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Legislative Review Committee
Parliament House
North Terrace
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via email to: seclrc@parliament.sa.gov.au

**Submission to Inquiry into
The Criminal Law Consolidation (Provocation) Amendment Bill 2013**

Thank you for the opportunity to comment on the Criminal Law Consolidation (Provocation) Amendment Bill 2013.

Reform in this area of law is well overdue. We welcome the opportunity to contribute to the discussion, and commend Greens MLC, Tammy Franks, for advocating for reform.

It is our submission that the defence of provocation should be completely abolished. However, we support the current Bill as a first stage of reform of the law.

Our reasons are detailed in the attached submission.

Please feel free to contact Kellie Toole at kellie.toole@adelaide.edu.au or on 8313 4440 if you require any further information, or if we can be of any assistance in advancing this reform.

We are happy for the submission to be made publically available, and it will be published on the University of Adelaide's Public Law Research Community blog at <http://blogs.adelaide.edu.au/public-law-rc/>

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Kellie Toole', with a long horizontal flourish extending to the right.

Kellie Toole, Professor Ngaire Naffine, Emeritus Fellow Ian Leader-Elliott,
Associate Professor Alex Reilly

Submission to the South Australian Legislative Review Committee Inquiry into The Criminal Law Consolidation (Provocation) Amendment Bill 2013

This submission was prepared by Kellie Toole, Professor Ngaire Naffine, Emeritus Fellow Ian Leader-Elliott and Associate Professor Alex Reilly of the Adelaide Law School.

It recommends the abolition of the partial defence of provocation, but supports the Bill as a first stage of broader law reform.

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1. OUR SUBMISSION

The Criminal Law Consolidation (Provocation) Amendment Bill 2013 proposes a statutory provision that prevents conduct of a sexual nature by a person towards another constituting provocation merely because the two people involved were the same sex. In effect, the Bill seeks to abolish the 'gay panic' or 'homosexual advance' defence.

We support the Bill because it provides a clear statement that homophobic attitudes should not provide a basis for even a partial defence to unlawful killing. Gay panic and homosexual advance defences are offensive and anachronistic and should not be reflected in current South Australian law.

South Australia is the only jurisdiction in Australia that has not abolished or modified provocation as a partial defence to murder, or recently recommended its modification. This Bill is the only current proposal regarding provocation before the South Australian Parliament, and so we support it as an important 'first step' toward broader reform in the area.

However, it is our position that homosexual advance is just one of the offensive applications of the defence of provocation – and one that is less likely to succeed than others. For these reasons it is preferable to address all the objectionable applications of provocation rather than focus selectively on homosexual advance.

We outline below our reasons why the partial defence of provocation should be completely abolished.

2. CONTEXT

2.1 History of Provocation

Provocation is based on the proposition that someone who kills in response to provocative conduct by the victim is less culpable than someone who kills deliberately in cold blood, but still deserves to face serious stigma and penalty. The rationale is that it 'amounts to a concession to human frailty'.¹ The defence was developed when there was a mandatory death sentence for murder.

Over the following centuries, provocation has come to apply where a person is provoked, loses self-control, and kills the person who provoked them. A person is convicted of manslaughter rather than murder if the jury accepts that the provocation was serious enough to make an ordinary person lose control and kill.

¹ Model Criminal Code Officers Committee of the Standing Committee of Attorneys General, *Discussion Paper: Model Criminal Code Chapter 5 - Fatal Offences Against the Person* (1998) 75.

2.2 The Current Law

Provocation is an affirmative defence. It arises where the elements of murder have been made out, i.e., where the defendant has recklessly or intentionally killed another person. Self-defence is the only other defence that excuses or justifies a defendant's conduct where a prima facie case of murder is made out, and that only applies where the offender was acting to defend themselves or another.

In South Australia, there is no defence to murder where a person is under duress from another, and fears for their life. There is no defence to murder where a person commits a 'mercy killing'. So anger is excused, but not fear or compassion.

3. LAW REFORM

3.1 The Current Bill - Homosexual Advance Defence

The homosexual advance defence has been much maligned; mostly on the basis of misrepresentations of the High Court case of *Green v R* (1997) 191 CLR 334, which recognised the defence in Australia.

Green is frequently presented as authority that where a man makes a casual sexual proposition to another man, which prompts the recipient of the proposition to respond with lethal violence, the actions of the offender can be considered manslaughter rather than murder because it is so abhorrent for a man to initiate a sexual encounter with another man.

This is not a correct statement of the law.

In *Green*, the victim of the homicide snuck into bed with the defendant and touched his genitals, causing the defendant to re-live the trauma of sexual abuse he had experienced as a child. The judgment contemplated that any sexual advance could provide a basis for provocation, and it is almost certain that a heterosexual advance made in similar circumstances would also have been found to provide a basis for the provocation defence.

