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Supplementary Submission
Response to Consultation on Reform Options Paper

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It is the argument of this submission, as well as previous submissions made by me to the Committee, that provocation should be abolished as a partial defence to murder in New South Wales (NSW) and that any consideration of provocation should be transferred to the sentencing stage of the criminal justice process. The following submission provides a detailed examination of how provocation could be abolished and transferred to the sentencing stage of the criminal process as well as a response to the other proposals for reform given in the *Consultation on Reform Options Paper*.

In implementing any reform the Committee should look towards research that has examined the effects of reforming, retaining and abolishing provocation in like jurisdictions.¹ This research provides valuable lessons on the outcomes of several divergent approaches to reform and also highlights some of the consistently emerging unintended consequences of those reforms. Whilst it is appreciated that several of these consequences are often unavoidable, an awareness of their influence in comparable jurisdictions could help shape a best practice model for addressing the provocation problem in NSW.

It is important to recognise that the bulk of the criticism that has been levied at the 2005 Victorian homicide law reforms by academics and in media commentary² has surrounded the introduction of a new offence of defensive homicide rather than the government's decision to abolish provocation as a partial defence to murder. As such, the Committee 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 the Committee can take from Victoria is that the creation of alternative categories of murder, such as a newly formulated partial defence or offence, can lead to unintended consequences that gravely undermine the goals of the law reform process.

1. Abolish provocation

The partial defence of provocation should be abolished. Over the last two decades a significant bank of scholarship has recognised that the law of provocation operates in an inherently gendered bias way that serves to partly legitimise the use of lethal violence by men who kill in the context of relationship separation or infidelity. The consequence of the successful use of provocation in such cases, as explained by Gorman (1999: 479) in relation to the Canadian context, 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.'

¹ See, for example, Clough 2010; Douglas 2012; Fitz-Gibbon & Stubbs 2012; Fitz-Gibbon & Pickering

² See, for example, Capper & Crooks 2010; Cleary 2006; Douglas 2010; Fitz-Gibbon 2012c; Fitz-Gibbon & Pickering 2012, Flynn & Fitz-Gibbon 2011; Howe 2010; Lowe 2010; Tyson 2011; Wilkinson & Crane 2012.

Furthermore, by its very design the law of provocation encourages the deligitimisation of the victim. In raising provocation the offender seeks to put the words or actions of the victim on trial in order to avail themselves of a murder conviction, often in situations where no one is able to contest their version of what occurred in the minute immediately prior to their use of lethal violence. As such, through the mobilisation of gendered stereotypes the characters of the, often female, victim of homicide has long been put on trial in cases where provocation is raised. A highly problematic trend that has been well established and critiqued in research.³ This trend of victim blaming is unavoidable in provocation cases and provides a central reason for why provocation should be abolished as a partial defence to murder.

Beyond these two key concerns, it is noted that several of the reasons to abolish provocation have been covered in other submissions made to the Committee⁴ as well as throughout research.⁵ Specifically, I would support the list of main arguments against the retention of provocation provided by the NSW DPP, Mr Lloyd Babb SC, in his submission to the Committee on 16 August 2012.

I am aware that the Committee has received submissions and heard during the Public Hearings from the Mr Lloyd Babb SC, as well as several representatives from the NSW defence bar. The opinions of these two, often conflicting, stakeholders have confirmed the findings of recent research examining legal stakeholder support for, or opposition to, the abolition of provocation in NSW (Fitz-Gibbon 2012b). In addition to the opinions of defence counsel and members of the ODPP, the research also sought the opinions of members of the NSW Supreme Court judiciary among which there were several participants who supported the abolition of provocation as a partial defence to murder in NSW. These judicial respondents believed that given the largely flexible sentencing practices for murder in NSW, as well as a need to recognise the intent present in these offences, that provocation should no longer reduce murder to manslaughter.⁶

The main argument posed against the abolition of provocation is that the partial defence is needed for women who kill in response to family violence but are unable to raise a complete defence of self-defence. Whilst it is appreciated that provocation has been used in this context – although it should be noted that in the last eight years there

