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

Submission on the *Crimes Amendment (Provocation) Bill 2013*

Thank you for this opportunity to provide a submission on the exposure draft Bill; Crimes Amendment (Provocation) Bill 2013. Please find my submission attached which argues for the New South Wales Government to abolish provocation as a partial defence to murder as opposed to implementing the proposed draft Bill or the earlier recommendations of the Select Committee.

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

It is important that the current momentum to review and reform the law of provocation in New South Wales 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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Introduction and Relevant Research

My interest in reform to the law of provocation in New South Wales (NSW) 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. Specific to NSW, this included interviews conducted in 2010 and 2013 with the following legal stakeholders:

	Judicial Member (NSWSC)	Prosecutor (ODPP)	Defence Counsel	Policy Representative (Member of the Select Committee)
2010 interviews	8	5	8	0
2012/13 interviews	4	6	5	5
Total by Professional Role	12	11	13	5

In NSW, at the time of the 2010 interviews there had not been a review of the law of provocation for over 10 years. Consequently, there were no policy representatives interviewed at this point. In the 2012/13 interviews the 5 policy representatives were all members of the 2012 NSW Select Committee of the Parliamentary Inquiry into the Operation of the Law of Provocation. While the Inquiry was underway during the 2012/13 interviews, all NSW policy representative interviews took place following the release of the Select Committee's (2013) *Final Report*.

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.

In responding to the drafted *Crimes Amendment (Provocation) Bill 2013* this submission draws on this body of research. The submission argues that a preferable approach to reform would be to abolish provocation as a partial defence to murder and transfer any consideration of provocation to sentencing for murder. In making this recommendation the submission sets out a response to the exposure draft Bill and a brief response to the earlier recommendations of the Select Committee alongside a discussion of the dangers of retaining provocation. In the second half of the submission, a model through which provocation could be considered at sentencing is proposed.

1. Response to Crimes Amendment (Provocation) Bill 2013

While I commend the intent of the Government's proposed Bill, and the desire to restrict the provocation defence to not apply in several of the controversial contexts within which it has been previously raised, there are several aspects of the drafted partial defence of 'extreme provocation' which are concerning. In light of these, it is the argument of this submission that neither this approach, nor the Select Committee's earlier recommended approach, is preferable. It argued that provocation should be abolished as a partial defence to murder in NSW.

The Bill's requirement that the partial defence of 'extreme provocation' will only apply where the conduct of the deceased amounted to a serious indictable offence (s23(2)(b)) significantly restricts the application of the defence and will likely ensure that it does not apply to homicides occurring in the context of sexual infidelity or relationship separation. Despite this welcomed restriction, when considered more broadly this restriction is likely to be highly problematic in practice for several reasons.

Limiting the provocative conduct to a serious indictable offence will undoubtedly present significant barriers for persons who kill in response to prolonged family violence and are unable to raise a complete defence of self-defence. If these defendants, often female, are able to prove a serious indictable offence then they should be able to access a complete defence to murder as opposed to a partial defence. Where unable to meet this requirement, however, under the new legislation such defendants would be unable to raise self-defence or a partial defence of provocation. For this reason, the draft Bill is unlikely to protect the very category of defendant for whom the Select Committee recommended retaining provocation for. With this in mind, it is important to question for what purpose the defence is being retained. The criminal justice system in NSW would be better served by abolishing provocation and considering the effect of any provocative conduct in sentencing for murder where a clear framework of mitigation could be provided for persons who kill in response to family violence.

