?

Professor STUBBS: I do not think we are currently having much difficultly with matters being run as provocation for women. Most of the cases are pleaded. The issue is not arising with women being excluded from provocation. My concern is what would happen to those women who are currently relying on it if we abolish it.

The Hon. TREVOR KHAN: The statistics suggest that victims of domestic violence, and, indeed, the victims of domestic killings, are either women or the partners of women who have separated. That is the case, is it not?

Professor STUBBS: In three-quarters of intimate partner killings the victims are women. As I said, in the last decade we found 24 cases of battered women going to trial for having committed homicide in New South Wales. So that is a number that we are talking about.

The Hon. TREVOR KHAN: Three-quarters of the cases the victims are women?

Professor STUBBS: That is true.

The Hon. TREVOR KHAN: And there is another group of victims that are the partners of women who have separated from their husbands, is there not?

The Hon. ADAM SEARLE: The new partners.

Professor STUBBS: I cannot give you any figures on that; I do not know the exact number. A smaller number.

The Hon. TREVOR KHAN: If what we are dealing with is on a numerical basis then the largest group that are impacted by the law of provocation at the present time are the women who are killed by their male partners?

Mr DAVID SHOEBRIDGE: Negatively impacted.

The Hon. TREVOR KHAN: Negative impact. Yes?

Professor STUBBS: Yes.

The Hon. TREVOR KHAN: Do we not have to give some attention to the fact that the signal that is sent out by such cases as Singh and Ramage and the like—however we do it—are those women who are butchered by their intimate partners?

Professor STUBBS: I would agree to that, but I do not think replacing one injustice with another would be a good outcome.

CHAIR: Could I just interrupt for a moment? I want to acknowledge the presence in the public gallery of staff from a number of Pacific Parliaments. These officers are attending the Effective Parliamentary Committee Inquiries course, which is being held this week in the New South Wales Parliament. They are looking at our committee in action. The course is a joint initiative of the Centre for Democratic Institutions in the New South Wales Parliament. I particularly acknowledge the presence of officers from the House of Representatives of the autonomous region of Bougainville and the National Parliament of the Solomon Islands. These Parliaments are twinned with the New South Wales Parliament under our twinning program. A very warm welcome to you. I hope it is profitable for your study.

The Hon. DAVID CLARKE: Professor, you want to retain this partial defence of provocation. Therefore, what is your solution for dealing with these outrageous cases that have been raised here today where those who have committed the most outrageous crimes seem to be going free after insufficient incarceration? What is your solution to that? Why would it not be a solution along the lines that I have put to you?

Professor STUBBS: I would certainly encourage some review of the outcomes in the ACT and the Northern Territory of re-crafting their provocation statute to exclude particular categories of behaviour. I do not think we have yet the evidence about how that is going, but we certainly need to look at the outcomes there. So they have sought to re-draft the statute to exclude some forms of domestic violence—non-violent sexual advances, for instance.

The Hon. DAVID CLARKE: Have you applied your mind to what could be excluded?

Professor STUBBS: I noticed that some of the submissions have made recommendations around that; for instance, issues around the threat of separation. Some people have sought to exclude words only as a provocation. Again, we need to think very, very carefully about that. The argument I gave you before, absent a good understanding of domestic violence, about what a woman faces, could be construed simply on some occasions as words only. Let me perhaps elaborate on that point.

We very readily understand physical violence and its consequences. The broader literature, including some of the empirical work with battered women, suggests that sometimes the violence that they suffer is not physical violence but very, very deeply felt emotional abuse and harassment that can be incredibly damaging. We need to think carefully how we might craft an exclusionary provision. So if we went readily to simply something like words only never constitute provocation, we may have an unintended consequence of excluding some other forms of violence that do not necessarily manifest themselves in physical ways.

The Hon. DAVID CLARKE: Excluding words only, words like "I am now going to kill you"?

Professor STUBBS: That is a threat which would be picked up, I think, in other ways.

CHAIR: With the Singh case is the problem because it changed from a murder charge to manslaughter? In that case, should it not have stayed murder when it is so violent and brutal?

Professor STUBBS: I am second guessing what the public found distasteful about the outcome in that case. I suspect that for many people the label "manslaughter" suggested to the public that it was not taken sufficiently seriously and they would have preferred a murder outcome. Some others it may be that the duration of the sentence that was handed down is not exactly clear from the public whether it was one or other or both of those factors.

CHAIR: That is what I was getting at. If it stayed murder it would have been a longer sentence than six years.

Professor STUBBS: Given our standard minimum non-parole period in New South Wales I think the last time the Judicial Commission looked the median non-parole period for a murder was about 16½ years. It is very likely that Singh would have got a longer sentence had he been convicted of murder.

Mr DAVID SHOEBRIDGE: Your analysis of R v Burke confirms that, does it not, where the factual circumstances seemed very much like many manslaughter cases but the labelling of murder seemed to lead to a stiffer sentence?

Professor STUBBS: Yes. Clearly the judge struggled with how to sentence. Burke was an Aboriginal woman who had experienced a long period of very, very horrendous domestic violence. She pleaded guilty to murder in the end and was sentenced for murder. I think, if I remember my own work sufficiently, we got a sentence of somewhere around nine years. The judge struggled with how to sentence. I also note that Burke was sentenced before the introduction of the standard minimum non-parole period in New South Wales; it is likely that that nine-year sentence would have been greater since 2003 when those provisions changed.

The Hon. HELEN WESTWOOD: I might just pick up on that case of Burke. Do you know why provocation was not used? Did you examine that?

Professor STUBBS: I do not have the detail on that, but the woman in that case, if I recall the details correctly, had offered to plead guilty to manslaughter; the Crown had not accepted that; the matter had gone to trial; the trial miscarried because there was a problem with the jury. For whatever reason, having been through the onerous and lengthy process of getting to trial and the trial not proceeding, she tried twice, I think, to plead guilty to manslaughter and in both cases that was not accepted by the Crown and, in the end, she just pleaded guilty to murder. I cannot second-guess why she would have done that, but there are many, many reasons why women may feel the incentives to plead guilty are greater than those of the risk of going to trial.

The Hon. HELEN WESTWOOD: That is something that has come up in the evidence that we have received in submissions and today where women are pleading guilty to manslaughter on the basis of provocation rather than looking at self-defence, and one of the things that seems to be coming up is the way in which the case is investigated and how the brief of evidence is prepared and then presented to the prosecution. Have you had an opportunity to have a look at that and examine whether there is any validity in looking at self-defence rather than provocation as a defence to murder?

Professor STUBBS: I have not had the opportunity to look at the briefs of evidence in these cases but, going back to your first point, I think it is common practice in New South Wales, as in other jurisdictions, to charge for murder and then later to accept a plea to manslaughter in cases of battered women. As I said, roughly two-thirds of the cases we saw in New South Wales of battered women, mostly they were charged with murder and the Crown accepted a plea to manslaughter. So that practice of charging high and then accepting a lesser plea I think needs greater scrutiny.

The Hon. TREVOR KHAN: But that does not only apply in murder; it applies with assaults. You are charged with what used to be called malicious wounding and then you accept a plea to assault occasioning actual bodily harm or, if needs be, common assault. That is the way the system has worked.

Professor STUBBS: I agree, but, with respect, the stakes are very high. One wears the possibility of being labelled a murderer and having a starting point of 20 years in the consideration of a sentence. So the stakes around that are very, very high.

The Hon. ADAM SEARLE: I note your concerns about abolishing the partial defence of provocation, but would not your concerns about removing one injustice and replacing it with another be addressed if there was the social framework evidentiary regime similar to Victoria available and self-defence was, if you like, broadened to not require immediate threat and was adjusted in other ways to make it broader than it presently is? Would not those two things go a long way to addressing your concerns about the abolition?

Professor STUBBS: That is possible. Again, I think we need to be really careful that assuming that practice necessarily follows the statute. In the work that I recently did with Professor Elizabeth Sheehy in Canada and Professor Julia Tolmie in New Zealand we found, comparing those three countries, that there was no neat correspondence between how restrictive the statute was and the outcomes of cases. What shapes practice is much more in many ways significant. Canada, for instance, had at the time a very, very tough framework for self-defence and yet was acquitting people at a much higher rate than, for instance, New Zealand, which had, on

the face of it, a much more permissive statute, but the New Zealand statute was read narrowly; the Canadian statute was read more expansively; and the culture of legal practice seemed to be what was more important in shaping debate. So things like what policies and practices did the prosecution bring to bear when they were looking at plea-bargaining; how well did lawyers understand domestic violence is a phenomenon when they were bringing cases to court; were battered women being well advised in terms of what their options were by a counsel who did or did not have a good understanding of domestic violence, all of those things really shaped the outcomes.

The Hon. ADAM SEARLE: Did all of them involve jury verdicts?

Professor STUBBS: Again, in Canada, as in New South Wales, a lot of the cases were plea-bargained. In New Zealand, for whatever reason, the prosecution seems to take battered women to trial for murder and, as a consequence in New Zealand where there are presumptive life sentences, battered women are going to jail for life.

CHAIR: Is there a factor that the Crown accepts a lesser plea so the person pleads guilty and it saves money; you do not have a long, drawn-out court case trying to prove the person is guilty?

Professor STUBBS: We have lots of incentives in our system to encourage early guilty pleas and to encourage people not to go to trial—we have a 25 per cent sentencing discount for an early plea. So, yes, there are all sorts of managerial efficiency concerns which are legitimate in criminal justice practice that shape the decisions that people make.

The Hon. ADAM SEARLE: In relation to self-defence there is an objective element that the jury must consider—one of reasonableness—but that is not present when people seek to rely on provocation. If provocation is to be retained should there be an element of reasonableness in the actions of an accused for the jury to consider?

Mr DAVID SHOEBRIDGE: It is in the second leg, to a degree, is it not?

The Hon. ADAM SEARLE: Not really. It is not explicitly on the face of the statute.

Professor STUBBS: We have the ordinary person test, although we are also talking about loss of self-control. So the idea about reasonableness is a mix of the two, is it not? We acknowledge that the person has lost their control but we also ask whether an ordinary person might behave in a similar way confronted with a similar set of circumstances.

The Hon. TREVOR KHAN: That is different from the test in self-defence. It is quite a different test in self-defence.

CHAIR: We have heard from other witnesses from the Women's Legal Services who are very critical of this term "loss of control" and do not feel that it is a valid excuse at all. They want to get rid of it so that it does not exist.

Mr DAVID SHOEBRIDGE: They say it is not reflected in the real domestic history or in the evidence because when you look at it it is not a one-off incident but it comes out of a long history of domestic violence.

The Hon. ADAM SEARLE: And premeditation. For example, in the case of Keogh the perpetrator took a knife to a pre-school or a kindergarten to confront the former partner.

Mr DAVID SHOEBRIDGE: So do you have any observations about that loss of self-control as a legitimate defence in provocation?

