Submission No 25

INQUIRY INTO PARTIAL DEFENCE OF PROVOCATION

Organisation: Homicide Victims Support Group (Australia) Inc

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Date received: 13/08/2012

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

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10 AUGUST 2012

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

1 BACKGROUND – The Homicide Victims' Support Group (Aust) Inc (HVSG)

The Homicide Victims' Support Group (Aust) Inc. was founded in June 1993, at the Institute of Forensic Medicine at Glebe.

The group was established when the parents of Anita Cobby and the parents of Ebony Simpson were introduced to each other and they, with the staff at the Institute, recognised the very real need for an organisation which could offer counselling, support and information to families and friends of homicide victims throughout NSW.

The aims of HVSG are threefold

- offering support, counselling and advice to families and;
- educating the general public, professional bodies and Government agencies about the needs of homicide affected families; and
- reform of various laws that impact on family members.

HVSG has a working partnership agreement with Victims Services within the Attorney General's Department and the NSW Police Force that enables them to receive a notification form of every homicide in NSW within 48 hours of a the homicide occurring. This then enables HVSG, the police and other services to put into place a comprehensive plan around supporting the surviving family members.

2 SCOPE OF THESE SUBMISSIONS

2.1 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.**

2.2 HVSG are grateful for the opportunity to provide comment to the Legislative Council Select Committee (**Legislative Committee**) on the partial defence of provocation. HVSG are hopeful that the Legislative Council's inquiry will help push towards an abolition of this long standing but highly controversial partial defence to murder.

2.3 At the end of these submissions is an Appendix which comprises several letters from families receiving support from HVSG who wanted to share their stories, experiences and frustrations with the Legislative Committee.

3 THE DEFENCE OF PROVOCATION

3.1 The defence of provocation in NSW is contained in Section 23A of *the Crimes Act* 1900 (**Crimes Act**). Section 23A provides that 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.

3.2 The partial defence of provocation reduces what would otherwise constitute a murder verdict to manslaughter. We note that the other partial defences to murder under the Crimes Act include excessive self defence and substantial impairment by abnormality of the mind.

3.3 HVSG submits that the partial defence of provocation should be abolished for the following main reasons:

(a) **Discretionary sentencing for murder.** Penalties available for murder in NSW are no longer the death penalty (abolished in 1955) and mandatory life sentence (abolished in 1982)[1]. Consequently, the original rationale for the partial defence of provocation no longer exists.

(b) **Killing with intent.** The archaic defence of provocation partially excuses and downgrades killing with intent (murder) to the lesser conviction of manslaughter.

(c) **Problematic legal test.** The legal test used to establish a partial defence of provocation is complex and difficult for a jury to apply. As a result, the operation of the test may be inconsistent and unpredictable.

(d) **Community expectations.** The rationale behind the partial defence of provocation is out of touch with community expectations. Society does not accept that violence with intent to kill is an appropriate response to provocative behaviour.

4 PROVOCATION CASES

Intention to kill

4.1 The partial defence of provocation can only be relied on by an accused when an intention to kill has been admitted. HVSG considers that allowing the offence of manslaughter to be applied to a crime where there was a finding of an intention to kill is unjust. It is particularly difficult for loved ones of homicide victims to accept that, despite all the elements of murder[2] being made out and an intention to kill being admitted, the law allows a downgrading of the offence of murder to manslaughter.

4.2 A key reason for the abolition for the partial defence of provocation in other jurisdictions has been the fact that the offenders intended to kill.

4.3 HVSG notes that when Tasmania abolished the defence of provocation in 2003 the Minister for Justice, when introducing the bill into the Tasmanian House of Assembly, stated that:

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[1] HVSG note that mandatory life sentences for the murder of police officers remain see Section 19B *Crimes Act* 1900 and also for certain offences (such as murder and drug trafficking) see Section 61 *Crimes Sentencing Procedure Act* 1999.

[2] Section 18(1)(a) of the Crimes Act provides that murder shall be taken to have been committed where the act or omission which caused the death was done with reckless indifference to human life or with intent to kill or inflict grievous bodily harm.

> "The main argument for abolishing the defence stems from the fact that people who rely on provocation intend to kill. An intention to kill is murder. Why should the fact that the killing occurred when the defendant was acting out of control make a difference? All the ingredients exist for the crime of murder."[3]

4.4 HVSG also notes that Victoria abolished the defence of provocation in 2005, after a Victorian Law Reform Commission report on homicide defences (VLRC) recommended its removal because of the "serious nature of the harm suffered by the victim, and the fact that the person intended to kill or seriously injure the victim."