Beyond persons who kill in response to prolonged family violence, the draft provisions arguably restrict the defence to the point of redundancy. In the period January 2005 to June 2013 there were 18 convictions finalised in the NSW Supreme Court for manslaughter by reason of provocation (see Appendix A for a list of cases). Of the 18 convictions, half resulted from a non-violent confrontation between the defendant and the victim. Under the new provisions these cases would be unable to raise a partial defence of provocation. Two of the remaining nine cases involved a female defendant who killed an abusive male partner.¹ In the circumstances immediately surrounding the female's use of lethal violence the level of threat posed by the male victim, according to the sentencing judgment, would not have reached the categorisation of a serious indictable offence. Under the proposed draft Bill it is somewhat unclear when the 'serious indictable offence' will be required to have occurred and hence the applicability of prior incidents of assault in these two cases is unknown. It is thus unclear what offence, if the draft exposure Bill were implemented, these two female defendants would be convicted of and the how the provocative conduct would mitigate culpability.

¹ *R v Joyce Mary Chant* [2009] NSWSC 593 (26 June 2009); *R v Russell* [2006] NSWSC 722 (21 July 2006).

Two additional cases during this period also occurred in the context of an alcohol-fuelled confrontation between the offender and the victim, hence under the new provisions (specifically Section 23(5)) it is unlikely that a partial defence of provocation would be successful in these cases.² Consequently, as this broad analysis reveals, under the new provisions the restricted defence would not apply to many of the cases that have given rise to a conviction for provocation in the last eight years. While in several of these cases this is a welcomed development, it does also raise the question of why the government should not go one step further and abolish provocation altogether.

Additionally, in raising the bar as to what conduct on the part of the victim constitutes 'extreme provocation' the revised law is likely to increase the incentive for defence counsel to focus upon the conduct of the deceased victim. Victims being 'put on trial' and the resulting narratives of victim blame have been a central concern in the operation of the partial defence of provocation. This legislation fails to address and/or overcome that concern.

By its very design the law of provocation encourages the legal delegitimisation 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 is put on trial in cases where this partial defence is raised. A highly problematic trend that is well established and critiqued in research,³ 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 NSW. Retention of the defence fails to overcome this key problem in its operation.

2. The dangers of retaining provocation

This section of the submission highlights why retaining provocation with amendments as proposed by the Government and the Select Committee is not a preferable approach to reforming the law of provocation and should not be adopted in NSW. While it is appreciated that there are important differences between the two proposals for reform, in retaining this controversial partial defence to murder both will leave the law of homicide in NSW open to further manipulation and unintended use.

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

² *R v Lynch* [2010] NSWSC 952 (15 September 2010); *R v Jeffrey Dunn* [2005] NSWSC 1231 (13 September 2005).

³ 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).

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. Whilst it is accepted that the unintended effects of any reform cannot be anticipated, retaining provocation 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 reform that seeks to retain the defence and in so doing anticipate how new provisions could be used in the future.

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 ultimately 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. Both the Government and the Select Committee noted the importance of the English experience and lesson learnt from this comparative jurisdiction's approach to reforming the law of provocation.

The 2010 English 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.⁴

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 by the jury.⁵ 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.⁶ 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:

⁴ Ministry of Justice. *Murder, Manslaughter and Infanticide: Proposals for Reform of the Law – Summary of Responses and Government Position* (2009).

⁵ *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.

⁶ The jury were, however, instructed that they could consider a partial defence of diminished responsibility.

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'.⁷ 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 NSW to steer clear of implementing this model of reform. The Government's desire to remove ambiguities in the language of legislation, such as the Select Committee's recommendation that 'gross' provocation be required, is supported for this reason. However, the *Clinton* experience also highlights why it is difficult to anticipate how the Government's reforms will be used following implementation and to what contexts of homicides it will apply. It also 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.

I would urge the Government to heed strong warnings from England and Wales and favour abolition of the partial defence of provocation.