Professor STUBBS: The doctrine of provocation has historically relied on this idea of loss of control. If, in practice, there are cases that are creeping in and being run as provocation that do not fit that model then perhaps we see a much more expansive use of provocation than historically had been intended. Whether or not all battered women are going to fit either provocation or self-defence, no, in my experience. There will be cases that are not a good fit with the facts. I am not arguing necessarily that all battered women do or should have a defence available to them, but what I am arguing, I guess, is that the defences that we have should recognise that

domestic violence is very common in our society and should not exclude women's experiences where relevant. I am not seeking to argue that all battered women necessarily should get self-defence; I do not think that is a likely outcome.

The Hon. TREVOR KHAN: I am uncomfortable with the proposition that seems to ignore somebody like Mrs Ramage. Mrs Ramage goes to a home to look at some renovations and within 15 minutes she has been clubbed to the floor and strangled. Her husband takes her body and buries it about an hour out of Melbourne, comes back, has dinner with their son, sees a lawyer and then goes off to a police station, makes a statement, runs a case, never gives evidence in the trial and gets off on provocation. Is that not the sort of circumstance—and if it were only one I am sure we could ignore it—that is reflective of a series of outcomes of criminal trials which surely leave the public horrified with the state of our criminal justice system? How can you say let us just send it off to the Law Reform Commission?

Professor STUBBS: My argument about sending it to the Law Reform Commission was an attempt to recognise the complex intersections between evidence, law, sentencing provisions and the partial defences, and the need for learning from, for example, what has happened in seeking to restrict provocation in the Australian Capital Territory and the Northern Territory and other jurisdictions that have retained it but sought to put some limits on it.

The Hon. TREVOR KHAN: And there was a working party that looked at the homosexual advance defence back in 1998 and it sat since 1998, a group of quite eminent people. Do we say that the men who have been killed in circumstances where it is alleged they have made a homosexual advance that, having had one working party look at it, we will wait some further years for the Law Reform Commission to have another look at it? Is that a satisfactory outcome for this Committee to look at?

Professor STUBBS: In my submission I draw attention to the fact that the Law Reform Commission in 2010 completed an inquiry on family violence, which has chapter 14 looking at defences to homicide and that it currently has a reference on sentencing law.

The Hon. TREVOR KHAN: On sentencing, not on murder?

Professor STUBBS: But it completed in 2010 the family violence inquiry that it did jointly with the Australian Law Reform Commission. Chapter 14 is all about homicide. On that basis, I would expect it is in a position to have a timely consideration of that. It already has a great deal of expertise. If it could bring together that expertise from the family violence inquiry and its current review of sentencing, I think that would be enormously valuable.

The Hon. ADAM SEARLE: Do you accept that the status quo in the criminal justice system is not satisfactory in relation to the treatment of women victims?

Professor STUBBS: I do accept that.

The Hon. ADAM SEARLE: And that the system should do better?

Professor STUBBS: The system should do better, I agree.

The Hon. ADAM SEARLE: Apart from leaving it to whatever deliberations the Law Reform Commission might come up with, do you have any proposals that we might consider that could improve the situation in the shorter term?

Professor STUBBS: This is a highly contested area. You will find all the legal profession line up on different sides.

The Hon. ADAM SEARLE: We notice it is quite contested. I was wondering whether you had any particular proposals we could consider.

Professor STUBBS: The difficulty is that whatever you come up with you will need to persuade the legal profession to come on board. How whatever recommendation you make is given effect will depend very much on how the legal profession interprets and applies this. Having them on board is very important. Again, I was thinking strategically that the Law Reform Commission might be in a position to begin the conversations

with various component parts of the legal profession to try to bring it to consensus, because it is not there at the moment.

The Hon. TREVOR KHAN: At least part of the legal profession was not on side—in fact, very opposed—when restrictions were placed upon the evidence that could be adduced in sexual assault trials. The criminal bar, the Law Society, were absolutely opposed to that, yet would you not agree that those reforms that were made as to evidence that could be adduced have been very effective in changing the nature of sexual assault trials in New South Wales?

Professor STUBBS: I am conflicted there because I was a member of the task force on sexual assault law reform, so I would be endorsing my own proposition.

The Hon. TREVOR KHAN: I am inviting you to do so. The answer is it worked without having the defence bar and the defence lawyers on side.

Professor STUBBS: I think, to the current Director of Public Prosecutions' credit, who chaired the inquiry, he worked miracles to craft a report from a very divided committee.

Mr DAVID SHOEBRIDGE: But is there not a job for the legislature to direct the legal profession as to how to go about its task in the criminal justice system? Is that not really part of the job of the legislature, if it feels like the culture and the practice is not producing the right outcomes, to craft fresh legislation that directs the cultural practice in a far more socially preferred outcome?

Professor STUBBS: As a matter of principle, yes. Having seen attempts to carefully do so in a number of directions, they have unintended consequences. I am always a little troubled by our capacity to anticipate all the relevant circumstances.

Mr DAVID SHOEBRIDGE: But if we accept that the current system is not providing the good outcomes, if this Committee came up with what it thought was a preferred outcome and then gave a direction that it be reviewed after three or four years in practice, might that not be a better way forward, accepting that this is probably a bit of a rolling debate in society at the moment?

Professor STUBBS: I am reluctant to endorse provisions on the run without having a really careful look at what is proposed. The content and the detail really matter.

Mr DAVID SHOEBRIDGE: I am not asking you to endorse any particular outcome now, but accepting the current system is producing substandard outcomes, if the Committee was of the view that there would be a preferable set of laws that would improve certain identifiable flaws, putting in some regime with a review after a period of time, would that be better than living with a status quo that we know is unacceptable?

The Hon. DAVID CLARKE: And one must keep an open mind that it may be a viable way forward?

Professor STUBBS: Again, I am not a defender of the current position. I want to tread warily because there are some traps in unintended negative consequences.

CHAIR: You make a strong point on page 6 in your submission that if the defence of provocation is removed, the prosecution is willing to accept a guilty plea under those circumstances, but if it is abolished it would necessitate more women going to trial for murder. We do not want to see that result either, do we?

Professor STUBBS: Yes, I think absent some other mechanism to avoid that, it is very likely that the abolition of provocation would see more women going to trial.

The Hon. ADAM SEARLE: If there were the evidentiary regimes to facilitate the giving of social context evidence about domestic violence and if the defence of self-defence was expanded to remove the requirement of immediate threat, it was expanded to include a wider range of circumstances, those two things together—assuming they are carefully drafted—would go a long way, would they not, to addressing the concern that abolition of the partial defence could lead more women accused to stand trial for murder? As I understand it, one of the obstacles to raising self-defence is the fact that the conduct did not happen immediately prior to the killing. If that was expanded, that would address that concern, would it not?

Professor STUBBS: That is possible. One of the groups of women who have particular difficulty in running self-defence is the women who kill in what are called non-confrontational circumstances. They have to wait for the offender to be drunk or asleep in order to take action. There will still be a group of women who cannot run self-defence.

The Hon. ADAM SEARLE: Such as?

Professor STUBBS: For instance, if we think of the so-called axe murder case, the woman who, having learned that her partner had been sexually abusing the children, then he assured her that their family would continue in a similar vein, they would be a happier family and would continue on as they were—which she seems to have taken that the sexual abuse would continue—that case is probably a closer fit with provocation than with self-defence, even with the more expanded understanding of self-defence.

The Hon. ADAM SEARLE: If it was expanded to include the defence of others, which I think it does now, so she is acting in defence of the children, how would that defence not be available?

Mr DAVID SHOEBRIDGE: Is it reasonable in circumstances where she should go to the police, would be some of the argument.

The Hon. TREVOR KHAN: That is the reason for the social framework evidence. That is precisely the circumstances where social framework evidence is essential.

CHAIR: It may be difficult to prove he was abusing the children.

Professor STUBBS: There will always be questions of proof, yes.

The Hon. TREVOR KHAN: Perhaps it is difficult to prove that Mr Gillies was putting the hard word on Mr Green but the evidence still went in.

The Hon. HELEN WESTWOOD: As a non-lawyer, I find it difficult to understand how, in cases that seem really obvious—like the one you spoke about earlier and even the case you have just given us an example of—how women are not found not guilty of murder but guilty of manslaughter or acquitted, yet loss of control is used in a way that I do not comprehend. It does not seem to align with the way we expect adults to behave in their relationships. I find it amazing that for women the test seems to be so much higher, so much harder, to prove that their violent action was justified yet for blokes it seems to be so much easier. I am really having difficulty reconciling that.

Professor STUBBS: That just goes towards recognition that because women rarely kill, the way the law has developed over centuries has been based on cases in which men resort to homicide and that has been much more readily endorsed in developments in the common law and in statute.

Mr DAVID SHOEBRIDGE: Is there not also some historical development where the law wants to control dangerous women and be seen to be controlling dangerous women and are less willing to give leeway to women than to men? Is that not a historical development of the law?

Professor STUBBS: I think that is arguable. But even if one does not attribute some sort of intent, the weight of the fact that the cases coming before the court, the cases that the legislator has historically had before it, are mostly those in which men kill men and that is what informed a lot of the doctrinal developments.

The Hon. SCOT MacDONALD: A lot of the discussion is around our distaste about Singh and the others, but, as you said and other people put in their submissions, the plea-bargaining works quite well in many cases for women, it was appropriate, or have I misunderstood you?

Professor STUBBS: Plea-bargaining is a common recourse. Most women's cases are plea-bargained. I have some concerns around the edges. I think from the facts of some of the cases I have seen, some of those cases could arguably have had a good run at self-defence if they had gone to trial and been run as a self-defence case.

The Hon. SCOT MacDONALD: So, a complete acquittal?

Professor STUBBS: And the possibility of a complete acquittal. But, that said, there are all sorts of reasons why incentives are there for people to plead and some women might choose not to go to trial. They might not like the risk that attaches to going to trial.

The Hon. TREVOR KHAN: And the case may not be as good as it appears on paper, and often it is the accused who knows what the weakness of their case is.

Professor STUBBS: Even if we have an extensive understanding of the relevant evidence by going to social framework evidence, often it is the case that the battering that has occurred in the past has been private. There may not be an evidentiary trail. There may not be a good history.

The Hon. SCOT MacDONALD: So even if we broaden that self-defence, as it has been described, and even if we bring in all that social framework, we could still run into that roadblock?

Professor STUBBS: We could still run into that problem. For instance, we know that the police have improved their practices very substantially in the last decade in particular. Police are much more likely now to document reports of domestic violence than they were in the past. But someone will come up against the fact that even if they have reported the violence to the police, even if they have been to the hospital, there may not be a good record kept that they can rely on. Some of the matters, for shame and other reasons, are kept private. People do not talk to others about the violence they have suffered. Even if we do extend the range of evidence that is accepted, and I think it is a good suggestion that we do pay more attention to the social framework evidence, there will be cases where the evidence is simply not easy.

The Hon. SCOT MacDONALD: And we end up in a murder trial with potentially a lot longer sentence?