Violence and brutality

4.5 HVSG submits that allowing a homicide to be partially excused is entirely contrary to the community's expectations that offenders will be appropriately punished for the gravity of their crimes. Sentences imposed upon defendants who successfully establish provocation are grossly inadequate and do not reflect the gravity of the crime which has been committed. Some examples of inadequate sentences include *R v Bernier* [2006] NSWSC 1421 (head sentence 9 years, non parole period 6 years), *R v Singh* [2012] NSWSC 637 (head sentence 8 years, non parole period 6 years) and *R v Vulovic* (No.3) [2012] NSWSC 211 (15 March 2012) (head sentence 9 years and, non parole period 6 years).

4.6 HVSG is concerned about the number of successful applications of provocation in particularly violent crimes. It is morally wrong to allow a defence that indicates that a murderer maybe less culpable if he or she committed the act after being provoked. HVSG is also concerned that one of the main groups that raise provocation in their defence is men who kill partners or former partners.

4.7 HVSG note Kirby J's dissent in *Green v R* [1997] HCA at 50 in which he suggested that provocation condones violence "by people who take the law into their own hands."

4.8 Indeed, in the more recent case of *R v Singh* the court acknowledged that the gravity of the offence was 'very significant.' The court found no mitigating factors and stated that the defendant should receive a 'significant' prison sentence. Despite this, Singh succeed in establishing provocation and was only sentenced to a 6 year non-parole period.

4.9 *R v Singh* illustrates that when provocation is established the courts may avoid imposing harsh sentences even when the crime is particularly grave. HVSG note McClellan CJ's comments during sentencing:

> "In all of the circumstances, I am satisfied that the offender must receive a prison sentence for a significant period. I see no reason for a finding of special circumstances. I shall impose a non-parole period of six years with a balance of term for two years."[4]

4.10 HVSG submit that a non-parole period of six years for a homicide of this nature seems particularly light especially given that the maximum sentence for manslaughter is 25 years.

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[3] Criminal Code Amendment (Abolition of the Defence of Provocation) Bill 2003 (No.15) Second Reading Speech dated Thursday 20th March 2003.
[4] Singh v R [2012] NSWSC 637 at 47

4.11 The Victorian case of *R v Ramage* [2004] VSC 508 is another key example of lenient sentencing where provocation is established. Ramage, despite brutally killing his wife and concealing the crime, received a light sentence of only 8 years' imprisonment.

4.12 At the University of Sydney the Professor of Law and Criminology, Graeme Coss, in his article "The Defence of Provocation: An Acrimonious Divorce from Reality", analysed the *Ramage* decision and suggested that, if the partial defence of provocation had not been available, Mr Ramage would likely have received a custodial sentence of approximately 20 years (as opposed to 8 years).

5 LEGAL TEST FOR PROVOCATION

The main problems with the test for provocation

5.1 When the partial defence of provocation is raised by an accused, the jury has to apply a convoluted three-limbed legal test. HVSG submits that the complexity of the test has contributed, and will continue to contribute, to unjust outcomes.

5.2 Each stage of the test requires a different aspect of the accused or their conduct to be considered which makes the test conceptually confusing and difficult to apply.

5.3 The nature of the test in NSW requires the jury to:

(a) consider what would be the ordinary person's perception of the gravity of the provocation (taking into account characteristics of the accused); and then

(b) limit the characteristics to maturity only when considering the ordinary person's power to exercise self control, and then to finally;

(c) consider whether an ordinary person could have formed an intent to kill or cause grievous bodily harm.

5.4 These stages of testing raise three critical problems;

(a) The application of the test demands a high degree of legal reasoning skills in considering only certain subject matter at a certain time and in a particular way. Despite this, the test is to be applied by lay people in a jury.

(b) The ability of juries to subsequently ignore the characteristics of the accused that they have been asked to previously considered is, arguably, limited. The effect of this is that the objective elements of the test (that remove all characteristic considerations) would be very difficult to preserve.

(c) The application of the ordinary person test is problematic in a multicultural society. HVSG questions whether the test can be fairly and adequately applied as it is difficult to conceptualise an 'ordinary Australian' against which a juror could realistically compare the accused behaviour.

6 ONUS OF PROOF

Onus of proof essentially rests upon the Crown

6.1 As noted, HVSG submits that the partial defence of provocation should be abolished. However, if the partial defence of provocation were to remain HVSG proposes that amendments to the current regime for onus of proof is required.