3. 'Social Framework Evidence' Reforms

The *Final Report* of the Select Committee released in April 2013 highlighted the importance of 'social framework evidence' and ensuring that there are specific provisions legislated to allow this type of evidence to be adduced in homicide trials (see Chapter 8 of *Final Report*, 2013). Specifically, Recommendation 2 of the *Final Report* provided that 'the NSW Government introduce an amendment similar to section 9AH of the *Victorian Crimes Act 1958*, to explicitly provide that evidence of family violence may be adduced in homicide matters' (p.186). While this evidentiary reform can be beneficial for a range of defendants, the introduction of 'social framework evidence' provisions are specifically targeted at ensuring that persons who kill in response to family violence are able to introduce evidence related to the history of violence and their prior circumstances. This is an important reform to ensure that the law is able to adequately understand the circumstances and context within which such persons commit lethal violence.

⁷ 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.

This is an essential recommendation from the Select Committee that is missing from the Government's exposure draft Bill. It is recommended that this current exclusion is reconsidered and if implemented, the exposure draft Bill be redrafted to include 'Social Framework Evidence' provisions. This will be particularly important in light of the need for persons who kill in response to prolonged family violence to show that the conduct of the deceased amounted to a serious indictable offence. Without the Select Committee's previously recommended evidence reforms battered women who kill will undoubtedly face significant barriers in meeting this requirement of the reformed defence.

4. Transferring provocation to sentencing for murder

This submission strongly recommends that provocation be abolished as a partial defence to murder in NSW and that any consideration of provocation should 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 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 intent to kill in provocation killings has been previously noted by law reform commissions.⁸ Most notably in 2002 the Victorian Law Reform Commission questioned why provoked 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?⁹

The importance of adequately recognising the 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.¹⁰

⁸ New Zealand Law Commission, *The Partial Defence of Provocation*, Report 98 (2007), Victorian Law Reform Commission, *Defences to Homicide Issues Paper* (2002).

⁹ Victorian Law Reform Commission, *Defences to Homicide Issues Paper* (2002), 67.

¹⁰ Honourable J Jackson, *Tasmanian Parliamentary Debate*, House of Assembly, 20 March 2003, 59.

Abolishing provocation and transferring it to sentencing provides a direct response to this 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).

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'.¹¹ 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'.¹² 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.¹³ 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 Sheehy, Stubbs 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.¹⁴ In considering this in the NSW 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 NSW and the largely discretionary approach to sentencing for murder, it is strongly believed that the concerns expressed in the NZ context could be protected against if provocation were abolished in NSW.

It is also important to note that the bulk of criticism levied at the 2005 Victorian homicide law reforms by academics and in media commentary 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.¹⁵ As such, NSW should not shy away from abolishing provocation on the basis of lessons learnt from

¹¹ Law Reform Commission of WA, *Review of the Law of Homicide: Final Report*, Project 97 (2007) 220.

¹² NZ Law Commission, *The Partial Defence of Provocation*, Report 98 (2007).

¹³ VLRC, *Defences to Homicide: Final Report* (2004) 58, Recommendation 1.

¹⁴ 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.

¹⁵ See, for example, 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).

this jurisdiction, as this aspect of the reforms has not been the point of critique. What NSW can take from the Victorian experience, however, 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.¹⁶

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. This submission will address both of these points.

a) 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.¹⁷ 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 in NSW – such as the 2012 *Singh*¹⁸ and *Won*¹⁹ cases - 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 – Chamaniot Singh – successfully raised provocation after he slit his wife's throat with a box cutter in their shared home

¹⁶ 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).

¹⁷ 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.

¹⁸ *Singh v R* [2012] NSWSC 637 (7 June 2012).

¹⁹ *R v Won* [2012] NSWSC 855 (3 August 2012).

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?'²⁰ 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'.²¹

Undoubtedly, the jury input in *Singh* served to undermine community confidence in the NSW criminal 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?²²

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.

b) The Stewart and Freiberg model for provocation in sentencing

In transferring provocation to sentencing, NSW could learn from the detailed framework formulated in the wake of the Victorian reforms by Stewart and Freiberg.²³

²⁰ NSWSC Transcript of *R v Chamanjot Singh*, per Mr Leask, at 390.

²¹ 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.