Professor STUBBS: We end up in a murder trial with a potential quite long sentence, yes.

CHAIR: Is it easier to get an acquittal if the person is charged with murder rather than manslaughter?

Professor STUBBS: We have so few cases that are charged with manslaughter that I do not know the answer to that question. We almost always seem to start with a murder charge.

Mr DAVID SHOEBRIDGE: Is that not part of the problem because once you start with a murder charge there is this absolute incentive to cut a deal for manslaughter and not run your self-defence arguments, but if you are charged with manslaughter you have every incentive to run the self-defence argument?

Professor STUBBS: Yes. In the Canadian self-defence review Justice Ratushny, who ran that review, raised some real concerns about practices in charging. She was encouraging the charge of manslaughter in more appropriate cases and giving people the opportunity to run self-defence to manslaughter rather than the much more risky strategy of trying to run self-defence to murder.

The Hon. ADAM SEARLE: Could you provide a copy of that report?

Professor STUBBS: I can provide a reference to that, certainly.

The Hon. ADAM SEARLE: A lot of the discussion about the misfiring of these sentences as particularly lenient sentences where men kill women and use provocation to reduce the severity of the sentence is around saying that we need to have stiffer sentences to protect women, yet the evidence from the Bureau of Crime Statistics and Research [BOCSAR] and others is that the harshness of the penalty does not act as a deterrent. There seems to be an educative role that having an appropriate sentence for male on women violence plays in society, but how do we see that working if it is not a deterrent, as such?

Professor STUBBS: We know that there is a range of competing objectives that sentencing is meant to perform. Deterrence is just one of a package that the instinctive synthesising judge is meant to bring to bear in the sentencing decision, but certainly sentences do communicate important messages to the community and the community, we know, are dismayed at times by the sentences that are handed down. We also know that evidence suggests that a community that is well informed and understanding of the background to sentencing is not necessarily one that is more punitive, although the research that that is drawn from is not necessarily specific to homicide, it is around a wider range of issues, but appropriate sentence lengths do matter. I think it is also the

case that provocation has some other elements that offer disquiet to the families and to the community because they necessitate inquiry into what the victim's role was, and we see victim-blaming narratives popping up and provocation as a defence, and my concern is that we will see those same narratives popping up when provocation arises as a sentencing issue post-conviction for murder. We need to find a way to manage how that sentencing practice happens even if we do have a conviction in a *Singh*-like case for murder.

CHAIR: Our time has expired. We thank you very much for giving us your expert knowledge. You mentioned a Canadian report—

Professor STUBBS: Yes, I will send a copy of that.

CHAIR: That would be very helpful, thank you. Some members may have questions on notice, which will be sent to you, and you have 21 days to answer those, if possible.

Professor STUBBS: Yes, whether it is possible to answer the questions—

Mr DAVID SHOEBRIDGE: To provide a response.

Professor STUBBS: I can provide a response, whether I can answer the question I cannot guarantee. Thank you very much.

(The witness withdrew)

GRAEME COSS, Senior Lecturer, Faculty of Law, University of Sydney, sworn and examined:

CHAIR: There may be some questions during the hearing that you would prefer to take on notice. Simply advise the Committee that you will take those on notice so that you can give more thought to the answer. If at any time you wish to give evidence in camera with the room being cleared, we would be happy to consider that.

Mr COSS: Thank you.

CHAIR: Do you wish to make an opening statement?

Mr COSS: Yes, I would actually like to tell a story, if that is all right. I was attending a conference in Oxford in England in 1991—which was the most boring conference I have ever been to, but that is actually not relevant today—and while I was there at breakfast one morning I picked up the newspaper and there was a report of a murder trial. It was about a woman by the name of Sara Thornton. Sara Thornton was charged with murder. She had been in a horrific, abusive relationship with her husband, who was a drunkard, who had continually threatened to kill her and who had subjected her to not only psychological but physical and sexual abuse over a long period of time.

On the night of the killing he had again, in a drunken stupor, threatened to kill her and then collapsed on the living room couch. Eventually she went into the kitchen, she picked up a knife and she stabbed him to death. She was charged with murder. She attempted to plead the defence of provocation. The court refused to allow the jury to consider the defence of provocation. The judge ruled that there had been no beating on the night of the killing; that the killing had not been one done suddenly in the heat of passion; that she could have simply opted to leave, either by going upstairs or simply walking out of the house; that essentially it was the deliberate killing of a defenceless man; and so, convicted of murder, she was sentenced to mandatory life imprisonment.

Three days later, again at breakfast, I picked up the newspaper and there was another newspaper report about another murder trial. It was about a man by the name of Joseph McGrail, who in this case had killed his wife. He had been in a relationship with a woman who was an alcoholic and on the night of the killing she had apparently abused him and, as she lay in her own vomit, he kicked her to death. He was charged with murder. He pleaded the defence of provocation. The court accepted the defence of provocation, so he was found guilty of manslaughter. The judge, in describing the wife, said that she would have tried the patience of a saint, and the man was given a suspended sentence. That was three days later.

I have been studying the defence of provocation since the mid-1980s, so for about 27 years. Up until then I had studied it in a very academic and very non-gendered way, shall we say. My eyes were opened. Since then I have become a passionate advocate for the abolition of what I regard as an abomination of a defence. Shall I go on?

Mr DAVID SHOEBRIDGE: So you have a view, Mr Coss?

Mr COSS: I suppose you could say I have a view, yes.

CHAIR: You say in your submission that the momentum towards abolition of the partial defence of provocation is irresistible. In other words, you see it at some point, as in the other States and Territories, being abolished or modified?

Mr COSS: I think it really must be seen as irresistible. Tasmania has abolished it after a brief period of time. In Victoria, lengthy reform analysis—abolished. In Western Australia the same—abolished. In New Zealand the same—abolished. Queensland clearly would have abolished it except for the unfortunate existence of the mandatory life imprisonment penalty for murder. England did abolish, but sort of rejigged it and reworded it. We have also had minor reform in the Northern Territory and the Australian Capital Territory. It would be extraordinary, I submit, if New South Wales was to be the only State amongst its relevant jurisdictions that chose to do nothing about it. My preference is for abolition, but at the very least I would expect it to be, if not abolished, certainly reformed in a significant way.

CHAIR: Why is it being defended so strongly by various law societies, and equally our last witness, Professor Stubbs?

Mr DAVID SHOEBRIDGE: I do not think that is entirely fair; Professor Stubbs did not defend it staunchly.

CHAIR: No, I am just asking the witness's opinion.

Mr COSS: I should mention Julie Stubbs is a very dear friend of mine, even though we do not always see eye to eye. With so many things in the criminal law we are talking about centuries of baggage, and provocation carries with it centuries of baggage. It was a defence constructed by men for men, in an age when violence was tolerated—it was a norm—and if I were to come to the present day, it is not surprising I think that still the majority of our barristers and judges are men. There is a great respect for the history of the criminal law and, without being disrespectful, I learned about this Committee and the very gendered issue of provocation and self-defence, and I was then told there would be one woman on the Committee out of seven. These issues exist, I think, and they are very powerful. I am not surprised—I am disappointed, but I am not at all surprised—at the resistance from certain quarters, particularly the criminal bar which I suppose is to be anticipated, against change. It is the same resistance that existed when there were proposals to reform the sexual assault laws, and that resistance is a powerful commodity.

The Hon. SCOT MacDONALD: The obvious question is the unintended consequence which a number of people have raised, and I see that you address it by saying you would have to look at bringing it in at the sentencing stage: a greater reliance on self-defence. It occurs to a few of us that there could be some harm in terms of the victims of domestic violence not being able to satisfy self-defence, relying on sympathy or at least awareness at the sentencing stage. Would you strongly disagree that that is not an issue and the fact that some of those women will fall into the murder trial is an issue?

Mr COSS: I would certainly not strongly disagree because I think it is impossible to anticipate 100 per cent exactly what would happen. However, I think New South Wales is in a unique position in that we already have a well-established defence of self-defence under section 418 and partial defence under section 421 of excessive self-defence. What we are lacking is a provision such as section 9AH in the Victorian Crimes Act, the so-called social framework evidence, which actually gives understanding to the position of abused women who are trying to plead self-defence or, at the very least, a partial defence of excessive self-defence. New South Wales has never had that, so again there are centuries of baggage attached to self-defence.

Neither of those defences have ever been constructed with a view to women for exactly the reasons that Julie Stubbs was suggesting, and so many other people have suggested, because the vast majority of crimes of violence have always been committed by men, so their factual situations, the arguments raised in their defence and the laws created around those occurrences have all been such a male sort of thing. Unfortunately, section 418 and section 421 at present still carry that baggage of non-understanding of the position of abused women. Arguably, if we were to adopt a provision like section 9AH in Victoria, that immediately emphasises to the court—and hopefully to the prosecution as well—that there is an entire world of understanding that needs to be addressed about the experiences of abused women, and New South Wales does not have that, so I think it would be a major plus to adopt that sort of provision in our jurisdiction. But, as some people have suggested, there are still possible circumstances where abused women may not be killing essentially in self-defence.

The Hon. DAVID CLARKE: If it is not abolished, how would you reform it?

Mr COSS: I would agree with a number of proposals that suggest that it be restricted. As I put in my submission, I am totally against the idea of specific restrictions in the defence because I think there is a danger they simply do not work, that they will be somehow got around by defence counsel and so on. However, if provocation is to continue then I think it has to be restricted, so it has to be specifically restricted that it not operate purely in terms of a verbal provocation. I do not agree with people who argue that there should always be an out, "except in exceptional and extreme circumstances". Every time there is an out, that out will be embraced, so I would certainly not recommend doing that. There have been so many horrific cases about non-violent sexual advances, which a lot of people found—and rightly so—horrific that there are successful pleas of provocation in those circumstances. So those sorts of pleas could be again excluded, not the way the Northern Territory and the Australian Capital Territory have done, which again allows an out of. If it is coupled with other conduct then it can be—

Mr DAVID SHOEBRIDGE: Tack it on.

Mr COSS: —included. So that is a major concern. England tried valiantly to expressly exclude the introduction of any evidence that linked to infidelity and the Court of Appeal, in January or February this year, simply disregarded that and decided that they would include consideration of that if it was coupled with other conduct, even though the Legislature pretty clearly did not say that and everything that the Government had said prior to the legislation made it clear that was not intended. So the court simply overruled that.

I think a point that Professor Stubbs made earlier is a terribly important point. It is of concern if major players in the criminal justice system, such as the criminal bar and the judiciary, are not on board because, either deliberately or otherwise, there are ways to get around whatever it is that Parliament attempts to do by particular wording in legislation and there have been instances of that, unfortunately. The Victorian example of introducing a partial offence of defensive homicide, which was seen to be something that would be of use as a fall-back position for battered women, has been used almost exclusively by men, not as intended. So these sorts of things do happen. A whole range of possible exclusions is what I would suggest.

