

Legislative Council Select Committee on the partial defence of provocation
Inquiry into the partial defence of provocation

Defences and Partial Defences to Homicide

July 2012

This briefing note has been prepared by the Secretariat for the purpose of informing the Committee members and stakeholders about the law relating to defences and partial defences to homicide in NSW, with a focus on provocation. It is not intended to define or limit the scope of the issues that may be considered by the Committee in undertaking this Inquiry.

CONTEXT

The Committee's terms of reference require it to examine the partial defence of provocation, as well as the adequacy of the (full) defence of self defence for victims of prolonged domestic and sexual violence. This briefing examines self defence and partial defences of excessive self defence, substantial impairment by abnormality of the mind and provocation. It includes a jurisdictional comparison of provocation law across Australian states and territories, and also some case summaries demonstrating the (successful and unsuccessful) use of the partial defence of provocation in Australia.

Provocation offers a defendant a partial defence to a charge of murder. It is one of three partial defences to murder (the others being excessive self defence and substantial impairment by abnormality of the mind). The success of a partial defence results in the defendant being convicted of manslaughter. Self-defence offers a full defence to a charge which, if established, results in a not guilty verdict to the charge of murder. An explanation of these defences is discussed below.

Murder and manslaughter (s 18 Crimes Act 1900 (NSW))

Murder and manslaughter are two forms of unlawful homicide. The difference between the two reflects the culpability of the offender.

Elements - murder

- The accused does an act (or omits to do an act) that caused the death of the deceased.
- Mental element is established where: the act or omission was done by the accused a) with reckless indifference to human life, or b) with an intention to kill or cause grievous bodily harm (s 18(1)(a) *Crimes Act*).¹
- Maximum penalty: imprisonment for life (s 19A *Crimes Act*).

Elements - manslaughter²

- The accused does an act (or omits to do an act) that caused the death of the deceased.
- Mental element is established where: the offender had, at the time of the killing, 'a state of mind that would support a conviction for murder but the culpability of the offender's conduct is reduced by reason of excessive self defence, provocation or substantial impairment by abnormality of the mind.'³
- These circumstances (excessive self defence, provocation or substantial impairment by abnormality of the mind) are partial defences to a charge of murder which, if established, mitigate the liability of the accused to conviction for manslaughter (as opposed to murder).
- Maximum penalty: 25 years imprisonment (s 24 *Crimes Act*).

SELF DEFENCE (full defence)

In NSW, a person is not held to be criminally responsible for an act resulting in a person's death if the act was committed in self defence (s 418 *Crimes Act*). There are two key tests that must be satisfied. The first is a subjective test: that is, the person committing the act must believe the conduct to be necessary to: a) defend him/herself or another person, or b) prevent or terminate the unlawful deprivation of liberty (of themselves or of another person).

¹ Note: a person will also be liable to conviction for murder where the act causing death was done in an attempt to commit, or during or immediately after the commission, by the accused, or some accomplice with him or her, of a crime punishable by imprisonment for life or for 25 years. For example, where a person is committing an armed robbery in company.

² There are two forms (voluntary and involuntary). This brief focuses on voluntary manslaughter.

³ Butterworths *Criminal Practice & Procedure NSW* [8-s 18.40]

The second test is an objective one: the conduct must be a reasonable response in the circumstances as the person perceives them.

There are two questions that a court must answer if self defence is raised:⁴

- a) Is there is a reasonable possibility that the accused believed that his or her conduct was necessary in order to defend himself or herself; and,
- b) If there is, is there also a reasonable possibility that what the accused did was a reasonable response to the circumstances as he or she perceived them.

If the answer to both of these questions is 'yes', a not guilty verdict results.

The Crown bears the onus of establishing that the defendant did not act in self defence by proving beyond reasonable doubt that either: a) the defendant did not at the time of the act believe that it was necessary to do what they did to defend him/herself; or b) the act of the defendant was not a reasonable response to the circumstances as they perceived them.

