



8<sup>th</sup> August 2013

The Honourable Tammy Franks  
Legislative Council  
Parliament House  
North Terrace  
Adelaide SA 5000

### **Submission on the Partial Defence of Provocation**

Dear Ms Franks,

Thank you for this opportunity to provide a submission on reform to the law of provocation in South Australia. Please find my submission attached which argues for the abolition of provocation as a partial defence to murder.

In my submission I draw on research that I have conducted over the past four years examining the operation of the provocation defence and divergent approaches to law reform in Australia and the United Kingdom.

It is important that the current momentum to review the law is transferred into meaningful reform that will ensure that the injustices of the provocation defence do not continue to plague the criminal justice system.

I would welcome the opportunity to discuss any aspects of this submission, or my wider research on the operation of the provocation defence in Australian and international jurisdictions, further.

Kind regards,

A handwritten signature in black ink, appearing to read "kfitzgibbon".

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# Submission on the Partial Defence of Provocation

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## ***Introduction and Relevant Research***

My interest in reform to the law of provocation in South Australia stems from my research examining the operation of the partial defence of provocation and divergent approaches taken to reforming this controversial partial defence in Australian and international jurisdictions. This research has been focused on the law of provocation and homicide law reform in Victoria, New South Wales and England with reference made to other relevant and comparable jurisdictions.

As part of my ongoing research examining reforms to the law of provocation, between 2010 and 2013 I conducted interviews with over 100 members of the Victoria, New South Wales and English criminal justice systems. This included interviews with members of the judiciary, current practising defence and prosecution counsel as well as relevant policy stakeholders from each jurisdiction. These interviews have provided me with a detailed understanding of how the law operates in practice from those involved in the daily operation of the criminal justice system. It has also allowed me to gain detailed insight into legal practitioner's perceptions of the divergent approaches taken to solving the problems posed in the operation of the partial defence of provocation.

This submission proposes that provocation should be abolished as a partial defence to murder in South Australia and that any consideration of provocation should be transferred to sentencing for murder. In making this recommendation this submission sets out why the defence operates in a gender biased way that no longer reflects current community values and expectations of justice. In doing so, it refers to the use of the defence in three contexts – by men who have killed a female intimate partner in response to allegations of sexual infidelity or threat of relationship separation, by persons who kill in response to prolonged family violence and by men who kill in response to a non-violent homosexual advance.

This submission also addresses concerns that the operation of the provocation defence complicates the law of homicide beyond what lay members of the jury can be expected to understand and apply to their decision-making. The final section of this submission considers how provocation could best be relocated to sentencing for murder and recommends that sentencing legislation for murder and manslaughter in this jurisdiction need also be reviewed alongside any reforms to the partial defence of provocation.

### ***1. Abolition of the partial defence of provocation***

The common law partial defence of provocation should be abolished.

Provocation has been abolished as a partial defence to murder in Victoria, Western Australia, Tasmania and New Zealand. These jurisdictions have rightly recognised that this partial defence to murder is conceptually flawed. It was designed and implemented in England in the 17<sup>th</sup> century by men and for men and consequently it's current operation in the 21<sup>st</sup> century is gender biased and upholds notions of male honour that are out of line with current community values and expectations of justice.

Over the last decade a significant bank of scholarship has recognised that the law of provocation operates in an inherently gender biased way that serves to partially legitimise and excuse the use of lethal violence by men who kill in unmeritorious

circumstances. This is most evident in the successful use of the defence by men who kill in the context of relationship separation and infidelity or in response to a non-violent homosexual advance. The successful use of the defence in these contexts is vastly out of line with current community values and expectations of 'ordinary' and 'reasonable' human behaviour.

By its very design the law of provocation encourages the legal delegitimation of the victim. This is a key problem with the foundations of the defence that cannot be overcome through reform and/or restriction. In raising provocation the offender seeks to put the words or actions of the victim on trial in order to illustrate how their use of lethal violence was provoked. In the majority of cases this occurs in situations where no one is able to contest the defendant's version of what occurred in the period immediately prior to their use of lethal violence. Consequently, the victim of homicide – often female – is put on trial in cases where this partial defence is raised. A highly problematic trend that is well established and critiqued in research,<sup>1</sup> and is often exacerbated by the mobilisation of gendered stereotypes to defame the character of the victim and deny them legitimate victim status. Victim blaming is unavoidable in provocation cases and provides a central reason for why provocation must be abolished as a partial defence to murder in South Australia.

## **2. The operation of the partial defence of provocation**

Over the last 10 years, the operation of the provocation defence, although with some variances in legislation, across Australian jurisdictions is highly concerning and provides ample evidence that the doctrine is vastly out of line with community expectations of justice. The operation of provocation clearly highlights the inherent flaws in the foundations of the defence whilst also revealing how its successful use in unmeritorious cases provides a highly problematic legal legitimisation of lethal violence.

In recommending the abolition of provocation as a partial defence to murder it is important to consider its application in the three key contexts upon which debate has focused. This section of the submission does this by providing an overview of the use of provocation by men who have killed a female intimate partner in response to allegations of sexual infidelity or threat of relationship separation, by men who kill in response to a non-violent homosexual advance and by persons who kill in response to prolonged family violence.

When considered together these three contexts of homicide give rise to the difficult question of how to reform the provocation defence to exclude unmeritorious male defendants whilst providing an avenue less than murder for battered women. It is this submission's contention, that this would be best achieved by abolishing provocation as a partial defence to murder and transferring any consideration of provocation to the sentencing stage of the court process. The range of contexts of lethal violence in which provocation is raised could then be adequately accounted for at sentencing for murder.

