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Select Committee on the Partial Defence of Provocation  
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Dear Committee Members

#### RESPONSE TO OPTIONS PAPER ON THE PARTIAL DEFENCE OF PROVOCATION

Thank you for the opportunity to appear before the Select Committee on the Partial Defence of Provocation (the Committee). In this letter the Inner City Legal Centre offers comments on the options proposed in the Committee's options paper dated 14 September 2012 (the Options Paper) and responds to the questions on notice and supplementary question directed at us.

*The Inner City Legal Centre is a community legal centre in Kings Cross that provides legal assistance to socially and economically disadvantaged clients in the Inner City of Sydney. The Inner City Legal Centre also provides a specialist state-wide legal service to people who identify as lesbian, gay, bisexual, transgender and intersex. Our service includes legal advice on criminal matters and our clientele includes those who are victims of domestic violence.*

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## Summary

- As per our previous submission to the Committee, we support the abolition of provocation, provided that the other homicide defences are reformed to adequately address the circumstances of victims of domestic or family violence who are charged with murder.
- We are wholly opposed to retention of the defence of provocation in its current form.
- If the Committee decides to retain provocation with amendment, we would observe that Option 1 as formulated in Appendix A to the Options Paper, with a minor amendment, is an acceptable potential alternative to abolition. We prefer this model on the basis that it would lead to a better outcome for victims of domestic violence, and avoid the use of the provocation defence to justify (a) 'gay panic' in response to non-violent sexual advances; and (b) relationship breakdown cases such as *Singh*<sup>1</sup> and *Ramage*.<sup>2</sup> However, we do hold some concerns about this model which we discuss further below.

## Abolish provocation

For the reasons set out in our submission to the inquiry dated 23 August 2012, we support and recommend the abolition of the defence of provocation. Provocation has led to unjust outcomes, particularly in cases where partners are killed in response to an alleged infidelity or relationship breakdown (**relationship breakdown cases**), and in cases of 'gay panic' in response to a non-violent sexual advance (**homosexual advance cases**). Any abolition of the partial defence of provocation ought to take into account the implications for victims of domestic or family violence. For this reason the abolition of provocation should be implemented in conjunction with reforms to the other defences to murder, particularly self-defence, to allow for circumstances of domestic violence to be taken into account. Once reformed, these other defences should provide adequate grounds for mitigating the punishment faced by people with reduced culpability who kill in the context of domestic violence. We support the submission made by Women's Legal Services NSW for a comprehensive and holistic review into NSW homicide defences.

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<sup>1</sup> *Singh v R* [2012] NSWSC 637.

<sup>2</sup> *R v Ramage* [2004] VSC 508.

### **Retain provocation without amendment**

It follows from the above that we oppose the retention of provocation without amendment. As we have set out in our previous submission, the law as it stands is giving rise to manifestly unjust outcomes.

### **Retain provocation with amendment**

Whilst our recommendation is for the abolition of the defence of provocation, we provide the following comments on the options set out in the Options Paper. In general we prefer the conduct-based approach which circumscribes the conduct that warrants use of the provocation defence and excludes its use in relationship breakdown cases and homosexual advance cases.

#### ***Option 1: 'Positive restriction' model – violent criminal conduct / family violence***

This model provides the opportunity to significantly circumscribe the availability of the defence to only those circumstances involving a response to violent crime or family violence.

This model has the following advantages:

- It eliminates the opportunity to put forward a 'gay panic' defence in circumstances involving a non-violent sexual advance since violence is a precondition to the availability of the defence.
- It enables victims of family and domestic violence to rely upon the defence but denies it to perpetrators of family or domestic violence who claim they acted in retaliation to a partner's decision to leave or alter the nature of a relationship.

However, there is a major difficulty with this model: defining the conduct which the provocation defence ought to be restricted to. In the formulation of Option 1 in Appendix A to the Options Paper there is ambiguity around the meaning of "violent criminal acts" (subsection (2)(a)). This phrase is not used nor defined in any of the crimes legislation in NSW, and there is no judicial interpretation of the phrase in NSW case law. "Violent offence" is alluded to in s 138 of the *Crimes (Administration of Sentences) Act 1999* (NSW) relating to release of an offender on parole. Section 138(1B) provides that, for the purposes of that section only, a "violent offender" means an offender who is serving a sentence for an offence involving violence against a person, including any type of sexual assault

referred to in clause 6 of Schedule 1 to the *Victims Support and Rehabilitation Act 1996*. "Serious offender" is defined in s 3 of the *Crimes (Administration of Sentences) Act 1999*, but this definition does not refer to "violent" criminal activity.