If it is established that the accused used force intentionally, resulting in the victims death, and that it is reasonably possible that they did so with the belief that the conduct was necessary in self defence and the Crown can establish that the conduct was not a reasonable response in the circumstances, the court gives a direction that the appropriate verdict is one of not guilty of murder, but guilty of manslaughter. This is excessive self defence (see also below).

PARTIAL DEFENCES

In NSW, murder can be reduced to manslaughter if the existence of a partial defence is established. Partial defences have been described as not operating to 'negate intent or recklessness; rather they recognise and make a concession for human frailty'.⁵

Explanations of the partial defences are discussed below.

Excessive self defence

Section 421 of the *Crimes Act 1900* provides for the partial defence of excessive self defence. It applies where, in response to the two questions arising in respect of self defence (see above), the answers are 'yes' and 'no' respectively. The test is entirely subjective. Excessive self defence will come into play where the response of an offender, although they believed it necessary, was not reasonable (i.e. was excessive).

Excessive self defence will reduce murder to manslaughter.

The Judicial Commission of NSW has suggested that there is some evidence that defendants tend to aim for full acquittal by arguing self defence, with excessive self defence offering a 'fall back position'.⁶

⁴ *R v Katarzynski* [2002] NSWSC 613.

⁵ *R v Chhay* (1994) 72 A Crim R 1 Gleeson CJ at 11.

⁶ Judicial Commission of NSW(2006)*Partial Defences to Murder in New South Wales 1990-2004*, p 52.

Substantial impairment by abnormality of the mind

Section 23A of the *Crimes Act 1900* provides for this partial defence. It only arises where all other issues on a charge of murder, including self-defence and provocation, have been resolved in favour of the Crown. Section 23A restricts “abnormality of mind” to the defendant’s capacity to understand events, judge whether his or her actions were right or wrong, or control him/herself. Additionally, the impairment must be so substantial as to warrant reducing murder to manslaughter.

There is evidence that section 23A and provocation are sometimes raised together to achieve a manslaughter conviction.⁷

Provocation

Section 23 of the *Crimes Act 1900* provides for the partial defence of provocation to murder which, if established, can reduce murder to manslaughter.

Current statutory regime on provocation

Provocation is established where an act (or omission) is the result of a loss of self control by the defendant that was induced by any conduct of the deceased toward or affecting the defendant **and** the conduct of the deceased was such that it could have induced an ordinary person to have so far lost self control as to have formed intent to kill or inflict grievous bodily harm.

The ‘ordinary person’ test has three components. Each component has a different test to determine the ‘ordinary person’. The components are:

- the ordinary person’s perception of the gravity of the provocation. In this context, ‘the ordinary person is regarded as having any relevant personal characteristics of the accused.’⁸
- the ordinary person’s power to exercise self-control in response to that provocation. In this context, the ‘ordinary person’ is a person of the same age and maturity as the accused. Considerations of sexual preference, racial background, physical disability and the like, while relevant to the assessment of the gravity of the conduct said to constitute provocation (i.e. the first component), are not to be imputed to the ordinary person.⁹
- the form of the ordinary person’s response after losing self-control in comparison to the accused’s response.’ The NSW Law Reform Commission has described this component of the test as being ‘less clear’:

In *Stingel v The Queen*, the High Court stated that, according to the ordinary person test as it operates under the Tasmanian Criminal Code and at common law, the jury must consider whether an ordinary person, once provoked, could have formed an intention to kill or cause grievous bodily harm, and whether the ordinary person could have retaliated to the provocation “to the degree and method and continuance of violence” as that adopted by the accused. Thus it may be that the more brutal or sadistic the attack on the victim, the less likely it is that an ordinary person could have reacted in the same manner and degree. More recently, however, the High Court appears to have given less importance to this third component of the ordinary person test, stating that whilst the test involves consideration of the nature and extent of an ordinary person’s reaction, it is the formation of an intention to kill rather than the precise form or means adopted which is the jury’s primary consideration

⁷ Judicial Commission of NSW(2006)Partial Defences to Murder in New South Wales 1990-2004, p 15.

