The Public Defenders

14 November 2013

The Director,
Criminal Law Review,
NSW Department of Attorney General and Justice,
GPO Box 6
SYDNEY NSW 2011

By Email

Dear Ms Musgrave,

re: Crimes Amendment (Provocation) Bill 2013

I refer to the above exposure draft Bill ("the Bill"), which was tabled in Parliament on 17th October last, and the NSW government's invitation to interested persons and parties to comment on the terms of the Bill. As you know, the Public Defenders have contributed significantly to the Legislative Council Select Committee's consultation process, as reflected in its Report, and I confine myself at this stage to a consideration of whether the Bill is likely to achieve its apparent objectives.

There are two matters that we would draw to your attention.

The first is that we note that the Bill at s 23(2)(b) restricts 'provocative' conduct for the purposes of activating the defence to a serious indictable offence, as defined in section 4 of the Crimes Act 1900, but that proposed section 23(3)(a) of the Act precludes "conduct [that] was only a non-violent sexual advance to the accused".

Section 23(3)(a) must be intended to further qualify s 23(2)(b); in other words, conduct which is within the definition of a "serious indictable offence" but which is also "a non-violent sexual offence advanced to the accused" is nevertheless excluded. Otherwise, s 23(3)(a) would be redundant since it would have work to do in the proposed section.

However, this creates what I presume to be an unintended lacuna in the Bill's application. A non-violent sexual advance may indeed, in some circumstances, constitute a serious indictable offence; for example, if the sexual advance or act of intercourse is exploitative of some forms of vulnerability on the part of the recipient of the advance, such as where the recipient is a child. Section 66C(3) of the Crimes Act 1900 (NSW) ("the Act") provides that it is an offence punishable by 10 years imprisonment to have sexual intercourse without consent with a child aged between 14 and 16, thereby satisfying the definition of a serious indictable offence. Neither violence nor a threat of violence is an element of the offence, or the absence of consent.

Pursuant to s 66C(4) and (5), the offence may be aggravated by various factors, including a threat of violence, increasing the maximum penalty to 12 years (66C(5)(b)); however, query whether a *threat* of violence would be precluded by s 23(3)(a) of the proposed section. It may also be aggravated by some other non-violent factors, such as if the victim

is under the authority of the offender, has a physical disability or cognitive impairment or if the offender took advantage of the victim being under the influence of alcohol or a drug; s 66C(5)(d)-(g).

There are other serious indictable offences involving non-violent sexual intercourse. Section 73(1) and (4) of the Act provides that a person who has, or attempts to have, sexual intercourse with a child aged 16 and who is "under his or her special care" is guilty of an offence and liable to a maximum penalty of 8 years imprisonment. "Special care" is defined in these terms:

*(3) For the purposes of this section, a person (**"the victim"**) is under the special care of another person (**"the offender"**) if, and only if:*
(a) the offender is the step-parent, guardian or foster parent of the victim, or
(b) the offender is a school teacher and the victim is a pupil of the offender, or
(c) the offender has an established personal relationship with the victim in connection with the provision of religious, sporting, musical or other instruction to the victim, or
(d) the offender is a custodial officer of an institution of which the victim is an inmate, or
(e) the offender is a health professional and the victim is a patient of the health professional.

Children aged 16 years or younger, on rare occasions are charged with murder in circumstances where they allege, and the court accepts, they were the victim in an exploitative sexual relationship initiated by the deceased, and that relationship played a significant part in their motive to cause grievous bodily harm or to kill the deceased. An example is *Regina v K* [1999] NSWSC 933. The offender, aged 16 years, killed an adult who was designated by the NSW Department of Community services as his "carer". He said the deceased had raped him when he was under the influence of drugs and was unable to resist. Two weeks later, when the deceased placed his hand on the offender's knee and made a non-violent sexual advance, he fatally stabbed the deceased. He relied on the defences of provocation and diminished responsibility (now known as the defence of substantial impairment). He was acquitted of murder and convicted of manslaughter by the jury.

The trial judge, Justice R.S. Hulme, in his remarks on sentence, found that the manslaughter verdict was properly based on both defences and placed him on a good behaviour bond, subject to conditions. The Court of Criminal Appeal unanimously dismissed a Crown appeal against leniency of sentence; *Regina v K* [2000] NSWCCA 24. The case did not attract any media comment, such as to suggest that there was community concern with the appropriateness of the outcome.

Mindful of the terms of the policy debate in the community and in the Legislative Council which preceded the Bill, it is likely that this type of case was not intended to be excluded from the re-fashioned defence of provocation. If that is correct, the terms of the Bill need to be modified in order to ensure that such circumstances continue to come within this defence.

The second matter is that the definition of "serious indictable defence" excludes common assault, which has a maximum penalty of two years; section 61 of the Act. Accordingly a pattern of behaviour by an abusive partner of repeated common assaults over a lengthy period of time would not, under the Bill, permit the defence to be considered by a trial jury or by the court. One can imagine circumstances where such a pattern could be exacerbated by, for example, the deceased repeatedly assaulting the accused in the presence of the accused's children, at times of particular vulnerability or with elements of blackmail, or in addition to non-consensual but non-violent sexual acts which the accused found deeply humiliating.

We are concerned that such scenarios, which have emerged in past cases, not be excluded from the jury as a basis for a verdict of manslaughter by provocation, rather than of murder.

Please do not hesitate to contact us if we can be of further assistance.

Yours faithfully,

Mark Ierace SC
Senior Public Defender