The defence has never been applied in Australia to opposite sex advances. It has rarely been used in relation to homosexual advances, and even more rarely been successful. It rarely arises in Australian courts because it is considered profoundly out of touch with modern attitudes toward homosexuality.²

The much-publicised 2010 Queensland case of *R v Meerdink* [2010] QCA 273 (12 October 2010), which related to the murder of Wayne Ruks, has been widely condemned for upholding the gay panic defence. Homosexual advance was indeed

² John Jerrard, 'Special Committee Report on Non-Violent Sexual Advances' (Special Committee Report to the Queensland Attorney-General, Parliament of Queensland, 2012) 3-4, 45.

raised in the case, but the convictions for manslaughter were reached on the basis that the two accused lacked the intent to kill or cause serious harm, rather than that their intention to kill was mitigated by the homosexual advance defence.

In South Australia, Chief Justice Kourakis stated in *R v Hajistassi* [2010] SASC 111 (27 April 2010) that provocation on the basis of any sexual advance is very unlikely to be allowed to go to a jury in a South Australian court.

In fact, the homosexual advance did go to a South Australian jury in 2012 in the case of *R v Lindsay* [2014] SASCFC 56. The prosecution case was that Lindsay stabbed the male victim after he made several sexual advances. The defendant did not testify, but his main defence was that his co-accused committed the stabbing. His secondary line of defence was that provocation was not negated and if he was found to have killed the victim then he should be convicted of manslaughter. Neither defence was successful and Lindsay was convicted of murder, and his conviction was upheld on appeal. However, in the Court of Criminal Appeal, Peek J made clear in his judgment that his decision did not question the decision in *Green*, which he considered correct.

So the current situation in South Australia is that it is possible to raise the provocation defence on the basis of a homosexual advance, though the defence is unlikely to succeed.

3.2 Abolition of Provocation in Other Australian Jurisdictions

Tasmania, Victoria and Western Australia (and New Zealand) have all abolished provocation as a partial defence to murder in the last 10 years.³

In Victoria and Western Australia, law reform commissions undertook extensive research and public consultation before recommending its abolition.⁴

Wherever the defence has been reviewed, criminal barristers have argued for its retention but the overwhelming weight of opinion from police, prosecutors, victims' rights advocates, women's groups and the public has been for its abolition.

³ Criminal Code Amendment (Abolition Of Defence Of Provocation) Bill 2003 (Tas); Crimes (Homicide) Bill 2005 (Vic) s 3; Criminal Law Amendment (Homicide) Bill 2008 (WA); Crimes (Provocation Repeal) Amendment Bill (2009) (NZ); *Crimes Act 1961* (NZ) s 50.

⁴ Law Reform Commission of Western Australia (2007) *Review of the Law of Homicide*; Victorian Law Reform Commission (2004) *Defences to Homicide: Final Report*. In addition, other jurisdictions have undertaken similarly comprehensive reviews that have recommended modifications to provocation: New South Wales, Parliament, Legislative Council, Select Committee on the Partial Defence of Provocation (2013) *The Partial Defence of Provocation*; Queensland Law Reform Commission (2008) *A Review of the Defence of Provocation*; Northern Territory Law Reform Committee, Department of Justice (2000) *Self Defence and Provocation*. Provocation has also attracted a large amount of academic attention. See: Thomas Crofts and Arlie Loughnan, 'Provocation: The Good, the Bad and the Ugly' (2013) 37 *Criminal Law Journal* 23 for the most recent commentary.

Since the abolition in each of those jurisdictions, there has been no apparent public or academic commentary indicating any negative consequences.

3.3 Modification of Provocation in Other Australian Jurisdictions

A number of jurisdictions have chosen not to abolish the defence, but rather to limit it from applying in certain circumstances.

- In the Northern Territory and the Australian Capital Territory a non-violent sexual advance toward a defendant cannot, without other factors, constitute provocation.⁵ A recent Select Committee of the Legislative Council of New South Wales recommended a similar provision for that state.⁶
- In Queensland, ending or changing a relationship cannot constitute provocation.⁷ The New South Wales Select Committee recommended a similar provision for that state.⁸

While these limitations remove the possibility of provocation applying in the cases that have most shocked the public in various jurisdictions, we do not support this approach in South Australia.

There is no principled basis for restricting a person from having a partial defence where they kill because their ex-partner impugns their masculinity, but allow a partial defence where, for example, the same man kills because a male acquaintance impugns his masculinity in a bar.

4. GENDER ISSUES

4.1 Gender Bias

There is a widespread belief that provocation as a concession to human frailty acts as a concession to male frailty,⁹ because it is commonly argued by men who kill out of jealousy, humiliation and rejection in intimate relationships. The reviews of provocation in Victoria and New South Wales were prompted by such cases that caused public outrage:

- Peter Keogh killed Vicki Cleary 2 months after their 4-year relationship ended in 1987. He had hoped for reconciliation but became convinced that Vicki had re-partnered. He stabbed her outside the kindergarten where she worked,

⁵ *Criminal Code Act (NT)* 158(5); *Crimes Act 1900 (ACT)* 13(3).