⁸ NSW Law Reform Commission (1997) *Partial Defences to Murder — Provocation and Infanticide, Report No 83* [2.45].

⁹ *Stingel v The Queen* (1990) 171 CLR 334.

in assessing the ordinary person's response (see *Masciantonio v The Queen* (1995) 183 CLR 58 at 69).¹⁰

It has been argued that the 'ordinary person' test(s) related to provocation are complex and confusing, and require juries 'to perform a kind of mental gymnastics'; and that such tests conflict with basic principles of criminal responsibility that a person's culpability should be assessed on the basis of their subjective mental state because they 'unfairly impose criminal liability according to an objective standard of behaviour.'¹¹

As noted above, it does not matter whether the conduct of the deceased occurred immediately before the act or omission causing death or at any previous time (i.e. there does not need to be a 'triggering incident'), however 'evidence of a 'cooling off' period between the provocative conduct and the killing will be a factor the jury can consider in determining whether there really was a loss of self control, or whether the killing was planned.'¹²

The defendant does not have to prove provocation. If there is evidence that there may have been provocation, the Crown bears the onus of proving beyond reasonable doubt that a defendant was **not** provoked.

It is important to understand the historical context of provocation to appreciate how and why it operates.

Historical context

Provocation developed as a common law defence to murder in the 17th and 18th centuries, during which time murder was punishable by a mandatory death sentence. The social norms of the period dictated that 'breaches of honour', such as an assault upon a person or the commission of adultery by a man's wife, justified an angry retaliatory response. Indeed, it was considered 'necessary for a man to 'cancel out' the affront by retaliating in some way ... the failure to produce such a response would be considered cowardly.'¹³ The Victorian Law Reform Commission explained how, in this context, 'the existence of provocation as a partial justification or excuse is ... inextricably linked with the desire to mitigate against the harshness of a mandatory [death] sentence.'¹⁴

In 1883, NSW abolished the common law of provocation and introduced a statutory regime. It reflected the common law at the time, which had broadened the use of provocation to forms of conduct beyond a physical assault or committing adultery with a man's wife, to include 'grossly insulting language or gestures'.¹⁵

¹⁰ NSW Law Reform Commission (1997) *Partial Defences to Murder — Provocation and Infanticide, Report No 83* [2.48], [2.49].

¹¹ Victorian Law Reform Commission (2004) *Defences to Homicide: Final Report*, pp 34-35. See also Hemming, Andrew (2011) *Reasserting the place of objective tests in criminal responsibility: ending the supremacy of subjective tests*. University of Notre Dame Australia Law Review, 13 (1); Model Criminal Code Officers Committee of the Standing Committee of the Attorneys-General, *Model Criminal Code, Chapter 5, Fatal Offences Against the Person Discussion Paper* (1998), p 79.

¹² Victorian Law Reform Commission (2004) *Defences to Homicide: Final Report*, p 24.

¹³ Victorian Law Reform Commission (2004) *Defences to Homicide: Final Report*, p 22.

¹⁴ Victorian Law Reform Commission (2004) *Defences to Homicide: Final Report*, p 21.

¹⁵ *Criminal Law Amendment Act 1883*, s 370.

In its original form in the *Crimes Act 1900*, the partial defence of provocation required an element of ‘suddenness’ in terms of the defendant’s response to provocation.¹⁶ This element was removed in 1982 following the 1981 report of the NSW Taskforce on Domestic Violence, which noted the difficulties faced by women who kill abusive husbands after experiencing prolonged domestic violence. The Taskforce found that provocation and self defence ‘place too much emphasis on behaviour immediately before the killing, and do not allow appropriate weight to be given to events occurring over a long period ... prior to the killing.’¹⁷

The 1982 amendment, which removed the temporal nexus requirement between the provocative act and the killing, has ‘paved the way for acceptance of cumulative provocation over a long period of time, often in cases of domestic or family violence against women.’¹⁸

JURISDICTIONAL COMPARISON – PROVOCATION

Over the past two decades, the law of provocation has undergone review and reform across many Australian jurisdictions. The table below sets out the law relating to provocation in other Australian jurisdictions.

