

14 November 2013

The Director
Crimes Law Review
NSW Department of Attorney General and Justice
GPO Box 6
Sydney NSW 2000

KINGSFORD
LEGAL CENTRE

By email: ProvocationReform@agd.nsw.gov.au

Dear Director,

RE: Crimes Amendment (Provocation) Bill 2013

Kingsford Legal Centre (KLC) thanks you for the opportunity to comment on the *Crimes Amendment (Provocation) Bill 2013 (the Bill)*.

Kingsford Legal Centre

KLC is a community legal centre which has been providing legal advice and advocacy to people in need of legal assistance in the Randwick and Botany Local Government areas since 1981. KLC provides general advice on a wide range of legal issues, including domestic violence, and undertakes casework for many clients who, without our assistance, would be unable to obtain a lawyer.

KLC also has a specialist employment law service, a specialist discrimination law service (NSW wide) and an Aboriginal Access Program. In addition to this work, KLC also undertakes law reform and policy work in areas where the operation and effectiveness of the law could be improved.

We are pleased that the Bill seeks to amend the partial defence of provocation because we believe that in its current form it can serve to perpetuate and entrench violence against women and gay men.

However, we are concerned that way in which the Bill seeks to amend the partial defence will continue to allow murder to be committed in circumstances of domestic violence and a need for control, and will still make it very difficult for some victims of domestic violence who kill their violent partner, to make a defence.

Provocative conduct must be a serious indictable offence.

We are particularly concerned that the Bill seeks to restrict the partial defence to circumstances where the deceased has engaged in conduct which constitutes a serious indictable offence. We submit that the tactics employed by perpetrators of domestic violence, which may ultimately cause victims to kill their partner, might not amount to conduct that constitutes a serious indictable offence.

Domestic violence is behaviour within a domestic relationship, that involves an abuse of power and is usually, though not exclusively, perpetrated by men against women and children. Domestic violence encompasses a range of behaviours including physical violence, coercion, emotional abuse, financial abuse, sexual abuse, physical abuse, isolation and

¹ *Crimes Amendment (Provocation) Bill 2013* section 23(2)(b)

psychological abuse, and other behaviours designed to control another person or people in a family.

Perpetrators of domestic violence can control their victims' behaviour through emotional abuse.¹⁵ Perpetrators emotionally abuse their victims by criticising, belittling and changing stories and confusing the victim's memory of events. Perpetrators can use this to reduce their victims' self-esteem and independence, destroy their victims' support networks and make the victim believe that the way the perpetrator is treating them is their own fault.

We acknowledge that section 43 of the Crimes (Domestic and Personal Violence) Act makes it a serious indictable offence to stalk or harass another person, or to cause or attempt to cause a person to fear physical or mental harm, however, we submit that perpetrators may engage in conduct that would not satisfy the definition of a serious indictable offence.

The amendments seem to be a response to the findings of the Select Committee on the Partial Defence of Provocation (the Committee).¹⁶ The Committee found that very few inquiry participants supported the partial defence of provocation because it failed to recognise the true nature of abusive relationships and concluded that the positive restriction model is not the appropriate model on which to reform the partial defence of provocation.

We also agree with the Committee's concerns about the type of evidence required to substantiate whether a 'serious indictable offence' was committed.

"If an 'allegation' of such conduct is adequate this may assist victims of long term abuse who have not reported, but it will also assist perpetrators who have killed leaving no surviving witness, which is common in domestic homicides. The Committee was concerned that such a model would allow a male defendant charged with killing his wife after subjecting her to years of abuse to argue that the relationship was one of domestic violence for a long period. However, if some 'real evidence' of the 'violence' is required (for example, police or doctors reports), this may disadvantage victims of long term abuse who have not reported or disclosed the abuse."

We submit that the positive restriction model of the partial defence of provocation, which requires the deceased's conduct constitute a 'serious indictable offence' will serve to perpetuate the gender bias inherent in the current partial defence of provocation.

Recommendation 4 The Bill should be amended to remove the requirement that the partial defence of provocation be available to the defendant only when the conduct constituted a serious indictable offence.

The exclusionary model

We are pleased that the Bill proposes to amend the partial defence of provocation to prevent defendants from asserting the defence where the conduct by the deceased was only violent or sexual. However, we are concerned that the Bill does not also remove the

² New South Wales Parliament, Legislative Council, Select Committee on the Partial Defence of Provocation, "Options Paper: Consultation on reform options" (14 September 2014), 12-4.

³ New South Wales Parliament, Legislative Council, Select Committee on the Partial Defence of Provocation, "Options Paper: Consultation on reform options" (April 2013) at 6.4.

⁴ Ibid, 6.27 and 6.35.

⁵ Ibid, 6.34.

Evidence of family violence

We also agree with many inquiry participants who expressed concern that it is often difficult for women who 'kill' their violent partners for reasons of self-preservation, to successfully assert the partial defence of provocation. This is because prosecutors, juries and members of the judiciary are often unable to appreciate the particular circumstances of such cases.

Victims of domestic violence who are charged with killing their violent partners should be able to introduce and rely on expert social framework evidence which explains the nature and dynamics of domestic violence. We submit that this kind of evidence would assist juries to understand why victims of domestic violence kill, and the circumstances in which they kill their violent partners. We therefore recommend that the Bill be amended to provide for such evidence to be admitted in homicide matters.¹¹

Recommendation 3: The Bill should be amended to adopt recommendation 2¹³ of the Committee.

Other recommendations

We acknowledge that the Bill does not address some of the recommendations made by the Committee. However, it does not address all of the Committee's recommendations, primarily because they cannot be dealt with by way of legislative reform.

We acknowledge that the Government has committed to tasking the NSW Law Reform Commission with conducting a comprehensive review of the law of homicide, including a review of any reforms to the law of provocation.

However, we submit that the remaining recommendations made by the Committee are crucial to ensuring that the partial defence of provocation is applied appropriately and therefore be adopted. The Government should ensure that they intend to adopt the remaining recommendations.

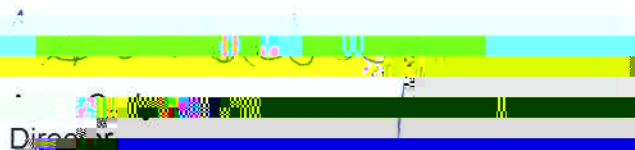
Recommendation 4: The NSW Government should make clear that it intends to implement recommendation 3 of the Committee.

Please do not hesitate to call us on (02) 9385 9566 if you would like to discuss with us the content of our submission further.

Yours faithfully,
KINGSFORD



Kellie Kingsford
Solicitor



Director

¹¹ Ibid, 8, 102 – 8, 120.

¹² Ibid, 8, 134.

¹³ Ibid, 8, 134.

¹⁴ Ibid, p 168.

¹⁵ Ibid, p 189.

¹⁶ Ibid, p 208.