



THE LAW SOCIETY  
OF NEW SOUTH WALES

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18 November 2013

The Director  
Criminal Law Review  
NSW Department of Attorney General and Justice  
GPO Box 6  
SYDNEY NSW 2001

By email: [ProvocationReform@agd.nsw.gov.au](mailto:ProvocationReform@agd.nsw.gov.au)

Dear Director,

### **Reform of the Partial Defence of Provocation**

I write to you on behalf of the Criminal Law and Juvenile Justice Committees ("the Committees") of the Law Society of NSW, in response to the call for submissions on the exposure draft Crimes Amendment (Provocation) Bill 2013 ("the draft Bill").

I thank you for the invitation to comment.

The Committees wish to make the following comments in relation to the proposed amendment.

#### **Serious indictable offence**

The Committees note that the requirement in s 23(2)(b) of the draft Bill, that the conduct of the deceased constitutes a serious indictable offence, is not in direct response to any recommendation in the report by the Select Committee of the NSW Parliament Legislative Council. The Committees submit that Recommendation 7 aims to open the partial defence to victims of domestic violence; partly reflects Victoria's defensive homicide provision (currently under review) and is a response to *R v Singh* [2012] NSWSC 637.

The Committees further note that matters such as infidelity, taunts about sexual inadequacy, or the desire to end a relationship; are not included in the list of matters in Recommendation 7 and cannot be grounds for the partial defence of provocation. It appears to the Committees that given none of the grounds set out in this list are an offence themselves, the inclusion of "serious indictable offence" as a pre-requisite to conduct considered extreme provocation, may be seen as an alternative means of implementing Recommendation 7. However, the Committees' view is that this approach may have undesirable outcomes.

In particular, the Committees take the view that this may inappropriately exclude some cases where the conduct does not constitute a serious indictable offence. For example, a vulnerable victim by virtue of a history of sexual or other abuse may lose self-control in response to conduct that may be a taunt but does not amount to intimidation (and is therefore not a serious indictable offence) because the deceased was not aware of the abuse history; (and is not the long term abuser). Alternatively, the conduct may be a common assault (again in circumstances where the deceased may not be the long term abuser and therefore conduct may not amount to intimidation).

### **Omitting "...in the position of the accused" from the ordinary person test**

The Committees note that the current s 23(2)(b) test requires that the "conduct....of the deceased was such as could have induced an ordinary person in the position of the accused to have so far lost self-control as to have formed an intent to kill, or to inflict grievous bodily harm upon, the deceased." The proposed ordinary person test at s 23(2)(d) does not place the "ordinary person" in the position of the accused. It is likely that this will significantly change the character of the current test as stated in *Stingel v The Queen* [1990] HCA 61; (1990) 171 CLR 312 F.C. 90/056 [para 27/28 in particular] and *Green v R* [1997] HCA 50; (1997) 191 CLR 334; (1997) 148 ALR 659; (1997) 72 ALJR 19 (7 November 1997).

The Committees submit that the new test for the partial defence of provocation may be interpreted as only allowing age/maturity to be relevant to the ordinary person test. The Committees are concerned that the new test may be interpreted to exclude consideration of particular attributes or characteristics of the accused to be taken into account when assessing the gravity of the wrongful act or insult. For example the "sexual abuse factor" which was relevant to assessing the gravity of the "conduct" in *Green v R* (but of course, not relevant to the minimum standards of self-control of the ordinary person).

Of concern to the Committees is that any evidence regarding a person's background (for example the person's background of sexual or physical abuse) may be interpreted as no longer relevant to the assessment of the gravity of the provocative conduct. Of further concern to the Committees are the implications this may have on vulnerable groups such as domestic violence victims.

The Committees are of the view that the intention of the amendment is to simplify the "hybrid" test for the jury but the consequences may defeat the purpose of protecting the vulnerable. The Committees note the interpretation of the "position of the accused" set out in *Green v R* in that "Paragraph (b) requires the jury to take full account of the sting of the provocation actually experienced by the accused."

### **General concerns**

The Committees also express their concerns regarding the following:

1. The impact of omitting "including grossly insulting words or gestures" (currently in 23(2)(a)); and
2. The significant technical issues that jurors will be required to contend with, which may potentially result in miscarriages of justice.

The Committees hope this feedback will be of assistance and would appreciate the opportunity to review any proposed revisions of the draft Bill.

Yours sincerely

A handwritten signature in black ink, appearing to read 'John Dobson', with a horizontal line underneath the name.

John Dobson  
**President**