Jurisdiction	Provision	Notes
Queensland	<i>Criminal Code 1889, s 304</i>	Retains suddenness element. Some limitations: the provision does not apply if the provocation is ‘words alone, other than in circumstances of a most extreme and exceptional character’. The provision also does not apply ‘other than in circumstances of a most extreme and exceptional character’ if a domestic relationship exists and the provocative act is based on anything done by the deceased to end the relationship, change the nature of the relationship. Reverse onus – defendant bears the onus of establishing that they were provoked. Note that s 304B provides for a separate (partial) defence of ‘Killing for preservation in an abusive domestic relationship’. Qld law provides for a mandatory life sentence for murder (s 305).
South Australia	Available under common law	Provocation at common law was described by the High Court in <i>Masciantonio v R</i> : <i>‘Homicide, which would otherwise be murder, is reduced to manslaughter if the accused causes death whilst acting under provocation. The provocation must be such that it is capable of causing an ordinary person to lose self-control and to act in the way in which the accused did. The provocation must actually cause the accused to lose self-control and the accused must act whilst deprived of self-control before he has had the opportunity to regain his composure.’</i> ¹⁹

¹⁶ *Crimes Act 1900* s 23(c) as introduced stated: ‘That the Act causing death was done suddenly, in the heat of passion caused by such provocation, without intent to take life’.

¹⁷ Attorney General’s Department of NSW (1981) *Report of the NSW Taskforce on Domestic Violence*, p 68.

¹⁸ Judicial Commission of NSW(2006)*Partial Defences to Murder in New South Wales 1990-2004*, p 31.

¹⁹ *Masciantonio v R* [1991] HCA 22 at 25 (Brennan, Deane, Dawson AND Gaudron JJ). See also *Stingel v R* [1990] HCA 61.

Jurisdiction	Provision	Notes
		SA law has a mandatory life sentence for murder. ²⁰
Tasmania	Abolished provocation in 2003	The Second Reading Speech to the bill that abolished provocation in Tasmania noted that: <i>'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 ... Another reason to abolish the defence is that provocation is and can be adequately considered as a factor during sentencing. Now that the death penalty and mandatory life imprisonment have been removed, provocation remains as an anachronism.'</i> ²¹
Victoria	Abolished provocation in 2005	<p>Victoria has provision for 'defensive homicide' (s 9AD <i>Crimes Act 1958</i>), which is an alternative verdict to murder in circumstances where the defendant kills a person in self defence, but does not have reasonable grounds to believe that the conduct was necessary for self defence.²²</p> <p>Victoria also has a provision that confirms the potential relevance of family violence related evidence to self-defence (s 9AH).</p> <p>The Victorian Law Reform Commission noted in its 2004 report which recommended the abolition of the partial defence of provocation: <i>'Our general approach is that factors affecting culpability should be taken into account at sentencing. We are not persuaded by arguments that provocation is a necessary concession to human frailty or that provoked killers are not murderers. Both the serious nature of the harm suffered by the victim, and the fact the person intended to kill or seriously injure the victim, in our view justifies a murder conviction ... [However] ... we believe a partial defence of excessive self-defence is justified. A person who honestly believes his or her actions were necessary in self-protection, but is unable to establish the objective reasonableness of his or her actions, is in a very different position from a person who intentionally kills due to provocation or diminished responsibility.'</i>²³</p>

²⁰ *Criminal Law Consolidation Act 1935*, s 11.

²¹ Tasmania, Parliamentary Debates, Assembly, 20 March 2003, 60 (J Jackson—Attorney General and Minister for Justice and Industrial Relations).

²² Defensive homicide was designed, in part, to protect women who kill abusive partners. It has been noted that there are 'concerns' as to its operation. Hemming refers to recent experience indicating that it is commonly used by men, and the majority were the result of guilty pleas. He suggests 'there is a danger that defensive homicide is provocation in a new guise.' See Hemming, Andrew (2011) *Reasserting the place of objective tests in criminal responsibility: ending the supremacy of subjective tests*. University of Notre Dame Australia Law Review, 13 (1). pp. 69-112.

