



The Hon. Greg Smith SC MP
Attorney General
Minister for Justice

23 October 2013

Revd. the Hon Fred Nile MLC
Chair, Select Committee on the Partial Defence of Provocation
NSW Legislative Council
Parliament House, Macquarie Street
SYDNEY NSW 2000

Dear Reverend Nile,

Legislative Council Select Committee on the Partial Defence of Provocation

I refer to the above inquiry conducted by the Legislative Council Select Committee on the Partial Defence of Provocation (**the Committee**).

The Committee released its report, *The Partial Defence of Provocation*, on 23 April 2013.

I now **enclose** the NSW Government's response to the Committee's report, together with a copy of the Exposure Draft Crimes Amendment (Provocation) Bill 2013 and the accompanying Discussion Paper.

Thank you for the opportunity to respond to the Committee's report. Should you have any queries or require further information, please contact my office.

Yours sincerely,

Greg Smith SC

Government response to the report of the Legislative Council Select Committee on the Partial Defence of Provocation.

The Legislative Council Select Committee on the Partial Defence of Provocation (**the Committee**) was established in June 2012. The Committee was established in the context of community concern about certain uses of the partial defence. In particular, concerns were raised about the appropriateness of men relying on provocation where they had killed women in the context of intimate relationships. The Committee received submissions from a range of stakeholders and individuals and also heard evidence from many of them. The Committee released its report, *The Partial Defence of Provocation*, on 23 April 2013. Although the Committee heard arguments for abolishing the partial defence altogether, it felt that it remained necessary to retain a restricted form of the partial defence, particularly for female victims of long-term domestic violence.

The Committee recommended retaining but amending the partial defence, making recommendations for legislative and policy reform.

The Government supports the Committee's policy position and the intent behind the recommendations.

The Government has now developed an Exposure Draft Bill which implements the Committee's policy intent. In some respects the Bill adopts a different approach to that recommended by the Committee, as the best means of achieving the Committee's policy intent. The draft Crimes Amendment (Provocation) Bill 2013, and a Discussion Paper accompanying the Bill, have been released for public consultation and are available for viewing on the Department of Attorney General and Justice website.

NEW SOUTH WALES
DRAFT GOVERNMENT BILL

Crimes Amendment (Provocation) Bill 2013

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Consultation Draft

NEW SOUTH WALES
DRAFT GOVERNMENT BILL

Crimes Amendment (Provocation) Bill 2013

No. , 2013

A Bill for

An Act to amend the *Crimes Act 1900* in relation to the partial defence of provocation to a charge of murder.

Consultation Draft

Crimes Amendment (Provocation) Bill 2013 [NSW]

The Legislature of New South Wales enacts:

1 Name of Act

This Act is the *Crimes Amendment (Provocation) Act 2013*.

2 Commencement

This Act commences on a day to be appointed by proclamation.

Consultation Draft

Crimes Amendment (Provocation) Bill 2013 [NSW]
Schedule 1 Amendment of Crimes Act 1900 No 40

Schedule 1 Amendment of Crimes Act 1900 No 40

Section 23

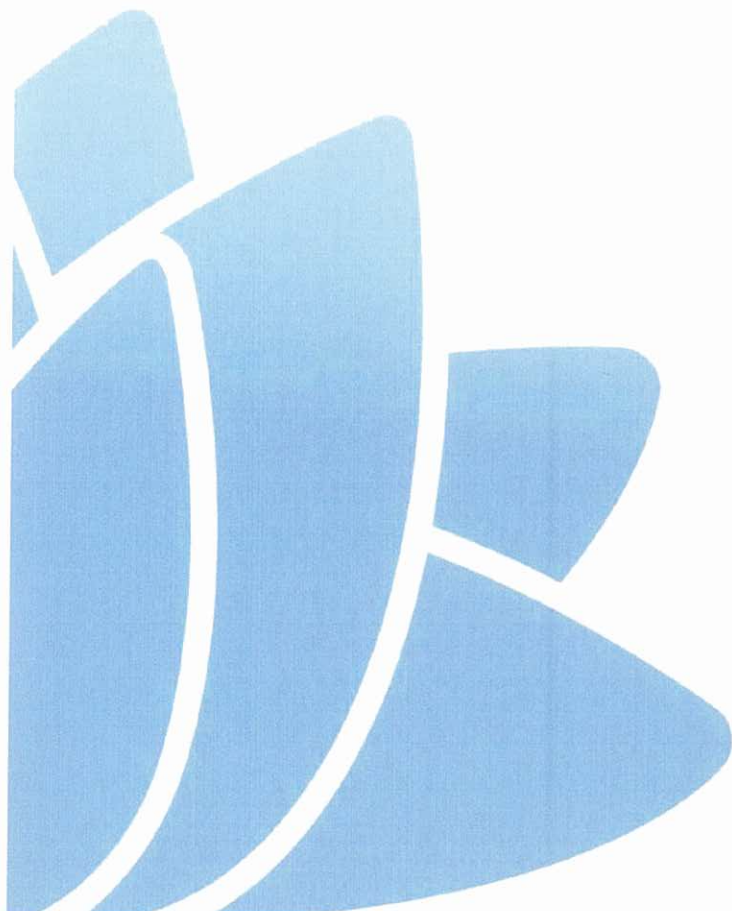
Omit the section. Insert instead:

