



Victorian Aboriginal Legal Service Co-operative Ltd.

Head Office:
6 Alexandra Parade,
P.O. Box 218
Fitzroy, Victoria 3065
Phone: (03) 9419 3888 (24 Hrs)
Fax: (03) 9419 6024
Toll Free: 1800 064 865

Submission to the Victorian Law Reform Commission Defences to Homicide Inquiry

From Victorian Aboriginal Legal Service Co-operative Limited

Defences to Homicide: Submission

Victorian Aboriginal Legal Service Co-operative Limited (VALS) provides legal representation to Aboriginal men and women charged with criminal offences. The response of VALS to the *Defences to Homicide* option paper is premised on the responsibility that we have to protect the interests of Aboriginal peoples charged with criminal offences.

Our submission is informed by the underlying consideration of all of VALS work;

Sentencing issues must be seen in the broader framework of Aboriginal over representation in the criminal justice system.

Over a decade has passed since the publication of the *Royal Commission into Aboriginal Deaths in Custody* in which the key finding was that

[t]he single significant contributing factor to incarceration is the disadvantaged and unequal position of Aboriginal people in Australian society in every way, whether socially, economically or culturally.¹

Aboriginal communities continue to experience high rates of domestic violence, alcoholism, drug abuse, unemployment and poor health;² The RCIADIC and the *Bringing*

¹ Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) Volume 1 para 1.3.1-1.3.3.

Them Home Report highlighted the impact of separation upon Aboriginal people and reminded us that racism does exist and is an unfortunate part of most Aboriginals' experience. The disadvantage Aboriginal people face is reflected in criminal offending statistics.³ This over representation extends to homicide offences. Across Australia Aboriginal people accounted for 16.6% of homicide offenders, although they account for under 2% of the total population and Aboriginal people are on average 8.1 times more likely to become victims of homicide.⁴

Provocation

VALS supports the retention of the partial defence of provocation.

Why retain provocation?

1. It recognises a hierarchy of culpability in killing

The common law in Victoria currently accepts that there are some cases of killing where a lesser degree of culpability can be established. When the New South Wales Law Reform Commission looked at the issue of provocation in 1997, they reached the conclusion that there are situations in which a person's power to reason and exercise self control over their actions is impaired and therefore the degree of culpability is lessened:

In the Commission's view, the defence of provocation should not be regarded as condoning violence in our society. On the contrary, the defence recognises that a particular killing was wrongful and unjustified, and for this reason the accused is not acquitted but is convicted of manslaughter (for which the maximum penalty is 25 years' penal servitude). At the same time, the law considers that certain provoked killings,

² For a clear discussion of these issues see: Hunter, B, 'Three Nations, Not One: Indigenous and Other Australian Poverty' (Working Paper No 1/1999, CAEPR, 1999). Available on line at www.anu.edu.au/caepr.

³ In March 2000 Indigenous people in Victoria were 15 times more likely to be in prison than non-Indigenous Australians. Gardiner, G.S, *Indigenous People and Criminal Justice in Victoria* (2001) 9.

⁴ Mouzos, J, 'Homicidal Encounters, A Study of Homicide in Australia 1989-1999' (Research and Public Policy Series No 28, Australian Institute of Criminology, 2000) 78.

committed as a result of a loss of self-control, do not fall within the worst category of unlawful homicide, and therefore should not be classified as "murder".⁵

VALS agrees with this conclusion reached by the NSWLRC.