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<sup>1</sup> See, for example, Kate Fitz-Gibbon, 'Provocation in New South Wales: the need for abolition' (2012) 45(2) *The Australian and New Zealand Journal of Criminology* 194; Danielle Tyson, *Sex, Culpability and the Defence of Provocation* (Routledge, 2013). Jenny Morgan, 'Provocation Law and Facts: Dead Women Tell No Tales, Tales Are Told About Them' (1997) 21 *Melbourne University Law Review* 237; Celia Wells, 'Provocation: The case for abolition', in A. Ashworth and B. Mitchell (eds) *Rethinking English Homicide Law* (Oxford: Oxford University Press, 2000).

### a) Men who kill in response to alleged infidelity or relationship separation

The use of the provocation defence by men who kill a female intimate partner in response to an alleged sexual infidelity or a threat to terminate the relationship has long garnered criticism amongst socio-legal, law and feminist scholars. These critiques have largely been focused on concerns surrounding the legal legitimisation of lethal domestic violence and the role that the defence plays in allowing the female victim – not the male offender – to be put on trial. The consequences of the successful use of the provocation defence in this context are well captured by Bradfield who argues that in practice provocation:

endorses outmoded attitudes that women are the property of their husbands, attitudes that continue to permit men who kill their partners following sexual provocation such as rejection, a partner's unfaithfulness or jealousy to be accommodated within the defence of provocation. The defence of provocation operates as a 'licence' for men to kill their female partners who dare to assert their own autonomy by leaving or choosing a new partner.<sup>2</sup>

The consequences of the successful use of the provocation defence in such cases, as explained by Gorman (1999, p.479) is that provocation serves to 'reward men who are so possessive of their spouses that they are willing to kill in order to ensure their spouse does not leave them for another man'. Furthermore, when the law is seen to legitimise the use of male violence in an intimate context, a standard of acceptable violence against women is further enforced. For this reason in itself, this submission would argue that provocation should be abolished to ensure that it no longer constitutes a partial 'excuse' for lethal domestic violence in South Australia.

At a policy level, the use of provocation by jealous and controlling men who have killed a female intimate partner has been important in terms of igniting debates surrounding provocation in various jurisdictions and propelling the implementation of reform. This was evident in the Victorian context where in 2004 the trial and sentencing of James Ramage for the manslaughter of his estranged wife Julie, thrust community and scholarly disquiet with the provocation defence into the spotlight.<sup>3</sup>

In July 2003, Julie Ramage met with her estranged husband, James Ramage, at their previously shared family home to discuss renovation plans. Ramage claimed that he 'lost control and attacked' Julie, following a discussion in which he claimed she told him that sex with Ramage 'repulsed her and screwed up her face and either said or implied how much better her new [boy]friend was'.<sup>4</sup> During this period of lost control, Ramage bashed and strangled his estranged wife to death, following which he buried her body along with other incriminating evidence in a shallow grave on the outskirts of Melbourne. At trial, Ramage successfully raised the partial defence of provocation and was subsequently convicted of manslaughter by reason of provocation.

The partial defence of provocation gave legitimacy to Ramage's defence that in the circumstances immediately prior to her death his wife's new relationship and failure

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<sup>2</sup> Rebecca Bradfield, 'Domestic homicide and the defence of provocation: A Tasmanian perspective on the jealous husband and the battered wife' (2000) 19 *University of Tasmania Law Review* 5, 35.

<sup>3</sup> *R v Ramage* [2004] VSC 508 (9 December 2004), hereinafter *Ramage*.

<sup>4</sup> *Ramage* per Osborn J: 22.

to consider returning to their marriage had caused him to lose self-control.<sup>5</sup> As such, the case became the key example cited throughout research and the media as evidence of the dangers of the provocation defence. Critics pointed to the role that the partial defence had played in effectively putting on trial Julie Ramage and in diminishing the seriousness of the perpetration of lethal violence against her. The case was described by one feminist scholar as a, 'spectacularly misogynist defence tale of a man provoked beyond endurance by a taunting, exiting, adulterous and menstruating woman'.<sup>6</sup> The influence of the *Ramage* is clearly evident throughout provocation debates in Australia and internationally. At a policy level, the case has also been cited as heavily influential in the speed of the Victorian's Government's decision to implement the earlier recommendation of the Victorian Law Reform Commission to abolish provocation.

The problematic use of the provocation defence by male defendants cannot, and should not, be ignored. Case law from across all Australian jurisdictions illustrates that the successful use of the defence in this context does not represent one off injustices of the defence. Men such as James Ramage and Peter Keogh in Victoria, Chamanjot Singh and Bradley Stevens in New South Wales, Damien Sebo and Gary Mills in Queensland, Leslie Humes and Mark Wilkinson in the UK are not the exceptions to the rule – if available the partial defence of provocation will be abused and will continue to provide a legal legitimisation for lethal violence committed by men. I would urge the South Australian parliament to recognise the defence's long catalogue of injustices and ensure that this avenue of excuse is closed in the South Australian criminal justice system.

#### **b) Men who kill in response to a non-violent homosexual advance**

Also focusing upon male defendants, the historical use of the provocation defence by men who have perpetrated lethal violence in response to a non-violent homosexual advance has garnered significant concern.<sup>7</sup>

The most frequently cited example of this in the Australian context is the *Green* case.<sup>8</sup> Green was initially convicted of the murder of a male friend who got into bed with him and made a sexual advance, however, on appeal to the High Court his conviction was overturned (in a 2:1 majority decision). On retrial, Green was convicted of manslaughter, on the grounds of provocation. Justice Michael Kirby commented that the decision of the High Court in *Green*:

would sit ill with contemporary legal, educative, and policing efforts designed to remove such violent responses from society, grounded as they are in irrational hatred and fear. In my view the 'ordinary person' in Australian society today is not

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<sup>5</sup> The defence argued that Julie had provoked Ramage in two different ways: first, by leading him to believe that there was a possibility that she would resume the marriage; and second, through her verbal taunts in their final argument.

