



14 November 2013

The Director
Criminal Law Review
NSW Dept. of Attorney General & Justice
GPO Box 6
SYDNEY NSW 2001

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

Dear Director

Exposure Draft Crimes Amendment (Provocation) Bill 2013

1. Women's Legal Services NSW (WLS NSW) thanks the Criminal Law Review Committee for the opportunity to comment on the Exposure Draft Crimes Amendment (Provocation) Bill 2013 ('Provocation Bill').
2. We also note the considerable work undertaken by the Select Committee on the Partial Defence of Provocation.
3. WLS NSW is a community legal centre that aims to achieve access to justice and a just legal system for women in NSW. We provide specialist legal services relating to domestic and family violence, sexual assault, family law, discrimination, victims compensation, care and protection, human rights and access to justice.
4. This submission will primarily focus on the use of the partial defence in circumstances in which a victim of violence is killed by her violent partner as well as circumstances in which a victim of domestic violence ultimately kills her violent intimate partner.

Introduction

5. WLS NSW made extensive submissions to the Parliamentary inquiry into the partial defence of provocation, appeared at a hearing before the Select Committee and provided a supplementary submission in response to the Options Paper.
6. In those submissions we expressed concern about the inherent gender bias in the law of provocation operating in both directions: (1) men who kill their partners frequently have a murder charge reduced to manslaughter because they can persuade a jury that they were so overcome by jealousy (or loss of male honour) that they 'lost control'; and (2) women who kill their partners who have experienced serious domestic violence are often convicted of murder or plead guilty to manslaughter due to an inability to persuade a jury that killing their partner is an act of self defence.
7. We advocated for a phased approach to the abolition of the partial defence of provocation, with its immediate abolition in the context of a change in a relationship including an indication of separation, attempt to leave, separation; or in the context of sexual jealousy. We submitted that continued use of



the partial defence of provocation in such circumstances condones and sanctions violence against women. We also advocated for the immediate abolition of the partial defence in circumstances of non-violent homosexual advance.

8. Following the release of the final report of the Select Committee on the Partial Defence of Provocation (Select Committee's Report), we wrote to Committee members also expressing support for the recommendation that the partial defence of gross provocation be unavailable 'where the defendant kills a person with who they are in conflict about parenting arrangements for children'.¹
9. Unlike the Select Committee, we support a complete abolition of the partial defence of provocation in circumstances of any indication of a wish to end a relationship; sexual jealousy, including sexual infidelity, taunts about sexual inadequacy or killing a third party believed to have been in relationship with their partner or ex-partner; or conflict about parenting arrangements for children. We believe that to exclude such a partial defence, except 'other than in circumstances of a most extreme and exceptional character' is to continue to condone violence against women.
10. Additionally, we recommended the abolition of the partial defence in certain circumstances be supplemented by a referral to the NSW Law Reform Commission for a more comprehensive and holistic inquiry into all partial and complete defences to homicide in NSW. This is to ensure the adequacy of the defence of self-defence in situations where victims of domestic violence (usually women) ultimately kill their violent intimate partners in self-defence, before the complete abolition of the partial defence of provocation occurs.
11. We continue to hold this position as we have concerns that the draft Bill is unclear and may not enable victims of domestic violence to establish the conduct of the deceased was a 'serious indictable offence'. Domestic and family violence is under-reported to police; there is poor record keeping of such disclosures; there are low levels of charges of indictable offences in situations of domestic violence; and other reasons are discussed below. Further work is needed to be done to draft a provision that takes into account the complexity and impact of domestic violence, including by specific provisions to allow social framework evidence.
12. In summary, in relation to the exposure draft Bill WLS NSW recommends:
 - a. the generic requirement of 'serious indictable offence' as one of the elements to establish extreme provocation be deleted from the Bill;
 - b. a list of conduct that does not amount to extreme provocation be included in the Bill: namely, any indication of a wish to end a relationship; sexual jealousy, including sexual infidelity, taunts about sexual inadequacy or killing a third party believed to have been in a relationship with their partner or ex-partner; or conflict about parenting arrangements for children. There should be no exceptions.
 - c. that any changes to the subjective and objective elements of the 'ordinary person' test only be made after careful consideration by a NSW Law Reform Commission inquiry.
 - d. that the exposure draft Bill include social framework evidence as outlined in Recommendation 2 of the Select Committee's Report.
 - e. that the partial defence of provocation in situations of non-violent sexual advance be completely abolished.

¹ Select Committee on the Partial Defence of Provocation, *The partial defence of provocation*, April 2013, Recommendation 7

- f. a referral to the NSW Law Reform Commission of a comprehensive and holistic inquiry into all homicide defences in NSW should occur now rather than in 5 years.