²³ Victorian Law Reform Commission (2004) *Defences to Homicide: Final Report*, pp xxix - xxvii.

Jurisdiction	Provision	Notes
Western Australia	Abolished provocation in 2008	It was stated during the Second Reading of the bill that abolished provocation in Western Australia that provocation was an issue better dealt with through the sentencing process: <i>'If an offender was provoked by the victim, it is considered that this, as well as any other relevant circumstance, is most appropriately taken into account when sentencing the offender.'</i> ²⁴ WA has a presumptive life sentence for murder. Prior to the abolition of provocation, murder carried a mandatory life sentence.
Northern Territory	<i>Criminal Code Act</i> , s 158	Similar to NSW except that NT law precludes reliance on conduct consisting of a non-violent sexual advance/s by the deceased as the sole basis for a defence of provocation; and the onus of proving provocation is on the defence. NT law provides for a presumptive life sentence for murder (s 157(2)).
Australian Capital Territory	<i>Crimes Act 1900</i> , s 13	Similar to NSW except that NT law precludes reliance on conduct consisting of a non-violent sexual advance/s by the deceased as the sole basis for a defence of provocation.

PREVIOUS REFORM PROPOSALS IN NSW THAT HAVE NOT BEEN PROGRESSED

1997 - The NSW Law Reform Commission examined the partial defences to murder of infanticide, provocation and diminished responsibility. The Commission recommended that provocation be retained as a partial defence to murder but that it be reformulated to address concerns regarding the 'ordinary person' test.²⁵ The Commission recommended retention of the partial defence of provocation on the basis that:

... there are circumstances in which a person's responsibility for an unlawful killing is reduced as a result of a loss of self-control to an extent which should, in any fair system of punishment, be taken into account when dealing with that person. The defence of provocation does not condone that person's actions, but recognises that this is a case which does not fall within the worst category of unlawful killing and should be viewed by the law with a degree of compassion. Where a person's mental state is significantly impaired by reason of a loss of self-control, it is appropriate that that person not be treated as a "murderer". The question of whether a person's culpability for an unlawful killing is so significantly reduced because of a loss of self-control is an issue which should be decided by a jury, as representatives of the community, and reflected in a conviction for murder or for manslaughter. The sentencing judge will then impose a sentence which reflects the jury's finding on the level of culpability involved. This ensures public confidence in the

²⁴ Western Australia, Parliamentary Debates, Assembly, Wednesday, 19 March 2008 (J.A McGinty—Attorney General).

²⁵ NSW Law Reform Commission (1997) *Partial Defences to Murder — Provocation and Infanticide, Report No 83* [2.23], [2.39].

administration of criminal justice, including confidence in sentences imposed, and maintains the proper role of both the judge and the jury.²⁶

1998 - In July 1995, the then Attorney General of NSW, the Hon Jeff Shaw QC MLC, directed that a Working Party be established to review the operation of the Homosexual Advance Defence in NSW. The Working Party recommended, among other things, that non-violent homosexual advances be excluded from forming the basis of a defence of provocation.²⁷

As yet, the recommendations referred to above by the NSW Law Reform Commission and the Homosexual Advance Defence Working Party have not been implemented.

THE USE OF PROVOCATION IN NSW CASES

Types of conduct forming the basis of successful provocation arguments

Research from the NSW Judicial Commission indicates that overwhelmingly violent physical confrontation is most commonly relied upon in successful provocation cases. However, other 'provocative conduct' that has been used successfully in NSW include:

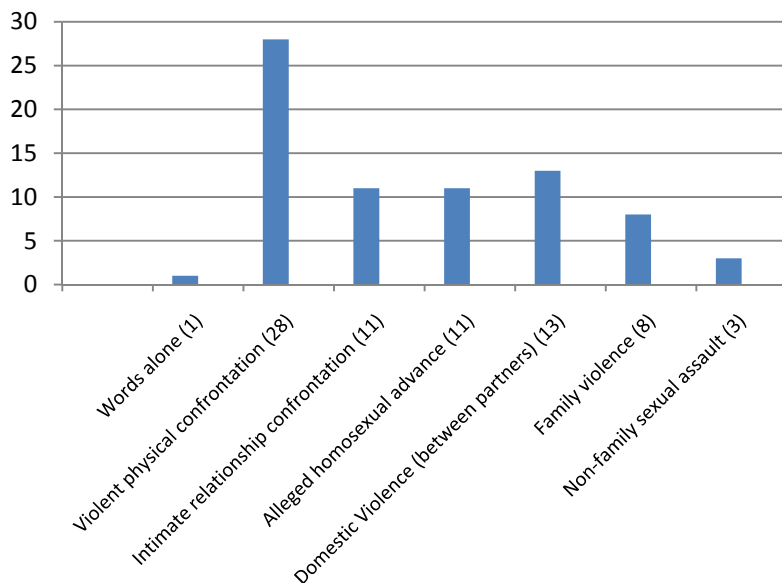
- domestic violence between intimate partners (where the defendant argues provocation based on previous domestic violence committed against them by the deceased)
- alleged homosexual advance(s)
- intimate relationship confrontations (where a defendant successfully argues they were provoked by an intimate partner's admission of, for example, adultery, or their desire to end the relationship)
- family violence (not involving an intimate partner, for example – abuse by an older relative of the defendant)
- non-family sexual assault
- words alone.

The table below indicates the prevalence of each category between 1 January 1990 and 21 September 2004:²⁸

²⁶ NSW Law Reform Commission (1997) *Partial Defences to Murder — Provocation and Infanticide, Report No 83* [2.38].

²⁷ NSW Attorney General's Department, Criminal Law Review Division (1998) *Homosexual Advance Defence: Final Report of the Working Party* [6.7].

²⁸ Judicial Commission of NSW(2006)*Partial Defences to Murder in New South Wales 1990-2004*, p 36.



Cases where provocation has been successful (NSW and other jurisdictions)

Moffa v The Queen (1977):²⁹ the High Court found (by 4:1 majority, Gibbs J dissenting) that a man who had killed his wife was provoked into doing so through his wife’s conduct comprising admissions of ‘wholesale promiscuity’, refusals of his sexual advances, statement that the relationship was over and generally offensive language. The Court recognised the cumulative nature of the deceased’s conduct in finding that the man should be convicted of manslaughter.

R v Chhay (1992):³⁰ The NSW Court of Criminal Appeal (NSWCCA) found that the defendant, a Cambodian migrant woman, who killed her husband after many years of violence and abuse was provoked. Ms Chhay had been convicted of murder in the NSW Supreme Court after the trial judge directed that a ‘triggering incident’ was required. Mrs Chhay alleged that she had stabbed her husband after he came at her with a knife. The Crown argued that she killed him whilst he was asleep. On appeal, the NSWCCA held that the ‘suddenness’ of response was not a bar to establishing provocation³¹ - the past abuse itself could be the provocation.³²

Gleeson CJ expressed concerns with the law regarding provocation as follows:

One common criticism was that the law’s concession to human frailty was very much, in its practical application, a concession to male frailty... The law developed in days when men frequently wore arms, and fought duels, and when, at least between men, resort to sudden and serious violence in the heat of the moment was common. To extend the metaphor, the law’s concession seemed to be to the frailty of those whose blood was apt to boil, rather than those whose blood simmered, perhaps over a long period, and in circumstances at least as worthy of compassion.³³

²⁹ (1977) 138 CLR 601. The case an application for special leave to appeal from the Supreme Court of South Australia.

³⁰ (1992) 72 A Crim R 1.

³¹ This was recently affirmed by the High Court in *Pollock v The Queen* [2010] HCA 35.

³² Note that by this time, the legislation had been amended as noted at page 3.

³³ *Chhay v R* (1994) 72 A Crim R 1, 11.

