

INQUIRY INTO PARTIAL DEFENCE OF PROVOCATION

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WOMEN'S LEGAL SERVICES NSW

Incorporating
Domestic Violence Legal Service
Indigenous Women's Legal Program

23 August 2012

The Director
Select Committee on the Partial Defence of Provocation
Parliament House
Macquarie St
Sydney NSW 2000

By email: provocationinquiry@parliament.nsw.gov.au

Dear Committee,

Inquiry into the Partial Defence of Provocation

Please find enclosed a submission by Women's Legal Services NSW (WLS NSW) to the Inquiry on the Partial Defence of Provocation.

If you would like to discuss any aspect of this submission, please contact Liz Snell, Law Reform and Policy Coordinator or Janet Loughman, Principal Solicitor on 02 8745 6900.

Yours sincerely,

Women's Legal Services NSW

Janet Loughman
Principal Solicitor



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Women's Legal Services NSW Submission to Select Committee on the Partial Defence of Provocation

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A. Introduction

1. Women's Legal Services NSW (WLS NSW) thanks the Legislative Council Select Committee for the opportunity to make a submission to the inquiry on the partial defence of provocation.

About Women's Legal Services

2. WLS NSW is a community legal centre that aims to achieve access to justice and a just legal system for women in NSW. We seek to promote women's human rights, redress inequalities experienced by women and to foster legal and social change through strategic legal services, community development, community legal education and law and policy reform work. We prioritise women who are disadvantaged by their cultural, social and economic circumstances. We provide specialist legal services relating to domestic and family violence, sexual assault, family law, discrimination, victims compensation, care and protection, human rights and access to justice.
3. The focus of this submission is on intimate partner homicides – both the context in which violent male intimate partners kill their female partners and female victims of domestic violence kill their violent intimate partners.
4. We are concerned that inherent gender bias in the law operates in both directions:
 - a) men who kill their partners frequently have a murder charge reduced to manslaughter because they can persuade a jury that they were so overcome by jealousy (or loss of male honour) that they lost control;
 - b) women who kill their partners who have experienced long term and serious domestic violence are often convicted of murder or plead guilty to manslaughter due to an inability to persuade a jury that killing their partner is an act of self-defence.
5. We note we have had the benefit of discussions with the NSW Domestic Violence Committee Coalition on this complex issue and in the development of our policy position. WLS NSW contributed significantly to aspects of the Domestic Violence Committee Coalition submission, particularly on self-defence.

Overview

6. Due to the short time frame of this inquiry, the purpose of this submission is to make some recommendations for important short-term change, and raise several issues that we believe should be considered in a more comprehensive review of homicide defences. Both the law and its implementation in practice are problematic, and reform will not be achieved simply by legislative change. The issue highlights the pronounced failure of the government and our society generally, to eliminate violence against women, and requires a holistic and sustained response.
7. WLS NSW submits that the current law of the partial defence of provocation is deeply flawed, anachronistic and gender-biased. It developed as a defence that acquiesced in the defending of male honour, reducing the offence to manslaughter, at a time when the mandatory sentence for murder was the death penalty. Accordingly,

the gender bias in the law has the effect that "female defendants whose experience ... fall outside the male-inspired defences are confronted with the prospect of either failing to plead them successfully or having to distort their experiences in an effort to fit them into the defence."¹

8. WLS NSW submits the NSW Government should be working towards abolishing the partial defence of provocation in a phased approach. As discussed below, WLS NSW is concerned that the current defence of self-defence inadequately addresses situations where victims of violence (usually women) ultimately kill their violent intimate partners in self-defence. We also acknowledge that not all circumstances in which a woman kills her violent intimate partner should necessarily be considered self-defence. For these reasons, we recommend the immediate abolition of the partial defence of provocation in particular circumstances, combined with a more comprehensive and holistic inquiry into all partial and complete defences to homicide
9. The continued use of the partial defence of provocation where killings have occurred in the context of sexual infidelity or a change in relationship condones and sanctions violence against women. In effect women are being killed for exercising their right to end a relationship. As a Victorian policy officer interviewed by Fitz-Gibbon describes it: "when women were exercising ... their equality rights, they were being murdered."²
10. Inequality and discrimination are key causes of violence against women. WLS NSW submits that the use of the defence of provocation in the circumstances described above breaches Australia's obligations under international human rights instruments including Article 2 of the *Convention on the Elimination of All Forms of Discrimination Against Women 1979* (CEDAW).³ It is also inconsistent with the *National Plan to Reduce Violence Against Women and their Children*. In particular, it is inconsistent with: National outcome one: Communities are safe and free from violence; National outcome two: Relationships are respectful and National outcome six: Perpetrators stop their violence and are held to account.
11. WLS NSW is also concerned by the use of the partial defence of provocation in the context of non-violent homosexual advances as exemplified in *Green v The Queen*.⁴ WLS NSW believes the continued availability of this defence sanctions discrimination and legitimises vilification and is contrary to international human rights obligations.⁵
12. The first phase of abolishing provocation should preclude the use of the partial defence in particular circumstances. Namely, it should be precluded in the context of a change in a relationship including an indication of separation, attempt to leave, separation or in the context of sexual jealousy; and non-violent homosexual advance. Social framework evidence should also be used to inform when the partial defence of provocation should be excluded on the basis of "words alone". This is discussed further below at paragraphs 88 to 92. This phase should also consider necessary changes regarding the ongoing