23 Partial defence of extreme provocation

- (1) If, on the trial of a person for murder, it appears that the act causing death was in response to extreme provocation and, but for this section and the provocation, the jury would have found the accused guilty of murder, the jury is to acquit the accused of murder and find the accused guilty of manslaughter.
- (2) An act is done in response to extreme provocation if and only if:
 - (a) the act of the accused that causes death was in response to conduct of the deceased towards or affecting the accused, and
 - (b) the conduct of the deceased was a serious indictable offence, and
 - (c) the conduct of the deceased caused the accused to lose self-control, and
 - (d) the conduct of the deceased could have caused an ordinary person to lose self-control to the extent of intending to kill or inflict grievous bodily harm on the deceased.
- (3) Conduct of the deceased does not constitute extreme provocation if:
 - (a) the conduct was only a non-violent sexual advance to the accused, or
 - (b) the accused incited the conduct in order to provide an excuse to use violence against the deceased.
- (4) Conduct of the deceased may constitute extreme provocation even if the conduct did not occur immediately before the act causing death.
- (5) For the purposes of determining whether an act causing death was in response to extreme provocation, evidence of self-induced intoxication (within the meaning of Part 11A) cannot be taken into account.
- (6) For the purpose of determining whether an act causing death was in response to extreme provocation, provocation is not negated merely because the act causing death was done with intent to kill or inflict grievous bodily harm.
- (7) If, on the trial of a person for murder, there is any evidence that the act causing death was in response to extreme provocation, the onus is on the prosecution to prove beyond reasonable doubt that the act causing death was not in response to extreme provocation.
- (8) This section does not exclude or limit any defence to a charge of murder.
- (9) The substitution of this section by the *Crimes Amendment (Provocation) Act 2013* does not apply to the trial of a person charged with murder before the commencement of that Act.
- (10) In this section:
act includes an omission to act.

Reform of the Partial Defence of Provocation

Call for Submissions on the exposure draft Crimes Amendment (Provocation) Bill 2013



October 2013

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Translating and interpreter service

If you need an interpreter ring 131 450 and ask the operator to ph: 02 8224 5330.
For alternative formats (audio tape, electronic or Braille versions) of this brochure, contact
Legislation, Policy & Criminal Law Review Division on ph:02 8061 9222 or Diversity
Services

email: diversityservices@agd.nsw.gov.au

phone: 02 8688 7507

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TTY: 02 8688 7733 for people who have a speech or hearing impairment.

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HOW TO MAKE A SUBMISSION

On 17 October 2013, the Attorney General tabled in Parliament the following exposure draft Bill:

Crimes Amendment (Provocation) Bill 2013

The Bill is now available on the Department of Justice and Attorney General's website at http://www.lpcld.lawlink.nsw.gov.au/lpcld/lpcld_index.html

The NSW Government is inviting interested persons to provide written submissions on the draft Bill. Submissions must be received by no later than 5 pm Thursday, 14 November 2013.

Please send your submissions by email to:

ProvocationReform@agd.nsw.gov.au

If you do not have access to email, please send your submission to:

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

If you have any questions about making a submission, please email:

ProvocationReformHelp@agd.nsw.gov.au or call (02) 98061 9208.

It is intended that all submissions received, including the identity of persons making a submission, will be made publicly available in due course.

The Government reserves the right not to publish material that is received which is not relevant to the exposure draft Bill, which contains material that may potentially be considered offensive or defamatory or otherwise inappropriate for publication, or which contains confidential personal information about an individual.

If your submission contains information of a personal and/or confidential nature that you do not want released publicly, you must indicate this clearly in your submission. Although confidential submissions will not be pro-actively published with the other submissions, you should be aware that there may be reasons of law or other legitimate Government purposes why they may need to be disclosed in the future. Unless prohibited by law from doing so, you will be notified before any confidential submission is disclosed.

If an application is received from another person to access personal or confidential information that you have indicated you do not want released publicly, then this request will be determined in accordance with the *Government Information (Public Access) Act 2009*.

