



Victorian Aboriginal Legal Service Co-operative Ltd.

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DEFENCES TO HOMICIDE

Self Defence, Provocation and Evidentiary Issues

Roundtables 2004

Questions/issues for discussion

1. Social framework evidence

a) Should social framework evidence be admissible?

VALS has no objections to social framework evidence being admissible, provided that such evidence is relevant to the issues in the case. VALS has no objection to social framework evidence as it places acts in their context and has the potential to dispel myths and stereotypes about family violence and indigenous peoples experience of family violence.

b) What issues would be an appropriate subject for expert social framework evidence where there has been a history of family or relationship violence between the accused and the deceased (see attached)?

VALS has no objections to the list of issues contained within Appendix A. The issues listed appear to be an appropriate subject for expert social framework evidence where there has been a history of family or relationship violence between the accused and the deceased.

c) Who should be considered qualified to give this evidence and on what issues?

It is the opinion of VALS that experts who have relevant qualifications, such as psychiatrists and psychologists, should be considered qualified to give social framework evidence on the realities of domestic violence. It is the opinion of VALS that the list of experts who are qualified to provide social framework evidence should be broader than psychiatrists and psychologists or those who hold qualifications. It is the opinion of VALS that those who have experience working with victims of domestic violence should be considered qualified to give social framework evidence on the realities of domestic violence. For instance, domestic violence workers, health workers and refuge workers should be considered qualified to give evidence. Employees of organizations, such as the Victorian Aboriginal Health Service and Elizabeth Hoffman House (Indigenous women's

refuge), should be considered qualified to give social framework evidence on the realities of domestic violence for indigenous people.

d) Would general evidence on the psychological effects of family and relationship violence (non case-specific) and/or effects on the particular defendant (case-specific) also be useful in some or all cases?

It is the opinion of VALS that caution should be exercised in relation to permitting non case-specific or case-specific evidence on the psychological effects of family and relationship violence. It is of note that Battered Woman Syndrome evidence has been criticized for pathologising women's actions and shifting the focus away from the violence of the batterer. Care should be exercised to ensure that social framework evidence is not subject to the same criticism.

e) Should trial judges be similarly required to direct juries on how general social framework evidence may relate to the elements of the defence and facts in issue?

VALS is in agreement that trial judges should direct juries on how general social framework evidence may relate to the elements of the defence and facts in issue. VALS is in agreement with Justice Phillips that the "focus of the Judge's directions ought to change" when "there is satisfactory evidence that the accused was involved with the deceased in a battering or abusive relationship".¹

f) What would be the best way to raise awareness of the way in which expert evidence can assist in these cases? For example, would some form of judicial and legal education be appropriate and/or guidelines on the nature of social framework evidence, when it should be introduced and how it should be used?

VALS is in agreement that the best way to raise awareness of the way in which expert evidence can assist in cases is for some form of judicial and legal education or guidelines on social framework evidence. Changes to law or procedure may not be effective if interested parties are not adequately informed about them. Members of the judicial and legal professions should be educated about social framework evidence in order to be of assistance to members of the jury.

2. Provocation

a) Should provocation be excluded in certain circumstances as an appropriate basis on which to reduce an offender's culpability for murder? in which the alleged provocation is:

VALS does not support the exclusion of the partial defence of provocation in circumstances such as the following: a) an actual or alleged infidelity; b) a non-violent sexual advance; or c) a partner leaving or threatening to leave a relationship. The

¹ Justice Phillips, 'Lesbia Harford Oration' (Speech delivered at the Inaugural Lesbia Harford Oration, Melbourne, 21 April 1999), page 29.

discretion of the jury to consider what circumstances constitute provocation should remain.

The abolition of the partial defence of provocation in the previously mentioned circumstances would have a negative effect on Aboriginal peoples who are over-represented in homicide offences and the prison system.² Without recourse to the partial defence of provocation, which reduces an offender's culpability for murder, it is likely that the number of convictions of murder will increase. In addition, without recourse to the partial defence of provocation longer sentences than would otherwise be imposed for manslaughter will be imposed.