<sup>6</sup> Adrian Howe, 'Provocation in Crisis: Law's passion at the crossroads? New directions for feminist strategists' (2004) 21 *Australian Feminist Law Journal* 53, 74.

<sup>7</sup> See, for example, Adrian Howe, 'More folk provoke their own deminse (homophobic violence and sex excuses – rejoining the provocation law debate, courtesy of the homosexual advance defence' (1997) 19(3) *Sydney Law Review* 336; Ben Golder, 'The homosexual advance defence and the law/body nexus: towards a poetics of law reform' (2004) 11(1) *Murdoch University Electronic Journal of Law* 1; Stephen Tomsen and Thomas Crofts, 'Social and cultural meanings of legal responses to homicide among men: masculine honour, sexual advances and accidents' (2012) 45(3) *Australian and New Zealand Journal of Criminology* 423.

<sup>8</sup> *Green v The Queen* (1997) 191 CLR 334.

so homophobic as to respond to a non-violent sexual advance by a homosexual person as to form an intent to kill...<sup>9</sup>

The case led to significant public, media and scholarly outcry nationwide but particularly in New South Wales where in response the government established a Working Party in 1995 to specifically examine the use of provocation in homosexual advance cases. While the recommendations for reform made by the Working Party have to date not been implemented by the government, the 2012 Inquiry into provocation in NSW and the resulting recommendations for reform made by the Select Committee did focus quite heavily upon the unsatisfactory use of provocation in this context.

Recent reforms implemented in South Australia to exclude this context of lethal violence from successfully raising a partial defence of provocation represent an important and much needed reform. It is difficult to believe that any member of the community in today's society would believe that such non-violent conduct is provocative enough to provoke an ordinary person to lose their self-control and kill. This reform, however, should be viewed as merely one of several steps needed in South Australia to clear this jurisdiction of a defence that has continued to stain Australian criminal court systems.

### **c) Persons who kill in response to prolonged family violence**

In contrast to concerns surrounding the abuse of the provocation defence by male defendants, debate surrounding the use of provocation by battered women has focused on the need to retain provocation as a halfway house between murder and self-defence for women who kill in response to prolonged family violence. Scholars have argued that provocation is an important alternative to murder for women who are unable to meet the stringent requirements of a complete defence of self-defence. Advocates have argued that without provocation battered women would be at risk of a murder conviction, which would subject them to harsher sentencing practices.

While it is certainly appreciated that provocation has been used in this context - although it should be noted that this accounts for a small percentage of overall cases in which the defence is successfully raised in most Australian jurisdictions – it is proposed that the partial defence of excessive self-defence in South Australia, as well as a reformed version of the complete defence of self-defence, are better suited to responding to this unique context of lethal violence. It is the argument of this submission that it would be more appropriate to reform self-defence to better cater for genuine cases of defensive lethal violence than to manipulate and retain provocation for this singular purpose.

If this is an area of concern for the South Australian parliament then alongside abolition of the provocation defence, a social evidence framework should be implemented, similar to that introduction in 2005 in Victoria through s9AH (3) (a)-(f) of the *Crimes Act 1958* (Vic). This framework would allow women's experiences of violence in the domestic context to be better understood, heard and responded to within the confines of the criminal courts. Evidentiary reform, alongside the potential implementation of reforms to strengthen the law of self-defence, would alleviate the key reason why advocates have argued that provocation should be retained.

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<sup>9</sup> *Green v R* [1997] HCA 50, per Kirby J at 193–4

### **3. The need to simplify the law of homicide**

In its present form, and indeed in any reformed version, there is a key concern that the partial defence of provocation serves to over complicate the law of homicide beyond comprehensive for members of the justice system, and in particular, for lay members of the jury. The complicated state of legislation surrounding provocation is heavily documented,<sup>10</sup> and is well captured in the description given by Queensland Supreme Court Judge, The Honourable Justice Jerrard, who has described provocation as requiring jurors to perform 'mental gymnastics'.<sup>11</sup> Similarly, in her review of reforms to the law of provocation in Australia, Canada and United Kingdom, Queensland law scholar Jennifer Yule noted that:

The test used in the defence of provocation is conceptually difficult for the jury to understand. The jury is told they can take certain characteristics into consideration in one part of a test but not in another part. This has the potential for injustice.<sup>12</sup>

The recognised complicated nature of legislation surrounding the provocation defence emphasises the need for any future reforms in South Australia to place simplifying the law as a key priority, particularly in the event that the defence of provocation is to be retained.

Without simplification of the law, it is unclear whether juries can adequately understand and comprehend the nuances of this defence, and thus whether a jury verdict is based on the elements of the partial defence as set out by law or a tendency to compromise to a half-way offence when confronted with confusing legislation. Legal practitioners interviewed in NSW, England and Victoria discussed their own experiences with the complicated provocation defence and their concerns that the desire for compromise was heavily influential in cases where provocation is raised as a partial defence given the difficulty and length of the directions that need to be given to the jury.