6.2 Under the current statutory regime in NSW, where there is evidence of provocation in a murder trial, the prosecution bears the onus of proving beyond reasonable doubt that a defendant was not provoked[5].

6.3 HVSG submits that this is an improper imposition of an onus of proof and should be reversed. This would force defendants relying on the partial defence of provocation to bear the onus of proving beyond reasonable doubt that he/she meets the requisite elements of the defence.

6.4 There are three compelling arguments supporting the reversal of the burden of proof;

(a) the need to reflect the rationale for the original change to the partial defence of provocation which was developed in 1982 (to accommodate domestic violence killings);

(b) the need to be consistent with the onus of proof for other partial defences in NSW; and

(c) the need to keep the burden of proof consistent with the statutory regimes in other jurisdictions.

6.5 Prior to 1982, the defendant bore the onus of proving beyond reasonable doubt that he/she was provoked. This approach reflected the common law position as summarised by the High Court in *Stingel v The Queen*[6]:

> "... a defence of provocation ... falls to be resolved by reference to the version of events most favourable to the accused" and " ... in a case where the evidence gives rise to a question of provocation, the onus lies on the Crown to disprove provocation beyond reasonable doubt[7]."

6.6 In 1982, amending legislation was introduced in NSW as a result of the Government Task Force on Domestic Violence making a recommendation to "broaden the definition of provocation in order to make it more appropriate for women who kill in situations of domestic violence."[8]

6.7 The amending legislation was designed to more adequately address women who kill as a result of long term abuse as opposed to addressing those who kill as a result of a single act of provocation. The amending legislation transferred the onus

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[5] *Crimes (Homicide) Amendment Act No. 24, 1982* (NSW), s4.
[6] 171 CLR 312 at 1009.
[7] per Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ at 316.
[8] Law Reform Commission of NSW, *Report 83 (1997) Partial Defences to Murder - Provocation and Infanticide*, Chapter 2 at para 2.5 available at http://www.csp.nsw.gov.au/lrc.nsf/pages/R83CHP2

of proof to the prosecution, to disprove a claim by the defendant that the murder was provoked[9].

6.8 Despite the rationale for the change, **there is no corresponding limitation that the partial defence of provocation is only to be raised in cases involving victims of domestic violence.**

6.9 HVSG submits that the current use of the partial defence of provocation undermines the intention of the change, as defendants who are not victims of domestic violence can rely on the same partial defence with the same onus of proof as victims of domestic violence.

Onus of proof for other partial defences in NSW

6.10 There are two other partial defences in NSW which are used to reduce a charge of murder to manslaughter; diminished responsibility and infanticide.

6.11 The partial defence of diminished responsibility[10] requires that the defendant bear the burden of proving, on the balance of probabilities, that he/she meets the requisite elements of the partial defence[11].

6.12 Infanticide can be brought as a charge or raised a partial defence to murder. Where infanticide is raised as a defence to murder, the legislation does not specify whether it is the prosecution who must disprove, or the defendant who must prove, that the defence is established.

6.13 Similarly, as there is no clear reason for the burden of proof to be reversed in the partial defence of provocation, it would seem consistent with other partial defences in NSW if, in a provocation defence, the burden of proof rests with the defendant.

The position in other jurisdictions

6.14 Queensland and the Northern Territory still have a statutory regime for the partial defence of provocation and they both place the burden of proof on the defendant[12].

6.15 Further, in Queensland, there is a separate partial defence to be used in cases of domestic violence[13]. HVSG believes that the statutory regime in Queensland draws the appropriate distinction between victims of domestic abuse killing their abusers and murder committed outside the context of domestic violence.

6.16 HVSG submits that, if NSW is to retain the partial defence of provocation, the burden of proof regime should remain with the defendant. This would ensure that NSW is consistent with the remaining jurisdictions.

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[9] Law Reform Commission of NSW, *Report 83 (1997) Partial Defences to Murder - Provocation and Infanticide*, Chapter 2, available at http://www.cso.nsw.gov.au/lrc.nsf/pages/R83CHP2

[10] *Crimes Act 1900* (NSW), ss23, 23A.

[11] *Crimes Act 1900* (NSW) s23A(2); *R v Purdy* [1982] NSWLR 964; *R v Tumanako* (1992) 64 A Crim R 149 at 159-150.

[12] South Australia relies on the common law position.

[13] *Criminal Code 1899* (QLD), ss304(7), 304B.