The Hon. DAVID CLARKE: What if the conduct causing the provocation was restricted to physical criminal conduct?

Mr COSS: I suppose my view would be it would depend on what the physical conduct was because if the physical conduct essentially was an assault, then that immediately in my mind would start raising the idea of self-defence. So why would we not be going down the self-defence path as opposed to provocation? I suppose my concern is, when I look at the models that exclude oodles and oodles of things, what seems to be left is essentially some sort of assault which should start raising one's interest in self-defence, not provocation.

Mr DAVID SHOEBRIDGE: But if it does not get to self-defence or is a legitimate alternative to self-defence, is there a legitimate role for provocation in the legal system restricted where the provoking conduct is violent criminal behaviour?

Mr COSS: It is a hard question for me to answer because I simply do not believe in provocation.

Mr DAVID SHOEBRIDGE: If you could put that prejudice to one side for a minute.

Mr COSS: Yes. If I have to put that prejudice to one side for one minute, then clearly there will be people who will be able to make use of a defence of provocation, including many of the people you do not want to, but there will be some people who, for whatever reason, because the defence exists, will be able to take advantage of it. I think the trouble is, it is always if the defence is there it will be used, and that will have an impact on the availability of other defences that might be more appropriate for the people that you hope to use it.

The Hon. DAVID CLARKE: But it will wipe away its use in these outrageous cases that have been referred to today, will it not?

Mr COSS: If we restrict it in a spectacular way?

The Hon. DAVID CLARKE: Yes.

Mr COSS: Possibly.

The Hon. DAVID CLARKE: These cases that were raised today, you do not think that that restriction would wipe away it being a successfully pleaded defence?

Mr COSS: As I mentioned, in England the Court of Appeal in a case where, from memory—I cannot remember the entire facts of the case—essentially an estranged couple, the husband alleged that his wife had said, "Oh, I'm now screwing everybody around", and he said, "I'm so depressed I want to commit suicide" and she allegedly said, "You haven't got the balls to commit suicide". So all of that was still able to be used in support of a provocation defence, notwithstanding the restriction.

Mr DAVID SHOEBRIDGE: But none of what the wife had done would fall within the class of violent criminal conduct.

Mr COSS: Sorry, if you are restricting purely to violent criminal conduct, no, absolutely.

The Hon. TREVOR KHAN: If we took your primary proposition, what do you do—I am trying to remember but I think the decision is Camplin in the United Kingdom.

Mr COSS: Yes.

The Hon. TREVOR KHAN: You know that decision, that is, young boy sexually assaulted by older man, laughed at post the event and the boy/young man becomes enraged and kills him. Is that an appropriate offence to be dealt with as murder in your proposition?

Mr COSS: In my proposition—

The Hon. ADAM SEARLE: It is not self-defence.

Mr COSS: No, it is not self-defence, indeed. In my proposition—it is something I did not address, I do not think, very successfully in my submission; it was a rather rough submission to meet an early deadline. In that submission I do not think I properly addressed the issue of labels, and I think labelling is extremely important. Murder is extremely specific; it carries so much weight as a label. Almost every law reform commission in the last 10 years has decided that that label should attach to an intentional killing. So every killing that is intentional, other than in lawful self-defence or that carries some sort of mental impairment, should have the label "murder".

What could arise and what should arise—and this may be something that the Committee would like to recommend to Parliament—is that if provocation was abolished then the offence of murder could attract sentences almost as broad as manslaughter currently does. Manslaughter, which we think of as unintentional killings and we regard as a very serious offence, carries a maximum penalty of 25 years, and that offence can receive a penalty of 25 years going all the way down to a suspended sentence. So that is recognising within it the differences in culpability, in the same way that I think so many people would recognise that even in intentional killings there are enormous differences in culpability. For example, so many studies have suggested that a contract killing would be one of the most extreme examples of an intentional killing.

The Hon. TREVOR KHAN: High pre-meditation.

Mr COSS: Indeed, whereas somebody killing out of love and compassion, a mercy killing, again most societal studies have suggested that that is probably at the very lowest end of intentional killing. There are still intentional killings, they are still attracting the label "murder", but the suggestion is that therefore the sentences should reflect the culpability.

Mr DAVID SHOEBRIDGE: But currently some of those instances are not attracting the label of murder and your proposal would expand the labelling of murder to cover a variety of circumstances which this Committee might feel troubled by.

Mr COSS: Sure. So which ones are not covered by murder currently?

Mr DAVID SHOEBRIDGE: The example that the Hon. Trevor Khan gave where the plea of provocation would be available in those circumstances would therefore diminish the offence to manslaughter but on your proposal it would be expanding the scope of murder to cover that instance, and many people might feel uncomfortable about that.

Mr COSS: Yes and I appreciate that.

The Hon. TREVOR KHAN: You could cover Mr Singh and Mr Ramage.

The Hon. ADAM SEARLE: Is one solution perhaps to abolish the partial defence of provocation only in circumstances of intimate partner crime?

The Hon. TREVOR KHAN: That would not apply to Mr Green, would it?

Mr COSS: It would not apply to Mr Green, and from the things I have written about Mr Green I am surprised that Mr Green did not come and deal with me. I am not a great fan of Mr Green. The Camplin decision is the ultimate troubling one because it is a young person who kills under extremely provocative circumstances.

The Hon. ADAM SEARLE: He was provoked.

Mr COSS: Indeed.

CHAIR: You have made a strong case on page 5 of your submission, stating that there are on average 60 murders a year involving men killing women, mostly involving a breakdown in relationship or separation, as opposed to 50,000 or more divorces. So 50,000 men are not killing their wives but they are divorcing. It seems to be a strong argument—in other words, your argument—to abolish the defence of partial provocation because it is only used in up to 60 cases, where it seems as if the male had some idea of ownership of that woman and he could actually carry out a murder, he could actually kill her and then claim he was provoked. What about the other 50,000 men involved in divorce?

Mr COSS: Who do not kill.

CHAIR: Who do not kill.

The Hon. TREVOR KHAN: They cry a lot.

CHAIR: Should those 60 who do kill get any mercy at all?

Mr COSS: If they were to receive mercy—and I am not suggesting that—

CHAIR: Mercy by partial—

Mr COSS: No. I hope I have made clear in the submission I think such men who kill under the circumstances, if they receive any sort of mercy, they should receive mercy at the sentencing stage, and nothing less than that.

The Hon. TREVOR KHAN: But perhaps not there either?

Mr COSS: That may well be my view, yes. Just on the Camplin issue, again it comes back to my prejudiced view that I simply cannot get rid of and that is I do not believe there is such a thing as loss of control that results in lethal violence and I do not believe that ordinary people actually kill or lose control. I think extraordinary people do. I think in the Camplin situation that could be put down to a situation of a shocking event to which a very young boy took revenge for that killing. So I think invariably provocation is not about loss of control; it is actually about revenge but there may be circumstances in which we as a society feel more sympathetic towards revenge.

Mr DAVID SHOEBRIDGE: Or there may be circumstances such as that where we accept that the extraordinary nature of the provocation, the offensive violent acts followed by taunting, makes it socially acceptable to allow a mitigating plea of provocation.

Mr COSS: It may well do.

The Hon. DAVID CLARKE: I want to get back to your answer when I raised the proposal that provocation should only be available where there is violent criminal behaviour. Why would that not right the result of some of these outrageous cases that we have heard about? I would like to specifically get a response to that.

Mr COSS: In the Camplin situation, the young boy who is raped and then laughed at, if a defence was limited purely to some sort of violent assault, I could not see a situation how that could be self-defence. So therefore, off the top of my head, I could only see that some sort of restricted provocation defence would deal with that.

The Hon. DAVID CLARKE: These cases like Singh and so on where the husbands have committed these outrageous violent crimes, it would not be available; we would not be getting those results.

Mr COSS: Indeed.

Mr DAVID SHOEBRIDGE: So you would cover the one instance where you might see it and then you would exclude most of them to the really offensive cases.

The Hon. DAVID CLARKE: So why would that not be a very viable alternative for this Committee—

CHAIR: He would be charged with murder; he would not get manslaughter in your version.

The Hon. ADAM SEARLE: No. I think what the Hon. David Clarke is suggesting is that the conduct constituting provocation had to be serious and violent criminal acts only; it is limited to that.

Mr DAVID SHOEBRIDGE: Or involving that. It would have to have an element.

CHAIR: He would still be charged with murder, not manslaughter.

The Hon. HELEN WESTWOOD: Is rape a violent criminal act?

Mr DAVID SHOEBRIDGE: It is.

The Hon. HELEN WESTWOOD: And whether you respond to it immediately or later on—

The Hon. ADAM SEARLE: That is what we are saying. If there was such an act you could use it as provocation.

The Hon. DAVID CLARKE: That is the proposition I am putting to you and I am trying to get a specific response to that. Why would that not be a viable way to go?

Mr COSS: Off the top of my head, it is a possible way to go.

Mr DAVID SHOEBRIDGE: You could also address it on notice.

Mr COSS: Yes, that would be good.

The Hon. HELEN WESTWOOD: Are there any jurisdictions where provocation was not existing? In know in our systems, which are based on English law, provocation has been part of that and then we have all looked to amending it. But are there examples like some of the new nations that start out with a blank sheet—

Mr COSS: I confess I could not answer that question. I do not know.

Mr DAVID SHOEBRIDGE: New Zealand has abolished it.

Mr COSS: Lots have abolished it.

The Hon. HELEN WESTWOOD: I am not talking about abolishing it.

Mr COSS: Where it has never existed.

The Hon. HELEN WESTWOOD: I am just interested to know. For example, in South Africa they established very different ways of dealing with sexual assault than we had traditionally done in nations where our legal system is based on the English system. I am just wondering whether or not there are other jurisdictions where they had not had the provision of provocation and whether we could look at how some of those cases there, for example the Camplin one, would be dealt with in those jurisdictions?

Mr COSS: I am sorry. I am certainly aware of jurisdictions that have abolished provocation or amended it. I do not know of jurisdictions that have never had it.

Mr DAVID SHOEBRIDGE: Has anyone done any analysis about how these kinds of factual situations sit within the civil law system—not the common law system—but the French or Scottish system?

Mr COSS: Again, off the top of my head I do not know.

The Hon. TREVOR KHAN: You have been asked to go away and consider the limitation involving violent criminal behaviour. A decision such as Middendorf would fit within that exception, would it not, because the allegation was that a female weighing 50 kilograms was brandishing a knife at Mr Middendorf—

Mr COSS: A ferocious 50 kilograms.

The Hon. ADAM SEARLE: He was around 95 kilograms.

The Hon. TREVOR KHAN: That would fall within that proposition, would it not?

Mr COSS: Which would trouble me rather, would it not?

The Hon. TREVOR KHAN: That is right. Would you like to also consider the Queensland exercise of—I am not going to say a reversal of the onus—an onus on the defence to at least prove on the balance of probabilities the defence was—

Mr COSS: One of the things I was going to suggest if we were going down the path of retaining provocation but reforming it, then I would have recommended the reversal of the onus so that the accused has to prove on the balance of probabilities.