As there is no case law or statutory definition of this term, we are uncertain how a judge or jury would interpret it. With respect to the formulation put forward in Appendix A, we are concerned that the triggering violent behaviour should not be a minor or inconsequential assault. The degree of seriousness of the violent criminal conduct is not specified. Since subsection (3) of the Option 1 model in Appendix A maintains that there is no requirement of proportionality, we are concerned that "violent criminal acts" is too broad and indefinite.

For this reason we prefer the following formulation at s 23(2)(a):

"was an act or omission that constitutes serious violent criminal acts or acts which constitute domestic or family violence".

We endorse the submission of Women's Legal Services NSW that the use of the provocation defence should not be restricted to violent and criminal acts alone, since "violence" or "criminality" are not always apparent in situations of domestic violence, for the reasons set out in that submission. As such, we support the insertion of "acts which constitute domestic or family violence" in s 23(2)(a) of the Appendix A model.

We note that the model removes the 'loss of control' test and does not put forward a substitute test. Careful consideration would need to be given as to whether simply removing rather than replacing the test could give rise to any unintended consequences in terms of broadening the availability of the partial defence to circumstances where it was not intended to apply.

If the above formulation were adopted it would be appropriate to maintain current arrangements with respect to onus of proof. We are concerned that reversing the onus of proof would mean that a defence put forward by a victim of family violence would be unduly constrained, as discussed further below.

### ***Option 2: 'Exclusionary conduct' model***

In the event that the Committee cannot recommend the abolition of the defence of provocation then option 2 is also a viable model. We do, however, recognise the shortcomings in creating an exclusionary list as raised by the Hon Mr David Shoebridge at the select committee hearing of this inquiry (transcript p 30, 28/08/2012). Any model put forward should not enable a provocation defence to be entertained where the killing is a response to anything said or done to end or change the nature of a relationship or non-violent sexual to advance.

Option 2 is to be preferred to any model which would allow a defence based on either 'gay panic' or in response to a person ending or changing the nature of a relationship including the defence as it currently stands. It is noted that both options 1 and 2 do not entertain a defence based on either circumstance.

### ***Option 3: Wood model***

We do not support Option 3. We have identified a range of shortcoming with this model including the following:

- The model maintains the status quo with respect to homosexual advance cases. Although there are some exclusions listed in subsection (5), including for conduct that constitutes "sexual infidelity or a threat to end a domestic relationship", there is no exclusion for non-violent sexual advances.
- The model maintains the "loss of control" test and specifically excludes a "premeditated intention to kill". We submit that "loss of control" may not always be present in a situation where a "battered woman" kills a partner in the context of long-standing domestic violence. We do not support the loss of control test for the reasons given in the Women's Legal Services NSW response to the Options Paper.
- We are concerned with the removal of the ordinary person test for the reasons given in the Women's Legal Services NSW response to the Options Paper.

#### **Option 4: Gross provocation model**

We do not support Option 4. There are several difficulties with this model, as formulated in Appendix C to the Options Paper, including the following:

- The definition of the conduct that can give rise to provocation in subsection (2)(a), although it is narrower than the current law on provocation, is still too broad. The limiting phrase, "justifiable sense of being seriously wronged", is left open to the interpretation of the judge or jury.
- Subsection (4)(c) attempts to exclude the use of provocation on the basis of a change in the nature of a relationship or a non-violent sexual advance, *except* "in circumstances of a most extreme and exceptional character". This phrase is undefined. Arguably, there are extreme and exceptional circumstances to be found in any situation where murder is committed. Inserting this clause may undermine the effect of the exclusions and allow for the provocation defence to be relied upon in relationship breakdown cases and homosexual advance cases.
- Subsection (7) reverses the onus of proof. We oppose reversing the onus of proof in this model due to the challenges in adducing evidence in domestic violence cases, as discussed further below.

#### **Reversal of the onus of proof**

On the one hand, in homosexual advance cases and relationship breakdown cases, the onus on the prosecution to disprove provocation runs against the interest of justice for the (deceased) victim of homophobic violence or family violence respectively. On the other hand, in cases of homicide committed in the context of domestic violence, maintaining the onus on the prosecution runs in favour of the interests of justice since victims of domestic violence who stand accused of murder may find it difficult to adduce evidence of conduct amounting to provocation due to the nature of domestic violence. As set out in the Women's Legal Services NSW submission, domestic violence and sexual assault often go unreported for a range of reasons and can be difficult to prove in a court of law.

The best way to resolve this tension is to clearly remove the availability of the provocation defence in homosexual advance cases and relationship breakdown cases, while preserving the status quo with respect to the onus of proof.