7 CONSIDERATION AT SENTENCING ONLY

7.1 HVSG submits that another reason why the partial defence of provocation should be abolished is that that evidence of provocation can already be taken into account during sentencing.[14]

7.2 Section 21A(3)(c) of the *Sentencing Act 1999* (NSW) provides that a mitigating factor in determining the appropriate sentence for an offence is whether the offender was provoked by a victim. By confining the consideration of provocation to sentencing, the probability of securing a murder conviction over manslaughter is greater, a result that will likely have a significant impact on victims' families.

7.3 HVSG notes that the 1998 Model Criminal Code Officers Committee[15] concluded that it was more appropriate to deal with questions of culpability, including evidence of provocation, during sentencing.

7.4 Tasmania abolished the partial defence of provocation in 2003[16], shortly followed by Victoria in 2005[17]. Provocation can now only be taken into account as a factor in sentencing in both Tasmania and Victoria.

7.5 HVSG argues that NSW should follow Tasmania, Victoria and Western Australia in abolishing the partial defence. The elements of the crime that indicate provocation should be left for consideration during sentencing only.

7.6 Indeed, when the amending legislation was introduced to parliament in Tasmania the Minister for Justice stated:

> "Another reason to abolish the defence is that provocation is and can be adequately considered as a factor during sentencing. Now that the death and mandatory life imprisonment have been removed, provocation remains as an anachronism."[18]

Concern about double consideration of provocative elements

7.7 HVSG submits that the consideration of provoking circumstances by the courts in both downgrading an offender's crime and during sentencing arguably prevents the proper administration of justice.

7.8 In the matter of *Singh v R*[19] the offender had the benefit of provocation as a partial defence to the killing and again as a factor considered during sentencing. Chief Justice McClellan at Common Law noted that he was "satisfied that the actions of the deceased were provocative and were sufficient to have occasioned an ordinary person in the offender's position to have lost his self-control".

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[14] *Crimes (Sentencing Procedure) Act 1999* (NSW), s21A.
[15] Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code - Discussion Paper - Chapter 5 - Fatal Offences Against the Person*, June 1998, 103.
[16] *Criminal Code Amendment (Abolition of Defence of Provocation) Act 2003* (Tasmania).
[17] *Crimes (Homicide) Act 2005* (VIC)
[18] Criminal Code Amendment (Abolition of the Defence of Provocation) Bill 2003 (No 15) Second Reading Speech dated Thursday 20th March 2003.
[19] [2012] NSWSC 637.

7.9 Particularly relevant is the judgment in *Tyne v Tasmania*[20] wherein Justice Blow outlined that, where provocation is raised as a mitigating factor the following should be considered:

> "the nature of the provocation, its severity, its duration, its timing in relation to the killing, any relevant personal characteristics of the offender... and the extent of the impact of the provocative conduct on the offender".

Consideration of provocative elements at sentencing only is less problematic

7.10 HVSG submits that the complex and problematic three-limbed test for provocation further supports the notion that it is more appropriate to consider the elements of provocation by a judge during sentencing only. At the sentencing stage courts are able to take a more flexible approach to determining whether there is sufficient provocation in a particular case to justify a reduction in the offender's sentence.

7.11 The VLRC seemingly supports this position, as evidenced by its conclusion in its report on homicide defences in 2004[21] which stated that:

> "Factors that decrease a person's culpability for an intentional killing should be taken into account at sentencing rather than form the basis of a separate partial defence."

7.12 In its report the VLRC noted that the test for provocation is conceptually confused, complex and difficult for juries to understand and apply. In comparison, taking provocation into account during sentencing only is less problematic as the judiciary is able to consider and apply all of the salient facts of the case during their decision making.[22] Given that members of the judiciary are required to justify their decisions where juries are not, the public can also be fully informed as to why provocation was a mitigating factor in a particular instance[23].

7.13 HVSG also submits that the consideration of circumstances involving provocation during sentencing is more appealable than a determination by a jury that the partial defence applies.

7.14 As such, HVSG argues that greater safeguards are afforded by allowing judges to give weight to provocation as a mitigating factor during sentencing than by requiring a jury to consider and attempt to fulfil the limbs of a complicated test.

8 OTHER AVAILABLE DEFENCES

8.1 NSW currently retains a number of partial defences to homicide that reduce murder to manslaughter in addition to provocation. They include, excessive self-defence,[24] and substantial impairment by abnormality of mind[25].

8.2 These partial defences operate in addition to the full defence of self-defence[26] which provides that an offender "is not criminally responsible for an offence" if the offender "carries out the conduct constituting the offence in self-defence".