²² Evidence to Select Committee on the Partial Defence of Provocation, NSW, 21 September 2012, 25 (The Hon. Helen Westwood).

²³ 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).

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.²⁴

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.²⁵ 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.²⁶

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.²⁷

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.²⁸ 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.²⁹

²⁴ Geoff Wilkinson, 'No L Let-off for Wife Killers: Report Urges Judges to Ignore Provocation', *Herald Sun* (Victoria), 7 February 2008, 23.

²⁵ Arie Freiberg and Felicity Stewart, *Provocation in Sentencing* (Sentencing Advisory Council, 2nd ed, 2009) s 1.1.10.

²⁶ Arie Freiberg and Felicity Stewart, 'Provocation in Sentencing: A Culpability-Based Framework' (2008) 19(3) *Current Issues in Criminal Justice* 283, 294.

²⁷ *Ibid.*

²⁸ 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).

²⁹ 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.

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 NSW is also established and implemented. This will ensure that reform of the law of provocation in NSW 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.

c) The influence of standard non parole periods for murder in NSW

The influence of the standard non parole periods for murder in NSW since their February 2003 introduction are undoubtedly concerning and highlight the need for a definite system through which provocation would be considered post-abolition in NSW. Since their introduction, and despite the High Court's decision in *Muldrock*,³⁰ the provision of standard non parole periods have significantly increased the minimum terms of imprisonment imposed for persons convicted of a serious offence in NSW.

Given that there is no standard non-parole period legislated for manslaughter, a transfer of cases that may otherwise have been considered manslaughter by reason of provocation to sentencing for murder is likely to have significant implications in terms of sentence length if not accompanied by a clear framework of how provocation should be taken into account as mitigating at sentencing. Whilst this is certainly an issue of concern, it does not present a problem without solution. It merely highlights the need for a transparent framework through which provocation can be considered at sentencing. Such a framework is proposed in the following section of this submission.

d) Guideline judgments

It is proposed that alongside the abolition of provocation, any consideration of provocation in sentencing for murder in NSW could be achieved through the development of specific guideline judgments for what have historically been the common scenarios of provoked lethal violence in this jurisdiction. In the period post-abolition, members of the NSW Supreme Court judiciary would be able to rely upon these judgements to provide standard guidance on how the issue of provocation should be accounted for in sentencing for murder. This would ensure consistency in sentencing post-reform.

Guideline judgments in NSW are legislated for under s 36–41a of the *Crimes (Sentencing Procedures) Act 1999* (NSW). A guideline judgment can be produced if the Attorney General applies for one or if the Court of Criminal Appeal issues one on its own motion.³¹ S 36 of the *Crimes (Sentencing Procedure) Act 1999* defines

³⁰ *Muldrock v R* [2011] 244 CLR 120 (5 October 2011).

³¹ Unlike in England and Wales, where the Sentencing Guidelines Council produces guideline judgments, in NSW the Sentencing Council is not permitted to issue guideline judgments. For a discussion of this, see John Anderson, 'Standard minimum sentencing and guideline judgments: An uneasy alliance in the Way of the future' (2006) 30 *Criminal Law Journal* 203, 221.

guideline judgments as ‘a judgment that is expressed to contain guidelines to be taken into account by courts sentencing offenders’. The legislation also sets out that guideline judgments can be applied to a particular court, offence or class of offender.

Guideline judgments are intended to ensure consistency in sentencing whilst still allowing individualised justice to be attained on a case-by-case basis. Importantly, guideline judgments are not intended to ‘straight jacket’ or ‘control judicial discretion’ rather they are a form of assistance and ‘structuring’,³² which in an area of the law as controversial as the partial defence of provocation should be viewed as welcomed assistance. As noted by the Honourable JJ Spigelman:

They are not precedents that must be followed. They represent a relevant indicator for the sentencing judge. They are not intended to be applied to every case as if they were binding rules. The sentencing judge retains his or her discretion both within the guidelines as expressed, but also the discretion to depart from them if the particular circumstances of the case justify such departure.³³

As part of the flexibility that judges have to move within and beyond the guideline judgment, and as alluded to in the above quotation, the legislation permits departure from the guideline judgment although it is recommended that any departure be justified by the sentencing judge within the given sentencing remarks.