## Response to questions on notice

- (a) *Response to the Hon Scot MacDonald's question: "[Y]ou have the more serious charge- for the rest of your life you are a murderer, not the committer of manslaughter. How do you feel about that?"*

We acknowledge the reality that for the offender convicted of murder they will carry with them a graver sense of culpability. The abolition of provocation for a community which cherishes the sanctity of life is a declaration that so-called provocative behaviour is not an acceptable excuse for homicide. Where there are genuine circumstances of reduced culpability (eg, in "battered woman syndrome" cases) then there needs to be an appropriate and adapted defence available such as the Victorian defence of defensive homicide.

- (b) *Response to the Hon Trevor Khan's question: "[B]y carving out specific areas in so many cases there is some further small amount of conduct that then brings in the previously excluded conduct. If you have the grabbing of a buttock associated with the sexual advance then the murder that follows is really no different in culpability from the one where there was not a grab on the butt or the thigh. I simply ask whether that is the way to proceed with this problem?"*

The abolition of the defence of provocation would address this problem. If provocation is to be retained with amendment we submit that a positive restriction model which allows the defence only where the conduct of the deceased was a serious violent criminal act or domestic or family violence, is the best way to mitigate against this problem. This is because the defence would thereby contain criteria which distinguish the conduct as more severe, namely, serious criminal violence or domestic or family violence.

- (c) *Response to the Hon Helen Westwood's question: "I do not know whether you have read the submission of the NSW Beat Project, but one of its suggestions is mandating jury warnings for hate-related crimes and sentencing enhancements. Have you considered that, or have you any thought on it?"*

The NSW Beat Project submission appears to be referring to the "court of morals" direction suggested in the *Homosexual Advance Defence: Final Report of the Working Party (HAD Working Party Report)*.<sup>3</sup>

The HAD Working Party Report stated:

6.11 In the Discussion Paper, the Working Party proposed a direction that should be given in any trial of a violent offence in which the unusual sexuality of the victim has been placed before the jury. The direction would be to the effect that jurors, as judges of the facts in the case, should come to their decision without reference to any personal sympathies or animosity they may have towards the victim or the accused. Furthermore, the directions should be to the effect that it is not for the jury to determine whether they think the behaviour of the victim is morally acceptable, but whether there is culpability on the facts.

6.12 The direction would be along the following lines:

You may conclude that the deceased's (or alleged victim's) behaviour and sexual orientation do not accord with those which you regard as morally acceptable. It is therefore important that you remember that this is a Court of Law and not a court of morals. Prejudice and emotion must have no place in a court of law. Everyone is equal before the law. So, on the question of sexuality, I direct you that a person's background is not of the slightest relevance. There should be no prejudice against the deceased (or alleged victim) or the accused on the basis of sexual orientation. You should decide the matters on the issues without prejudice and without empathy to the deceased (or alleged victim) or the accused.

6.13 A similar suggestion [25] was positively received in the submissions responding to the Discussion Paper. The Working Party understands that such a direction is already often given by many judges in such circumstances. The Working Party continues to support its inclusion in appropriate trials, and recommends that the Attorney General write to the Judicial Committee suggesting its inclusion in the Judges' Benchbooks as a standard direction available to them.

The HAD Working Party then recommended the following:

6.39 The Working Party believes that, as a first step, it is not inappropriate for the Attorney to seek to have the direction along these lines included in the Benchbooks. However, if the suggestion is rejected for whatever reason, there should be consideration given to legislative reform pertaining to the direction.

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<sup>3</sup> Working Party to the NSW Attorney-General (1998) *Homosexual Advance Defence: Final Report of the Working Party*.



6.40 Although it is a little uncommon for the legislature to mandate directions that are to be given by judges to juries in criminal trials, it is by no means unheard of. Since 1981, section 405B of the Crimes Act has required a warning from judge to jury in sexual assault trials once certain factual precondition exist. Similarly, in sections 114 and 165 of the Evidence Act, there are number of warnings that must be given in certain situations.

6.41 In Victoria, a trial judge must give a jury certain directions in the nature of a warning in sexual assault trials in which consent is an issue.

6.42 If the suggested direction is not utilised in appropriate cases by trial judges, the Working Party recommends that the Attorney consider the option of legislative reform requiring the giving of the "Court of Morals" direction.

The "court of morals" direction is suggested to judges in the Queensland Supreme Court Equal Treatment Bench Book.<sup>4</sup> It is also alluded to in the Supreme Court of NSW Equality Before the Law Bench Book,<sup>5</sup> which emphasises the need to make directions to ensure the issues are decided without prejudice to a person's sexuality.