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[20] (2005) 15 Tas R 221.
[21] Victorian Law Reform Commission, *Defences to Homicide: Final Report*, October 2004, 26.
[22] Riley, M, "Provocation: Getting Away with Murder?", Vol 1(1), 2006, *Queensland Law Student Review*.
[23] Ibid.
[24] *Crimes Act 1900* (NSW), s421.
[25] *Crimes Act 1900* (NSW), s23A.
[26] *Crimes Act 1900* (NSW), s418.

8.3 HVSG submits that, in genuinely provocative circumstances, other full or partial defences already exist under both legislation and the common law and therefore are not reliant on the partial defence of provocation. Furthermore, provocation has been upheld in arguably spurious circumstances, such as non-violent homosexual advance and "grossly insulting words or gestures". This is illustrated in *R v Milija Vulovic* (No 4) [2012] NSWSC 212 where provocation was established in circumstances that involved a "sustained stabbing attack" on a deceased who had allegedly "provoked" the accused through insults and words. It is important to note that there was no witnesses to the alleged provocation (insults) in this matter.

8.4 The Judicial Commission of NSW's report titled "Partial Defences to Murder in New South Wales 1990 - 2004"[27] demonstrates that the partial defence of provocation is generally overwhelmingly in circumstances of violent physical confrontation. However, we note that the following acts have also been held to be "provocative" conduct in NSW for the purposes of section 23. These include:

(a) previous domestic violence allegedly committed against the offender by the deceased[28];

(b) violence allegedly committed by a deceased who is a non-intimate family member of the offender[29];

(c) non-intimate "male-to-male" violence allegedly occurring between the offender and the deceased[30];

(d) familial or non-familial sexual abuse allegedly committed by the deceased against the offender[31] or an intimate of the offender[32];

(e) intimate relationship confrontations (such as the deceased's alleged infidelity[33], or the breakdown of an intimate relationship between the deceased and the offender[34]); and

(f) homosexual advance(s) allegedly made by the deceased toward the offender[35].

8.5 HVSG submits that in many of the circumstances listed above, a range of alternative defences may be available. Indeed, self-defence or excessive self-defence may be appropriately available in cases of truly provocative circumstances, such as domestic violence, violence against a family member, severe "male-to-male" violence and sexual assault or abuse.

8.6 In circumstances of prolonged or severe domestic violence or sexual abuse, an offender may be able to establish an "abnormality of mind arising from an underlying condition", such as post-traumatic stress disorder, depression, severe or borderline personality disorder.

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[27] Judicial Commission of New South Wales (2006)
[28] See, for example *R v Chant* [2009] NSWSC 593; *R v Vandersee* [2000] NSWSC 916.
[29] See, for example *R v Bell* [2001] NSWCCA 487.
[30] See, for example *R v Lynch* [2010] NSWSC 952.
[31] See, for example *R v Marlow* [2003] NSWSC 1130; *R v Korhonen* [1999] NSWSC 933.
[32] See, for example *R v Ladd* [2001] NSWSC 1055.
[33] See, for example *R v Lovell* [2009] NSWSC 1427.
[34] See, for example, *Singh v R* [2012] NSWSC 637, *Moffa v R* (1977) 138 CLR 601.
[35] See, for example *Green v R (1997)* 191 CLR 334; *R v Dunn* (unreported, 28 October 1997, NSWCCA); *R v Jacky* (unreported, 10 June 1993, NSWCCA).

8.7 HVSG feel comfortable that in the absence of the partial defence of provocation there remain well established alternative defences that provide an appropriate plea in genuinely provocative circumstances.

9 AN OUTDATED PARTIAL DEFENCE

9.1 It is widely recognised that the defence of provocation has been surrounded by controversy and debate since its inception.

9.2 The defence of provocation was originally developed as part of the common law doctrine and arose as a defence to murder in the 17th and 18th centuries[35] at a time when murder was punishable by death. It is believed that provocation as a defence was developed to provide some concession to the human failings of those who lost self control and were being convicted of murder and facing the certainty of the death penalty.

9.3 The law of provocation was developed in a society that was very different to that which we live in today, when duels were commonplace and where men openly bore arms and engaged in 'sudden and serious violence'[37] in the defence of one's honour. Societal norms and values of the time permitted certain categories of unlawful conduct to fall within the grounds of provocation. These categories were based on the notion that 'breaches of honour, such as an assault upon a person or the commission of adultery by a man's wife'[38], were commonplace and justified 'an angry retaliatory response'[39].