Lobbyists wishing to make a submission on behalf of a client are reminded of their obligations under the NSW Lobbyist Code of Conduct. Further details on the Code and the NSW Register of Lobbyists are available on the Department of Premier and Cabinet's website at www.dpc.nsw.gov.au/prem/lbbyist_register

BACKGROUND

Background to the Inquiry of the Legislative Council Select Committee on Provocation

In June 2012, with bipartisan support, the Legislative Council established a Select Committee on Provocation. The Committee's Terms of Reference required it to inquire into and report on, amongst other things, whether the partial defence of provocation should be retained, abolished or amended.

The Committee was established in the context of community concern about certain uses of the partial defence. In particular, concerns were raised about the appropriateness of men relying on provocation where they had killed women in the context of intimate relationships. It has been argued that the law of provocation may disadvantage women and that it appears to privilege typically male reactions to conflict. There is also a concern that it is not appropriate for a person who kills their partner to have their culpability for murder reduced merely because they killed on discovering their partner had been unfaithful or wished to end the relationship. Concerns have also been raised about the inappropriate use of the partial defence for homicides committed in response to a non-violent sexual, and in particular homosexual, advance.

The Committee's Report and the Government's approach

The Committee published its Report in April 2013 (available [here](#).)

The Committee noted significant problems with the partial defence of provocation. It noted that there is a case, which had significant support, to abolish it completely. However, the Committee ultimately concluded that, in the absence of any broader review of defences to murder (including self-defence), there are sound reasons to retain a restricted version of the partial defence. The Committee was particularly concerned about the potential impacts on accused persons who kill in circumstances that, in the eyes of the community, do not warrant a conviction for murder.

The Government agrees, in principle, with the Committee's approach and has developed an exposure draft Bill to reflect the Committee's policy intent. The Government also agrees with the Committee's recommendation that the Law Reform Commission should, in five years' time, conduct a comprehensive review of the law of homicide and homicide defences, including a review of any reforms to the law of provocation.

The partial defence of provocation

The law of provocation provides that where a person is tried for murder, but the act causing death was done in response to 'provocation', the jury is to find the offender guilty of manslaughter and not murder.

Currently, section 23 of the *Crimes Act 1900* provides that the partial defence of provocation is made out where:

- the conduct of the deceased towards the accused caused the accused to lose self-control; and
- the conduct 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 intention to kill or inflict grievous bodily harm.

In deciding, the jury enter into a two stage test.¹ The jury must first consider the gravity of the provocation to the accused personally, taking into account all of his or her personal characteristics, such as age, sex, race, ethnic or cultural background, personal attributes, intoxication or past history.

If the jury are satisfied that the accused lost self control they must then consider whether it is possible that an "ordinary person", of the accused's age and sex only, provoked to that level and for that reason might have lost self-control so far as to have formed an intention to kill or inflict grievous bodily harm.

The rationale for the doctrine of provocation is that a person's moral culpability is reduced where they kill in these circumstances, such that a conviction for manslaughter rather than murder is warranted.

THE EXPOSURE DRAFT BILL

The Bill retains and restricts the partial defence of provocation by requiring that the 'provocative' conduct be a serious indictable offence

The Bill requires that, to constitute 'extreme provocation', the conduct of the deceased must have been a serious indictable offence (s23(2)(b)). A serious indictable offence is any offence which, when dealt with on indictment, carries a maximum penalty of five years or more.² This significantly tightens the partial defence and means that conduct such as merely leaving a relationship or infidelity cannot amount to 'extreme provocation'. This reflects the view that, in contemporary society, there is an expectation that people otherwise faced with offensive, insulting or upsetting conduct should not resort to homicide.

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*. Section 13 sets out the offence of stalking or intimidation intended to cause a fear of physical or mental harm to a person (or another person with whom that person has a domestic relationship). This offence is particularly relevant to cases of domestic violence.³

As explained below, the Bill, by requiring the 'provocative' conduct to be a serious indictable offence, differs from the Committee's recommended model. However, the Bill achieves the Committee's policy intent of restricting the partial defence by

¹ *Stingel v The Queen* (1990) 171 CLR 312 at 324 – 332.

² Section 4, *Crimes Act 1900*

³ In making out this offence, evidence of past conduct is relevant, particularly if it involved violence (s7(2) *Crimes (Domestic and Personal Violence) Act 2007* (C(DPV) Act). Further, it is not necessary to prove that the person actually felt fear, only that the accused intended to cause fear (s13(4) C(DPV) Act).

requiring the conduct be of a sort the community recognises as serious criminal behaviour.