Whilst it is appreciated that there are many areas of the law that can be critiqued as over complicated, and as such provocation is but one example, given that the South Australian Parliament appears to be taking the opportunity to undertake reform to this area of homicide law it would be hoped that the opportunity is taken to not only reform the law but if retaining provocation, to simplify it. This would ensure that in its future operation it could be better understood and more accurately interpreted by members of the jury.

### **4. The dangers of retaining provocation**

This section of the submission addresses why retaining provocation without amendment or retaining provocation with amendment is not a preferable approach to reforming the law of provocation and should not be adopted in South Australia.

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<sup>10</sup> See, for example, Kate Fitz-Gibbon, 'Provocation in New South Wales: the need for abolition' (2012) 45(2) *The Australian and New Zealand Journal of Criminology* 194, 209-2010. Andrew Hemming, 'Provocation: A totally flawed defence that has no place in Australian criminal law irrespective of sentencing regime' (2010) 14 *University of Western Sydney Law Review* 1; NZ Law Commission, *The Partial Defence of Provocation*, Report 98 (2007); D M Paciocco, *Getting Away with Murder: The Canadian Criminal Justice System* (Toronto: Irwin Law 1999); Julia Tolmie, 'Is the Partial Defence an Endangered defence? Recent proposals to abolish provocation' (2005) 25 *New Zealand Law Review* 25; Victorian Law Reform Commission, *Defences to Homicide: Final Report* (2004) Victorian Law Reform Commission (Melbourne, Victoria).

<sup>11</sup> John A. Jerrard, 'Conceptualising domestic violence in the criminal law' (1995) 14(1) *Social Alternatives* 23, 25.

<sup>12</sup> Jennifer Yule, 'Current issues with regards to the defences of provocation and self-defence in the criminal law context' (2007) in *Proceedings Australasian Law Teachers Association*: Perth, Australia.



### **a) Retain provocation without amendment**

It would be very disappointing if South Australia did not take this opportunity to make substantive changes to the law of provocation as it presently stands. South Australia is the last jurisdiction in Australia to recognise the dangers of this defence with review and reform, and whilst the recent reform implemented to restrict the application of provocation in cases involving a non-violent homosexual advance is to be commended, it does not go far enough in ensuring that the injustice of the provocation defence is adequately addressed. It is the argument of this submission that this can only be achieved through abolition.

### **b) Retain provocation with amendment**

An overriding concern relevant to any proposal to retain provocation with amendment is that it is extremely difficult – if not impossible – to predict what the unintended consequences of a reformed partial defence of provocation will be. The dangers of unintended consequences of homicide law reform have been considered in recent research examining comparable jurisdictions where the importance of ongoing evaluation and monitoring of the law post-reform has been well documented.

Whilst it is accepted that the unintended effects of any reform cannot be anticipated, retaining provocation in some form allows for the continued possibility that it will be abused in ways similar to those heavily critiqued throughout past research. It is for this overriding reason that complete abolition of the defence is favoured over the implementation of reforms that seek to either tinker at the edges of the defence or anticipate how it could be used in the future.

Specifically, exclusionary conduct models of reform, which have been favoured in comparable jurisdictions, such as England and Wales, are subject to judicial interpretation and manipulation, which can serve to undermine the goals of the reform package implemented. The validity of this concern is clearly evident from an analysis of the operation of the law of homicide in England and Wales since the implementation of the 2010 homicide law reforms. The 2010 reforms saw the implementation of a new partial defence of loss of control, which is in many ways merely a reformulation of the provocation defence using an exclusionary conduct model. Implemented in October 2010, the partial defence of loss of control was formulated to include a provision to exclude situations of sexual infidelity from constituting a qualifying trigger. At the time, in justifying this exclusion the Ministry of Justice commented that:

The Government does not accept that sexual infidelity should ever provide the basis for a partial defence to murder. We therefore remain committed to making it clear – on the face of statute – that sexual infidelity should not provide an excuse for killing.<sup>13</sup>

Despite the inclusion of this provision to exclude situations of sexual infidelity from giving rise to a partial defence of loss of control, in January 2012 Jon Jacques Clinton successfully appealed against his murder conviction on the basis that at trial the judge should have allowed the partial defence of loss of control to be considered

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<sup>13</sup> Ministry of Justice. *Murder, Manslaughter and Infanticide: Proposals for Reform of the Law – Summary of Responses and Government Position* (2009).

by the jury.<sup>14</sup> The trial judge's decision not to allow loss of control to go to the jury had been made in light of the sexual infidelity provision which meant that in this case the victim's confession of infidelity could not be considered as having caused a justifiable sense of being seriously wronged on the part of the offender.<sup>15</sup> Clinton was subsequently convicted following trial of murder.

However, just over a year later— and less than two years after the reforms had been implemented – the Court of Appeal in *Clinton* quashed this initial conviction and ruled that to:

seek to compartmentalise sexual infidelity and exclude it when it is integral to the facts as a whole is not only much more difficult, but is unrealistic and carries with it the potential for injustice ... In our judgement, where sexual infidelity is integral to and forms an essential part of the context in which to make a just evaluation whether a qualifying trigger properly falls within the ambit of [the qualifying trigger provisions] the prohibition [on sexual infidelity] does not operate to exclude it.

In making this judgment, the Court of Appeal has likely ensured that the sexual infidelity provocation within the new partial defence of loss of control will be largely ineffective in minimising the use of the defence by men who kill a female intimate partner in the context of sexual infidelity. As described by one media commentator at the time, the decision 'restores the defence in so-called crime of passion cases'.<sup>16</sup> Consequently, it raises the fear that in practice the 2010 reforms will do little to overcome the problems associated with the now abolished provocation defence in England and Wales.