9.4 During the 21st century, community values have changed dramatically. However, the defence of provocation is still available and used as a partial defence to murder. HVSG contends that "killing is never justified as a reaction to provocative conduct"[40] and that provocation no longer aligns with contemporary societal values, rather it is an anachronism.[41]

9.5 The existence of provocation as a partial justification or excuse was "inextricably linked with the desire to mitigate against the harshness"[42] of the death penalty. Now that the death penalty and mandatory life sentencing for murder have all but been abolished,[43] so too should the defence of provocation.

9.6 RECOMMENDATIONS

9.7 HVSG 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.

9.8 In summation, HVSG recommend that:

(a) The partial defence of provocation be abolished.

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[35] Legislative Council Select Committee Briefing Paper, *Defence and Partial Defences to Homicide: Inquiry into the Partial Defence of Provocation* (July 2012) at p5.
[37] Gleeson CJ in *R v Muy Ky Chay* (1994) 72 A Crim R 1 at [11].
[38] Legislative Council Select Committee Briefing Paper, at p. 5.
[39] Ibid.
[40] Ibid.
[41] *R v Kumar* [2002] VSCA 139 at [179]
[42] Victorian Law Reform Commission, *Defences to Homicide: Final Report* (2004) at p. 21.
[43] HVSG note that mandatory life sentences for the murder of police officers remain see Section 19B Crimes Act 1900 and also for certain offences (such as murder and drug trafficking) see Section 61 Crimes Sentencing Procedure Act 1999.

(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.

10 SUMMATION

This completes the submission prepared on behalf of the HVSG.

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

Henry Davis York (HDY) have prepared these submissions 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 or Jillian Mitford-Burgess on the numbers below.

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Appendix

Letters from family members involved with HVSG

1. Telephone conversation with Tony Darkovski on 9th August 2012.
2. Letter from Jaspreet Kaur dated 1 July 2012.
3. Letter from Ron Patton dated 28 July 2012.
4. Letter from to HVSG marked PRIVATE AND CONFIDENTIAL dated 31 July 2012.
5. Telephone conversation with Helen Hagenson on 9 August 2012.

Re: Victim: Tony Darkovski - 9 August 2012

Comments from Dragan Razmovski, (first cousins twice removed, culturally referred to in Macedonian as Grandfather)

- Dragan and Suzanna Altiparmakova (sister) were both very upset and very shocked that the offender was given such a small sentence, they expected longer for the crime he committed.

- The wounds were shocking, he was stabbed five times and the offender had no wounds.

- The offender had been provoking Tony, not Tony provoking the offender. The offender told lies.

- Dragan is angry that the offender got manslaughter instead of murder.

- He described the situation as very difficult and very sad.

- He believes the offender should be serving a lengthy sentence as he is violent and has a violent history.

THE ATTENTION OF THE LEGISLATIVE COUNCIL SELECT COMMITTEE

I am Jaspreet Kaur, I am writing this letter for my deceased sister, Manpreet Kaur. We are four sisters and one younger brother. Manpreet was the third daughter of my parents. Manpreet was elder than me. Manpreet was a very charming girl. We both grew up together in India. My mother passed away in 2006. I came to Australia first; one and half years later Manpreet came to Australia. Manpreet and Chamanjot both studied International English Language System in India. Manpreet was about to come to Australia on her behalf only, but while studying together they both fell in love. While studying their teacher recommends them that why don't from one of you go on student visa and other will go on dependent visa. After some time they both talked with their parents that they are in love and want to get married.

After some days, Chamanjot's parents met with my father and asked for the marriage of Manpreet and Chamanjot. My father was bit hesitant about this proposal because Manpreet was older then Chamanjot, but Chamanjot and his parents said we don't have any problem. Then my father agreed for their marriage. Chamanjot's family decide that Manpreet will go on student visa and Chamanjot will go on dependent visa. Chamanjot's parents said we don't have any money, Manpreet's father will have to spend all money for their expenses (Manpreet's college fees and airfares). My father agreed, he said I will arrange all money. My father was running very small business. It was very hard for him to arrange all that money but he agreed. My father and our whole family know how my father arranged all that money. My father spent money for their sponsorship as well.

