

EXPOSURE DRAFT BILL FOR THE PARTIAL DEFENCE OF PROVOCATION

**Legal Aid NSW submission to the
Department of Attorney General and Justice**

November 2013

About Legal Aid NSW

The Legal Aid Commission of New South Wales (Legal Aid NSW) is an independent statutory body established under the *Legal Aid Commission Act 1979 (NSW)* to provide legal assistance, with a particular focus on the needs of people who are economically or socially disadvantaged.

Legal Aid NSW provides information, community legal education, advice, minor assistance and representation, through a large in-house legal practice and private practitioners. Legal Aid NSW also funds a number of services provided by non-government organisations, including 36 community legal centres and 28 Women's Domestic Violence Court Advocacy Services.

The Legal Aid NSW criminal law practice provides legal assistance and representation in criminal courts at each jurisdictional level throughout the State, including proceedings in Local Court and Children's Court, committals, indictable sentences and trials, and appeals. Our specialist criminal law services include the Children's Legal Service, Prisoners' Legal Service and the Drug Court.

The Legal Aid NSW Women's Domestic Violence Court Advocacy Program administers funding for 28 Women's Domestic Violence Court Advocacy Services (WDVCASs) which service 108 Local Courts in NSW. Women's Domestic Violence Court Advocacy Services are locally-based, independent services for women and children seeking help and information about how to get protection from the court from domestic violence.

Legal Aid NSW values the opportunity to make a submission in relation to the Exposure Draft Bill on the Partial Defence of Provocation.

Should you require any further information, please contact Erin Gough, Manager Legal Policy on (02) 9219 5778 or at erin.gough@legalaid.nsw.gov.au or Annmarie Lumsden, Executive Director, Strategic Policy and Planning on (02) 9219 6324 or at annmarie.lumsden@legalaid.nsw.gov.au.

Proposed amendment of the partial defence of provocation

While Legal Aid NSW supports the retention of the partial defence of provocation, we are concerned about the inadvertent effect the amendments may have on deserving cases involving victims of long term abuse, a group that the amendments seek to protect. In particular:

- *The requirement that "the act causing death was in response to extreme provocation" (section 23(1))*

The unintended consequence of the requirement that the act causing death was in response to *extreme* provocation may be that some justifiable cases will not attract the defence. Particularly with victims of long term abuse, the act causing death may not be in response to a final climactic event but rather the culmination of ongoing abuse.

- *The requirement that "the conduct of the deceased was a serious indictable offence" (section 23(2)(b))*

Requiring as an element of the defence, the conduct of the deceased to be a serious indictable offence, has the real possibility of making the defence unavailable in deserving cases, particularly to women and vulnerable accused. It should be for the jury to apply contemporary community standards to the specific factual circumstances of the case in making the judgment about culpability and accountability.

This requirement also has procedural implications. In practice, this clause will require a trial within a trial which would increase the length and complexity of the matter.

In order to establish this element of provocation the defence would likely need to particularise an offence and call evidence in the absence of the jury. Particularly in the case of a victim of long term abuse, the offence relied on may not have been reported to police at the time. This will potentially raise complex evidentiary issues for both the prosecution and defence, including the imputation of the mens rea element of the serious indictable offence from the evidence. This may not be simple, for example, in the nominated case of an offence of stalking or intimidation *with intent* to cause fear of physical or mental harm.¹

If this element of provocation is made out, an advance decision would then need to be made by the Judge about how much context evidence, which is particularly important in the case of victims of long term abuse, may then be adduced and in what form, in addition to the relied upon serious indictable offence.

- *The ordinary person test (section 23(2)(d))*

The ordinary person test is complicated and requires the jury to engage in an artificial assessment of the relevant conduct. In determining liability for the death, the focus should instead be on the accused's state of mind.

¹ s 13 *Crimes (Domestic and Personal Violence) Act 2007*.

Legal Aid NSW notes that the current test in section 23(2)(b) of the *Crimes Act 1900* refers to "an ordinary person *in the position of the accused*." The omission of the words "in the position of the accused" from the test proposed in section 23(2)(d) of the Exposure Draft Bill appears to create an objective test that would not require the jury "to take full account of the sting of the provocation actually experienced by the accused": *Green v R* [1997] HCA 50.

➤ *The exclusion of specific categories of conduct (section 23(3))*

Legal Aid NSW opposes the exclusion of specific categories of conduct. It should be for the jury to apply contemporary community standards to the specific factual circumstances of the case in deciding how to characterise the conduct of the deceased for the purpose of determining whether the act causing death attracts the partial defence.

➤ *The inclusion of the word "immediately" (section 23(4))*

Legal Aid NSW is concerned that the reformulation in section 23(4) of the Exposure Draft Bill, when compared to the current wording in section 23(2) of the *Crimes Act 1900*, is actually a narrowing of the temporal requirement and could have the unintended result of limiting the availability of the defence to the exclusion of victims of long term abuse.

➤ *The exclusion of the current provisions stating that the defence of provocation may apply even if the act or omission causing the death was disproportionate with the conduct of the deceased or it was not an act done or omitted suddenly*

Sections 23(3)(a) and (b) of the *Crimes Act 1900* place beyond doubt the fact that the partial defence is available even if the act causing the death was disproportionate with the conduct of the deceased or the act causing the death was not done suddenly. These instances are more common in matters where the accused has been the victim of long term abuse. Legal Aid NSW is therefore concerned that the Exposure Draft Bill does not include the provisions in the current legislation.

Concluding remarks

While Legal Aid NSW supports the retention of the partial defence, we are concerned that the overall effect of the amendment will be to restrict or deny the defence of provocation in justifiable cases involving victims of long term abuse.

Legal Aid NSW welcomes the opportunity to provide these comments and would be prepared to provide further comment if this would be of assistance.