The Hon. TREVOR KHAN: Are there any other workings of the Evidence Act—I know that your proposition deals with section 9AH—or other sections of the Crimes Act that would form an armoury of amendments to improve the situation?

Mr COSS: I am not an evidence lawyer so again I could not answer that question. I just do not have a proper handle on that, I am sorry.

The Hon. TREVOR KHAN: Mr Odgers will be appearing before the Committee tomorrow. No doubt he will regale us about that.

Mr COSS: That might be interesting, yes.

Mr DAVID SHOEBRIDGE: You have actually put pen to paper and crafted what you think is sort of a social framework provision in your proposed section 418A?

Mr COSS: You are far too kind. It was simply a—

The Hon. TREVOR KHAN: Cut and paste.

Mr COSS: —cut and paste with a bit of dodgy reworking, yes.

Mr DAVID SHOEBRIDGE: If the defence of provocation was to be reformed, I assume that you would want that social framework evidence to be also available to women raising the partial defence of provocation?

Mr COSS: I suppose if provocation was still to be there then it would make sense that it was there to assist women with whatever defence they were raising. My proposition, of course, was with provocation gone but, yes.

Mr DAVID SHOEBRIDGE: Would it also, if you were to leave provocation on the books, allow the prosecution to put that evidence in to, if you like, debunk some of the story being raised by the defence about the instance of provocation?

Mr COSS: If the provision was there to essentially get a little bit closer to a truth then I think that would actually be a valuable thing.

The Hon. HELEN WESTWOOD: Do you want to add anything to what we have already discussed about self-defence?

Mr COSS: I think there are two weaknesses in self-defence currently. The essential weakness is the historical baggage and the fact that women have a difficulty establishing that the killing was not done immediately, even though the legislation makes no mention of immediacy, and also that the killing was not done in proportion to the threat, again even though the legislation does not make specific mention of that. But the baggage of case law over the years includes those almost requirements, so section 9AH specifically addresses those. So it helps a court to understand why it is that the abused woman may have thought her response was necessary—that is the first limb—and why a court should see that response as reasonable under the circumstances. So the section 9AH social framework evidence will hopefully add to those two limbs and it specifically addresses the issue both of immediacy and proportionality. So it may help a court to understand why the response was reasonable, notwithstanding it was not immediate and also notwithstanding it was not done proportionally. They are important provisions.

CHAIR: Even though you want to abolish the partial defence of provocation in your submission you agree that it can be considered by the judge at sentencing. How would that work?

Mr COSS: Under section 21A (3) I think it is of the Crimes (Sentencing Procedure) Act, provocation is there as a mitigating factor. The curious thing about provocation, and the thing that always bothers me, is that it is not a defence to any other offence. The most basic offence of violence in our society is assault. If you punch somebody in the face deliberately you have committed an assault. If you say, "I was provoked" and you have evidence that you were provoked that is not a defence; it is only taken into account in sentencing. For some reason provocation has this exclusive position as a defence to murder. However, there are presumably circumstances why it should be there as a mitigating factor to be utilised. But I think what I recommended in my submission is—following the recommendations of the Felicity Stewart and Arie Frieberg report on provocation in sentencing, which made a whole raft of suggestions as to how provocation should be considered at sentencing—how somebody like James Ramage should not be allowed to have a dramatically reduced sentence based on his provocation even if he were convicted of murder after provocation was abolished, but how somebody like Camplin et cetera who had, as they called it, a justifiable sense of being seriously wronged could have that provocation taken into account to reduce their sentence.

CHAIR: Only by the judge.

Mr COSS: Only by the judge.

CHAIR: Not by the jury.

Mr COSS: No.

Mr DAVID SHOEBRIDGE: Given the culture that you and other witnesses have identified, and in fact it has probably been identified through the submissions of the legal profession, is such that they indeed embrace provocation as a legitimate defence, if we duck shove it off to sentencing will not all of the concerns that we have about the partial defence of provocation raise their head at sentence and it is the cat in the hat—we will have just moved it outside the bathtub.

Mr COSS: I know the point you are making. Essentially that is what the Stewart and Frieberg report, which is a very lengthy report, is there to address specifically so that that does not happen. So that all the horrific circumstances of provocation that somehow have been allowed to exist and people only get manslaughter with dramatically reduced sentences does not happen at sentencing in those awful circumstances. That means then exclusively restricting provocative circumstances.

Mr DAVID SHOEBRIDGE: That brings me back to where we were at the beginning with the Hon. David Clarke's question. Would we not be better off looking at limiting what the provocative circumstances are at the outset so that we do not find it squeeze its way through into sentencing and other places?

Mr COSS: I understand what you are saying.

Mr DAVID SHOEBRIDGE: We have to grapple with that at some point, do we not?

Mr COSS: Yes, I suppose my concern again is simply that how it is worded is the key and that wording has failed in some circumstances already—examples that exist in England and so on. It is a nightmare job.

The Hon. HELEN WESTWOOD: I want to ask you about the complexity of the issue for jurors, which has been raised by a number of witnesses and in a number of submissions. Given the way that discussion has taken place today at looking at further qualifying the law with exclusions, is there a risk that we are complicating it further for jurors and we may not get very different outcomes from the ones that we have already got?

Mr COSS: At present the subjective test is: Did the accused lose control—whatever that means? It is only a partial loss of control; it cannot be a complete loss of control. If it is a complete loss of control then that means you are acting as an automaton and therefore you are not criminally responsible. That is the first thing that has to be explained to juries somehow: What loss of control is in this partial state? Secondly, the easy part is the ordinary person test: Could an ordinary person have lost control? In other words, all the characteristics of the accused can somehow be attached to this hypothetical ordinary person to help understand the gravity of the provocation—in other words, to point the insult of the provocation—but those personal characteristics of the accused are not to be attached to the ordinary person in assessing their powers of self control, they just have the ordinary powers of control. Are you with me so far? Good. It is a nightmare. It is an absolute illogical, nonsensical nightmare, and judges have actually admitted it is a nightmare.

Mr DAVID SHOEBRIDGE: Is it illogical or is it just taking logic to such a degree that it is such a refined concept that it is very hard to convey? Because you can see the argument—and I am not in any way endorsing it—if a stranger comes across to people in a bed he or she will not necessarily be provoked by two people in a bed in a bed, but if someone comes across two people in a bed and one of them is their partner then you need to understand that relationship to understand the nature of the provocative conduct. The first element is that you look at that relationship.

Mr COSS: Yes.

Mr DAVID SHOEBRIDGE: That is how you understand whether it is provocative or not.

Mr COSS: Yes.

Mr DAVID SHOEBRIDGE: Then you say given that were the actions in any way excusable or reasonable?

The Hon. TREVOR KHAN: And ignore 49,950 other breakdowns.

Mr DAVID SHOEBRIDGE: It is very hard to explain, but I am saying it is not necessarily illogical.

Mr COSS: I think it is logical on a theoretical level but I do not think it is logical on a real level because you are asking the jury to take on certain characteristics that determine how you view the provocation but then disregard those in terms of how you react to it, and that is problematic in the extreme.

The Hon. ADAM SEARLE: One of the problematic things about the ordinary person is: Could the ordinary person have reacted this way, not would the ordinary person? It would make a lot more sense if it was: Would the ordinary person?

Mr DAVID SHOEBRIDGE: Or was it reasonable?

The Hon. TREVOR KHAN: That would be a much easier test for a jury to understand: Were the actions reasonable in the circumstances?

Mr COSS: A lot of people suggest that the word "reasonable" carries with it enormous baggage. What is reasonable to one person is not necessarily reasonable to another person. The notion of reasonable is gendered, cultured et cetera. It is a nice sounding word but it has problems in practice

The Hon. ADAM SEARLE: That may be so but there is no objective sort of concept in the provocation area.

Mr COSS: Sorry?

The Hon. ADAM SEARLE: Could an ordinary person have been provoked? I suppose a lot of jurors putting themselves into the position of an accused might say, "Yes, I might be provoked." But that does not require them to answer the next question: Is what the accused actually did when provoked reasonable? For example, a juror might accept that it was reasonable to be very upset by what they saw or what happened to them and maybe to strike their partner but if they then had to answer the question: Was it reasonable to stab them 35 times in the back? Maybe that might cause a jury to pause and consider carefully. It may have been reasonable to have been provoked but was what the accused actually did reasonable? They are not asked that second question.

Mr COSS: I suppose again my concern is that so many studies of social attitudes and then so many studies of jurors suggest that there is a great sympathy to violence that is inspired by jealousy. That is always going to be a key factor.

CHAIR: I interrupt questions to acknowledge the work of two of our parliamentary research staff: Lenny Roth and Lynsey Blayden, in drafting the parliamentary briefing paper on provocation, which has been cited in many submissions to the inquiry. On behalf of the Committee I thank them for their work, which has been very helpful to the inquiry.

The Hon. TREVOR KHAN: We have talked in terms of what the jury might do. Is the problem that the primary direction that is given to the jury is that the Crown has to prove its case beyond reasonable doubt?

Mr COSS: Yes.

The Hon. TREVOR KHAN: Having been given that direction at the start, then no doubt halfway through and then again at the end of what the judge has to say, is then interspersed this convoluted exercise with regards to provocation. The jurors go away and what they are essentially left with is: How can we exclude it?

The Hon. HELEN WESTWOOD: But how can you prove it if the only other person involved is dead? How can you prove beyond reasonable doubt that there was not provocation when the only other person who was witness to the incident is dead, is not there to give their side of the case?

The Hon. TREVOR KHAN: That is the problem.

CHAIR: And their reputation is blackened during the case.

Mr COSS: Those are the two problems.

The Hon. TREVOR KHAN: The Public Defence will have a different view, I suspect.

Mr COSS: James Ramage argued that his estranged wife Julie said these things, laughed about the home renovations, claimed that she had a new lover, and said, "Sex with you repulses me." There are two things. Firstly, who is to say that conversation ever happened? Secondly, if it did, why does that justify killing under provocation? So both of those things are problematic in the extreme.

The Hon. TREVOR KHAN: We know in Ramage that after he had killed her, he took an hour away from Melbourne and buried her in a shallow grave.

Mr COSS: Yes.

The Hon. TREVOR KHAN: Do you know whether in that case evidence was available to the jury that he came back, had dinner with his son, met with his lawyer and then went to the police station?

Mr COSS: That is a wonderful question, and I cannot answer it. I read so many things about the Ramage case, but I was not at the trial so I do not know what evidence was adduced.

The Hon. TREVOR KHAN: Do you know in Singh whether the evidence was that he left the house with her bleeding to death on the floor, caught a bus to Melbourne and was extradited from Melbourne?

Mr COSS: Yes. And in Won, he parked around the corner and came tip-toeing into the house.

The Hon. TREVOR KHAN: Certainly, evidence that he parked around the corner was given at the trial, and he was still acquitted of murder.