³ See, for example, Morgan 1997; Naylor 2002; Tyson 1999; Wells 2000

⁴ See, submissions made by Graeme Coss (Submission 12), WDVCS NSW Inc. (Submission 16), Jaspreet Kaur (Submission 20), Homicide Victims Support Group (Australia) Inc. (Submission 25), Office of the Director of Public Prosecutions (Submission 34), Wirringa Baiya Aboriginal Women's Legal Centre (Submission 35), Inner City Legal Centre (Submission 38), Amy Fox et al (Submission 40), Redfern Legal Centre (Submission 42), ACON (Submission 43), OWDVN (Submission 45), Miss Natasha Godwin (Submission 46), Miss Lauren Blumberg (Submission 47), Australian Lawyers Alliance (Submission 48).

⁵ From a broad overview of debates surrounding the partial defence of provocation, see Fitz-Gibbon 2012b.

⁶ For a more detailed discussion of these findings see Fitz-Gibbon 2012a.

have only been two cases where a female defendant has raised provocation⁷ – it is proposed that the partial defences of substantial impairment and excessive self defence, as well as a reformed version of self-defence are better suited to this unique context of lethal violence. The Committee has been told during the public hearings, and in submissions, that women are reliant on provocation given the difficulties often faced when raising a complete defence, as such would it not be more appropriate to fix the source of the problem and reform self-defence rather than retain provocation for this singular reason.

Furthermore, by implementing a social evidence framework, similar to that introduced in 2005 in Victoria,⁸ women's experiences of violence in the domestic context could be better understood, heard and responded to within the confines of the criminal courts. As such, this evidentiary reform – alongside the implementation of reforms to the law of self-defence – would alleviate a key reason why many have argued that provocation should be retained.

In abolishing provocation another concern often raised in opposition is whether similar problematic narratives of victim blame will merely be displaced to the sentencing stage of the criminal process. The tendency for this to occur has been noted in research examining the Victorian context by Fitz-Gibbon and Pickering (2012: 175), who argued that:

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 narrative at the sentencing stage.

For this reason, alongside the abolition of provocation, it is essential that a clear framework for how provocation should be addressed at sentencing for murder also be implemented.

a. Transferring provocation to sentencing

A key concern often raised in response to proposals to abolish provocation relates to the adequacy of current sentencing structures for murder in NSW and the ability for provoked lethal violence to be adequately dealt with through differences in the sentence imposed rather than the verdict. This is particularly the case in NSW where the current structure for sentencing is somewhat restricted given the February 2003 introduction of standard non-parole periods for a variety of serious offences, including murder.⁹ Given that there is no standard non-parole period legislated for the offence of manslaughter in NSW, a transfer of cases that may otherwise have been

⁷ These cases were both resolved by guilty plea prior to trial. See *R v Joyce Mary Chant* [2009] NSWSC 593 and *R v Russell* [2006] NSWSC 722.

⁸ Implemented through s9AH(3) (a)-(f) *Crimes Act 1958* (Vic)

⁹ Implemented through Part 4, Div IA of the *Crimes (Sentencing Procedures Act) 1999*

considered manslaughter by reason of provocation to sentencing for murder is likely to have implications in terms of sentence length if not accompanied by a clear framework of how provocation should be considered at this phase of the criminal process. Whilst this is certainly an issue that would need to be attended to, alongside the abolition of provocation, it does not present a problem without solution. The consideration of provocation in sentencing for murder could be achieved in NSW through the careful development of specific guideline judgments for what have historically been the common scenarios of provoked lethal violence in NSW. These judgements would then be used in the period post-abolition to guide judges on how provocation should best be considered in sentencing for murder.

Drawing from a detailed analysis of the operation of provocation in NSW since 1 January 2005 to 31 August 2012, it is proposed that there are six key scenarios in which provocation is successfully raised, and for which guideline judgments could be formulated. 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. There were 17 cases where provocation was successfully raised during this period, all of which are accounted for within these six scenarios of provoked lethal violence.

