THE UNIVERSITY OF
NEW SOUTH WALES

KINGSFORD
LEGAL CENTRE

14 November 2013

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

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 afford 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 men to assert the defence, when they kill their partners out of jealousy and a need for control, and will still make it very difficult for some victims of domestic violence who kill their violent partners, to make use of this partial defence.

Provocative conduct must be a serious indictable offence

We are particularly concerned that the Bill seeks to restrict the availability of the partial defence to circumstances where the deceased has engaged in conduct which constitutes a serious indictable offence.[1] 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 intimidation, coercion, emotional abuse, financial abuse, sexual abuse, physical abuse, isolation and

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

psychological manipulation. Domestic violence is a deliberate and intentional pattern of behaviours designed to control another person or people in a family.

Perpetrators of domestic violence can control their victim's behaviour and thoughts by emotional abuse. Perpetrators emotionally abuse their victims by criticising, belittling and changing stories and confusing their victims' memories. Perpetrators of domestic violence 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 13 of the *Crimes (Domestic and Personal Violence) Act* makes it a serious indictable offence to stalk or intimidate another person with the intention of causing the other person to fear physical or mental harm, however we submit that perpetrators may in engage in conduct that would not satisfy this definition.

The amendments seeking to restrict the availability of the partial defence to provocative conduct which constitutes a serious indictable offence, falls within the 'positive restriction' model proposed by the Select Committee on the Partial Defence of Provocation (**the Committee**).[2] The Committee found that very few inquiry participants supported this model because it failed to recognise the true nature of abusive relationships[3] and concluded that the positive restriction model is not the appropriate model on which to reform the partial defence of provocation.[4]

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

"If an 'allegation' of such conduct is adequate this may assist victims of long term abuse who have not reported, but it will also leave open a window of opportunity for 'less meritorious' claims by defendants who have killed leaving no surviving witness, which is common in domestic homicides. The Committee is 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 characterised by mutual violence for a long period. However, if some 'real evidence' of the 'violent criminal acts' or 'acts which constitute family 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."[5]

We submit that the by restricting the partial defence of provocation to circumstances where the deceased's conduct constituted a serious indictable offence will serve to perpetuate the gender bias inherent in the current test by continuing to make it difficult for victims of domestic violence to assert the partial defence.

Recommendation 1: The Bill should be amended to remove the requirement that the partial defence of provocation by available to the defendant only when the deceased's conduct constituted a serious indictable offence.

<u>The exclusionary model</u>

We are pleased that the Bill proposes to amend the partial defence of provocation to restrict defendants from asserting the defence where the conduct by the deceased was only a non-violent sexual advance. However, we are concerned that the Bill does not also seek to

[2] New South Wales Parliament, Legislative Council, Select Committee on the Partial Defence of Provocation, "Options Paper: Consultation on reform options" (14 September 2012), 1 – 2.
[3] New South Wales Parliament, Legislative Council, Select Committee on the Partial Defence of Provocation, "The partial defence of provocation" (April 2013) at 6.4.
[4] Ibid, 6.27 and 6.35.
[5] Ibid, 6.34.

exclude defendants asserting the partial defence when the deceased has sought to exercise a basic right to end a relationship and/or start a new relationship.

The Committee was established and tasked with conducting an inquiry into the partial defence of provocation after there was community outrage at a jury in *R v Singh*[6] finding the defendant guilty of manslaughter after he strangled and cut his wife's throat with a box cutter after she told him she was in love with someone else.

The Victorian Law Reform Commission (**VLRC**) reviewed the circumstances in which men and women successfully raised the defence of provocation and found that:

"When many men who kill their partners successfully raise provocation, the provocation is often their partners' alleged infidelity and/or their partner leaving or threatening to leave. Their actions are therefore primarily motivated by jealousy and a need for control. In comparison, when women kill their partners and successfully raise the defence, there is often a history of physical abuse in the relationship."[7]

The Committee:

"has been moved and disturbed by the many stories involving a person exercising their right to make choices about their relationships and their lives who is killed, or where a third party killed, by a defendant who has then been able to rely on that fact to achieve a conviction for the lesser charge of manslaughter... [and] is concerned to ensure that the partial defence is not available to defendants who respond with lethal force to conduct that essentially involves a person exercising their rights to autonomy and choice."[8]

The NSW Government needs to proactively address the inappropriate use of the partial defence of provocation by restricting the availability of the partial defence where defendants use lethal force against someone seeking to end a relationship and/or start a new relationship.

We submit that the risk that the partial defence of provocation will continue to be used by men who kill their female partners because of jealousy and a need for control, far outweighs the concerns raised by *R v Clinton*[9].

As the partial defence is primarily used by men who have killed their female partner, restricting the availability of the partial defence where the deceased has sought to change the nature of a relationship with the defendant, will send a powerful message. This much needed message is, that violence against women who are asserting their basic rights is absolutely unacceptable.

We submit that the NSW Government should adopt recommendation 7[10] made by the Committee, without the exception allowing defendants to rely on the conduct set out in recommendation 7 in "circumstances of a most extreme and exceptional character".

Recommendation 2: The Bill should be amended to adopt recommendation 7 of the Committee, without the exception allowing defendants to rely on the conduct set out in recommendation 7 in "circumstances of a most extreme and exceptional character".

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[6] (2012) NSWSC 637.
[7] Victorian Law Reform Commission, *Defences to Homicide*, Final Report, October 2004, 29.
[8] Above n 3, 9.66 – 9.67.
[9] (2012) EWCA Crim 2.
[10] Above n 3, p 203.

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 often have a poor understanding of the nature and dynamics of domestic violence and the reasons why victims of domestic violence kill their violent partners in particular circumstances.[11]

Victims of domestic violence who are being tried for 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 agree with the Committee that there is merit in explicitly providing for such evidence to be adduced in homicide matters.[12]

Recommendation 3: The Bill should be amended to adopt recommendation 2[13] of the Committee.

Other recommendations

We acknowledge that the Bill addresses 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 in five years' time of the law of homicide and homicide defences, 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 believe the Government should make clear whether they intend to adopt the remaining recommendations.

Recommendation 4: The NSW Government should make clear whether they intend to implement recommendations 1[14], 3[15] and 10[16] of the Committee.

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

Yours faithfully,
KINGSFORD LEGAL CENTRE

Kellie McDonald
Solicitor

Anna Cody
Director

[11] Ibid, 8.102 – 8.120.
[12] Ibid, 8.134.
[13] Ibid, p 186.
[14] Ibid, p 168.
[15] Ibid, p 189.
[16] Ibid, p 208.