Drawing from an analysis of the operation of the partial defence of provocation in NSW in the period 1 January 2005 – 31 August 2012 (as detailed in Appendix A), it is proposed that there are six key scenarios in which provocation is successfully raised in NSW, and for which guideline judgments would need to be formulated post-abolition. These scenarios are listed in the table below and include footnote references to the cases that would have likely fallen into each of the scenarios for the period studied. Importantly, of the 18 cases where provocation was successfully raised during this period all are accounted for within these six scenarios of provoked lethal violence.

Table: Scenarios of provoked lethal violence in NSW

Scenario	Guideline judgment should be formulated on the directive that -
Scenario 1: Intimate partner homicide perpetrated in response to actual (or alleged) sexual infidelity, relationship separation, threat of a change in the nature of the relationship, or verbal taunt. ³⁴	In such cases, provocation should not be considered mitigating at sentencing for murder.
Scenario 2:	The provoking conduct at sentencing does not need to

³² John Anderson, ‘Guideline judgments and standard minimum sentencing – an uneasy alliance in the way of the future’ *Paper presented at the Sentencing: Principles, Perspectives and Possibilities conference* (Canberra, 10-12 February 2006) 1. See also Nicholas Cowdrey QC, ‘Guideline Sentencing: A prosecution perspective’ (1999) 11 *Judicial Officers’ Bulletin* 2.

³³ The Hon JJ Spigelman, ‘Sentencing guideline judgments’ (1999) 73 *Australian Law Journal*, 876, 877.

³⁴ In the period studied, the cases of *Singh*; *Regina v Stevens* [2008] NSWSC 1370 (18 December 2008); *R v Hamoui* [no 4] [2005] NSWSC 279 (15 April 2005) would likely fall into this category.

Lethal violence committed in response to prolonged family violence or in response to violence constituting serious criminal conduct. ³⁵	<p>have occurred in the period immediately prior to the lethal violence for the judge to consider it, but in some cases it may have.</p> <p>In cases where the provoking family violence or violent criminal conduct is particularly grave and/or prolonged, the judge should depart significantly from the standard non-parole period for murder and impose an exceptionally mitigated sentence that falls outside the usual range of sentences for murder, and more closely aligns with the lower range of sentences imposed for manslaughter.</p>
Scenario 3: Lethal violence committed in response to the victim's sexual involvement with the offender's intimate partner (current or estranged). ³⁶	In such cases, provocation should not be considered mitigating at sentencing for murder.
Scenario 4: Lethal violence committed in response to an alcohol-fuelled confrontation between the deceased and the offender. ³⁷	<p>This scenario should include a directive that where a person is intoxicated at the time of the act or omission causing death, and the intoxication is self-induced, loss of control caused by that intoxication or resulting from a mistaken belief occasioned by that intoxication, is to be disregarded.³⁸</p> <p>The degree to which provocation should be considered mitigating should be taken into account in determining the appropriate sentence as outlined in the <i>Crimes (Sentencing Procedure) Act 1999</i> (NSW) s 21A (3)(c).</p>
Scenario 5: Lethal violence committed in response to a non-violent confrontation between the victim and offender. ³⁹	In line with the gross provocation model proposed by the Inquiry, provocation should not be considered mitigating in cases where the provoking act was words alone or a non-violent sexual advance.
Scenario 6: Lethal violence committed in response to a violent confrontation between the victim and offender. ⁴⁰	<p>Consideration in sentencing should be given to whether the offender intended to kill the deceased or to cause the deceased grievous bodily harm.</p> <p>The degree to which provocation should be considered mitigating should be taken into account in determining the appropriate sentence as outlined in the <i>Crimes</i></p>

³⁵ In the period studied, the cases of *R v Joyce Mary Chant* [2009] NSWSC 593 (26 June 2009); *R v Russell* [2006] NSWSC 722 (21 July 2006); *R v Gabriel* [2010] NSWSC 13 (4 February 2010); *R v Beau Steven Mitchell* [2008] NSWSC 320 (18 April 2008); *Regina v Mohamad Ali* [2005] NSWSC 334 (18 April 2005) would likely fall into this category.