¹ Yeo cited in Kate Fitz-Gibbon, *The Aftermath of Provocation: Homicide Law Reform in Victoria, New South Wales and England* (PhD thesis), Monash University, 2012 at 30.

² Cited in Fitz-Gibbon, Note 1 at 122.

³ Article 2 of CEDAW ratified by Australia on 28 July 1983 states: "[s]tates Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake: (f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women..."

⁴ *Green v The Queen* [1997] HCA 50.

⁵ Article 2 *International Covenant on Civil and Political Rights* ratified by Australia on 13 August 1980.

education of police, law students, legal practitioners, judiciary and the wider community about the general nature and dynamics of relationships affected by family violence.

13. At the same time, a comprehensive review of homicide defences should be commissioned. Significantly, reform to the partial defence of provocation in other jurisdictions clearly highlights that legislative change of itself is not enough. Any review therefore needs to go beyond a review of legislation and take a holistic approach. This includes:
 - 13.1. Examining all aspects of the process from the police investigations stage, including reassessing prosecutorial guidelines to help determine the circumstances in which charges should be laid.
 - 13.2. Transparent processes in plea-bargaining through to what defences should be available, reviewing Bench Books and jury directions and assessing whether mitigating factors should be limited to sentencing.⁶
 - 13.3. The need to examine the role of social framework evidence which can inform the jury and judges about the dynamics and impact of family violence, as has been developed in Victoria.
 - 13.4. The importance of education of police, law students, legal practitioners, the judiciary and the wider community about the general nature and dynamics of relationships affected by domestic violence, including the possible consequences of separation from the abuser and how this should be considered in the context of self-defence.
14. We note that the joint Australian Law Reform and NSW Law Reform Commissions' *Family Violence – A National Legal Response* made several recommendations relating to homicide defences.⁷ We support these recommendations and submit that any review should consider and seek to implement these recommendations.
15. We refer to the Victorian Law Reform Commission's (VLRC) review of defences to homicide.⁸ We commend the VLRC's phased approach which began with the release of an occasional paper that specifically explored the issues of why women kill in circumstances of domestic and family violence. This was followed with the release of an issues paper that included research and sought responses to proposed changes. Adequate time for well-considered input to any proposed changes was provided.
16. We note that the Law Reform Commissions of Western Australia, New Zealand and the United Kingdom have also recently completed homicide defences reviews. These reviews were conducted over an extended period of time. We recommend that the NSW Law Reform Commission undertake a similarly comprehensive review in NSW.
17. Ongoing monitoring and evaluation of any changes to law and legal processes, including a formal review, is also required. This would allow an opportunity to examine the effectiveness of any changes, including seeking to address any unintended consequences. Enough time should pass to be able to see the impact of any changes. Once any changes

⁶ As it now the case in Victoria, Western Australia and New Zealand.

⁷ Australian Law Reform and NSW Law Reform Commissions' *Family Violence – A National Legal Response*, 2010, Recommendations 14.1-14.5.

⁸ Victorian Law Reform Commission (VLRC), *Defences to Homicide: Final Report*, 2004.

are in force, we would recommend an initial review after five years (as has taken place in Victoria) and regular reviews thereafter.