‘Serious Indictable offence’

13. WLS NSW acknowledges that the intent of the inclusion of a ‘serious indictable offence’ as an element of extreme provocation is to eliminate the partial defence in situations of sexual jealousy and a change in relationship, including any suggestion of separation.
14. However, such inclusion could have the unintended consequence of removing the partial defence for victims of domestic violence who ultimately kill their violent partners. This is because it is not clear what is meant by ‘conduct of the deceased *was* a serious indictable offence’(emphasis added). The impact of this uncertainty is supported by the arguments made below.
15. The Government’s response to the Select Committee’s report states
- ‘Ongoing domestic violence will generally involve serious indictable offences such as assaults. Even where abuse is not physical but psychological it may amount to a serious indictable offence under s13 of the *Crimes (Domestic and Personal Violence) Act 2007*.’
16. Our experience is that many women do not report domestic violence to the police, but may end up being killed by their intimate partners. In Australia, almost one woman loses their life to domestic violence each week.
17. This is further supported by Case Reviews documented in the *NSW Domestic Violence Death Review Team Annual Report 2011-2012*. In Case Review 1 where there had been reports of violence to friends and police, there is no mention of any convictions of a serious indictable offence prior to the woman’s death. The couple had been separated for 2 years prior to her death.² The woman died as a result of strangulation.
18. In Case Review 3, there had been ‘a significant criminal record in relation to domestic violence’ between the perpetrator and his first wife. The police responded to a ‘serious domestic dispute’ three months prior to the woman’s death. The next day, the woman and her daughter sought assistance from a refuge. Several days later the woman informed refuge staff that when she made inquiries with the police about seeking an AVO, the police said there were insufficient grounds for such an order. The police had no record of this contact. The woman and her daughter were strangled to death three months after the police were called to respond to the ‘serious domestic dispute’.³
19. In Case Review 7, a woman and man had been in a relationship for 9 years and then separated. They continued to work together. The police were called to an incident where the male caused property damage at work. An AVO was taken out for the woman’s protection, but there is no mention of any charges laid. Twelve months later the perpetrator hit the woman on the back of the head with a hockey stick and then the woman and perpetrator struggled. The woman died. The cause of death was strangulation, with head injuries as a possible contributing factor.⁴
20. Again and again the case studies in the Domestic Violence Death Review Team Reports highlight that most victims of domestic violence do not pursue a criminal justice response.
21. Had any of these women, fearing for their lives, responded by killing their violent intimate partner,

² *NSW Domestic Violence Death Review Team Annual Report 2011-2012* at 93 (99).

³ *Ibid* at 95 (101).

⁴ *Ibid* at 100 (106).

would there have been sufficient grounds to establish the conduct of the deceased ‘was a serious indictable offence’?

22. Just as many women who do not report domestic violence to police may ultimately be killed by their intimate partner, so too, some women who do not report serious domestic violence to police may ultimately kill their violent intimate partners due to fearing for their lives.
23. We are also concerned that conduct by the deceased that must be a ‘serious indictable offence’ has much more of a focus on physical violence and ignores the diverse and complex nature of domestic violence. Domestic violence is not limited to acts of physical violence, and includes emotional, psychological and financial abuse, harassment, intimidation, damage to property and isolating the victim from their family and friends.
24. While the Government’s response to the Select Committee’s Report acknowledges domestic violence includes psychological abuse, we dispute the claim that s 13 of the *Crimes (Domestic and Personal Violence) Act 2007* adequately deals with psychological abuse. In our experience where women report such abuse to police, this seldom results in a s13 charge.
25. Additionally, not all individual domestic violence offences are serious indictable offences, for example common assault and act of indecency.
26. It is important that the cumulative effect of the violence is able to be considered by a jury with the assistance of social framework evidence. Therefore, in addition to the woman giving evidence of the history of domestic violence, there should be legislative provisions to ensure social framework evidence can also be introduced so that the impact of the domestic violence can be properly understood.
27. WLS NSW therefore does not support the generic requirement of ‘serious indictable offence’ as one of the elements to establish extreme provocation. Rather, we support the use of a list of conduct that does not amount to extreme provocation, namely, any indication of a wish to end a relationship; sexual jealousy, including sexual infidelity, taunts about sexual inadequacy or killing a third party believed to have been in a relationship with their partner or ex-partner; or conflict about parenting arrangements for children. There should be no exceptions. This should also be accompanied by a referral now to the NSW Law Reform Commission of a comprehensive and holistic inquiry into all homicide defences in NSW.

Loss of self-control

28. We raised concerns in our submission to the Select Committee about the ‘loss of control’ requirement in order to raise the partial defence of provocation.
29. In consultations during the Victorian Law Reform Commission’s Defences to Homicide Inquiry, many criticised the conceptualisation of men’s behaviour as a loss of control.