³⁶ In the period studied, the cases of *Won*; *Regina v Munesh Goundar* [2010] NSWSC 1170 (5 November 2010); *Regina v Ronnie Phillip Lovett* [2009] NSWSC 1427 (2009) would likely fall into this category.

³⁷ In the period studied, the cases of *R v Lynch* [2010] NSWSC 952 (15 September 2010); *R v Jeffrey Dunn* [2005] NSWSC 1231 (13 September 2005) would likely fall into this category.

³⁸ This provision is taken from the model of reform proposed by the Honourable James Wood AO QC, as detailed in Appendix B of the *Consultation on Reform Options*. See Select Committee on the Partial Defence of Provocation, NSW, *Consultation on Reform Options* (2012) 1, 5.

³⁹ In the period studied, the case of *R v Frost* [2008] NSWSC 220 (17 March 2008) would likely fall into this category, as well as several of the cases listed under the first scenario involving a male perpetrated intimate homicide.

⁴⁰ In the period studied, the cases of *R v Mark Allan Forrest* [2008] NSWSC 301 (4 April 2008); *R v Berrier* [2006] NSWSC 1421 (21 December 2006); *R v Ari Hayden Bullock* [2005] NSWSC 1071 (21 October 2005) would likely fall into this category as well as several of the cases listed under the second scenario.

In addition to the directives listed for each of the scenarios in the table above, the guideline judgments for these six scenarios of provoked lethal violence should also be developed with reference to the three relevant factors established by Chief Justice Hunt in *R v Alexander*.⁴¹ In *Alexander*, Hunt CJ listed three factors relevant to determining an offender's level of culpability in provocation cases. These were:

- (1) the degree of provocation offered (or, alternatively, the extent of the loss of self-control suffered), which when great has the tendency of reducing the objective gravity of the offence;
- (2) the time between the provocation (whether isolated or cumulative in its effect) and the loss of self-control, which when short also has the tendency of reducing the objective gravity of the offence; and
- (3) the degree of violence or aggression displayed by the prisoner, which when excessive has the tendency of increasing the objective gravity of the offence.⁴²

These factors have been widely cited throughout NSW provocation case law and could be transferred to sentencing for murder where the guideline judgements would direct the presiding judge to consider the three factors as listed in *Alexander*. These factors would assist a judge in determining the extent to which the sentence imposed for murder should be mitigated below the standard non-parole period.

Beyond these three factors, in developing the guideline judgments, NSW should also draw from the framework of provocation in sentencing proposed by Stewart and Freiberg.⁴³ This framework could be used to further inform the development of the six guideline judgments for considering provocation in sentencing for murder. As discussed above, Stewart and Freiberg's recommendation that provocation relating to a victim exercising their equality rights should not serve to reduce an offender's level of culpability at sentencing should be included within the guideline judgment for Scenario 1 (see *above Table*) to provide a clear justification for why provocation should not be considered a mitigating factor at sentencing in these cases.

5. The need for 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 that are implemented in NSW. For this reason, I strongly support the Government's recommendation that included in any reform to the law of provocation in NSW be a clear directive that the law of homicide, and the effects of the reforms, be monitored and evaluated five years after their implementation. The fact that a comprehensive review of the law of

⁴¹ *R v Alexander* [1994] 78 A Crim R 141

⁴² *Ibid* 144.