Table 1: Scenarios of Provoked Lethal Violence in NSW

Scenario	Guideline judgment should be formulated on the directive that:
<i>Scenario 1:</i> 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. ¹⁰	In such cases, provocation should not be considered mitigating at sentencing for murder.
<i>Scenario 2:</i> Lethal violence committed in response to prolonged family violence or in response to violence constituting serious criminal conduct. ¹¹	For the judge to consider the provoking conduct at sentencing it does not need to have occurred in the period immediately prior to the lethal violence, but in some cases it may have. 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

¹⁰ In the period studied, the cases of *Singh, Regina v Stevens* [2008] NSWSC 1370, *R v Hamoui* [no 4] [2005] NSWSC 279 would likely fall into this category.

¹¹ In the period studied, the cases of *R v Joyce Mary Chant* [2009] NSWSC 593, *R v Russell* [2006] NSWSC 722, *R v Gabriel* [2010] NSWSC 13, *R v Beau Steven Mitchell* [2008] NSWSC 320 and *Regina v Mohamad Ali* [2005] NSWSC 334 would likely fall into this category.

	range of sentences for murder, and more closely aligns with the lower range of sentences imposed for manslaughter.
<i>Scenario 3:</i> Lethal violence committed in response to the victim's sexual involvement with the offender's intimate partner (current or estranged) ¹²	In such cases, provocation should not be considered mitigating at sentencing for murder.
<i>Scenario 4:</i> Lethal violence committed in response to an alcohol-fuelled confrontation between the deceased and the offender ¹³	In line with the Wood model (Appendix B) 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. The degree to which provocation should be considered mitigating should be taken into account in determining the appropriate sentence as outlined in s21A (3)(c) of the <i>Crimes (Sentencing Procedure) Act 1999</i> .
<i>Scenario 5:</i> Lethal violence committed in response to a non-violent confrontation between the victim and offender. ¹⁴	In line with the gross provocation model, provocation should not be considered mitigating in cases where the provoking act was words alone or a non-violent sexual advance.
<i>Scenario 6:</i> Lethal violence committed in response to a violent confrontation between the victim and offender. ¹⁵	Consideration in sentencing should be given to whether the offender intended to kill the deceased or to cause the deceased grievous bodily harm. The degree to which provocation should be considered mitigating should be taken into account in determining the appropriate sentence as outlined in s21A (3)(c) of the <i>Crimes (Sentencing Procedure) Act 1999</i> .

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 –

1. The three relevant factors established by Hunt CJ at CL in *R v Alexander*¹⁶
2. The extensive research conducted by Stewart and Freiberg in the Victorian context.

¹² In the period studied, the cases of *Won*, *Regina v Munesh Goundar* [2010] NSWSC 1170 and *Regina v Ronnie Phillip Lovett* [2009] NSWSC 1427 would likely fall into this category.

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

¹⁴ In the period studied, the case of *R v Frost* [2008] NSWSC 220 would likely fall into this category, as well as several of the cases listed under the first scenario involving a male perpetrated intimate homicide.

¹⁵ In the period studied, the cases of *R v Mark Allan Forrest* [2008] NSWSC 301, *R v Berrier* [2006] NSWSC 1421 and *R v Ari Hayden Bullock* [2005] NSWSC 1071 would likely fall into this category as well as several of the cases listed under the second scenario.

¹⁶ *R v Alexander* [1994] 78 A Crim R 141, hereinafter *Alexander*

In *Alexander*, Hunt CJ at CL 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.¹⁷

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 a judge to consider the three factors listed in *Alexander* - the degree of provocation, the time between the provocation and the loss of control (where relevant), and the degree of violence displayed by the offender. These factors would be considered 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 in the wake of the Victorian reforms by Stewart and Freiberg (2008, 2009, 2011). The Stewart and Freiberg framework has been praised by former Victorian Attorney-General Rob Hulls as providing 'an important resource' for sentencing in the wake of the abolition of provocation (Wilkinson 2008: 23). Stewart and Freiberg (2009) suggest that provocation should only be considered at sentencing 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. Specifically, they assert that:

Where the offender reacted 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. (Stewart & Freiberg 2008: 294)

Importantly, Stewart and Freiberg (2008, 2009) argue that this judgement should be made with consideration of society's common understandings and expectations of human behaviour and personal autonomy. This framework could be used to inform the development of the six guideline judgments for considering provocation in sentencing for murder.