Summary of recommendations

18. In summary, WLS NSW makes the following recommendations:

- 18.1. That the NSW Government works towards abolishing provocation in a phased approach.
- 18.2. That phase one include:
 - 18.2.1. Precluding the use of the partial defence of provocation in particular circumstances, namely in the context of: a change in a relationship including an indication of separation, attempt to leave or separation; sexual jealousy; and non-violent homosexual sexual advance. Social framework evidence should also be used to inform when the partial defence of provocation should be excluded on the basis of "words alone".
 - 18.2.2. Ensuring the admissibility of social framework evidence regarding family violence in the context of a defence to homicide. This should be made explicit through legislative amendment similar to s 9AH *Crimes Act 1958 (Vic)*.
 - 18.2.3. The ongoing education of police, law students, legal practitioners, the judiciary and the wider community about the general nature and dynamics of relationships affected by family violence.
- 18.3. That the NSW Law Reform Commission undertakes a comprehensive and holistic review of full and partial homicide defences in NSW. That this review be cognisant of the gender bias in the law and include, but not be limited to examining all aspects of the process including:
 - 18.3.1. Police investigations stage.
 - 18.3.2. Prosecutorial guidelines to help determine the circumstances in which charges should be laid.
 - 18.3.3. Transparent processes in plea-bargaining including guidelines for when manslaughter rather than murder should be the charge.
 - 18.3.4. Full and partial defences.
 - 18.3.5. Reviewing Bench Books and jury directions.
 - 18.3.6. Sentencing, including whether the circumstances that may lead to provocation being raised as a defence initially are more properly considered as potential mitigating factors in sentencing (with the view of not transferring the problems inherent in the partial defence of provocation to a sentencing stage).
 - 18.3.7. Ensuring the admissibility of social framework evidence which can inform the jury and judges about the dynamics and impact of family violence, as has been developed in Victoria, and considering the role of experienced domestic

violence workers and other experts in providing such evidence.

18.3.8. Considering admissibility of other evidence.

18.3.9. Ongoing education of police, law students, legal practitioners, the judiciary and the wider community about the general nature and dynamics of relationships affected by family violence, including the possible consequences of separation from the abuser and how this should be considered in the context of self-defence.

18.3.10. Implementation of recommendations 14.1-14.5 in the joint Australian Law Reform and NSW Law Reform Commissions' *Family Violence – A National Legal Response*.

18.4. That ongoing monitoring and evaluation of any changes to law and legal processes be undertaken including an initial review after five years and regular reviews thereafter.

18.5. That funding of women's domestic violence services should be increased. This is discussed further below, see paragraphs 28 to 30.

B. Social Framework evidence and the context for intimate partner homicides

Definition

19. The National Homicide Monitoring Program defines intimate partner homicide as:

“where the victim and offender share a current or former intimate relationship, including homosexual and extramarital relationships.”⁹

Context for intimate partner homicides

20. Between 2003 and January 2008 there were 215 recorded domestic violence related deaths in NSW.¹⁰ Of the 25 intimate partner victims in NSW in 2007-2008, 20 were female and 5 male.¹¹

21. The main risk factor for intimate partner homicides is prior domestic violence. Significantly, there is evidence that “women who experience attempted strangulation by their partner are ten times more likely to be murdered than other women.”¹² Prior strangulation is therefore a significant indicator of future lethal force. Arguably, there should be a rebuttable presumption that the offender has been a perpetrator of violence in

⁹ National Homicide Monitoring Program cited in *Domestic Violence Death Reviews Team, Annual Report 2010-11*, Attorney General and Justice, October 2011, at 10 (16) accessed on 3 August 2012 at: http://www.coroners.lawlink.nsw.gov.au/agdbasev7wr/_assets/coroners/in40160115/dvdr_t_annual_report_oct2011_x.pdf.

¹⁰ *Domestic Violence Death Reviews Team, Annual Report 2010-11*, Note 9 at iv.

¹¹ *Domestic Violence Death Reviews Team, Annual Report 2010-11*, Note 9 at 11(17).

¹² Spangaro citing Professor Jackie Campbell's schema for risk factors in femicide in Jo Spangaro, (Churchill Fellow) *Health programs for identification and assessment of sexual and domestic violence*, The Winston Churchill Memorial Trust of Australia, 2004 at 28 accessed on 4 August 2012 at:

http://www.churchilltrust.com.au/site_media/fellows/Spangaro_Jo_2004.pdf.

an intimate partner relationship where strangulation and/or multiple methods of killing are present. In such circumstances and where the offender is the primary aggressor, provocation should not be open to the offender as a defence. Social framework evidence should be used to help identify the primary aggressor.