*Clinton* illustrates the ineffectiveness of exclusionary-based reform models and provides an important warning for South Australia to steer clear of implementing this model of reform. More broadly, it illustrates the dangers associated with retaining but amending provocation where the unintended consequences of reform can undermine the goals of the law reform package and leave the law open to manipulation in practice.

## **5. Transferring provocation to sentencing**

This submission strongly recommends that common law provocation be abolished as a partial defence to murder in South Australia and consequently, that any consideration of provocation be transferred to the sentencing stage of the criminal process. Within Australia, provocation has been transferred to the realm of sentencing in three jurisdictions - Tasmania, Victoria and Western Australia. Internationally, provocation is also considered at sentencing in New Zealand and France.

Transferring provocation to sentencing will allow for a clearer recognition of the intent present in the offence committed (through a conviction for murder rather than

<sup>14</sup> *R v Clinton (Jon-Jacques)* [2012] EWCA Crim 2, hereinafter *Clinton*. Clinton killed his estranged wife, Dawn, after she admitted to having sex with five different men and allegedly sniggered at the prospect of the offender committing suicide. After bashing the victim with a wooden baton, strangling her with a belt, Clinton tied a rope around the victim's neck causing her to die from head injury and asphyxia. Following her death and after removing the victim's clothes, Clinton took a series of photographs of the victim which he sent to the man with whom she had begun a relationship. Clinton was found by police in the loft of their previously shared home with a noose around his neck.

<sup>15</sup> The jury were, however, instructed that they could consider a partial defence of diminished responsibility.

<sup>16</sup> F Gibb "Killers Can Use Crime of Passion Defence, Jurors Told: Sexual Infidelity by Victim Is Relevant, Says Law Chief" (2012) 18 January *The Times* 9.

manslaughter. It is argued that this will consequently allow for a more accurate retelling of the fatal event that places responsibility for the lethal violence perpetrated in the first instance with the offender, rather than the victim. This is an important factor as it will allow the criminal law to further distance itself from the victim blaming narratives that have plagued the operation of the provocation defence. The presence of an intent to kill in provocation killings has been previously noted by law reform commissions.<sup>17</sup> Most notably in 2002 the VLRC questioned why provocation killings should be mitigated to manslaughter given the presence of an intention to kill:

On the one hand it can be argued that those who rely on provocation as a defence have generally formed an intention to kill. Why should the emotion of anger reduce moral culpability more than other emotions such as envy, lust or greed? ... Why should it make a difference to the level of criminal responsibility that a person who intends to kill does so as a result of loss of self control?<sup>18</sup>

The importance of recognising this level of intent was also raised in 2003 as a key reason supporting the abolition of provocation in Tasmania, where it was argued in a parliamentary debate that:

The main argument for abolishing the defence stems from the fact that people who rely on provocation intend to kill. An intention to kill is murder. Why should the fact that the killing occurred when the defendant was acting out of control make a difference? All the ingredients exist for the crime of murder.<sup>19</sup>

Abolishing provocation and transferring it to sentencing provides a direct response to these argument by allowing for the intent to kill in a provocation killing to be recognised through a conviction for murder while also providing a legitimate framework for the application of mitigation at sentencing in cases of genuine provoked violence (this framework is described in detail in the latter sections of this submission).

#### **a) The mandatory life sentence for murder**

It is important to state that the transfer of provocation to sentencing must be undertaken alongside review and, I recommend, abolition of the mandatory life sentence for murder in South Australia. It is recognised that consideration of the ongoing viability of a mandatory life sentence for murder may be beyond the scope of the current review of the law of provocation, however, it is stressed that the relationship between the partial defences and sentencing structures for murder are intensely interrelated and consequently, it is difficult, if not impossible, to consider reform to one without the other.

The English Law Commission recognised the need for any reform to the law of provocation to be undertaken as part of a comprehensive review of the broader law of homicide in their 2004 report on the partial defences to murder. The Commission noted that without such review the intent of any reform package would be at risk of being undermined:

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<sup>17</sup> New Zealand Law Commission, *The Partial Defence of Provocation*, Report 98 (2007), Victorian Law Reform Commission, *Defences to Homicide Issues Paper* (2002).

<sup>18</sup> Victorian Law Reform Commission, *Defences to Homicide Issues Paper* (2002), 67.

<sup>19</sup> Honourable J Jackson, *Tasmanian Parliamentary Debate*, House of Assembly, 20 March 2003, 59.

We have a real and serious concern that reforming the law of provocation without a wider review of the law of murder may in the long run fail to achieve its objective, because the same pressures are liable to lead in practice to a stretching either of the reformed provocation defence or possibly of diminished responsibility in cases where the judge and jury have a degree of sympathy for the defendant.<sup>20</sup>

It is difficult, if not impossible, to adequately reform a partial defence to murder without also considering structures for sentencing in homicide offences. I would urge the South Australian parliament to take this opportunity to conduct a comprehensive review of the law of homicide and sentencing for murder and manslaughter in South Australia alongside any reforms implemented to the law of provocation.

I would be happy to provide a more detailed and focused argument for why South Australia should abolish the mandatory life sentence for murder, including reasons extending beyond reform to the partial defences to murder.<sup>21</sup> For the purpose of this submission I have focused my discussion on the need for reform to the law of provocation, which must be undertaken with close consideration given to the implications in sentencing and the current structure for sentencing in homicide offences.