Stewart and Freiberg (2008, 2009) also propose that provocation relating to a victim

¹⁷ *Alexander*, per Hunt CJ at CL: 144.

exercising their equality rights should not serve to reduce an offender's level of culpability at sentencing. This specific exclusion could be included within the guideline judgment for Scenario 1 (from *Table 1*) to provide a clear justification for why provocation should not be considered a mitigating factor at sentencing in these cases.

In terms of sentence length, Stewart and Freiberg (2008: 286) identified two potential impacts of transferring provocation to sentencing for murder: that abolishing provocation may 'result in a significant (upward) departure from previous sentencing practices for provoked killers'; or conversely that the prior average sentencing range for the offence of murder 'may experience a downward departure to reflect the incorporation of "provoked murderers"'. The LRCWA (2007: 221) also predicted that moving the consideration of provocation to sentencing would have disparate effects on the lengths of murder sentences:

in some cases an offender will receive a higher sentence than would have been imposed if the offender was convicted of manslaughter, but in some cases the offender will be sentenced leniently for murder ... Not all cases of provocation deserve leniency. A person who kills his wife after discovering she is having an affair is entitled to less mitigation than a person who kills his friend after discovering him sexually abusing his child.

In this respect, the development of six guideline judgments – as proposed in *Table 1* – would be crucial in NSW to assist members of the judiciary to differentiate between cases that do and do not warrant a degree of mitigation in sentencing for murder.

Transferring provocation to sentencing is an approach to reform that has been previously commended by other 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). The Law Reform Commission of WA 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' (Law Reform Commission of WA 2007: 220). In agreement, the NZLC (2007) 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'. Two years earlier, the VLRC (2004) 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. 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 NZ, what has rarely been the focus of criticisms since these reforms is the subsequent adequacy of sentencing for murder to account for provoked killings.¹⁸

¹⁸ Whilst it is recognised that research, including the extensive research conducted by Stubbs, Sheehy and Tolmie (2012), has noted concern over the adequacy of sentencing for murder in New Zealand post

As such, it is recommended that the Committee recommend abolishing provocation as a partial defence to murder and transferring any consideration of provocation to the sentencing stage. However, what it also recommended, and is perhaps more important, is that in abolishing provocation the Committee should develop a clear set of standards, in the form of guideline judgments, to guide the transfer of provocation to sentencing and to ensure that the gendered narratives and injustices that have become infamous at the trial stage are not permitted to continue in sentencing.

2. Retain provocation without amendment

It would be very disappointing if the Committee were to retain provocation without amendment. The recent decisions in *Singh*¹⁹ and *Won*²⁰, as well as those made more broadly in NSW provocation cases over the last 10 years, are highly concerning and provide ample evidence that at present the law of provocation in NSW is not operating as intended. These cases clearly highlight the inherent flaws in the design and operation of this partial defence to murder whilst also revealing how its successful use in unmeritorious cases provides a problematic legal legitimisation of lethal violence in a way that is vastly out of line with community expectations of justice.

3. Retain provocation with amendments

It is noted that the Committee has signalled three broad ways in which the provocation defence could be amended, and within this has specifically provided four different models for retaining provocation with amendments. The sub sections below address specific concerns emerging from each of these models, however, an overriding concern relevant to all proposals to retain provocation with amendments is that it is extremely difficult – if not impossible – to predict what the unintended consequences of a reformed partial defence of provocation will be. Whilst it is accepted that the unintended effects of any reform cannot be anticipated, retaining provocation in some form does allow 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.

a. Conduct Based Reform Option 1: ‘Positive restriction’ model – violent criminal conduct/family violence

abolition of provocation, this has been specifically in relation to battered women and focuses upon a jurisdiction where no other partial defences to murder currently exist and where there is a presumptive life sentence – neither of which are relevant to the NSW context.