22. The most dangerous point of a relationship for a victim of intimate partner violence is the point at which the victim leaves the relationship. Wallace's study of NSW Police homicide files from 1968 – 1981 found that 46% of women killed by their husbands were killed in the context of their having left or in the process of leaving their husband.¹³ This is important to recognise because in the context of women killing their violent intimate partners, juries and judges, like members of the broader community, frequently do not understand why women simply do not leave the relationship. The danger in doing so is but one of many reasons.¹⁴ The lack of understanding of this important issue again highlights the need for social framework evidence to "assist juries and judiciary to better assess the reasonableness of a defendant's claim to self-defence."¹⁵
23. Indigenous communities are also affected disproportionately by intimate partner homicide. Despite Indigenous persons representing just over 2% of the total Australian population, they account for just under a quarter of the intimate partner homicides (as both victims and offenders).¹⁶ Therefore the adequacy and operation of current homicide defences has a particular impact on Indigenous women. It is crucial that any social framework evidence admitted in such matters is culturally appropriate and cognisant of the particular dynamics around family violence that exist in Indigenous communities.

Violence Against Women

24. Violence against women is one of the most widespread human rights abuses. The National Plan to Reduce Violence Against Women and their Children recognises the widespread and urgent nature of the problem. We understand that the NSW Government is currently developing its jurisdictional Implementation Plan.

In Australia:

- domestic violence puts more women aged 15-44 years at risk of ill health and premature death than any other risk factor;¹⁷
- one in three Australian women will report being a victim of physical violence and

¹³ A Wallace, *Homicide: The Social Reality*, NSW Bureau of Crime Statistics and Research, Sydney, 1986 at 112 (125) accessed on 2 August 2012.

¹⁴ Other reasons include: financial insecurity and lack of financial independence; inadequate accommodation, including an inability to take teenage sons to a refuge; shame and embarrassment; denial/disbelief; fear of post separation violence against themselves or their children; fear that their partner will obtain custody and they will not be able to protect their children from violence; lack of appropriate services. For further information, see, for example, Bradfield thesis at 44-49.

¹⁵ Julie Stubbs & Julia Tomlie, "Falling Short of the Challenge? A Comparative Assessment of the Australian Use of Expert Evidence on the Battered Woman Syndrome," *Melbourne University Law Review*, Vol 23, 1999 at 709.

¹⁶ Jenny Mouzos & Catherine Rushforth, "Family Homicide in Australia", *Trends & Issues in Crime and Criminal Justice*, Australian Institute for Criminology, 2003, accessed on 17 August 2012.

¹⁷ VicHealth and Department of Human Services, *The Health Costs of Violence. Measuring the Burden of Disease Caused by Intimate Partner Violence – A Summary of Findings*, 2004 at 10 accessed on 1 May 2012 at: <http://www.vichealth.vic.gov.au/~media/ResourceCentre/PublicationsandResources/Mental%20health/IPV%20BOD%20web%20version.ashx>

almost one in five will report being a victim of sexual violence in their lifetime according to the Australian Bureau of Statistics.¹⁸ We also know that family violence and sexual assault are under reported.

- approximately 350,000 women will experience physical violence and 125,000 women will experience sexual violence each year.¹⁹
 - some groups of women experience higher rates of violence. These include Aboriginal women²⁰, women with disabilities²¹, women from culturally and linguistically diverse backgrounds²², younger women and older women.²³
 - whatever the form violence takes, it has serious and often devastating consequences for victims, their extended families and the community.
 - domestic and family violence is the biggest single cause of homelessness among women and children.
 - almost one in four children in Australia have witnessed violence against their mothers or step-mothers.
 - violence against women also comes at an enormous economic cost. Research released by the Government shows that each year violence against women costs the nation \$13.6 billion.²⁴ This figure is expected to rise to \$15.6 billion by 2021.
25. Under international human rights, States are required to act with due diligence to protect, promote and fulfil their human rights obligations.²⁵
26. Significantly, States may be held responsible for private acts, such as domestic and family violence, if they fail to act with due diligence to prevent, investigate or punish acts of violence.²⁶
27. In her first thematic report to the United Nations Human Rights Committee, the current Special Rapporteur on Violence Against Women, its causes and consequences, Ms Rashida Manjoo focused on the right of individuals to reparations for the violation of their human rights, a right 'firmly enshrined in the corpus of international human rights and humanitarian instruments.'²⁷

18 Australian Bureau of Statistics (2005) Personal Safety Survey, ABS Cat. No. 4906.0, Canberra: Commonwealth of Australia. (ABS 2005).