The exclusion of circumstances a), b) and c) will impact on women's already restricted use of the partial defence of provocation. It will also inadvertently impact men's use of the partial defence of provocation. This is significant in light of the fact that most Aboriginal homicides involve men killing men.³

b) If so, in what circumstances and how might these be defined?

VALS does not support the exclusion of the defence of provocation in any circumstances and argue that the defence of provocation should be retained in its current form.

3. Excessive self-defence

a) Is this an appropriate statement of the main arguments for and against the reintroduction of excessive self-defence?

The list of arguments for not re-introducing excessive self defence does not mention the following:

- Killing a violent husband to protect your life should not be seen to be excessive;
- Gender stereotypes of men as aggressive and women as passive may come into play (ie: what is considered excessive self defence for a man and woman is different).

DEFENCES TO HOMICIDE

Victorian Aboriginal Legal Service provides legal representation to Aboriginal men and women charged with criminal offences.

The response of VALS to the options paper is premised on the responsibility that we have to protect the interests of Aboriginal people charged with criminal offences.

² 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) & Royal Commission into Aboriginal Deaths in Custody (1991).

³ 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), p 4, (Table 1).

Sadly, Aboriginals are over-represented in the criminal justice system and the prison population.

In our view, an analysis of the criminal justice system based on gender is simplistic in relation to Aboriginal men and women and changes generated by gender analysis are likely to operate harshly on males, and possibly females, and do little to address issues of domestic violence within the Aboriginal community.

The Royal Commission Into Aboriginal Deaths In Custody and the Bringing Them Home Report highlight the impact of childhood separation upon Aboriginal people and the reasons for offending. These reports also remind us that racism does exist and is an unfortunate part of most Aboriginals' experience. A gender analysis of criminal law operates against an informed and sensitive understanding of the causes of offending of Aboriginal men and women.

Provocation

VALS supports the retention of the partial defence of provocation.

The existence of provocation and the loss of control in the face of provocation should be viewed as reducing moral culpability, particularly where racism is involved. Further, we would not support some of the postulated limits on the availability of the partial defence. The ability of many Aboriginals to control responses to emotional stress has been very damaged by childhood separation from family and the consequent disruption to family networks, as well as the many other disadvantages experienced by the Aboriginal community.

The abolition of the partial defence and the reduction of provocation to a sentencing factor would almost certainly result in longer sentences than otherwise imposed for manslaughter.

Further, there may still be evidentiary issues as to whether provocation did exist and there was a loss of control, and we take the view that a jury is the most appropriate arbiter of that question.

The requirements of the defence and the directions to the jury do have some complexity. However, we do not underestimate the capacity of the jury to grapple conscientiously with those issues and the evidence before them.

The test does presently require the ordinary person to be imbued with key characteristics of the accused such as race, and the present law does require that juries receive adequate directions in that regard. Accordingly, we do not postulate any change to the test.

Self-Defence

The present test is simple and broad in scope.

In our experience, violence perpetrated by Aboriginal women occurs in circumstances very similar to that of men ie in the context of immediate response to the conduct of the victim, often accompanied by excessive consumption of alcohol or drug abuse.

We have not encountered situations giving rise to consideration as to whether a defence of battered woman was viable. This may be explicable by differences in socio-economic circumstances and aspirations. We do not offer a view in relation to changes to the law to make defensible killing in the absence of an immediate threat.

We take the view that victims of domestic violence are best served by measures to prevent the occurrence of such violence. Community standards have changed, and these are reflected within the Aboriginal community and programs to address this problem.

Mental Impairment

First, we note the reluctance to use the defence of mental impairment, and suggest this is explicable in large part by the fact that the notional sentence is the maximum. Provision for a lesser nominal sentence may in fact result in a greater use of that defence. That could be achieved without compromising community protection by the process of review.

There is some logic in the argument that if loss of control as a result of provocation is a partial defence, so also should mental impairment not amounting to the present defence. The law does presently provide intellectual disability and mental illness to be taken into account in sentence. However, it is a question of weight and a reduced sentencing range, by having a lower maximum, is the most effective tool for ensuring adequate weight is given to those factors.