Manpreet and Chamanjot got married on 14th September 2008. She was really very happy for getting married. I was not able to attend her marriage because I had university exams in Sydney. Manpreet came on 29th January 2009 in Australia on student visa. Due to some reasons Chamanjot's visa was delayed. Manpreet was living with me in Sydney. I was really very happy to see Manpreet in Sydney. We both were studying in the same college in Sydney. We both used to go to college together every day. Chamanjot came on 12th May 2009 to Sydney. While Chamanjot was in India, Manpreet was missed him too much. She was eagerly waiting for him. After his arrival they started to live together. Chamanjot's behaviour was straight away changed

after arriving in Sydney. Manpreet started complaint to me about Chamanjot's behaviour. When I met him I also feel that he is not behaving like he was behaving in India, his behaviour was totally changed. I was thinking that his main motive was to come to Australia, because his parents were not able to spend money to send him Australia. He was not in love with Manpreet, but Manpreet loved him too much.

Chamanjot was not working much; Manpreet was working as well as studying. Chamanjot was always suspicious of Manpreet while she was talking on phone or while some time she got late by 5 or 10 minutes. Sometimes trains got in late, that's why Manpreet got late to reach home but Chamanjot always start fighting on these small matters. Chamanjot did not even like when we both sisters were talking on the phone. If my father called her from India then also Chamanjot did not like it.

In August 2009 Chamanjot physically beat Manpreet while they lived in Homebush; Manpreet had some marks on her face and arm. I met Manpreet in the city and she was crying and showed me those marks and she told me that last night Chamanjot beat her. I said to her, let's go to the police station, we will lodge a complaint against him, but she said don't worry, he is my husband and one day he will be good man and he will understand the relationship of husband and wife. Whenever they had a fight she always told me. Manpreet was a very loving and caring girl.

Now the case is provocation - in this case where is the provocation? In the court, Chamanjot said last night Manpreet told him that I never love you, I only love the guy name called Preet and Chamanjot said after listening to this I was out of my mind and I don't know how all this happened. So where is the evidence of this conversation? Deceased is not alive. Where is Preet? Where is the evidence of Preet? I asked to the crown prosecutor and detectives did you find that guy to whom Manpreet had affair? Did you find anything from Manpreet's phone records that she was talking with Preet? They said we don't have any evidence and we do not find any guy from Manpreet's phone records, and we don't know who this guy is. Chamanjot said this guy Preet is in Sydney, so if he is in Sydney, why detectives could not find him? Chamanjot was lying in all these matters. So how you can say this is the case of provocation. Chamanjot said my brother-in-law spoke with him over the speaker phone from India and used abusive

language, so where is the evidence of this conversation? They didn't take any statement of my brother-in-law. How court and Jury believed on Chamanjot's statement? Chamanjot said, Manpreet and her father told him several times that they will kick him out from this country, so again same question where is the evidence? Did they ask to my father if he said to him these words or not? They took the statements of my father and sister from back home in India but the crown did not show them in the court in front of Jury.

The Jury just accept all his lies because they were not shown all the evidence to prove he lied. If Chamanjot was out of his mind then how could he run away, how he was talking with his mother after this incident? Chamanjot spoke with his mother for approximately 200 minutes after this incident, from the park which is outside of his house. While he ran away he had his passport with him, this matter was hidden from the Jury. If he was out of his mind, how could he think to take his passport with him when ran away? He withdrew money from different ATM's before he came home and murdered Manpreet. Why did he withdraw money. He knew what he was going to do. Chamanjot was caught in Melbourne, if person is out of mind how he can arrange all this? These matters were also hidden from the Jury that he was caught in Melbourne.

As per the doctor witness, the doctor said Manpreet had more than 22 cuts on her body. Doctor said she got them in self defence. If Chamanjot was out of his mind how come he hit several times? Chamanjot slit Manpreet's throat eight times, this shows he was in his control. While their housemates were knocking on the door, Chamanjot said from inside, brother I will open the door in two or three minutes. If the person is out of his mind, how can he speak so calmly while doing this? This case is not a provocation case. Chamanjot said his parents spend all their life savings, he was again lying, I have all the receipts that my father spent all that money, I have given all receipts to the crown but they were not shown in the court room, I don't know why all these matters were hidden from Jury.

What Chamanjot said in the court room - everything was accepted. Without any proof and evidence, how it is possible to accept what he said? This is not justice for my sister and my whole family.

I asked the DPP lawyer, can we reappeal in this case? He said we have 28 days to think either appeal or not. But after a few days he said we can't appeal. Why can't we appeal in this case? This case was all about Chananjot's lies.

It's my humble request to you all, if you can dig out this case and find out something to appeal, because everything was hidden and the Jury believed only his lies. I want justice. Only six years imprisonment for take someone's life. If law of provocation was abolished in some states why not in NSW?

If this is the law of NSW, then anybody can kill someone because they know if they say in the court, I lose my self control, they will get out after three or four years then one day crime will be at very high level. Now any man knows to say that his wife said, I do not love you. I am going to leave you and he will get away with murder and only go to prison for a small number of years.