19 ABS 2005, Note 18

20 ABS 2005, Note 18 Mouzos, J. and Makkai, T. Women's experiences of male violence: Findings from the Australian component of the International Violence Against Women Survey, Research and Public Policy Series, No. 56, Canberra: Australian Institute of Criminology, 2004.

21 ABS 2005, Note 18; Lievore, D. 'Prosecutorial Decisions in Adult Sexual Assault Cases' Trends and Issues in Crime and Criminal Justice, Issue.1 2005 at 291.

22 ABS 2005, Note 18.

23 ABS 2005, Note 18.

24 KPMG, *The Cost of Violence against Women and their Children. Safety Taskforce*, Department of Families, Housing, Community Services and Indigenous Affairs, Australian Government, 2009.

²⁵ Human Rights Committee, *General Comment No. 31*, CCPR/C/74/CRP.4/Rev.6, para. 8; Committee on the Rights of the Child, *General Comment No. 5*, CRC/GC/2003/5, 27 November 2003, para. 1; Committee on Economic, Social and Cultural Rights, *General Comment No. 14*, E/C.12/2000/4 (2000), para. 33.

²⁶ CEDAW *General Comment 19: Violence against Women*, as contained in UN Doc A/47/38 (1992) at paragraph 9.

²⁷ *Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo*, Human Rights Council, A/HRC/14/22 accessed on 23 August 2012 at:

Better funding of women's domestic violence services

28. WLS NSW encourages any review of partial defences to homicide to take a holistic approach, including examining the background and precipitating factors and reasons why people may kill in response to domestic violence. Research in the United States has found that where there is adequate and appropriate legal assistance, accommodation and other victim support services, the number of women killing their violent intimate partners is lower than where these services are not available.²⁸
29. An important part of any holistic review of homicide defences, particularly the adequacy of such defences for victims of violence who kill their violent intimate partners, should include enhancing funding of women's domestic violence services. Based on the US research, such funding will not only reduce preventable deaths of victims of violence at the hands of their violent partners, it should also reduce incidences of women victims of violence feeling they have no other option to protect the lives of themselves and their children but to kill their violent partner.
30. We also refer the Committee to the submission we recently made to the Parliamentary Inquiry into Domestic Violence Trends and Issues in NSW. In our submission dated 16 September 2011 we recommended:
 - 30.1. Increased funding for integrated services for victims of domestic violence, including regional services;
 - 30.2. Increased funding for refuge, counseling and health services'
 - 30.3. Various measures to improve access to justice and legal assistance services , especially for Indigenous women, women from CALD backgrounds and women with disabilities;
 - 30.4. The establishment of mechanisms for referral of cases involving family violence to specialised family violence courts and the appointment of a high level inter-agency advisory group to investigate the potential for specialist family violence courts to be established in NSW.

Men who kill their female intimate partners

31. Based on the work of a number of researchers, Coss notes the different motivations and distinguishing features of males killing their female intimate partners and females killing their male intimate partners:

“men kill in revenge, out of jealousy, for honour, as the climax in a chain of violence... when women kill it is mostly as a form of self-preservation (or protection of children) in response to violence inflicted upon them,”²⁹

<http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.22.pdf> See also: the *Universal Declaration of Human Rights* (art. 8), the *International Covenant on Civil and Political Rights* (art. 2, para. 3), the *International Convention on the Elimination of All Forms of Racial Discrimination* (art. 6), the *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (art. 14), the *Convention on the Rights of the Child* (art. 39), CEDAW General Comment 19 at paragraphs 9, 24(i), 24(t)(i).

²⁸ Angela Browne and Kirk R. Williams, “Exploring the Effect of Resource Availability and the Likelihood of Female-Perpetrated Homicides,” *Law & Society Review* 23(1) (1989) at 87, 90.

²⁹ Coss cites research by Dobash and Dobash, Polk and Wilson and Daly in Graeme Coss, “Provocative reforms: A comparative critique,” *Criminal Law Journal*, Vol 30, 2006 at 139 and footnotes 7-9.