¹⁹ *R v Singh* [2012] NSWSC 637, hereinafter *Singh*

²⁰ *R v Won* [2012] NSWSC 855, hereinafter *Won*

The conduct based reform proposal to restrict the provocation defence to only apply where the provoked violence is violent criminal conduct or family violence would appear at face value to have merit and for me, is certainly the more viable of the proposed options which retain provocation using a restriction or exclusionary model. However, when looking at recent homicide cases in Victoria it is apparent that at least one unmeritorious case, that of Luke Middendorp,²¹ would fit within the confines of this proposed defence. Given this it is certainly questionable how many other unanticipated cases would also fit within this reformed version of provocation.

The *Middendorp* case was heard in the Victorian Supreme Court in 2010 and resulted in a defensive homicide conviction for Luke Middendorp who had killed his former girlfriend, Jade Bownds. Middendorp was sentenced to 12 years maximum, with a non-parole period of 8 years.²² Middendorp stabbed Bownds multiple times in the back following a verbal argument during which he claimed that she approached and threatened him with a knife – it is this alleged conduct of the victim that I believe would allow a comparable case in NSW to problematically fall within the confines of this proposed reformed version of provocation.

The *Middendorp* case exhibited many of the problematic characteristics that have often been critiqued in provocation defences where successfully raised by a male offender who has killed a current or estranged female intimate partner. Middendorp had a history of violence towards his eventual victim, and indeed, at the time of her death Bownds had a domestic violence order (DVO) in place to protect herself from him. However, despite an uncontested history of domestic violence, throughout the trial there was an undertone of victim denigration that served to minimise the perceived seriousness of the lethal harm that had been perpetrated against Bownds. This is seen in the descriptors used to portray Bownds at trial, who was repeatedly described as a ‘truculent’ and ‘difficult’ woman by the defence, prosecution and judicial representatives involved in the case. In the defence’s closing address to the jury, he warned the jury that it is not in his nature to ‘speak ill of the dead but at times it is our duty to do so. This is one of those times’²³ – the defence counsel then went on to describe the victim as ‘obviously a very volatile person, who is quick to anger and physical violence’,²⁴ suggesting this as a justification for the use of lethal violence committed against her by a man nearly double her body weight.²⁵

²¹ *R v Middendorp* [2010] VSC 202, hereinafter *Middendorp*

²² To date this is the highest maximum sentence imposed in a defensive homicide case in Victoria.

²³ *Supreme Court Transcript of Luke Middendorp* 12/03/10, Address by Mr Walsh, at 515.

²⁴ *Supreme Court Transcript of Luke Middendorp* 12/03/10, Address by Mr Walsh, at 526.

²⁵ At the time of her death Jade Bownds weighed 50 kg, whilst Luke Middendorp (the defendant) weighed 99 kg.

The prosecution in *Middendorp* did attempt to overcome the denigration of the victim's character in his closing address by focusing the jury on the lethal violence perpetrated against her:

What's happened here is that an angry, aggressive man, and maybe he is dealing with somebody who is truculent, given to mouthing off and a difficult woman in that way, but so what? Who stabbed whom in this? Who finished up dead? The woman.²⁶

However, despite this, and in recognition of the victim denial that occurred throughout the trial, at sentencing the judge conceded that the verdict of defensive homicide might be partially representative of the jury's negative perception of the victim. Noting that, 'her reliability was put in doubt at the trial, and she, of course, not cross-examined. It may be that the jury were distrustful of her version of these earlier events'.²⁷ The mobilisation of such victim blaming narratives in the *Middendorp* case, as well as the offenders history of violence against his victim and the fact that his version of the fatal events were relatively uncontested at trial given that the only other person present at the time was the deceased, meant that this case differed little from those extensively critiqued during the operation of provocation in Victoria. Based on the case facts it appears that if the proposed Option 1 or Appendix A models were implemented in NSW then a Luke Middendorp type of offender would similarly enjoy an avenue to a conviction less than murder.

It is hoped that this is the type of case that the Committee would be looking to exclude from a reformed version of the provocation defence – an exclusion that would not be achieved under the Option 1 Positive restriction model or the Appendix A model.

b. Conduct Based Reform Option 2: 'Exclusionary conduct' model

Exclusionary conduct models, such as that proposed in Appendix B, are subject to judicial interpretation and manipulation, which in some cases can serve to undermine the goals for which the model was implemented. This concern is clearly evident in recent English case law relating to the 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.²⁸ At the time, in justifying this exclusion the Ministry of Justice (2009) commented that:

²⁶ *Supreme Court Transcript of Luke Middendorp* 12/03/10, Address by Mr Horgan, at 484.