In response to the HAD Working Party's recommendation, the NSW Criminal Trials Bench Book<sup>6</sup> suggests to judges that:

- In some cases, it may be appropriate to point out to the jury specific matters which may give rise to prejudice or sympathy in the jury's mind in respect of either the victim or the accused – including "sexual orientation of the accused, any witness or deceased, especially in cases of violence".
- In addition, it may be appropriate to point out to the jury that although the witness/deceased/accused's sexual orientation does not accord with what the jury might accept as morally acceptable, the case is not concerned with morality and the jury is not sitting as a court of morals, and that everyone should be treated as equal before the law.

<sup>4</sup> Supreme Court of Queensland (2005) *Equal Treatment Bench Book* at 253. Accessible online at: [http://www.courts.qld.gov.au/data/assets/pdf\\_file/0004/94054/s-etbb.pdf](http://www.courts.qld.gov.au/data/assets/pdf_file/0004/94054/s-etbb.pdf)

<sup>5</sup> Supreme Court of NSW (2006) *Equality Before the Law Bench Book* on p.8503 at 8.5.4. Accessible online at: <http://www.judcom.nsw.gov.au/publications/benchbks/equality>

<sup>6</sup> Supreme Court of NSW (2012) *Criminal Trial Courts Bench Book*. Accessible online at: [http://www.judcom.nsw.gov.au/publications/benchbks/criminal/the\\_jury.html#p1-580](http://www.judcom.nsw.gov.au/publications/benchbks/criminal/the_jury.html#p1-580)

- A trial judge's general powers and obligations under the common law to give appropriate warnings and directions to a jury also remain except where they have been limited in respect of the evidence of children by s 165A and in respect of forensic disadvantages suffered by a defendant because of delay by s 165B.

The seminal text on evidence law by Stephen Odgers<sup>7</sup> states:

Under the common law, [a trial judge's general powers and obligations to give appropriate warnings and directions] may be 'necessary to avoid the perceptible risk of miscarriage of justice arising from the circumstances of the case'.<sup>8</sup> This is a specific manifestation (at least in criminal proceedings) of 'the overriding duty of the trial judge ... to ensure that the accused secures a fair trial.'<sup>9</sup>

We note that the benefit of using the bench books is that they provide the opportunity to ensure that the language used in the jury warning is modern and in terms that the jury can readily comprehend. Already the language in the NSW Criminal Trials Bench Book around what is "morally acceptable" in connection with a person's "sexual orientation" is appearing dated and outmoded.

- (d) *Response to the Hon David Shoebridge's question: "Have any of you turned your minds to the way the plea of provocation works in practice, where the defendant basically gets a double discount? For example, in a homosexual advance defence, the defendant is charged with murder and early on tells the prosecution they would be willing to plead to manslaughter on the basis of provocation, and the prosecution will not accept the plea of manslaughter and they go to trial; then the defence is upheld, the person is convicted of manslaughter and gets a double discount on the penalty: one, because it is no longer murder, because they are being sentenced for manslaughter; but they also get the benefit of a 25 per cent discount on sentence because they have indicated an early plea to manslaughter. If you like, is it one of the reasons that sentences are so poorly reflecting community attitudes that there is a double discount?"*

We do not have any specific proposal with respect to double discounts, other than to note that any perceived problem would be avoided if the defence of provocation were abolished as we have recommended.

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<sup>7</sup> S Odgers (2010) *Uniform Evidence Law*, 9<sup>th</sup> ed.

<sup>8</sup> *Longman v The Queen* (1989) 168 CLR 79 at 86 per Brennan, Dawson and Toohey JJ.

<sup>9</sup> *Crofts v The Queen* (1996) 186 CLR 427 at 451.

**Supplementary question**

- (e) *Both of your submissions support an amendment to the legislation to exclude non-violent sexual advances as forming the basis of a provocation defence. The NSW Law Society in its submission opposes exclusion of specific categories of conduct from founding a provocation defence "because it would prevent proper consideration of the merits of individual cases." Do you have any comments in respect of that assertion?*

It is difficult to respond to the NSW Law Society's submission as it is unclear how the exclusion of non-violent sexual advances as the basis of a provocation defence would deprive the courts from the opportunity to hear and determine a case according to its merits. It would still be open to the court to determine on a merit basis whether there are any other circumstances warranting reliance on the provocation defence.

If we can be of any further assistance, please contact me or Lee Hansen our Principal Solicitor on 9332 1966.

Yours sincerely

**INNER CITY LEGAL CENTRE**

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