32. The issue of “loss of control” is discussed below in the section on provocation.

Women who kill their violent intimate partners

33. As noted above “when women kill it is mostly as a form of self-preservation (or protection of children) in response to violence inflicted upon them.”³⁰ This is reflected in Wallace’s study of NSW Police homicide files from 1968 – 1981, in which she found 70% of women who killed their husbands did so in a context of violence perpetrated by the husbands.³¹
34. Similarly, Bradfield conducted research about women in Australia who killed their male intimate partners over the period from 1980-2000. She identified 76 cases. Of these, there was a history of physical violence in 65 cases (86%).
35. Bradfield’s study found that of the women who killed their violent intimate partners, self-defence was left for consideration by the jury at trial in 21 of 65 cases. Of the 21 women, 9 were acquitted on the grounds of self-defence,³² 11 were convicted of manslaughter and 1 was convicted of murder.³³ The question should be asked: why didn’t more of these defendants raise self-defence?
36. This concern is also reflected in a recent examination of reported NSW cases of murder between 2002 and 2012 in which the defence of provocation was raised in an intimate partner context.³⁴ Of the 21 cases identified, 9 involved a woman killing her male intimate partner. In eight of these cases a history of violence perpetrated by the deceased against the defendant was alleged. In the ninth case, the deceased had sexually assaulted the defendant’s 9-year-old niece.
37. A summary of these cases is provided at Annexure A. Eight out of the nine cases involved an immediate response to the violence. All of the cases involved weapons.
38. In two cases, the defendants initially pleaded not guilty and later changed their plea to manslaughter on the grounds of provocation³⁵ and substantial impairment of mind³⁶ respectively. In a further two cases, a plea to manslaughter on the grounds of excessive self-defence was accepted.³⁷ In two other cases, a plea to manslaughter on the grounds of provocation was accepted by the Crown.³⁸ In one case, a plea of unlawful and dangerous act was accepted by the Crown.³⁹ In another case, a plea for manslaughter was not accepted by the Crown and a conviction for manslaughter was made on the grounds of unlawful and dangerous act.⁴⁰ In one case, the defendant was convicted of murder.⁴¹ Further examination

³⁰ Coss cites research by Dobash and Dobash, Polk and Wilson and Daly in Graeme Coss, *Provocative reforms*, Note 29 at 139 and footnotes 7-9.

³¹ A Wallace, *Homicide: The Social Reality*, Note 13 at 110 (123).

³² Including two from NSW: *Hickey*, unreported, SC NSW 14 Apr 1992; *Terare*, unreported, SC NSW, 20 Apr 1995.

³³ Rebecca Bradfield, *The treatment of women who kill their violent intimate partners within the Australian criminal justice system*, PhD Thesis, University of Tasmania, 2002 (Bradfield, thesis) at 194.

³⁴ We thank Ashurst for undertaking this research.

³⁵ *R v Russell* [2006] NSWSC 722.

³⁶ *R v Weatherall* [2006] NSWSC 486.

³⁷ *R v Scott* [2003] NSWSC 627; *R v Trevenna* [2003] NSWSC 463.

³⁸ *R v Joyce Mary Chant* [2009] NSWSC 593; *R v Ferguson* [2008] NSWSC 761 – we note that both provocation and substantial impairment were raised.

³⁹ *R v Duncan* [2010] NSWSC 1241.

⁴⁰ *R v Cavanough* [2007] NSWSC 561.

⁴¹ *R v Anderson* [2002] NSWCCA 194.

is required to try to determine why self-defence was not raised in more of these cases.

39. Significantly, in the matter of *R v Trevenna*, there was a history of violence perpetrated by the deceased against the defendant. On the night of the killing, the deceased accused his wife of sexual infidelity and threatened to kill her. He grabbed her by the throat saying: "I'll kill you, bitch" several times. He got a cricket bat, held it towards her and said he would "smash [her] face in so no one will know [her]" and told her she would never see her son again. The defendant reached for a shotgun that she knew was under the bed and shot the victim once. The defendant pleaded guilty to manslaughter on the grounds of excessive self-defence. During sentencing Justice Buddin commented that a jury may have acquitted on the grounds of self-defence.⁴² As Sheehy et al note,⁴³ similar comments were made in *R v Kennedy*⁴⁴ and *R v Yeoman*.⁴⁵ Again, this raises the question – what are the barriers to victims of violence who kill their violent partners raising self-defence as a complete defence? This is discussed below in the section on self-defence.