²⁷ *Middendorp*, per Byrne J, at 7.

²⁸ *Coroners and Justice Act*: s. 55[6][c]

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.

Despite the inclusion of a 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.²⁹ 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 provocation 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.³⁰ Clinton was subsequently convicted 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' (Gibb 2012) and as such raises the fear that in practice this new partial defence will do little to overcome the problems associated with the now abolished provocation defence.

What *Clinton* also provides is a clear example of the ineffectiveness of exclusionary-based reform models, and as such, a warning to the Committee to steer clear of implementing this model of reform in NSW. Whilst it is appreciated that the model proposed by the Committee in the *Consultation on Reform Options Paper* differs to

²⁹ *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.

³⁰ The jury were, however, instructed that they could consider a partial defence of diminished responsibility.

the reforms implemented in England and Wales, the lessons learnt from this largely unsuccessful attempt at reform are still of high relevance to the NSW context.

c. Test based Reform Option, including Option 3: Wood model

The test based reform options proposed on page 1 of the *Consultation on Reform Options Paper*, as well as in the Wood model (Appendix B), do address important complexities in the current operation of the law of provocation in NSW. However, this approach to reform fails to address other key – and arguably more concerning – issues in the operation of provocation such as the inherent gender bias in its operation, the trend for victims to be ‘put on trial’ in cases where provocation is raised and the concerning successful use of the defence in male perpetrated intimate femicides. For this reason, it is argued that test based reform options in themselves are not sufficient for addressing the multitude of problems that are currently posed in the operation of provocation in NSW.

A particularly concerning aspect of the Wood model (Appendix B) is that the small number of exclusions included in section 5(a) and 5(b) of the model would still allow for cases where an intimate partner alleged that the provoking conduct was the words alone, including sexual taunts, of the deceased. Historically, this scenario has led to controversial convictions for manslaughter by reason of provocation in cases of male perpetrated intimate homicide, such as the 2004 Victorian *Ramage* case.³¹ Whilst the victim in *Ramage*; Julie Ramage, was in the process of leaving her estranged husband one of the key provocative conducts that he relied upon at trial was that in the period immediately prior to his use of lethal violence Julie had:

told you [Ramage] that she had had sleepovers and how much nicer then you the new an was, that they shared interests and he cared for her. She then said that sex with you repulsed her and screwed up her face and either said or implied how many better her new friend was.³²

If provocation is retained using the Wood model – (a reform option not recommended by this submission) – then this section of the model should be expanded upon so that section 5(b) excludes cases not only where the conduct of the victim constituted sexual infidelity or a threat to end a domestic relationship with that person, but also where the conduct of the victim was words alone. However, ultimately – and for the reasons outlined in the above examination of the exclusionary conduct models – it is doubtful how effective exclusionary models are in deterring cases such as *Ramage* and *Singh*.

³¹ *R v Ramage* [2004] VSC 508, hereinafter *Ramage*.

³² *Ramage*, per Osborn J at 22.

**d. Combination of Conduct and Test based reform options, including
Option 4: ‘Gross provocation’ model**

The combination reform option, including the ‘gross provocation’ model proposed in Appendix C, adopts many of the problems that have previously been identified in section 2(b) of this submission. A significant portion of the ‘gross provocation’ model given in Appendix C comprises a list of situations and contexts where the reformed partial defence of provocation should not apply. As discussed above, this exclusionary approach to reform is particularly vulnerable to manipulation. This is particularly so given that the model proposed in Appendix C clarifies that several of these exclusions can be considered in the ‘most extreme and exceptional’ contexts³³ - an inclusion that would be likely to open the defence up to the possibility of wider use and abuse.