Green v The Queen (1997):³⁴ The High Court held (by 3:2 majority, Kirby and Gummow JJ dissenting) that a 22 year old man who fatally stabbed and bashed a 36 year old male friend was provoked by the deceased's sexual advances toward him. The case is the authority on what is commonly referred to as 'homosexual advance defence',³⁵ and has been the subject of significant criticism, largely based on the reasoning of the dissenting judges that 'the "ordinary person" in Australian society today is not so homophobic as to respond to a non-violent sexual advance by a homosexual person as to form an intent to kill or to inflict grievous bodily harm.'³⁶ In his dissent, Kirby J stated:

If every woman who was the subject of a "gentle", "non-aggressive" although persistent sexual advance... could respond with brutal violence rising to an intention to kill or inflict grievous bodily harm on the male importuning her, and then claim provocation after a homicide, the law of provocation would be sorely tested and undesirably extended.... Any unwanted sexual advance, heterosexual or homosexual, can be offensive. It may intrude on sexual integrity in an objectionable way. But this Court should not send the message that, in Australia today, such conduct is objectively capable of being found by a jury to be sufficient to provoke the intent to kill or inflict grievous bodily harm. Such a message unacceptably condones serious violence by people who take the law into their own hands.³⁷

R v Ramage (2004):³⁸ James Ramage was charged with the bashing and strangulation murder of his estranged wife. A jury returned a verdict of manslaughter on the basis that the Crown had not established beyond reasonable doubt that the defendant was not provoked by the deceased. The Victorian Supreme Court accepted that James Ramage had become 'provoked to rage and anger by the confrontation with [his] wife'³⁹ during which time 'hurtful things [were said] to each other'. The defendant was told by his wife that he repulsed her, and that the relationship was over, and that she had found a new lover.⁴⁰ In sentencing, Osborn J noted that the maximum penalty for manslaughter was 20 years imprisonment. He also noted that the killing was deliberate and brutal, and involved 'overwhelming and continuing assault on a smaller and weaker victim'.⁴¹ Osborn also noted that the provocation was not 'objectively extreme' and was not persuaded that Ramage was remorseful.⁴² He was sentenced to 11 years imprisonment, with an 8 year non-parole period.

Regina v Stevens (2008):⁴³ Bradley Stevens was charged with the murder of his de facto partner and mother of his two children, after bashing her to death. The deceased and the defendant were heavy drug users and there was a history of violence. The defendant's offer of a guilty plea to manslaughter on the basis of provocation was accepted by the Crown. He argued that he was provoked by the deceased's 'continued drug abuse and the effect that had on her ability to care for the two infant children'. He also suspected infidelity, which was discussed on the night of the killing. Stevens was sentenced to 8 years and 9 months, with a non-parole period of 6 years and 7 months.

³⁴ [1997] HCA 50. Appeal from NSW Court of Criminal Appeal.

³⁵ Other cases involving 'homosexual advance defence' include *R v Hodge* [2000] NSWSC 897; *R v Bonner* (Unreported, 19 May 1995); *R v Dunn* (unreported, 28 October 97); *R v Turner* (Unreported, 14 July 1994); *R v Jacky* (Unreported, 10 June 1993); *R v McGregor* (Unreported, 9 October 1993); *R v McKinnon* (Unreported, 24 November 1993); *R v Turner* (Unreported, 14 July 1994).

³⁶ *Green v R* (1997) 148 ALR 659 at 714 (Kirby J).

³⁷ *Green v R* (1997) 148 ALR 659 at 719 (Kirby J).

³⁸ [2004] VSC 508.

³⁹ [2004] VSC 508 at 29.

⁴⁰ [2004] VSC 508 at 32.

⁴¹ [2004] VSC 508 at 55.

⁴² [2004] VSC 508 at 55.

⁴³ [2008] NSWSC 1370.