‘Rather than a loss of self-control, the use of anger and violence by men against women is often instrumental – a deliberate and conscious process – intended to gain compliance and control.’⁵

30. We are concerned that the continued requirement for ‘loss of control’ condones and legitimises violence against women.
31. This is one of the reasons why we advocate for a phased approach to the abolition of this partial

⁵ Victorian Law Reform Commission, *Defences to Homicide Inquiry, Final Report*, 2004 at [2.28].

defence: to immediately abolish the partial defence in certain circumstances, while at the same time seeking reforms that provide adequate protection for victims of domestic violence who ultimately kill their violent intimate partners before a complete abolition of the defence. We submit the referral to the NSW Law Reform Commission should be as soon as possible and not at the end of 5 years from the date of the Select Committee's Report as recommended by the Select Committee.

Changes to the 'ordinary person' test

32. We note the Government also proposes amending the ordinary person test at proposed s23(2)(d) which was not a recommendation included in the Select Committee Report. Careful consideration should be given to any possible unintended consequences, particularly for victims of domestic violence who ultimately kill their violent intimate partners. Rather than amend this test now, we recommend allowing more time for careful consideration through a comprehensive and holistic review of all homicide defences by the NSW Law Reform Commission.

Importance of social framework evidence

33. Following an extensive review of homicide defences, with a particular focus on victims of family violence who kill their violent intimate partners, the Victorian Law Reform Commission recommended and the Victorian Government introduced legislative provisions to ensure a wide range of social framework evidence can be admitted in criminal trials where intimate partner violence is raised.
34. The resulting provision: Section 9AH (3) *Crimes Act 1958 (Vic)* allows the following evidence to be admitted where family violence is alleged:

Evidence of -

- (a) the history of the relationship between the person and a family member, including violence by the family member towards the person or by the person towards the family member or by the family member or the person in relation to any other family member;
 - (b) the cumulative effect, including psychological effect, on the person or a family member of that violence;
 - (c) social, cultural or economic factors that impact on the person or a family member who has been affected by family violence;
 - (d) the general nature and dynamics of relationships affected by family violence, including the possible consequences of separation from the abuser;
 - (e) the psychological effect of violence on people who are or have been in a relationship affected by family violence;
 - (f) social or economic factors that impact on people who are or have been in a relationship affected by family violence.
35. Significantly, in addition to physical and sexual abuse, s 9AH(4) *Crimes Act 1958 (Vic)* specifies that 'family violence' includes psychological abuse such as intimidation, harassment, damage to property, threats and allowing or putting a child at risk of seeing such abuse. Importantly, both a single act and a pattern of behaviour that when viewed in isolation may appear trivial are included in the definition of violence.
36. WLS NSW supports the use of social framework evidence due to its ability to provide the context in

which to understand the issues in a particular case. In cases of domestic and/or family violence, social framework evidence is valuable for explaining the nature and dynamics of relationships affected by domestic violence; the reasons why victims remain in abusive relationships; the cumulative effect of the violence on the victim; why a woman may have to plan to kill in order to protect herself; and the social realities for the woman.

37. Social framework evidence is important for its potential to dispel myths, for example, regarding why women do not leave violent relationships and why women victims of violence kill either using weapons, such as knives or guns or in non-confrontational contexts, such as when their violent partner is sleeping.
38. Social framework evidence is relevant to both the subjective and objective aspects of the self-defence requirements. In terms of subjective elements, for example, it can be used to explain why, due to past experiences of violence, a seemingly innocuous look or a word from the perpetrator of violence can in fact be a significant threat to the victim.
39. Significantly, social framework evidence counters the male construction of homicide defences which focus on discrete incidents. As Bradfield argues, citing Dutton, domestic violence ‘cannot be understood as a series of isolated incidents detached from the overall pattern of power and control within which the violence is situated’.⁶ In situations of domestic violence it is the cumulative effect of the violence, which is part of a continuum of violence which is significant.
40. WLS NSW favours social framework evidence over Battered Woman’s Syndrome (BWS). While it is not a defence in its own right, evidence of BWS may be used to explain why women remain in violent relationships and ultimately kill their violent intimate partners. The syndrome focuses on ‘learned helplessness’ as a response to the ongoing cycle of violence. The concept of BWS is problematic and widely criticised as it pathologises the behaviour of women rather than focusing on the actions of the perpetrator of the violence.
41. Sheehy et al note, ‘even if the expert gives evidence that the woman’s response was a *normal or reasonable* response to having lived through her abusive circumstances, the testimony may be understood as explaining why she had an *unreasonable but understandable over-reaction* to her circumstances’.⁷ This is because BWS evidence ‘is often interpreted by the Crown, judges and juries as explaining the woman’s subjective state of mind but not the mind of the reasonable person in her position’.⁸
42. We note that the High Court affirmed the use of Battered Woman’s Syndrome evidence in *Osland v R*, though Justice Kirby expressed misgivings about the use of this syndrome. Justice Kirby refers to the Supreme Court of Canada in *R v Malott*:

‘It is possible that those women who are unable to fit themselves within the stereotype of a victimized, passive, helpless, dependent, battered woman will not have their claims to self-defence fairly decided. For instance, women who have demonstrated too much strength or initiative, women of colour, women who are professionals, or women who might have fought back against their abusers on previous occasions, should not be penalized for failing to accord with the

⁶ Rebecca Bradfield, ‘Understanding the Battered Women Who Kill her Violent Partner – The Admissibility of Expert Evidence of Domestic Violence in Australia,’ *Psychiatry, Psychology and Law*, Vol 9(2) 2002 at 178.

⁷ Elizabeth Sheehy, Julie Stubbs, Julia Tomlie, ‘Defences to Homicide for Battered Women: A Comparative Analysis of Laws in Australia, Canada and New Zealand,’ *Sydney Law Review* Vol 34 2012 at 468.

⁸ Ibid.

stereotypical image of the archetypal battered woman.’⁹

43. In supporting the use of social framework evidence, consideration needs to be given as to which experts can provide such evidence. It may be that instead of or in addition to psychologists and psychiatrists, experienced domestic violence workers and other experts could give evidence about the impact of domestic violence and the social context in which domestic violence takes place. This is particularly relevant in the case of Indigenous and culturally and linguistically diverse women, whose experiences of violence can raise particular issues that may benefit from further explication to judges and juries.
44. The domestic violence sector in NSW and relevant stakeholders should be consulted regarding both the development of guidelines for the use of social framework evidence as well as who is best placed to give this evidence.
45. Recommendation 14.4 of the joint Australian Law Reform and NSW Law Reform Commissions’ *Family Violence – A National Legal Response* calls for a consistent approach to recognising the dynamics of family violence in homicide defences across Australia. Recommendation 14.5 calls for guidance on the use of social framework evidence regarding family violence in the context of a defence to homicide. Section 9AH *Crimes Act 1958 (Vic)* is specifically referred to as an ‘instructive model’.
46. Legislation for inclusion of social framework evidence, as recommended in the Select Committee Report, is required.

Non-violent sexual advance

47. We welcome efforts to abolish the partial defence of extreme provocation in circumstances of non-violent sexual advance, However, we fear that the inclusion of the word ‘only’ in proposed s23(3)(a) will mean the partial defence will continue to be used in such circumstances.
48. This fear has been realised in the United Kingdom where provocation was abolished in 2010 and replaced with a partial defence to murder, being ‘loss of control’ triggered by (1) fear of serious violence, or (2) circumstances of an extremely grave character that caused the defendant to have a justifiable sense of being wronged. It was legislated that sexual infidelity was to be disregarded in such cases in the UK. However, the UK Court of Appeal found that sexual infidelity can be considered if it is one of multiple triggering events.¹⁰
49. We call for a complete abolition of the partial defence in circumstances of non-violent sexual advance.

NSW Law Reform Commission Inquiry

50. Significant reform to the partial defence of provocation in other jurisdictions highlights that legislative change alone is not enough. Any review therefore needs to go beyond a review of legislation to take a holistic approach.
51. We note the Select Committee Report recommended the Attorney General issue a reference to the NSW Law Reform Commission for a comprehensive review of NSW homicide laws and defences.
52. We believe such an inquiry should include:
 - a. Examining all aspects of the process from the police investigations stage, including reassessing prosecutorial guidelines to help determine the circumstances in which charges should be laid.

⁹ *R v Malott* (1998) cited in *Osland v R* (1998) 159 ALR 170.

¹⁰ *R v Clinton* [2012] EWCA Crim 2

- b. Transparent processes in plea-bargaining through to what defences should be available, reviewing Bench Books and jury directions and assessing whether mitigating factors should be limited to sentencing and other issues regarding sentencing.¹¹
 - c. The importance of ongoing education of police, law students, legal practitioners, the judiciary and the wider community about the general nature and dynamics of relationships affected by domestic violence, including the possible consequences of separation from the abuser and how this should be considered in the context of self-defence.
53. For reasons outlined throughout this submission, we believe the referral to the NSW Law Reform Commission should occur as soon as possible and not wait until at the end of 5 years from the date of the Select Committee's Report.
54. If you would like to discuss any aspect of this submission, please contact Alira Morey, Senior Solicitor or Liz Snell, Law Reform and Policy Co-ordinator on (02) 8745 6900.

Yours sincerely,

Women's Legal Services NSW

Janet Loughman
Principal Solicitor

CC: Members of the Select Committee on the partial defence of provocation

¹¹ As is now the case in Victoria, Western Australia and New Zealand.