The importance of social framework evidence

40. Following an extensive review of homicide defences, with a particular focus on victims of family violence who kill their violent intimate partners, the Victorian Law Reform Commission recommended⁴⁶ and the Victorian Government introduced legislative provisions⁴⁷ to ensure a wide range of social framework evidence can be admitted in criminal trials where intimate partner violence is raised.
41. The resulting provision: Section 9AH (3) *Crimes Act 1958 (Vic)* allows the following evidence to be admitted where family violence is alleged:
- Evidence of—
- (a) the history of the relationship between the person and a family member, including violence by the family member towards the person or by the person towards the family member or by the family member or the person in relation to any other family member;
 - (b) the cumulative effect, including psychological effect, on the person or a family member of that violence;
 - (c) social, cultural or economic factors that impact on the person or a family member who has been affected by family violence;
 - (d) the general nature and dynamics of relationships affected by family violence, including the possible consequences of separation from the abuser;
 - (e) the psychological effect of violence on people who are or have been in a relationship affected by family violence;
 - (f) social or economic factors that impact on people who are or have been in a relationship affected by family violence.

⁴² *R v Trevenna* [2003] NSWSC 194 at paragraph 40.

⁴³ Sheehy, 2012 at 26.

⁴⁴ *R v Kennedy* [2000] NSWSC 109.

⁴⁵ *R v Yeoman* [2003] NSWSC 194.

⁴⁶ VLRC *Final Report*, Note 8 Recommendation 25.

⁴⁷ See s 9AH (3) (a) – (f), *Crimes Act 1958 (Vic)*.

42. Significantly, in addition to physical and sexual abuse, s 9AH(4) *Crimes Act 1958* (Vic) specifies that “family violence” includes psychological abuse such as intimidation, harassment, damage to property, threats and allowing or putting a child at risk of seeing such abuse. Importantly, both a single act⁴⁸ and a pattern of behaviour that when viewed in isolation may appear trivial⁴⁹ are included in the definition of violence. WLS NSW supports the use of social framework evidence due to its ability to provide the context in which to understand the issues in a particular case.⁵⁰ In cases of domestic and/or family violence, social framework evidence is valuable for explaining the nature and dynamics of relationships affected by domestic violence; the reasons why victims remain in abusive relationships; the cumulative effect of the violence on the victim; why a woman may have to plan to kill in order to protect herself; and the social realities for the woman.
43. Social framework evidence is important for its potential to dispel myths, for example, regarding why women do not leave violent relationships and why women victims of violence kill either using weapons, such as knives or guns or in non-confrontational contexts, such as when their violent partner is sleeping.
44. Social framework evidence is relevant to both the subjective and objective aspects of the self-defence requirements. In terms of subjective elements, for example, it can be used to explain why, due to past experiences of violence, a seemingly innocuous look or a word from the perpetrator of violence can in fact be a significant threat to the victim.
45. Significantly, social framework evidence counters the male construction of homicide defences which focus on discrete incidents. As Bradfield argues, citing Dutton, domestic violence “cannot be understood as a series of isolated incidents detached from the overall pattern of power and control within which the violence is situated.”⁵¹ In situations of domestic violence it is the cumulative effect of the violence which is part of a continuum of violence⁵² which is significant.
46. WLS NSW favours social framework evidence over Battered Woman’s Syndrome (BWS). While it is not a defence in its own right, evidence of BWS may be used to explain why women remain in violent relationships and ultimately kill their violent intimate partners. The syndrome focuses on “learned helplessness” as a response to the ongoing cycle of violence.⁵³ The concept of BWS is problematic and widely criticised as it pathologises the behaviour of women rather than focusing on the actions of the perpetrator of the violence.
47. Sheehy et al note, “even if the expert gives evidence that the woman’s response was a normal and reasonable response to having lived through her abusive circumstances, the testimony may be understood as explaining why she had an unreasonable but

⁴⁸ Section 9AH(5)(a), *Crimes Act 1958* (Vic).

⁴⁹ Section 9AH(5)(b), *Crimes Act 1958* (Vic).

⁵⁰ Julie Stubbs and Julia Tolmie, *Falling Short of the Challenge?* Note 15 at 71.1

⁵¹ Rebecca Bradfield, “Understanding the Battered Women who Kill her Violent Partner - The Admissibility of Expert Evidence of Domestic Violence in Australia,” *Psychiatry, Psychology and Law*, Vol 9(2) 2002 at 178.