### **b) The transfer of provocation to sentencing**

Law reform bodies, such as the Victorian Law Reform Commission (VLRC), the New Zealand Law Commission (NZLC) and the Law Reform Commission of WA (LRCWA), have commended the transfer of provocation to sentencing. The LRCWA noted that the sentencing process, rather than the trial phase, was 'uniquely suited to identifying those cases of provocation that call for leniency and those that do not'.<sup>22</sup> In agreement, the NZLC commented that, 'sentencing judges may be better equipped to deal with the issues in a way that is consistent, and therefore just, than juries are'.<sup>23</sup> Two years earlier, the VLRC also explained that through a consideration of the full range of options available when sentencing an offender for murder, members of the judiciary would be able to impose appropriate sentences to reflect the culpability of the offender.<sup>24</sup> Whilst various aspects of the reforms implemented in each of these jurisdictions have been critiqued, such as the implementation of defensive homicide in Victoria and the removal of all partial defences in New Zealand, what has rarely been the focus of criticisms since these reforms were implemented is the subsequent adequacy of sentencing for murder to account for provoked killings.

It is recognised that since the abolition of provocation in New Zealand in 2009 research has suggested that battered women have been inadequately responded to at sentencing for murder. Specifically, the extensive research conducted by Stubbs, Sheehy and Tolmie suggests that following the abolition of provocation women who have killed in response to family violence have been convicted of murder and have received considerably longer terms of imprisonment than if they had been able to raise a partial defence of provocation.<sup>25</sup>

<sup>20</sup> Law Commission, *Partial Defences to Murder: Final Report* (2004) Law Commission (London) 40

<sup>21</sup> For an analysis of the need to abolish the mandatory life sentence for murder in the English context, see Kate Fitz-Gibbon, 'The Mandatory Life Sentence for Murder: An Argument for Judicial Discretion in England' (2012) *Criminology and Criminal Justice: An International Journal*, doi: 10.1177/1748895812458297.

<sup>22</sup> Law Reform Commission of WA, *Review of the Law of Homicide: Final Report*, Project 97 (2007) 220.

<sup>23</sup> NZ Law Commission, *The Partial Defence of Provocation*, Report 98 (2007).

<sup>24</sup> VLRC, *Defences to Homicide: Final Report* (2004) 58, Recommendation 1.

<sup>25</sup> Elizabeth Sheehy, Julie Stubbs and Julia Tolmie, 'Battered women charged with homicide in Australia, Canada and New Zealand: How do they fare?' (2012) 45 *Australian and New Zealand Journal of Criminology* 383.

In considering this in the South Australian context, it is important to note that New Zealand abolished all partial defences to murder and also retain a presumptive life sentence for murder. Given the existence of a partial defence of excessive self-defence in South Australia and the recommendation contained in this submission that the mandatory life sentence for murder should be abolished in favour of a discretionary approach to sentencing, it is strongly believed that the concerns expressed in the NZ context would not be relevant to South Australia.

Additionally, it is important to note that the bulk of criticism levied at the 2005 Victorian homicide law reforms by academics and in media commentary<sup>26</sup> has surrounded the introduction of the new offence of defensive homicide rather than the government's decision to abolish provocation as a partial defence to murder. As such, South Australia should not shy away from abolishing provocation on the basis of lessons learnt from this jurisdiction, as this aspect of the reforms has not been the point of critique. What South Australia can take from the Victorian experience is that the creation of alternative categories of murder, such as a newly formulated partial defence or offence, can lead to unintended consequences in practice that gravely undermine the goals of the law reform process. The dangers of implementing alternative categories alongside the abolition of provocation has been analysed in detail in relation to the Victorian context (see, Fitz-Gibbon, 2013; Fitz-Gibbon and Pickering, 2012). The validity of creating alternative specialist defences for battered women has also been rejected by several law reform commission bodies including the VLRC and the ALRC and NSWLRC in their 2010 review of legal responses to family violence.<sup>27</sup>

Beyond Victoria and New Zealand, given the recency of the majority of reforms to abolish provocation the intended and unintended effects of the transfer of provocation to sentencing in these jurisdictions is still emerging in initial evaluations of the reforms. Despite this, the decision to transfer consideration of provocation to sentencing in these jurisdictions, as well as in other jurisdictions that have reviewed and reformed provocation without abolition, has continued to animate discussion amongst scholars, relevant government and non-government bodies. This discussion has focused predominately on two key issues: (1) the viability of considering provocation at sentencing rather than as a jury decision following trial; and (2) the framework through which provocation could be applied in sentencing.

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<sup>26</sup> See, Heather Douglas, 'A consideration of the merits of specialised homicide offences and defences for battered women' (2012) 45 *Australian and New Zealand Journal of Criminology*, 367; Kate Fitz-Gibbon, 'The Victorian Operation of Defensive Homicide: Examining the delegitimisation of victims in the criminal justice system' (2013) 21 *Griffith Law Review* 556; Kate Fitz-Gibbon and Sharon Pickering, 'Homicide law reform in Victoria, Australia: From provocation to defensive homicide and beyond' (2012) 52(1) *The British Journal of Criminology* 159; Asher Flynn and Kate Fitz-Gibbon, 'Bargaining with Defensive Homicide: Examining Victoria's secret plea bargaining system post-reform', (2011) 35(3) *Melbourne University Law Review* 905; Danielle Tyson, 'Victoria's new homicide laws: provocation reforms or more women "asking for it"?' (2011) 23 *Current Issues in Criminal Justice* 203; Danielle Tyson, *Sex, Culpability and the Defence of Provocation* (Routledge, 2013).