Thanks and regards,
Jaspreet Kaur
1/07/12

Hi Martha,

Just a few comments on the subject of provocation in a murder for the NSW Parliament inquiry on the Partial Defence Of Provocation.

According to the laws of physics to every action there is an equal and opposite reaction In the case of a provocation, reactions will vary according to the person, their upbringing, education, culture and religion.

Some cultures and religions will endorse murder on the basis of some insult or provocation that relates to the culture or religion. The law should not favour cultural or religious factors to condone murder.

We live in a modern secular state governed according to the principles of democratic, elected representative government where the value of the individual is of paramount importance. For a life to be taken because of some insult or offence against a person's family or faith will only undermine our democratic institutions.

Murder victims were individuals whose life and future had been taken away and there is no way that a provocation, any provocation justifies murder.

Provocation is an act of provoking that stirs a person to anger or incites an action or response. Provocation can stir to anger, resentment, or irritation which can arouse, induce, stimulate or cause a response.

In the case of murder, I cannot accept that provocation could or should be a defence for an act of murder to the extent that it allows a person who has committed a murder to have a reduced sentence or even have the charge reduced to manslaughter. The basis of this opinion is that if the law continues to go down this path it is in danger of encouraging more murders and more lack of self control within the community because progressively the tactics used to defend those charged with murder are diminishing the value of the life of a person who has been murdered.

We have entered a period where discipline and self-discipline are lacking for a number of reasons. Granting more importance to provocation as a defence for murder will only encourage some to over react to a provocation.

This trend could be weakened by having a MINIMUM MANDATORY SENTENCE FOR MURDER OF TEN YEARS. in this case, no matter what, the life and the future of a person has been taken and there is no rational, logical reason for that to happen if we respect each other and the value of each person.

PROVOCATION is no excuse for murder. In the first instance, the person who commits the crime reveals that this was their MOTIVE, yet no motive, no reason of provocation should be advanced to also be a defence.

We all have options. We chose to do things. We must accept the consequences of our actions. In the case of murder, there should be no place for there to be a defence for committing a murder because no response to provocation should be to want to kill another person. The response has been out of proportion to the actual provocation, whatever it is.

Granted, in some societies, cultures and religions there are honour Murders but we do not accept such practices and we should not encourage them within our society. They not only devalue a person or a life of a person, they also usually focus on women victims more than men, and we live in a society in which gradually the role of women and their importance in our community is being progressively raised.

Most honour murders are the result of some provocation in the mind of those who murder. We do not want to encourage these practices through our legal system. We do not want to give some people a feeling that if they are provoked they were entitled to commit a murder and are entitled to use the provocation as their defence. There is increasing violence in our streets. We do not want to encourage more violence by giving the people who are easily provoked to commit a murder.

When people are provoked and then commit a murder, they will claim that they did not really want to kill the person. They will claim that they were angry, lost their cool, did not know what they were doing, etc. If that was true, why did they pick up the weapon are use more than excessive force? it is easy after the event to claim such thoughts or reasons. What all this misses, and what defence counsel fail to appreciate is that a life has been taken and the PUNISHMENT SHOULD FIT THE CRIME.

That is why I believe that a MANDATORY MINIMUM SENTENCE will resolve the issue. With a mandatory minimum sentence, there can still be some examination of the influence of provocation. but however that provocation cannot influence the sentence to such an extent that a reduced sentence could produce a negative reaction by the community to a light sentence.

Hope these thoughts help your submission.

Regards,
Ron Patton.
Dated 28 July 2012.

PRIVATE AND CONFIDENTIAL (Not to be released to the public)

Helen Hagenson - Mother to Lucas Bruin (the matter of Berrier)
Notes from telephone conversation with HVSG counsellor.
9 August 2012

- provocation needs to be taken off the table
- in Lucas's case he had a fight with the offender who then went away and some 30 minutes later returned to another location with a knife, got his girlfriend to get Lucas and then stabbed him
- the offender would know that if you carry a knife it could seriously harm or kill someone
- she feels he intended to kill Lucas
- how could it be provocation when they parted after the fight and then he returned and stabbed Lucas
- she doesn't think a jury has enough legal understanding to make a decision about provocation
- the court process was traumatic
- offenders should take responsibility for their actions
- Lucas sentence was too low
- as a mother she was made to feel Lucas was responsible for his own death
- worried that Lucas's case will be used in other similar altercation matters to assist offenders re provocation