In light of a dominant argument made to the Committee; that provocation should be retained as somewhat of a ‘safety net’ for women who kill in response to prolonged family violence, another concern that emerges from the model proposed in Appendix C is that its provisions may undermine the defence’s applicability to such cases. Section 4(c)(i) states that the partial defence should not apply to cases where an intimate relationship exists between the defendant and another person, except in the most extreme and exceptional circumstances. Whilst the clarification to include the ‘extreme’ and ‘exceptional’ cases may on face value appear to capture cases of lethal violence which is provoked by prolonged family violence, it should be hoped – and indeed achievable – that where the circumstances are extreme and exceptional, such women are able to raise a complete defence of self-defence. If this is not the case, than rather than capturing these women and convicting them of manslaughter – it is recommended that a far more satisfactory outcome would be to reform the law of self-defence to ensure that battered women who use lethal violence in cases involving ‘extreme’ and ‘exceptional’ circumstances are able to avail themselves of a complete defence of self-defence.

4. Additional Issues: Simplifying the law of provocation in NSW

It is concerning that several of the reforms proposed in the *Reform Options Paper*, particularly those which propose to retain provocation with amendments, would arguably serve to further complicate the current law of provocation in NSW. In its current form provocation has been critiqued because of its inherently complicated nature (see Fitz-Gibbon 2012b: 209-210). In interviews conducted in 2010 with members of the NSW ODPP, Supreme Court judiciary and defence counsel, the law of provocation was described as ‘a very complex issue’ and as including ‘very difficult concepts for a jury’. Building on this, one prosecutorial respondent in the study commented:

³³ See *Appendix C, 4c*.

The difficulty with provocation is to explain it to a jury ... one wonders just how much of it they really understand. There are a lot of lawyers who don't understand the rules so how do you expect a group of non-lawyers coming into court for the first time to understand it. It's really hard.

In agreement, a defence counsel respondent questioned, 'they are not lawyers, they've never been in a courtroom before and they've got to go through all these directions – how can juries possibly take it all on?' These opinions are also evident in past reviews of the provocation defence in comparable jurisdictions (NZLC 2007; Tolmie 2005) and in NSW case law, where in 2001 Justice Smart commented that the ordinary person test in the provocation defence had:

...proved hard to explain to a jury in terms, which are intelligible to them ... juries struggle with the distinction and find it hard to grasp. Many do not do so. The directions on provocation and the distinction frequently lead to a series of questions indicating that these issues are causing difficult, prolonged deliberation by juries.³⁴

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 Committee have been given the opportunity to recommend 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 also simplify it. This would ensure that in its future operation it could be better understood and more accurately applied by juror members.

Conclusion

This submission has favoured the abolition of provocation as a partial defence to murder and has pointed to several concerns emerging from the proposed reforms that seek to retain provocation with varying amendments. In doing so, this submission has pointed to individual cases from comparable jurisdictions that would still be able to raise a partial defence of provocation if several of the proposed models for reform were implemented in NSW. Whilst on an individual scale the one-off case may not appear to pose a substantial criticism to the proposed model, these cases should provide a serious warning that merely amending the provocation defence – rather than abolishing it – carries the serious risk that the defence will continue to be abused.

Recent case law from multiple comparable jurisdictions illustrates that the cases listed above are not exceptional examples of lethal violence, men such as James Ramage,³⁵ Peter Keogh,³⁶ Chamanjot Singh,³⁷ Bradley Stevens,³⁸ Luke Middendorp,³⁹ Damien

³⁴ *R v Mankotia* [2001] 120 A Crim R 492: 18-19

³⁵ *R v Ramage* [2004] VSC 508

³⁶ *R v Keogh* [1989] Courtroom Transcript

³⁷ *R v Singh* [2012] NSWSC 637

³⁸ *Regina v Stevens* [2008] NSWSC 1370

Sebo,⁴⁰ and Garry Mills⁴¹ are not the exceptions to the rule – if available the provocation defence will be abused and will likely continue to provide a legal legitimisation for lethal violence committed by men. I would urge the Committee to recognise the defence’s long catalogue of injustices and ensure that this avenue of excuse is closed in the NSW criminal justice system.

³⁹ *R v Middendorp* [2010] VSC 202

⁴⁰ *R v. Sebo; ex parte A-G (Qld)* [2007] QCA 426

⁴¹ *R v Mills* [2008] QCA 146

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