2. Abolishing provocation would have a negative effect on Aboriginal peoples who are over represented in homicide offences. This over representation can be understood in the context of Aboriginal disadvantage

Indigenous homicide rates (as previously outlined) are indicative of the overall over representation of Aboriginal people in the criminal justice system. Jenny Mouzos, a research analyst with the Australian Institute of Criminology published the paper *Indigenous and Non-Indigenous Homicides in Australia: A Comparative Analysis*. The study indicated that Indigenous homicides are qualitatively different from non-Indigenous homicides. Homicides that involve Aboriginal people are predominantly intra racial offences and the most common type of homicide in the Aboriginal community is between men. The report stated that

Many of the incidents resulted from some kind of domestic altercation, many of which were by and large impulsive and unpremeditated. Another feature of Indigenous homicides was the presence of alcohol. Just over four out of five Indigenous homicides involved either the victim or offender, or both, drinking at the time of the incident.⁶

The RCIADIC found that family violence and alcoholism are symptomatic of a larger picture of socio economic marginalisation. The ability of many Aboriginal people to control responses to emotional stress has been damaged by childhood separation from family and the consequent disruption to family networks, as well the many disadvantages experienced by the Aboriginal community. In these circumstances Aboriginal people have often argued provocation, leading to a reduced sentence of manslaughter. Without recourse to provocation a conviction of murder will likely result in larger sentences.

⁵ New South Wales Law Reform Commission, Defences to Homicide, Report No 83 (1998).

⁶ Mouzos, J, 'Indigenous and Non-Indigenous Homicides in Australia: A Comparative Analysis' (Trends and Issues in Criminal Justice No 210, Australian Institute of Criminology, 2000) 5.

Self Defence

VALS advocates that self defence be retained in Victoria. The test for self defence is simple and broad in scope.

The issue of women's access to the law of self defence has been raised in this and previous reform papers. There is concern that women who kill violent partners to protect their lives and the lives of their children are currently not able, or have great difficulty, establishing self defence as a defence to murder. At VALS we have not encountered situations giving rise to consideration as to whether a defence of battered women was viable. In our experience, violence perpetrated by Aboriginal women occurs in circumstances very similar to that of men, i.e. in the context of immediate response to conduct of the victim, often accompanied by excessive consumption of alcohol or drug abuse.

One of the options provided for in the VLRC's paper is further changes to the law to recognise self defence in cases where the threat of harm does not fall into the traditional categories of what constitutes imminently life threatening, this would reflect women's experience of domestic violence. In the *Inaugural Lesbia Harford Oration* former Chief Justice of the Victorian Supreme Court Justice Phillips said:

In such cases where there is satisfactory evidence that the accused was involved with the deceased in a battering or abusive relationship, in my opinion, the focus of the Judge's directions ought to change. The last attack or threat should be dealt with as simply a component of the sum total of conduct directed against the accused by the deceased so that the accused is regarded as defending herself against the accumulation, the sum total, of the deceased's violence and abuse.⁷

VALS has no objections to the suggestions outlined by Justice Phillips, however, we do take the view that victims of domestic violence are best served by measures to prevent the occurrence of such violence. Community standards have changed, these changes are reflected within the Aboriginal community and programs have been established to address this problem. VALS has taken affirmative steps to address these issues through

⁷ Justice Phillips, 'Lesbia Harford Oration' (Speech delivered at the Inaugural Lesbia Harford Oration, Melbourne, 21 April 1999).

our Community Legal Education programs and our strong involvement with the Indigenous Women's Justice Forum.

Mental Impairment

VALS recommends changing the nominal sentence of 25 years to a lesser nominal sentence, accompanied by a process of review

At VALS our solicitors note a reluctance to use the defence of mental impairment. This may be explicable in large part by the fact that the nominal sentence, as outlined in the *Crimes (Mental Impairment and Fitness to be Tried) Act (1997)* is the maximum sentence. We recommend that a provision for a lesser nominal sentence which may result in a greater use of the defence. This could be achieved without compromising community protection by implementing a process of review.

There is some logic in the argument that just as a loss of control as a result of provocation is a partial defence, so also should mental impairment in the case of killing be used as a partial defence. The law does presently provide that intellectual disability and mental illness be taken into account in sentencing. A partial defence with a lower maximum sentence is the most effective tool for ensuring adequate weight is given to issues of mental illness.