<sup>27</sup> See Victorian Law Reform Commission. *Defences to Homicide: Final Report* (2004) Victorian Law Reform Commission (Melbourne, Victoria); Australian Law Reform Commission/New South Wales Law Reform Commission (2010) *Family Violence – A national Legal Response: Final Report* (Attorney-General's Department: Barton, ACT).

### c) Judge or Jury?

A key argument that has been raised against the transfer of provocation to sentencing is that members of the jury – as representatives of the community – are best placed to decide on questions relating to a defendant's culpability, such as provocation.<sup>28</sup> This argument invariably leads to the question of whether provocation is a value judgment best decided upon by representatives of the community or whether justice can be more simply and predictably achieved when such decisions are moved to realm of sentencing and decided upon by members of the judiciary.

While I am certainly a strong supporter and believer in the jury system, it is the argument of this submission that consideration of provocation is best placed at sentencing where the extent to which it is influential on the sentence imposed can be ruled upon by an experienced member of the judiciary, without the complicated jury directions that hinder the operation of the defence at trial. Additionally, given that several of the most controversial successful uses of the provocation defence – such as the 2012 *Singh*<sup>29</sup> and *Won*<sup>30</sup> cases in New South Wales - have been the result of a jury verdict, the argument that the jury are important in terms of injecting community values into the justice system is somewhat undermined.

For example, in *Singh* the defendant – Chamanjot Singh – successfully raised provocation after he slit his wife's throat with a box cutter in their shared home following a verbal argument during which he alleged that his wife slapped him several times. At trial, the defence argued that Singh had been provoked to kill his wife, Manpreet Kaur, for multiple reasons including his suspicions of infidelity, disparaging comments made by the victim and her sister's husband about his mother, and Singh's belief that the relationship was ending. The defence argued that his belief that the relationship was ending was compounded by the fact that he had moved to Australia on a spousal visa and would likely be deported if he and his wife separated.

In addressing this provocative conduct of the victim, the Crown Prosecutor finished his closing address by asking the jury to consider one key question - 'Is it really the sort of conduct that could have caused an ordinary person to do this?'<sup>31</sup> Painting a dark picture of the behaviour of the ordinary man, the jury accepted Singh's defence that in response to the provocative conduct of his wife he had lost his self-control and been provoked to kill. He was consequently sentenced for manslaughter by reason of provocation and received a non-parole period of six years with a maximum term of eight years. Responses to the case following both conviction and sentencing were widespread, with one commentator describing that the case had 'sparked an uproar' as the community realised 'that a woman's words to a violent husband could somehow "justify" a fatal attack'.<sup>32</sup>

<sup>28</sup> Most recently this argument has been advanced in Thomas Crofts and Arlie Loughnan, 'Provocation: the good, the boy and the ugly' (2013) 37 *Criminal Law Journal* 23, 29.

<sup>29</sup> *Singh v R* [2012] NSWSC 637 (7 June 2012).

<sup>30</sup> *R v Won* [2012] NSWSC 855 (3 August 2012).

<sup>31</sup> NSWSC Transcript of *R v Chamanjot Singh*, per Mr Leask, at 390.

<sup>32</sup> Josephine Tovey, 'Finding reason for taking a life', *The Sydney Morning Herald* (Sydney), 1 September 2012, 2. For further examples of the media coverage surrounding the *Singh* case, see Paul Bibby and Josephine Tovey, 'Six years for killing sparks call for law review', *The Sydney Morning Herald* (Sydney), 8 June 2012, 3; Josephine Tovey, 'Dead woman's sister pleads for a change in provocation law', *The Sydney Morning Herald* (Sydney), 27 August 2012, 5.

Undoubtedly, the jury input in *Singh* served to undermine community confidence in the justice system as opposed to the opposite. As commented in NSW Parliament in the wake of the verdict by the Honourable Helen Westwood:

We keep hearing this argument that the jury system and juries reflect community values but there are really stark examples where they do not. There are examples where they are at odds with community values. Surely we need to examine those to understand how we get outcomes that are completely out of step ... There is no way that the outcome in the Singh case reflects community values – it has failed. I just find, as a legislator, do we ignore that?<sup>33</sup>

Importantly, given the closed nature of juror decision making in Australian jurisdictions, it is near impossible to understand the jury reasoning behind these verdicts. However, if transferred to sentencing, detailed reasoning would be provided by the sentencing judge through the publicly available judgment, and an avenue of appeal would also be available to the Crown or defence. This opportunity for appeal is an important factor that is not available to jury verdicts.

#### **d) The Stewart and Freiberg model for provocation in sentencing**

In transferring provocation to sentencing, South Australia could learn from the detailed framework formulated in the wake of the Victorian reforms by Stewart and Freiberg.<sup>34</sup> The Stewart and Freiberg framework has been praised by the former Victorian Attorney-General Rob Hulls as providing ‘an important resource’ for sentencing in the wake of the abolition of provocation.<sup>35</sup>

In establishing parameters for its operation in sentencing, Stewart and Freiberg suggest that provocation should only be considered where ‘serious provocation should be found to have given the offender a justifiable sense of having been wronged’ and where the degree of provocation is proportionate to the severity of the offender’s response.<sup>36</sup> They assert that:

Where the offender reaction particularly violently or intentionally caused serious harm or death, only the most serious examples of provocation are likely to reduce the offender’s culpability. Where the harm caused by the offender is less serious, a lower degree of provocation may warrant a reduction in the offender’s culpability.<sup>37</sup>

Stewart and Freiberg recommend that a sentencing judge should consider the gravity of the provocation (including both the duration and the nature of the provoking conduct), the emotional response of the offender and whether it was proportionate to the provocation experienced, and third, the justifiability of that response.<sup>38</sup>

<sup>33</sup> Evidence to Select Committee on the Partial Defence of Provocation, NSW, 21 September 2012, 25 (The Hon. Helen Westwood).

