



**SUPPLEMENTARY SUBMISSIONS TO  
LEGISLATIVE COUNCIL SELECT  
COMMITTEE ON BEHALF OF THE  
HOMICIDE VICTIMS' SUPPORT GROUP  
(AUST) INC.**

**RESPONSE TO OPTIONS PAPER**

**INQUIRY INTO THE PARTIAL DEFENCE OF  
PROVOCATION**

**OCTOBER 2012**

# **SUPPLEMENTARY SUBMISSIONS TO LEGISLATIVE COUNCIL SELECT COMMITTEE ON BEHALF OF THE HOMICIDE VICTIMS' SUPPORT GROUP (AUST) INC.**

## **1 SCOPE OF THESE SUPPLEMENTARY SUBMISSIONS**

- 1.1 These supplementary submissions are in response to the release of the Options Paper by the Select Committee dated 14 September 2012 (**Options Paper**). They are to be read in conjunction with HVSG's initial submissions to the Select Committee on the partial defence of provocation, dated 10 August 2012 (**Initial Submissions**).
- 1.2 The scope of these submissions is limited to issues raised by HVSG and the families. **They relate only to defendants who have been found guilty of manslaughter by relying on the partial defence of provocation.**
- 1.3 HVSG are grateful for the opportunity to provide comment to the Legislative Council Select Committee (**Committee**) on the various options released in the Options Paper. HVSG's response to these reform options are set out below.

## **2 ABOLISH PROVOCATION**

- 2.1 HVSG supports this option for reform of the law of provocation.
- 2.2 HVSG notes that this option has received support from a variety of other stakeholders, including: the Women's Legal Services New South Wales; Dr Kate Fitz-Gibbon, Lecturer in Criminology, Deakin University; Mr Graeme Coss, Senior Lecturer, Faculty of Law, University of Sydney and Lloyd Adam Babb, SC, Director of Public Prosecutions.
- 2.3 As the Committee is well aware, the partial defence of provocation reduces the charge of murder to manslaughter in circumstances where the offender has intentionally killed a person.
- 2.4 The intentional killing of another is never acceptable. This has been an immutable moral principle since the dawn of modern civilised society. The continued operation of the defence of provocation is directly contradictory to this moral principle, because it endorses the notion that killing is a justifiable response to provocative conduct.
- 2.5 HVSG reiterates its Initial Submission and asks the Committee to endorse the principle that killing is never justified by recommending that the archaic partial defence of provocation be abolished.

## **3 RETAIN PROVOCATION WITHOUT AMENDMENT**

- 3.1 HVSG is unreservedly opposed to this proposal for the reasons set out in its Initial Submission.

## **4 RETAIN PROVOCATION WITH AMENDMENTS**

- 4.1 HVSG recognises that the factual circumstances in which the killing of another can take place are infinite. It also recognises that these circumstances can be separated into various categories such as premeditated murder and murder in a moment of passion.

- 4.2 HVSG understands and appreciates the horrifying reality that there are women in our community that have been the subject of prolonged family and domestic abuse at the hands of their partner, who have as a result have killed their abusive partner in an attempt to escape the ongoing cycle of abuse. HVSG also accepts that the Committee is concerned about recommending a course of action that would leave these women to face charges of murders as opposed to manslaughter.
- 4.3 However, HVSG submits that there are methods through which such women can be protected without endorsing the notion that killing can sometimes be justified; methods such as confining the consideration of provocation to sentencing. HVSG refers the Committee to section 7 of its Initial Submissions.
- 4.4 Should the Committee recommend that the partial defence of provocation not be abolished, HVSG would ask the Committee to recommend that the onus of proof in applying the provocation defence be placed on the defendant and that it should only be used in specific and serious circumstances such as violent criminal conduct that need not occur immediately prior the incident resulting in the death of the deceased.
- 4.5 Under the current statutory regime in NSW, the prosecution bears the onus of proving beyond reasonable doubt that a defendant was not provoked. One of the practical implications of this is that any evidence of provocation presented by the accused will be relatively untested, especially in circumstances where the accused and victim were alone at the time of the murder, as it would be the word of the accused against the silence of the deceased victim.
- 4.6 HVSG would like to highlight that the reality of this situation is that the deceased victims' family are subjected to witnessing the Court consider and ultimately accept untested evidence led by an accused who has admitted to intentionally killing a member of their family. As a result, family members are left not only angry and sceptical regarding the moral legitimacy of our judicial system, but instilled with the belief that killing can sometimes be justified.
- 4.7 HVSG submits that this is not an acceptable outcome in a modern civilised society.
- 4.8 HVSG refers the Committee to section 6 of its Initial Submissions.

## **5 RECOMMENDATIONS**

- 5.1 HVSG re-submits it is time that the partial defence of provocation is abolished to enable the State to fully pursue justice for victims of homicide and their families.
- 5.2 In summation, HVSG would reiterate its initial recommendations that:
- (a) The partial defence of provocation be abolished.
  - (b) Evidence of provocation to be considered as a mitigating factor during sentencing only.
  - (c) In the alternative, if the partial defence of provocation is retained:
    - (i) the onus of proof should be reversed, and
    - (ii) the partial defence of provocation should only be used in specific and serious circumstances. Not to be used for circumstances that involve insulting words or gestures.

## 6 SUMMATION

HVSG would like to thank you for the opportunity to contribute to this inquiry.

Henry Davis York (**HDY**) have prepared these supplementary submission in response to the Options Paper on behalf of HVSG and the family members and loved ones of persons who have been killed. HDY is very proud of this unique and longstanding pro bono partnership and is very grateful for the opportunity to provide pro bono legal services to HVSG.

Should you have any further questions, please contact Martha Jabour on the numbers below.

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