⁶ New South Wales, Parliament, Legislative Council, Select Committee on the Partial Defence of Provocation, *The Partial Defence of Provocation* (2013) Recommendation 6, 200.

⁷ *Criminal Code 1899 (Qld)* s 304(3).

⁸ New South Wales, Parliament, Legislative Council, Select Committee on the Partial Defence of Provocation, *The Partial Defence of Provocation* (2013) Recommendation 7, 203.

⁹ *R v Chhay* (1994) 72 A Crim R 1, 11.

with a knife he had supposedly taken to damage her car. He had a long history of alcohol-fuelled violence offences.¹⁰

- James and Julie Ramage were married for 30 years marked by James' periodic violence and controlling and intimidating behaviour. Julie moved out of their home while he was on an overseas trip. 5 weeks after their separation in 2003, they met at the matrimonial home, where, according to James, Julie told him about a new partner, and that sex with James 'repulsed' her. He 'lost it', inflicting heavy blows to her face then strangling and burying her.¹¹
- In December 2009, Chamanjot Singh 'lost control' when his wife, Manpreet Kaur, supposedly told him that she had never loved him, was in love with someone else, and threatened to have him deported. She died following a 'ferocious attack' involving strangulation and having her throat cut at least 8 times with a box cutter. There was no evidence of an affair by Kaur.¹²

We seek the abolition of provocation so that if a case such as one of the above arose in South Australia, the defendant would not be able to argue provocation and would be convicted of murder.

4.2 Women Who Kill Abusive Partners

The retention of provocation is often argued as necessary to provide a partial defence to women who kill abusive partners but are unable to rely on the complete defence of self-defence.

Women who kill abusive partners have relied on provocation to avoid a murder conviction. In South Australia in 2011, Rajini Narayan was convicted of manslaughter instead of murder by successfully arguing provocation.¹³

Rajini and her husband Satish were traditional Fijian Hindus. Rajini tolerated physical and emotional abusive from Satish for 20 years. When she discovered he was having an affair and intended to leave her, she decided to burn the tip of his penis to leave a red spot matching that on her forehead to bind them together. Rajini took a beaker of petrol and a candle to the bedroom, and told Satish of her plan. He turned his back on her and said 'No you won't, you bitch'. She snapped, threw petrol on him, and set him alight. She immediately assisted him to the shower, and then out of the burning house, but he died from his injuries.

¹⁰ *R v Keogh* [1989] VSC 478.

¹¹ *R v Ramage* [2004] VSC 391.

¹² *R v Singh* (2012) NSWSC 637.

¹³ *R v Narayan* [2011] SASCF 61 (1 July 2011).

The reporting of her case, the conviction for manslaughter, and the suspension of her prison sentence, indicate that Rajini had considerable public sympathy for her actions. Without provocation it is likely that she would have been convicted of murder and liable to a lengthy prison sentence.

However, the end of provocation would doom few abused women to a definite murder conviction. Most commonly, women kill abusive partners in response to either immediate violence they fear will turn lethal if they do not act, or, ongoing violence they fear will ultimately turn lethal even if they call the police or leave the relationship.¹⁴

If abused women kill to stop their partner from killing them, they should have the full defence of self-defence and be acquitted of all charges. However, they sometimes rely on provocation as a 'back-up' if self-defence fails.

In South Australia, the partial defence of excessive self-defence has been enacted to cover situations where a defendant acts in self-defence but their actions are not reasonably proportionate to the threat they believed they faced.¹⁵ This means that where abused women act to defend themselves or their children, but go further than they need to, they can be convicted of manslaughter. This will usually be a more appropriate argument than provocation.

5. TECHNICAL ISSUES

5.1 Self-Control

The 'loss of self-control' in provocation is not literal. It refers to an 'intermediate stage between icy detachment and going berserk.'¹⁶ The language surrounding the defence is imprecise, and is not based on scientific research. It is a legal construction that may have had historical significance, but is unsustainable under our current social norms.

5.2 Jury Directions

The objective and subjective elements in the defence make it very confusing for jurors to assess both of a person's state of mind (did they lose their self-control) and whether a reasonable person would have lost their self-control the circumstances. This is an unreasonable assessment to require of a jury that leads to great difficulty for judges in explaining the elements of the defence, and regular appeals against conviction.

¹⁴ The cases of *R v Heyward and Minter* [2010] SASCF 38 (28 September 2010) and *R v Allen* [2011] SASCF 40 (3 May 2011) are recent South Australian cases where men have been charged with the murder of their wives after the women have left physically abusive relationships. Kane Allen was convicted of murder. Neil Heyward committed suicide in custody while awaiting trial for murder.

¹⁵ *Criminal Law Consolidation Act 1935* (SA) s 15(2).

¹⁶ *Phillips v R* [1969] 2 AC 130, 137.

6. CONCLUSION AND RECOMMENDATION

We support the Criminal Law Consolidation (Provocation) Amendment Bill 2013 but strongly recommend that consultation start immediately to explore the possibility of the complete abolition of the partial defence of provocation.