<sup>34</sup> Arie Freiberg and Felicity Stewart, ‘Provocation in Sentencing: A Culpability-Based Framework’ (2008) 19(3) *Current Issues in Criminal Justice* 283; Arie Freiberg and Felicity Stewart, *Provocation in Sentencing* (Sentencing Advisory Council, 2nd ed, 2009).

<sup>35</sup> Geoff Wilkinson, ‘No L Let-off for Wife Killers: Report Urges Judges to Ignore Provocation’, *Herald Sun* (Victoria), 7 February 2008, 23.

<sup>36</sup> Arie Freiberg and Felicity Stewart, *Provocation in Sentencing* (Sentencing Advisory Council, 2nd ed, 2009) s 1.1.10.

<sup>37</sup> Arie Freiberg and Felicity Stewart, ‘Provocation in Sentencing: A Culpability-Based Framework’ (2008) 19(3) *Current Issues in Criminal Justice* 283, 294.

<sup>38</sup> *Ibid.*

Importantly, Stewart and Freiberg state that any judgment in provocation cases should be made with consideration of society's expectations of human behaviour and personal autonomy.<sup>39</sup> In this respect, they propose that provocation related to a victim exercising their equality rights should not serve to reduce an offender's level of culpability at sentencing for murder. This would be relevant to violence arising from a victim leaving an intimate relationship, a victim's formation of an intimate relationship or friendship with someone other than the offender, as well as conduct arising from the victim's decision to work, obtain an education or any other assertions of the victim's independence. This specific exclusion to be applied at sentencing seeks to ensure that the controversial cases that have given rise to concern surrounding the operation of the provocation defence at trial do not continue to receive leniency and mitigation at the sentencing stage.

This is particularly important in light of scholarly concerns that the abolition of provocation will merely facilitate the transfer of problematic narratives of victim blame from the trial phase to the sentencing phase of the criminal process. It is important to ensure that this does not occur. As noted in the Victorian context by Fitz-Gibbon and Pickering:

It is essential that the gains made in removing the provocation defence are not undermined by the mobilisation of problematic gender tropes that, either explicitly or implicitly, continue to mobilise provocation-type narratives at the sentencing stage.<sup>40</sup>

For this reason, alongside the abolition of provocation, it is essential that a clear framework for how provocation should be considered at sentencing for murder in South Australia is also established and implemented. This will ensure that reform of the law of provocation in South Australia is not accompanied by unintended outcomes and that the gendered narratives and injustices that have been infamous at the trial stage are not permitted to continue into the realm of sentencing.

## **6. Post-reform evaluation**

In light of concerns raised in comparable Australian and international jurisdictions as to the potential unintended effects of reforming the law of provocation, there will be a clear need for an examination of the effects of any reforms in practice. As Bradfield noted in relation to the abolition of provocation in Tasmania, post-abolition caution and evaluation is important to ensure that no undue sympathy is afforded to intimate homicide offenders during the sentencing stage of the court process and that a clear rejection of their claim of provocation is given by members of the judiciary.<sup>41</sup>

For this reason, it is recommended that included in any reforms to the law of provocation in South Australia is a directive that the law of homicide, and the effects of the reforms, be monitored and evaluated five years after their implementation.

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<sup>39</sup> Arie Freiberg and Felicity Stewart, 'Provocation in Sentencing: A Culpability-Based Framework' (2008) 19(3) *Current Issues in Criminal Justice* 283; Arie Freiberg and Felicity Stewart, *Provocation in Sentencing (Sentencing Advisory Council, 2nd ed, 2009)*.

<sup>40</sup> Kate Fitz-Gibbon and Sharon Pickering, 'Homicide law reform in Victoria, Australia: From provocation to defensive homicide and beyond' (2012) 52(1) *The British Journal of Criminology* 159, 175.

<sup>41</sup> Rebecca Bradfield, 'Contemporary Comment: The Demise of Provocation in Tasmania' (2003) 24 *Criminal Law Journal* 322.



### ***Summary of Recommendations***

This submission has recommended that provocation should be abolished as a partial defence to murder in South Australia. This is an essential and long overdue reform to bring the criminal law into line with community values and expectations of human behaviour and to prevent the list of injustices caused by the defence from lengthening.

In arguing for abolition of provocation, this submission recommends the following reforms to the criminal law in South Australia:

- 1) That the partial defence of provocation be abolished;
- 2) That a clear framework be established for the consideration of provocation in sentencing, including provisions, where appropriate, for culpability relating to lethal violence that is provoked be considered as a mitigating factor at sentencing for murder, rather than as an alternative verdict;
- 3) That any reform to the law of homicide should seek to simplify jury directions in homicide cases;
- 4) That a comprehensive review of the law of homicide and sentencing legislation for murder and manslaughter in South Australia be undertaken alongside the abolition of provocation.

I would strongly recommend that this reform should be undertaken as a package, rather than adopting one recommendation in isolation. As noted throughout the submission the unintended consequences of piecemeal reform are well documented in other jurisdictions and should be used as a warning in South Australia.

From this, it is also recommended that a review is conducted five years following the implementation of reform to monitor the effects of reform and to ensure that the law is operating in practice in line with the original intent of the goals of the law reform package.

It is important that the current momentum to review the law is transferred into meaningful reform that will ensure that the injustices of the provocation defence do not continue to plague the South Australian criminal justice system.