The Bill also restricts the partial defence in other ways

The exposure draft Bill also restricts the partial defence in the following ways:

- The Bill recasts the defence as one of 'extreme provocation'. This signals the grave nature of the behaviour required for the partial defence to be available. The Bill does not adopt the Committee's recommended term, 'gross' provocation, since the term 'gross' has multiple meanings, including something that is unpleasant.
- The Bill then also includes a tighter objective test, removing the current requirement for the jury to first consider the degree of provocation from the accused's perspective (s23(2)(d)). This will simplify the jury's task and provide for a greater focus on ordinary community standards in determining whether the provocation was such that an ordinary person could have lost self-control to the extent of intending to kill or inflict grievous bodily harm. Although the Committee did not propose this change, it is consistent with the Committee's policy intent of restricting the use of the partial defence.
- Consistent with the Committee's recommendations, the Bill includes other restrictions to make clear that:
 - a non-violent sexual advance to the accused, taken alone, cannot constitute 'extreme provocation'⁴ (s23(3)(a))
 - there is no provocation where the accused themselves incites the 'provocative' conduct by the deceased (s23(3)(b))
 - evidence of self-intoxication is excluded when considering whether an ordinary person could have lost self-control (s23(5)).

A workable model for excluding certain conduct from the concept of 'extreme provocation'

As noted above, in order to limit the sorts of conduct that can amount to 'provocation', the Bill requires that the 'provocative' conduct must constitute a serious indictable offence. This reflects the Committee's policy view that only the most egregious forms of provocative conduct should provide a partial defence to murder. The requirement that the conduct be a serious indictable offence provides for a degree of certainty, as this concept is clearly defined in legislation.⁵ It will also capture behaviour associated with ongoing domestic abuse (as explained above).

While the approach adopted in the Bill may result in an overlap between the law of provocation and the law of self-defence, this is already the case and is, to some extent, unavoidable. Self-defence is a complete defence to murder and, if made out, will result in an acquittal even if provocation has also been made out.

⁴ While a non-violent sexual advance would not ordinarily be a serious indictable offence and would thus not meet the s23(b) test, there may be some circumstances such as touching the groin on the outside of clothing, which could amount to an indecent assault (a serious indictable offence). The Bill make clear this conduct does not amount to 'extreme provocation' (s23(3)(b)).

⁵ Section 4, *Crimes Act 1900*.

The Committee's preferred approach to ensuring that 'provocative' conduct was sufficiently serious in nature was to list certain conduct that would not amount to provocation except in extreme or exceptional circumstances (e.g. infidelity or ending a relationship). However, this approach can be problematic, and may not be effective in achieving the Committee's policy objectives. For example, the *Clinton*⁶ case in the United Kingdom demonstrates the problems of trying to exclude particular sorts of conduct, such as infidelity, where such conduct is combined with other conduct that is 'provocative'.

The Committee proposed to provide that the excluded conduct could be taken into account in 'extreme and exceptional circumstances'. However, there is a lack of clear guidance as to what circumstances may be 'extreme and exceptional', and this could lead to uncertainty, unexpected outcomes and appeals. To achieve the Committee's policy objectives, the alternative approach of requiring that the provocative conduct must be a 'serious indictable offence' provides for greater certainty.

'Loss of self-control' as an element of provocation

The Committee raised valid concerns with the requirement for a loss of self-control as an element of provocation. It was concerned that the concept is unclear, has no clear basis in science or medicine, and may tend to favour the typical male reaction to conflict (disadvantaging women who kill their partners after long-term abuse, in what the Committee referred to as 'slow burn' situations). The Committee recommended replacing the requirement for a loss of self-control with a requirement for a 'justifiable sense of being seriously wronged'.

Following careful consideration of this issue, the Government's draft exposure Bill is based on the approach that, if the partial defence of provocation is to be retained, the requirement for a loss of self-control should remain its central element. There is a concern that removing this requirement, and replacing it with a requirement of a 'justifiable sense of being seriously wronged', could significantly expand the use of the law of provocation, contrary to the Committee's policy intent. In particular, if there is no requirement for loss of self-control, this could open up the use of the partial defence to situations involving a premeditated plan to kill, committed 'in cold blood'. Further, many people accused of murder may feel a 'justifiable sense of being seriously wronged'.

The 'slow burn' situation is partly addressed by the fact that the conduct causing loss of self-control need not occur immediately before the act causing death (s23(4)).

Even where there is a history of abuse, the Bill is based on the approach that the partial defence should not be available in cases of pre-meditated killing that do not involve a loss of control. In such cases, self-defence may be available, or the circumstances may be considered as mitigating factors on sentencing.

Common law principles about when the judge leaves the defence to the jury

The common law requires that where provocation, or any other defence or partial defence, is raised by any reasonable evidence, the judge must explain the relevant law and direct the jury to consider it before reaching their verdict. The Committee

⁶ *R v Clinton* (2012) EWCA Crim 2.

recommended that this principle of general application be specifically set out in relation to the law of provocation.

The Bill does not set out this principle. Codifying this longstanding rule in this context alone may produce uncertainty in other areas. The same general principle applies to all defences and partial defences and is not expressly set out in the legislation in other contexts.

Submissions

The NSW Government invites submissions about the terms of the exposure draft Bill (see 'How to make a submission' above).