Mr COSS: Indeed.

CHAIR: Is it possible that the defence lawyers would object to those matters being led in evidence?

The Hon. TREVOR KHAN: As night follows day, I suspect.

Mr COSS: Yes.

CHAIR: So that evidence may not have been allowed?

Mr COSS: Yes, which also is problematic.

CHAIR: Probably because it was prejudicial to the accused.

Mr COSS: Indeed.

CHAIR: We thank you very much for coming. Yours has been an interesting and, might I say, provocative submission. We appreciate that.

Mr COSS: I am pleased.

(The witness withdrew)

DINA YEHIA, Public Defender, Public Defenders Office, affirmed and examined:

CHAIR: Thank you very much, Ms Yehia, for agreeing to appear before this inquiry as a witness. Do you wish to make an opening statement?

Ms YEHIA: I would like to make some points, if I may.

CHAIR: Yes, you may. We have the submission; but you did not actually write the submission.

Ms YEHIA: No. The Senior Public Defender, Mark Ierace, wrote the submission. It is brief. In essence, it supported the Bar Association's submission. I would, as an opening statement, make a point that I do not think was made in our submission, or certainly was not made with full effect. It is that the argument that the partial defence of provocation should be abolished because it is no longer in line with community values and expectations rather ignores the fact that in the overwhelming number of cases where provocation is run as a partial defence it is decided by a jury.

As members of the Committee will appreciate, in our system of justice a jury has a fundamentally important role in all criminal trials. They are people selected from a wide range of different backgrounds, men and women, of different ages, of different ethnic backgrounds; and every day in trials in this State when juries are empanelled they are told, and we accept, that they represent community standards and community values. So these are the people who are sitting in trials and deciding this question of whether murder should be reduced to manslaughter on the basis of the partial defence of provocation.

To suggest that juries do not understand the test is to overlook the fact that in many criminal trials there are very complex directions and complex matters of fact that are presented to juries. Fraud trials are immensely complex. Conspiracy directions are very difficult to grasp. But juries do that. And, after all, it is for judges and for practitioners like me to make sure that directions and evidence is presented in a way that is clear and that is simple. So I just want to emphasise, by way of an opening statement, that juries do represent community values. The fact that in an overwhelming number of cases where this defence is run it is not successful I think demonstrates that juries do bring a serious and very considered approach to their function.

CHAIR: Can I clarify that? Do you say the jury makes a decision whether murder is to be reduced to manslaughter?

Ms YEHIA: Yes.

CHAIR: Is there not a direction from the judge?

Ms YEHIA: The direction from the judge is simply to explain the defence. It is no part of the judge's role to indicate what should happen in terms of the verdict. So the judge will give directions of law. But it is completely a matter for the jury as to whether they find an accused not guilty of murder but guilty of manslaughter on the basis of provocation—in the same way that it is completely a matter for the jury to decide whether the defence of substantial impairment reduces murder to manslaughter.

CHAIR: Where does plea bargaining fit into that scenario?

Ms YEHIA: In relation to that aspect, I think the Committee would have the Judicial Commission study that looked at the cases—

The Hon. TREVOR KHAN: We have got several volumes of material; we have plenty of material.

Ms YEHIA: There are two studies that I have been able to locate in the material: the Judicial Commission study in relation to cases between 1990 and 2004, and the more recent study of Dr Kate Fitz-Gibbon between 2005 and 2010. But, in relation to the 1990 and 2004 cases study, my understanding is that 32 of the 115 cases where provocation was raised, or 28 per cent, resulted in the accused being dealt with for manslaughter because the Crown had accepted a plea of guilty to manslaughter. That is getting back to the Chair's question in relation to plea bargaining.

CHAIR: So the jury had no role in those.

Ms YEHIA: The jury had no role.

CHAIR: That is the point I was trying to make.

Ms YEHIA: Certainly, there is a breakdown of matters. The matters that I was referring to in the opening statement were matters that actually proceeded to trial. As the studies show—certainly that study between 1990 and 2004—a percentage of cases were dealt with by way of acceptance of a plea by the Director of Public Prosecutions without the matter going to trial. Perhaps it is more convenient for me to raise this later, but this is a matter that the Public Defenders feel is important: that is, the existence of the partial defence of provocation in relation to plea negotiation, particularly in some circumstances.

My major concern and that of the Public Defenders relates to the existence of the partial defence of provocation in relation to plea bargaining, particularly in circumstances where female accused, so women charged with murder are appearing in courts where there has been a background of domestic violence; or where—and there are at least two examples I have been able to find in relation to this—where the killing has been perpetrated by a female accused in circumstances where she has found out that a family member or a male person has sexually abused children. I emphasise that our concern is that the partial defence of provocation does work in relation to those circumstances of female accused charged with murder. In fact, it works in some cases before we get to the trial process, and that is with negotiations or discussions with the Director of Public Prosecutions in relation to entering pleas of guilty.

The Hon. ADAM SEARLE: We have had submissions that indicate that, even in cases where there is evidence suggestive of self-defence or defence of others, in a lot of cases it is not raised by a defence counsel or is not raised as part of a defence. Are you able to give us any insight as to why that may be the case? Is it the requirement of the contemporaneity of the events and the killing?

Ms YEHIA: And perhaps also the reasonable response. I can say that in any case in which I or my colleagues have appeared where the factual circumstances are such that would allow an argument for both self-defence, excessive self-defence or provocation, and where on the evidence that would be left by the judge to the jury, I would expect it would be run. It may be that in circumstances where it is not raised either a view is taken that the factual circumstances or the evidence is such that it would not allow the defence to be left to a jury. That is one of the great concerns that we have in relation to women in particular who are charged with murder, and what happens in those circumstances where the factual circumstances are such that it does not make it to the point of self-defence or even excessive self-defence. If I could give an example. Where for instance a woman has been the subject of domestic violence and abuse over a number of years, and then kills her partner, but in circumstances where there is no physical threat at that point—so that it may well be that there is an argument that the male partner says things that are offensive; not so much threatening, but offensive; and, because of the history of domestic violence—

The Hon. TREVOR KHAN: It triggers it.

Ms YEHIA: That is right. In those circumstances, unless something is proposed that we have not looked at, it is hard to see how the current situation in terms of self-defence in this State would cover that.

The Hon. ADAM SEARLE: One of the proposals put before us is the inclusion of the so-called social framework evidence to positively facilitate that going into evidence in these sorts of cases. Would that be beneficial in your view?

Ms YEHIA: I think so. I mean, in cases in which I have appeared where I have represented women who have suffered from domestic violence, we have always in those cases had admitted evidence of the background to the relationship, the physical abuse.

The Hon. ADAM SEARLE: You were able to get that in?

Ms YEHIA: I have been. But certainly, if there is a proposal whereby a legislative provision could facilitate that, then we would be in favour of that.

The Hon. TREVOR KHAN: Indeed, the proposal is broader than that: that it allow essentially evidence of, how would you describe it?

The Hon. ADAM SEARLE: Evidence about the nature of domestic violence or family violence, not only about the particular accused.

Ms YEHIA: And also, for instance, in cases in which I have been involved, sometimes it is quite important to have evidence before the jury as to why it is in certain relationships where there has been abuse the female remains in the relationship. In my experience of running murder trials with a female accused that is really important. Often a question will arise, or you can see that a reasonable question may arise in reasonable minds: "Why didn't you just leave?"

Mr DAVID SHOEBRIDGE: Do you get that evidence in current practice?

Ms YEHIA: I have in my cases, yes.

Mr DAVID SHOEBRIDGE: Without a struggle?

Ms YEHIA: I have not had a case where there has been a struggle.

The Hon. ADAM SEARLE: But that would be limited to the circumstances of your particular accused not the more general nature of family violence.

Ms YEHIA: That is correct. With the second limb—that is, why did the accused not leave—the evidence is based on a more general study or understanding of these issues.

The Hon. ADAM SEARLE: We understand the old phrase that hard cases make bad law. However, I think it is fair to say that some members of this Committee—certainly including me—are profoundly troubled as lawmakers and policymakers about the outcomes in some cases, such as Ramage, Singh and Won, and the message that that sends to society about a certain level of acceptability about killing women. One of the ideas put to the Committee is that perhaps conduct used as provocation should be limited to circumstances where the conduct is serious and violent conduct; that is, you would limit provocation to only those circumstances. Would that not be a beneficial thing to do in terms of enhancing the system's protection of women?

Ms YEHIA: I do not know how you would frame that. One would have to look at the terms in which such legislation was framed. Our concern would be that it would still allow for situations where women would not be protected. As I indicated earlier, that was the situation in, for example, the case of Nelson 1996, where a woman and her brother killed a boarder in their house who they understood had sexually molested her daughter.

Mr DAVID SHOEBRIDGE: Sexually molesting the daughter would be criminal conduct. Why would that not fall within the terms of provocation?

Ms YEHIA: That is why I say it would depend on the way the legislation is framed.

Mr DAVID SHOEBRIDGE: Assume it picked up those kinds of cases.

Ms YEHIA: Some form of amendment could be considered. However, I am concerned and the Public Defenders Office is concerned, that the current models—for instance, what we have seen in New Zealand and Victoria and the attempts to amend the law of provocation to meet some of the concerns that this Committee is referring to—do not appear to have worked. At least the evidence thus far is inconclusive. Indeed, an online article prepared by Lorana Bartels, Senior Lecturer in Law at the University of Canberra, deals with the Victorian experience. That article states:

> … the Victorian law has so far hardly achieved a more just response for battered women.

Her analysis of what has happened since 2005 indicates that three of the women who relied upon the amended defence of defensive homicide in fact received a sentence that was harsher than the sentence they would have received under manslaughter. I hesitate because one can put a scenario whereby this can be covered by appropriate legislation, but at this stage there is no evidence—at least in those States that have made the move—that the place of female accused has been protected. That is our concern.

The Hon. ADAM SEARLE: What about requiring a reasonableness test in provocation of the kind that applies in self-defence? The jury is asked the question, "Could the ordinary person be provoked?" But it is then not asked the question, "But, having been provoked, is it reasonable that the accused did this particular thing?"

Ms YEHIA: In relation to the category of accused that we are most concerned about—

The Hon. ADAM SEARLE: Women who kill their partners.

Ms YEHIA: Yes. The reasonableness test could potentially be harsher for women. It is more restrictive. The ordinary person test is an objective test, but it allows for an ordinary person in the position of the accused. However, the reasonableness test may in fact see women further disadvantaged. It would be more difficult to inform juries of the particular experience and the reaction of that woman faced with that history of domestic violence, particularly in circumstances where there is not a physical threat at the time that she kills.

Mr DAVID SHOEBRIDGE: But the woman stabbing to death the drunken, violent male partner may have difficulties with the reasonableness test in light of arguments that might be run by the prosecution.

Ms YEHIA: Yes.