⁴³ 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); Arie Freiberg and Felicity Stewart, 'Beyond the Partial Excuse: Australasian Approaches to Provocation as a Sentencing Factor' in Julian Roberts (eds), *Mitigation and Aggravation in Sentencing: A Socio-legal Analysis* (Cambridge University Press, 2011) 102.

homicide and all homicide defences has been proposed is a definite strength of the proposed reforms.

However, it could also be questioned whether it is necessary, and indeed desirable, to wait five years for this comprehensive review of the law of homicide in NSW to take place. At present in NSW there are several aspects of the law of homicide that is under scrutiny (including most recently the law's response to 'one punch' killings). Consequently it would timely for the NSW Law Reform Commission to conduct an indepth review of legal responses to lethal violence in NSW. By reconsidering the operation and viability of all defences to murder alongside a review of current practices, a comprehensive approach to reform would be of clear benefit to the NSW criminal justice system.

Summary of Recommendations

This submission has recommended that provocation should be abolished as a partial defence to murder in NSW and that the proposed exposure draft Bill should not be implemented. Abolition of the provocation defence is an essential and long overdue reform to bring the criminal law in NSW into line with community values and expectations of human behaviour and to prevent the list of injustices caused by the partial defence from lengthening.

In arguing for abolition of the partial defence of provocation, this submission recommends the following reforms to the criminal law in NSW:

- 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 by way of guideline judgments, where appropriate, for culpability relating to lethal violence that is provoked to 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.

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

APPENDIX A

Table: Convictions for manslaughter by reason of provocation in New South Wales
1 January 2005 to 30 June 2013

Defendant Name	Year	Verdict /Plea	Defendant Sex	Victim Sex	Relationship between victim and defendant	Provocative Incident – general category
Butler	2012	Plea	Female	Male	Victim was a prostitution client of the offender.	Non-violent confrontation
Won	2012	Verdict	Male	Male	Victim was in a sexual relationship with the offender's estranged wife.	Non-violent confrontation
Singh	2012	Verdict	Male	Female	Married	Non-violent confrontation
Goundar	2010	Verdict	Male	Male	Victim was in a sexual relationship with the offender's estranged wife.	Planned confrontation ⁱ
Lynch	2010	Plea	Male	Male	Acquaintances	Violent confrontation
Gabriel	2010	Verdict	Male	Female	Married	Violent confrontation
Lovett	2009	Verdict	Male	Male	Victim was in a sexual relationship with the offender's estranged wife.	Non-violent confrontation
Chant	2009	Plea	Female	Male	Married	Violent confrontation
Stevens	2008	Plea	Male	Female	Defacto Relationship	Non-violent confrontation
Mitchell	2008	Plea	Male	Male	Acquaintances	Violent confrontation
Forrest	2008	Plea	Male	Male	Acquaintances	Violent confrontation
Frost	2008	Plea	Male	Female	Divorced	Non-violent confrontation
Berrier	2006	Verdict	Male	Male	Acquaintances	Violent confrontation
Russell	2006	Plea	Female	Male	Defacto Relationship	Violent confrontation
Bullock	2005	Verdict	Male	Male	Acquaintances	Violent confrontation
Dunn	2005	Verdict	Male	Female	Close acquaintances (lived together)	Non-violent confrontation
Ali	2005	Verdict	Male	Male	Former acquaintances	Violent confrontation
Hamoui	2005	Verdict	Male	Female	Estranged girlfriend	Non-violent confrontation

ⁱ In the case of *Goundar* the defendant had planned for his wife to bring the victim, his best friend, to the marital home she shared with the defendant. The defendant was aware that the victim and his wife had been involved in a sexual relationship prior to this incident. The defendant was sentenced on the basis that he had become provoked upon realising that the victim intended to have sexual intercourse with his wife and that this realisation was further heightened by cultural factors (see *Regina v Munesh Goundar* [2010] NSWSC 1170, at 59).