R v Singh (2012):⁴⁴ Chamanjot Singh was charged with the murder of his wife, Manpreet Kaur, who was strangled before having her throat cut eight times with a box-cutter blade. The defendant pleaded not guilty to murder but guilty to manslaughter, on the grounds of provocation. The Crown did not accept that plea and the matter proceeded to a trial with a jury. There was a 'long history of marital disharmony and domestic violence that characterised their relationship.' On the night of the killing, the defendant said that the deceased then told him that she had never loved him and was in love with someone else, and threatened to have him removed from the country. The defendant became 'enraged', and gave evidence that he held the deceased by the throat while she slapped him, before taking hold of the box cutter that was nearby. He said that he had no recollection of the events that followed. The jury acquitted the offender of murder but convicted him of manslaughter on the basis of the partial defence of provocation. He was sentenced to 8 years imprisonment, with a 6 year non-parole period.

Cases where provocation has been unsuccessful (NSW and other jurisdictions)

R v Osland (1998):⁴⁵ Heather Osland and her son David were charged with murdering Frank Osland by sedating him and hitting him over the head with an iron bar, before burying him in a pre-dug hole. There was evidence that Heather and her children had been victims of severe physical, sexual and psychological violence by Frank Osland for over a decade. Heather and David relied on provocation and self defence at trial. The jury was unable to reach a verdict with respect to David⁴⁶ but convicted Heather of murder. Heather unsuccessfully appealed to the Victorian Court of Appeal, and then to the High Court, which also dismissed her appeal, on the basis that it was 'coolly premeditated [with] little or no evidence to demonstrate that she had lost that level of self-control which the common law and statute law in Australia ascribes to the "ordinary person" in the position of the accused.'⁴⁷

In highlighting 'battered woman syndrome', the Court noted that the existence of previous domestic violence will not, of itself, justify a defence of provocation or self defence:

Least of all does the mere raising of [battered woman syndrome]... cast a protective cloak over an accused, charged with homicide, who alleges subjection to a long-term battering or other abusive relationship. No civilised society removes its protection to human life simply because of the existence of a history of long-term physical or psychological abuse. If it were so, it would expose to unsanctioned homicide a large number of persons who, in the nature of things, would not be able to give their version of the facts. The law expects a greater measure of self-control in unwanted situations where human life is at stake. It reserves cases of provocation and self-defence to truly exceptional circumstances. Whilst these circumstances may be affected by contemporary conditions and attitudes, there is no legal *carte blanche*, including for people in abusive relationships, to engage in premeditated homicide. Nor in my view should there be.⁴⁸

Heather Osland was sentenced to 14 and a half years, with a 9 and a half year non-parole period. She was released in July 2005.

R v Faehndrich (2008):⁴⁹ John Faehndrich was charged with murdering his partner of 3 months, Dianne Condon, by stabbing her with a pair of scissors. The Crown rejected the defendant's plea of

⁴⁴ [2012] NSWSC 637.

⁴⁵ [1998] HCA 75.

⁴⁶ David was subsequently retried and acquitted.

⁴⁷ [1998] HCA 75 at 170 (Kirby J).

⁴⁸ [1998] HCA 75 at 165 (Kirby J).

⁴⁹ [2008] NSWSC 877.

guilty to manslaughter based on provocation and substantial impairment by abnormality of mind at the first day of trial. The defendant argued that the deceased had attacked him first, provoking him to react in the manner resulting in death. There was evidence that the deceased had intended to end the relationship. At trial, the jury rejected the defendant's argument that he was provoked. He was convicted of murder and sentenced to 20 years, with a 15 year non-parole period. The judge accepted that while the partial defence of provocation was not made out, the provocative conduct of the deceased did have a role in sentencing:

... the changes in the deceased's attitude and behaviour towards [the defendant] contributed to the loss of self-control. To this extent, I find that the prisoner was provoked by the deceased which mitigates the objective seriousness of the offence... Having made that finding, I hasten to add that Miss Condon was entitled to end the relationship whenever she chose to do so. The deceased sadly would not have been aware of the impact that her volatility in the relationship was having upon the prisoner.⁵⁰

⁵⁰ [2008] NSWSC 877 at 55 (Price J).