CHAIR: The Bar Association's submission states:

> …without such a defence [the provocation defence] being available, many injustices are likely to occur—especially where accused persons respond to significant acts of violence but in a manner which cannot be characterised as self defence.

Do you agree with that statement? If so, can you explain why self-defence is more difficult to establish in such circumstances?

Ms YEHIA: As I indicated earlier, I agree with that statement. The concern is that the current laws of self-defence are such that in circumstances where a female accused who has been subjected to violence for a long period is confronted with a situation where, not as a result of a physical threat but as a result of some other conduct by that abusive partner, snaps, losses control, becomes so enraged informed by that history of domestic violence and abuse that she does an act that causes death—

The Hon. TREVOR KHAN: No, she forms the intention to kill, cause grievous bodily harm or is reckless.

Ms YEHIA: In those circumstances it is difficult to see how the current defence of self-defence under section 418 of the Crimes Act would be available. If available, I think it would be difficult to establish, or at least I would certainly have concerns about it. I agree with the Bar Association's submission that there is a real concern.

The Hon. TREVOR KHAN: Self-defence in its current form is a problem?

Ms YEHIA: Yes. Since the amendments were introduced in Victoria—and particularly the defence of defensive homicide—I have not seen sufficient evidence to suggest that the position of women is met or that they are not further disadvantaged by the abolition of the defence.

The Hon. TREVOR KHAN: But the position that the Parliament adopted in Victoria is not the position promoted by the Victorian Law Reform Commission. It had a different proposition.

CHAIR: We get the impression when discussing some of these very brutal cases that all the evidence is not presented to the jury. Is that correct? As the public defender do you object to the giving of further background material involving a murder that would further blacken the murderer's reputation?

Ms YEHIA: It rather depends on the evidence. If it is relevant then it is admitted. As a public defender, if I am faced with evidence—

The Hon. TREVOR KHAN: That is not entirely the test.

Ms YEHIA: It is one of the tests. Indeed, it is the fundamental and most basic test under the Evidence Act that all evidence must be relevant. If it is not relevant, it is not admissible. There is no discretion.

The Hon. TREVOR KHAN: I understand that.

CHAIR: Who makes the decision?

The Hon. HELEN WESTWOOD: Who determines whether it is relevant?

Ms YEHIA: The judge.

CHAIR: You do not object?

Ms YEHIA: I can object to evidence, but the decision—

CHAIR: Is made by the judge.

Ms YEHIA: Yes.

CHAIR: But you trigger it by your objection.

Ms YEHIA: That is correct.

Mr DAVID SHOEBRIDGE: Or the prosecution.

Ms YEHIA: Hypothetically I am about to start a case next week where I want to raise evidence and the Crown is taking objection to it. It obviously works on both sides. We argue it in front of the judge and, depending upon the ruling, the evidence is either admitted or not. Relevance is the fundamental test. If it is ruled to be relevant, the next test is whether it is prejudicial. Again, that is a matter for the judge to determine.

The Hon. DAVID CLARKE: I did not catch the question put to you by the Hon, Adam Searle. I may be touching on the same area; if so, pull me up. What is your response to the proposition that the partial defence of provocation be available only where the accused acted in response to violent criminal behaviour?

Ms YEHIA: My response was that I would have some grave concerns about it.

The Hon. DAVID CLARKE: That was the question he put?

Ms YEHIA: Yes.

The Hon. DAVID CLARKE: I thought he was talking about self-defence.

Ms YEHIA: That was another question.

Mr DAVID SHOEBRIDGE: But then you illustrated your concerns with a case that did not support your argument.

Ms YEHIA: I can illustrate it with another case. Let us say we have a situation where a female accused has suffered significant abuse over a number of years. There is then a confrontation with that abuser and it does not involve physical violence. The confrontation may involve a verbal altercation during which the abuser uses words or representations that are highly offensive, particularly in the context of that relationship. So, that is not conduct that would be criminal.

The Hon. DAVID CLARKE: But the earlier conduct would be.

Ms YEHIA: Yes.

The Hon. DAVID CLARKE: And if that were drawn into this social framework we are talking about, would that not resolve that problem?

Ms YEHIA: In terms of self-defence?

The Hon. DAVID CLARKE: No, in terms of qualification.

Mr DAVID SHOEBRIDGE: As an element of the conduct that you are relying upon that it provoked. One element, probably a not insignificant element, would have to be a violent criminal act or violent criminal conduct. If that were the threshold for provocation—that is, it is included as an essential element of provocation—can you think of instances where women would be restricted or disadvantaged unjustly?

Ms YEHIA: Do you mean that the event of physical violence can be some years in the past?

Mr DAVID SHOEBRIDGE: It does not have to be immediate. Perhaps the insults or the verbal abuse is seen in the context of prior criminal assaults upon you. That would be sufficient to satisfy the test.

Ms YEHIA: It would include acts of violence in the past and some form of criminal behaviour?

Mr DAVID SHOEBRIDGE: Violent criminal behaviour.

Ms YEHIA: But short of that, the defence would not be triggered or available?

Mr DAVID SHOEBRIDGE: An element of it.

Ms YEHIA: I can still see some cases where it would not.

Mr DAVID SHOEBRIDGE: Such as?

Ms YEHIA: Let us take the case of a female accused who has murdered a male. The female accused is someone who has a history of being abused sexually as a child by her stepfather over many years. She is engaging in sexual acts during which the male starts to say things that relate to men or fathers having sexual contact with their children. It triggers in her experiences and the abuse that she herself suffered as a child.

Mr DAVID SHOEBRIDGE: But that abuse would be prior criminal violence.

Ms YEHIA: But it is not prior criminal violence by the person—

The Hon. TREVOR KHAN: That seems to be, in a sense—and I am not being too derogatory—a cute way of varying the facts in Green.

Ms YEHIA: No.

The Hon. TREVOR KHAN: It is similar, is it not, and I would have thought one would be uncomfortable with Green?

Ms YEHIA: You are referring to a homosexual advance defence.

The Hon. TREVOR KHAN: I am talking about a triggering of an event or a triggering of violence that really had nothing to do with the victim.

The Hon. DAVID CLARKE: What has triggered this? In cases like Won and Singh and so forth would not the proposition that I was putting to you to consider do away with all those problems? Those sorts of cases are not going to arise. We are here because of the outrage coming from cases like that. So if we put parameters around this, that it is in response to violent criminal behaviour, we are not going to hear any more about the cases of Singh and Won, are we?

Ms YEHIA: From the 20 years of being in criminal practice and a defence lawyer, there will always be public outrage of one sort or another in relation to cases. I think the Public Defender's view would be that it is something that should be considered, the proposition should be considered. I cannot put a view without evidence of seeing how it operates in other jurisdictions and whether the position of women continues to be disadvantaged as to whether that would—the proposition or the amendment suggested—protect the position of

female accused. That is something that I would not be able to comment on. I have not seen evidence in relation to other jurisdictions that suggest that; so it is difficult to answer.

The Hon. DAVID CLARKE: But worthwhile pursuing?

Ms YEHIA: It may be worthwhile looking at, certainly. If there were some provision or amendment that was to be considered that we could look at, that perhaps the Law Reform Commission could consider, that would be of use. But it is difficult in circumstances where there is an absence of evidence from other jurisdictions that have sought to go down this path that it has been successful—to answer the question.

The Hon. HELEN WESTWOOD: I have to comment on the way that the lawyers here conduct themselves—as though we are actually in a courtroom. One of the benefits of the parliamentary inquiry system is that you have, I think, a different method of gaining information and insight into the matter before the inquiry. Going back to the example you gave us of a case where a woman had been a victim of child sexual assault, are there not other defences available in those sorts of cases, like substantial impairment? Do they not have diminished responsibility, because there is a recognition of the psychological impacts of child sexual assault on adults?

Ms YEHIA: It may be that in some cases the facts would be such as to allow for substantial impairment, in other cases not, because to raise substantial impairment, for me to rely on behalf of my client on substantial impairment first I would have to have psychiatric evidence that at the time that my client committed the act she was suffering from an abnormality of mind—and that is something that a psychiatrist would have to give evidence about; and, secondly, that the abnormality of mind was such as to substantially impair her capacity to control herself or to judge right from wrong and then, the second limb of that, which is something that is left completely to a jury in many respects like this partial defence of provocation, that even if she had an abnormality of mind and even if that did substantially impair her capacity to control herself or judge right from wrong, whether the jury, as representatives of the community—and this is the test, the direction they are given—thinks that the impairment is so substantial as to reduce murder to manslaughter.

So, in answer to your question, there may well be cases where substantial impairment could, in fact, be run as well as the partial defence of provocation, and, indeed, from my understanding of the Judicial Commission's study—the one I was referring to earlier that looked at cases from 1990 to 2004—in about 10 of the cases it was when female accused were relying upon the partial defence and in some of those cases they relied upon provocation as well as substantial impairment. But I would not agree that in every case where there are circumstances as I have described earlier you could rely upon substantial impairment. It would really depend upon getting the psychiatric evidence in relation to abnormality of mind, and I have had cases where I have run substantial impairment and you can have a psychiatrist give you an opinion that your client is substantially impaired and the Crown can have a psychiatrist who gives an opinion that they are not. I have been in many cases where that has occurred and there has to be then, of course, a trial and the jury decides. I am not suggesting that substantial impairment is not something that could also be run; I do not think it could be run in all cases, and it would then depend upon the psychiatric evidence.

The Hon. SCOT MacDONALD: One of the difficulties I have found with this is just getting my head around the juries. We have had witnesses who say that men come on to the jury with gender biases, baggage and all sorts of language like that, that the juries have difficulty understanding the two-limb test, and the inadequacies of the jury is the basis for the abolition of provocation, or part of the reason. Can you comment on whether you think that is right, whether you think that our juries are representative of our community? I know you said that before. Are they evolving? Are juries inadequate?

Ms YEHIA: I would certainly be of the very strong view, and that is why I started with the opening statement because my very strong view—and I know it is shared by the Public Defender's—is that the jury system, and I am not suggesting for one minute there may not be some imperfections, is the fundamentally most important system that we have. I say that having had a number of cases in my own practice where they have come back with a verdict that I have not liked. So I am not suggesting for one minute that the jury system is ideal because I have always had the results I have wanted. But can I say a few things in answer to your question? From my experience—21 years now as a criminal defence lawyer—

The Hon. TREVOR KHAN: It's gone up a year. I thought it was 20 before.

Ms YEHIA: It has been a long afternoon. But certainly 13 years at the Bar and running jury trials even before that, people do, obviously, come on to juries from very different backgrounds. We have men, we have women, we have different ages, we have different backgrounds, as I indicated earlier. People will come on to juries with their particular prejudices. But from my experience, having run jury trials, hundreds of them now, and from the experience of colleagues at the Public Defender's, when juries are empanelled, by and large and in the overwhelming number of cases, they take on a responsibility, and sometimes you can see it—from the minute they are empanelled and the Crown opens, the defence opens and the judge makes the opening remarks, you can see how seriously they are taking their responsibilities. As I indicated earlier, there are cases where directions are much more complex than the provocation direction, there are cases where evidence is complex—I think you will all remember that a couple of years ago we had the terrorism trial in New South Wales that went for 11 months; we had a jury on that trial. They had to deal with hundreds of documents, if not thousands of documents; they had to deal with very complex issues, and they did.

