Homicide Victims Support Group:

Response to the Supplementary questions from the Select Committee on the Partial Defence of Provocation

Question from the Committee:

> On page 8 of your submission you argue that provocation should be considered during sentencing, and not operate as a partial defence to murder. The Committee has received evidence that it is appropriate that juries determine issues of culpability. For example, the Bar Association submits that an accused should have the question of whether they are guilty of murder, of manslaughter, or are acquitted outright determined by a jury, on the basis that "juries are an important and central part of our criminal justice system and are very well placed to decide issues that relate to common human experience." Do you have any comment in response to that statement.

1 Introduction

1.1 HVSG would like to thank the Select Committee on the Partial Defence of Provocation (**Committee**) for the opportunity to respond to the above supplementary question.

1.2 This response has been prepared in reply to the above question from the Committee and should be read alongside our initial submissions to the Committee dated 10 August 2012 (**Initial Provocation Submission**).

1.3 HVSG's Initial Provocation Submission:

(a) argue that the partial defence of provocation should be abolished and that any evidence of provocation should be considered as a mitigating factor during sentencing only, and

(b) set out a clear message that murder is not a justifiable response to provocative behaviour.

1.4 HVSG respectfully disagrees with both the contention that it is appropriate for juries to decide on issues relating to provocation and the submission of the New South Wales Bar Association, as framed above, for the reasons set out below.

2 Ongoing misconception of the interaction of "culpability" and the partial defence of provocation

2.1 HVSG does not believe any consideration of provocation, whether as a partial defence or mitigating factor, should change an offender's "culpability" on the basis that an offender who has been found guilty of manslaughter on account of the provocation defence still possesses an intention to kill or inflict grievous bodily harm.

2.2 The notion that an offender's culpability is lessened on account of the fact that they were provoked is inappropriate and contrary to community expectations. HVSG would like to take the opportunity to reinforce the message set out in the Initial Provocation submissions that:

it is unjust for an accused who has admitted possessing an intention to kill, as is the case when the defence of provocation is argued, to be charged with manslaughter as opposed to murder.

3 The role of juries

3.1 HVSG disagree with the submission of the New South Wales Bar Association that an accused should have the question of whether they are guilty of murder, of manslaughter, or are acquitted outright determined by a jury, in so far as it applies to the defence of provocation, on both legal and policy grounds.

3.2 As outlined at paragraph 3.1 of our Initial Provocation Submission the defence of provocation will be established where:

(a) the act or omission is the result of a loss of self-control on the part of the accused that was induced by any conduct of the deceased (including grossly insulting words or gestures) towards or affecting the accused; and

(b) that conduct of the deceased was such as could have induced an ordinary person in the position of the accused to have so far lost self-control as to have formed an intent to kill, or to inflict grievous bodily harm upon the deceased.[1]

3.3 The defence, as it currently stands requires juries to distinguish between the characteristics or attributes that affect the gravity of the provocative act and those that affect the power of self-control. The jury can take into account relevant characteristics of the accused for the purpose of assessing the gravity of the provocation. However, the jury cannot taken into account any of these characteristics when considering the issue of loss of control.[2]

3.4 As Justice Mark Weinberg acknowledges in his article "Moral blameworthiness - The 'objective test' dilemma",[3] there are many who find this distinction almost impossible to understand.[4] To apply this complex legal test appropriately requires a high degree of legal reasoning skills, which the majority of jurors do not possess. It is not appropriate that a jury of people be charged with such a legally complex determination as they are ill-equipped to appropriately apply the test.

3.5 In *R v Smith (Morgan),*[5] the House of Lords considered the defence of provocation in the United Kingdom, specifically whether the jury was entitled to take account of characteristics of the accused when determining the question of self-control. The prosecution contended that a rigid approach to the defence should be taken and that the accused's severe depressive illness was not a matter for the jury to take into account in deciding whether an ordinary man sharing the respondent's characteristics would have lost self-control, i.e. an approach consistent with that in New South Wales. Lord Slyn of Hadley, when considering this approach, commented that the distinction between the 'objective' and 'subjective' tests for which the prosecution contended was very difficult for a jury and doubted whether it was really workable.[6]

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[1] Section 23A of the *Crimes Act* 1900 .
[2] Justice Mark Weinberg, "Moral blameworthiness - The 'objective test' dilemma" (2003) 24 *Australian Bar Review* 173, 189.
[3] Ibid.
[4] Ibid.
[5] [2000] 4 All ER 289.
[6] Ibid, 296.

3.6 The overly complex conceptualisation and operation of the provocation defence should necessitate that its application not be left to a jury comprised of lay persons with little to no understanding of the legal reasoning required. We consider that the basis for the New South Wales Bar Association's submission, that is that juries are well placed to decide issues that relate to common human experience, is misguided in relation to the partial defence of provocation.

3.7 As stated by the Legislative Council Select Committee in their briefing paper,[7] killing is never justified as a reaction to provocative conduct. When you strip away the complex legal conceptualisation of the defence of provocation you are confronted by the frightening concept that, at its core, its application essentially involves the determination of when murder is more or less acceptable. Continuing to bestow the responsibility for determining when killing is more or less acceptable on juries made up of members of the public will instil the public with the view that sometimes killing is a justifiable response to provocative conduct.

4 Further comments

4.1 HVSG note that the application of the defence of provocation in New South Wales was raised in 7.8% of homicide cases between 1990 and 1993.[8] The defence was successfully applied in 70% of cases.

4.2 HVSG submit that the it is inappropriate to continue to allow the use of the partial defence of provocation as a defence for murder. **Murder is not a justifiable response to provocative conduct.** The continued use of the partial defence of provocation sends an unacceptable message to the social and legal institutions of our civilised and modern society.

[7] Legislative Council Select Committee Briefing Paper, at p 5.
[8] Peter Zahara SC, *Partial Defences to Murder, Provocation and Diminished Responsibility* (available at: http://www.lawlink.nsw.gov.au/lawlink/pdo/ll_pdo.nsf/pages/pdo_partialdefences)