So I do not accept that the provocation test or the directions are so complex that juries cannot understand it and therefore it should be abolished. If it is complex then it is a matter for the judges and for advocates to try to present it as simply and as clearly as they can. I do not accept that juries take up their role in such a prejudiced way that they cannot bring an informed and objective view; that has not been my experience, by and large. There will always be a small number of cases where one might think that a jury got it wrong, but I am sure in those cases where I think a jury got it wrong my opponent, the Crown, will think the jury got it right. So there will always be a small number of cases where one will not agree. But, by and large, I think juries are well equipped to deal with the issues and if there is a failing then there is a failing on the part of judges and advocates.

Mr DAVID SHOEBRIDGE: In your Public Defender roles do you defend the outcomes in Ramage, Singh and Won—just to give three? Do you defend those outcomes?

The Hon. TREVOR KHAN: And Keogh.

Mr DAVID SHOEBRIDGE: Of course Keogh. I am not asking you to go through a detailed analysis of each of them but do you defend the thrust of the outcome in those cases?

Ms YEHIA: I defend a system that allows a jury that is representative of the community to have evidence placed before it, to have proper directions given to it, to have arguments put fairly before it and relevant evidence presented. As I said earlier, there will be a handful of cases that you can put to me and I may not personally agree with the result or I might have difficulty personally justifying the result, but a handful of cases that we disagree with, in my respectful submission, is not a basis upon which to abolish a defence that, if you look at it in terms of the benefit it has in dealing particularly with female accused in certain situations—

Mr DAVID SHOEBRIDGE: That is true but then if you look at it from a reform point of view, on the one hand you have a series of very concrete cases which you can identify and be greatly troubled by being produced by the current open nature of the partial defence of provocation and then, on the other hand, in terms of if you had limited the scope of provocation to requiring an element of criminal violence, what I see against that is, at best, a very highly refined, abstruse, extreme situation that you put before the committee as the argument against it. On the one hand it is a very highly refined, abstruse, extreme situation and on the other hand there is a series of very absolute concrete cases. In an imperfect system what should a committee do with those kinds of balance considerations?

Ms YEHIA: As I indicated earlier, if there is some proposal to include some form of amendment to the defence that involves a requirement for, for instance, an incident of past violence or criminal conduct as a way in which to meet concerns that relate to the types of cases we all know we are talking about, that is a proposal I think the public defenders would be happy to look at and to consider. But there is not, well, I have not seen—

Mr DAVID SHOEBRIDGE: Could you take it on notice and consider it?

Ms YEHIA: Yes.

CHAIR: Ms Westwood was asking a question and she got interrupted by Mr Shoebridge. Have you finished the point you were trying to make?

The Hon. HELEN WESTWOOD: It was not that I was interrupted, I was just responding to the examples that you gave. It seems to me we are continually hearing a defence of a defence of provocation because it is used by women who kill their violent partners, but the overwhelming number of cases are violent men who have a history of domestic violence who murder their female partners. That is the majority of cases. Just on the issue you raised about the jury—and I hear what you say—what I again cannot reconcile is the huge gap between the outcome in cases like Singh and the community's expectations. I hear you say the jury represents the community but there is just such a huge gap it is difficult to understand or find some explanation of how it can be so far away from what the community expects.

Ms YEHIA: Two responses: I will take the last point first. That is why I indicated earlier in a handful of cases there are results that we may not be able to understand. We were not in the courtroom, we did not hear all the evidence, we did not hear the submissions, we did not see the manner in which witnesses gave evidence. So, it is not surprising that people would see results like that and be concerned by them. But, by and large, they are a handful of cases when you look at the cases in which the jury has rejected the defence completely or in those cases where female accused rely upon it.

If I can take the point you made in relation to the overwhelming number of cases being men who kill their intimate partners. The two studies that I have and have looked at in preparing for this, and there may be others that I am not aware of, so I rely on the two studies I have been referred to. The first is the Judicial Commission study from 1990 to 2004—so that is over a period of 14 years. My understanding of these is there were 115 cases where the issue of provocation was raised; 32 offenders, 28 per cent, as I indicated earlier, had their plea accepted by the Crown so there was no trial. That left 83 offenders in the 14-year period who raised the issue of provocation. Forty of those 83 were unsuccessful so the jury decided murder; 43 offenders succeeded at trial with the defence and I think two those were judge-alone trials but 41 were jury trials.

In relation to the overwhelming number of those 43 cases where the defence was successful, the majority involved male on male, so it was a male offender and a male deceased and that involved a physical confrontation. So, there was some form of physical violence that prompted the act that caused death. There were 11 cases in that period where provocation was successfully claimed in circumstances of infidelity or jealousy—I think the cases you are talking about. In two of those cases the victims were women. In two of them the victims were homosexual partners. Seven of the victims were men who were alleged to have been having an affair.

The Hon. TREVOR KHAN: The Won scenario?

Ms YEHIA: Yes. So, out of the 11, four, in effect, two female and two homosexual male partners, four cases, I am dealing with the partners. Four out of the 11 cases were jury verdicts; seven were where the Crown had accepted the plea of guilty. According to the study, in that same period, 10 cases involved a woman accused of killing her partner after physical abuse and successfully claiming provocation, either by way of a trial or, I think, in many of these cases acceptance of a plea by the Director of Public Prosecutions. That study certainly did not demonstrate the type of gender bias defence, if that is how we are going to define gender bias defence.

The only other study I am familiar with is the study of Ms Kate Fitz-Gibbon. My understanding of that study is that between 2005 and 2010 it records 15 successful cases of provocation manslaughter, and a table that appears in one of Ms Kate Fitz-Gibbon's papers shows three cases involving male accused who killed female partners in circumstances where there was no violent confrontation. Ms Kate Fitz-Gibbon is here and I am sure she will correct me if I am wrong. It appears, as far as I can understand the table, in one of those three cases, the case of Stephens, the Crown had accepted a plea. In that same period, two women successfully claimed provocation defence in the killing of their male partners and I understand that was by way of acceptance by the Crown of a plea. I stand to be corrected if there are further studies out there, but from the studies I have been referred to I do not see that the evidence establishes that point.

The Hon. DAVID CLARKE: Can I put this to you? There will always be an outrage and there can be an editorial going one way and there is an outrage, and the next day there can be another editorial putting the opposite view and there could be outrage that way. The fact is there is continual outrage that is responsible for this Committee being here and it is because of cases like Won and Singh. Nobody is complaining that in most instances the law is operating effectively. But in these types of cases it generates sufficient outrage that it puts the telescope on the full area of this partial defence. So, I come back to this proposal that this partial defence only be available in relation to violent criminal behaviour, and will that not deal with the cases that are generating all of this outrage out there? I understand that outrage.

Ms YEHIA: As I said earlier, it would be something that certainly the public defenders would want to take note of and consider. I say that because in the absence of evidence or any material I have looked at to suggest that such an amendment would not disadvantage women I do not want to commit the public defenders to it, but I think the public defenders would be willing if they are given the opportunity to consider it. I will take it on notice.

CHAIR: If the Committee were to recommend abolishing provocation—you may have to take this on notice now—would you suggest any other recommendations that could be made to improve the availability of self-defence, in particular for battered women who kill?

Ms YEHIA: Certainly our primary position is we do not want it abolished. My concern is, as I have indicated earlier, not leaving the defence in some form will greatly disadvantage women in the absence of a provision that has been demonstrated to work, an alternative position. The current self-defence laws, from my experience, will not be able to cover a number of cases involving the type of female accused that I have represented. That is a real and considerable concern of the public defenders. I have to say, my practice at the moment involves almost exclusively murder trials and a large proportion of those, certainly this year, are women. It is not a concern I put lightly in terms of the potential disadvantage for female accused, but we are not an unreasonable lot, defence lawyers, and we certainly would be willing to consider any proposed amendment as has been flagged here.

The Hon. TREVOR KHAN: Can I take you to a proposition that has been about since 1998 and is more in the Australian Capital Territory and the Northern Territory? That relates to an exclusion of non-violent sexual advance as being a ground for provocation. What do you say with regard to that proposition?

Ms YEHIA: I think that is probably a reasonable proposition.

The Hon. HELEN WESTWOOD: Help me just understand the system. We talked about this earlier, proof beyond reasonable doubt.

Ms YEHIA: Yes.

The Hon. HELEN WESTWOOD: When provocation is used by a man who has murdered his female partner, invariably she, in her absence, is on trial. Who is there to defend her? If she was alive someone would be there to defend her but there is not, so she is on trial and it seems you do not have to prove beyond reasonable doubt that she was guilty of provocation. I do not understand that.

Ms YEHIA: Alive or dead, if a woman is a victim of an offence she is in essence represented by the Crown because if a female victim, for instance, was assaulted but not killed—so she is still alive—she is not separately represented in criminal trials; her interests in the case are put by the Crown in the same way that the circumstances of a female deceased are put by the Crown. In that respect there is no difference. There has been a criticism made that in circumstances where a person is dead and then the accused raises allegations or accusations about that person, how can they refute it, because they are dead? There are two things that I would say to that. Firstly, that is certainly not unique to provocation.

There are many cases of self-defence where the only people present at the time that the person is killed are the accused and the deceased, and the version of events comes from the accused. In those circumstances, a deceased also cannot refute it, so it is not unique to provocation and therefore I cannot see that it is necessarily a basis on its own for abolition. The other point I would raise in answer to that criticism is this. We are no longer in the days of dock statements where an accused used to get up in the dock and say, "This is my version. You are not going to test it. I am just going to tell you a version and nobody has the right to cross-examine me." Gone are those days. Now an accused has to get into the witness box—

The Hon. TREVOR KHAN: No, he does not; Ramage did not.

Ms YEHIA: I am sorry, I will withdraw that and put it more accurately. If an account has to be given and an accused has not made a record of interview, he has to get into the witness box. He cannot give a dock statement. In those circumstances, he is cross-examined: he is tested. The version that is put is tested and the jury has the opportunity to assess the credibility of that person. That is one way in which an account of what occurred can be tested. Another way is that in a lot of cases there may be some sort of supporting evidence that is raised on behalf of the accused, so the blanket criticism that in cases of provocation it is really the word of the

accused and the deceased is not in a position to be able to refute it is not unique to provocation, and that version is tested if these days an account has to be put by an accused and has not been put in a record of interview.

CHAIR: You have given us a wide range of answers and covered many issues, and with your experience as senior counsel you have presented your case very well and very persuasively. Thank you for appearing before the Committee.

Ms YEHIA: Thank you for your time.

(The witness withdrew)

(The Committee adjourned at 5.33 p.m.)