⁵² See Dr Lesley Orr, *The Case for a Gendered Analysis of Violence Against Women*, July 2007 at 15-16 accessed on 4 August 2012.

⁵³ For an explanation of Walker’s theory see Elizabeth Sheehy, Julie Stubbs and Julia Tolmie, “Defending Battered Women on Trial: The Battered Woman Syndrome and its Limitations,” *Criminal Law Journal*, Vol 16, 1992 at 380-382.

understandable over-reaction to her circumstances.”⁵⁴ This is because BWS evidence “is often interpreted by the Crown, judges and juries as explaining the woman’s subjective state of mind but not the mind of the reasonable person in her position.”⁵⁵

48. We note that the High Court affirmed the use of Battered Woman’s Syndrome evidence in *Osland v R*, though Justice Kirby expressed misgivings about the use of this syndrome. Justice Kirby refers to the Supreme Court of Canada in *R v Malott*:

“It is possible that those women who are unable to fit themselves within the stereotype of a victimized, passive, helpless, dependent, battered woman will not have their claims to self-defence fairly decided. For instance, women who have demonstrated too much strength or initiative, women of colour, women who are professionals, or women who might have fought back against their abusers on previous occasions, should not be penalized for failing to accord with the stereotypical image of the archetypal battered woman.”⁵⁶

49. In supporting the use of social framework evidence, consideration needs to be given as to which experts can provide such evidence. It may be that instead of or in addition to psychologists and psychiatrists, experienced domestic violence workers and other experts could give evidence about the impact of domestic violence and the social context in which domestic violence takes place. This is particularly relevant in the case of Indigenous and culturally and linguistically diverse women, whose experiences of violence can raise particular issues that may benefit from further explication to judges and juries.
50. The domestic violence sector in NSW and relevant stakeholders should be consulted regarding both the development of guidelines for the use of social framework evidence as well as who is best placed to give this evidence.
51. Any review of homicide defences must go beyond an examination of the defences alone to consider what additional changes are required.
52. Recommendation 14.4 of the joint Australian Law Reform and NSW Law Reform Commissions’ *Family Violence – A National Legal Response* calls for a consistent approach to recognising the dynamics of family violence in homicide defences across Australia. Recommendation 14.5 calls for guidance on the use of social framework evidence regarding family violence in the context of a defence to homicide. Section 9AH *Crimes Act 1958 (Vic)* is specifically referred to as an “instructive model.”

⁵⁴ Elizabeth Sheehy, Julie Stubbs, Julia Tomlie, ‘Defences to Homicide for Battered Women: A Comparative Analysis of Laws in Australia, Canada and New Zealand,’ (Author’s copy) at 2 (author’s copy). The final version will be published in the Sydney Law Review in 2012.

⁵⁵ *Ibid.*

⁵⁶ *R v Malott* (1998) cited in *Osland v R* (1998) 159 ALR 170.

C. The partial defence of provocation

Inappropriateness of a "loss of control" label

53. We refer to the NSW Parliamentary Research Service paper, *Provocation and self-defence in intimate partner and sexual advance homicides (Briefing Paper)* which outlines the historical development of provocation in NSW.⁵⁷
54. While the "loss of control" element of the partial defence of provocation has not always been a requirement of the defence itself, it has long been a requirement in NSW law.⁵⁸
55. WLS NSW questions the suitability of a "loss of control" label to explain the behaviour of a perpetrator of violence who kills their intimate partner. As Dobash and Dobash argue, drawing on Ptacek's study of 18 men in a community program for abusers:

"Despite the claim of "loss of control," men cited clear objectives for their use of violence: Silencing her; punishing her for "wrongdoings"; frightening her into behaving as he demands; and teaching her a lesson."⁵⁹

Therefore, the notion that men kill their partners due to "loss of control" does not accord with the intentional and deliberate nature of the domestic violence perpetrated in the lead-up to the killing.

56. Additionally, in consultations during the Victorian Law Reform Commission's *Defences to Homicide Inquiry*, many criticised the conceptualisation of men's behaviour as a loss of control.

"Rather than a loss of self-control, the use of anger and violence by men against women is often instrumental – a deliberate and conscious process – intended to gain compliance and control."⁶⁰

It was argued that those who "inflict violence, including in the context of a relationship of sexual intimacy ... generally made a decision to act or not to act."⁶¹

57. Coss argues that for male violent partners who kill their female intimate partners the "loss of control" is that "the man has lost control of his woman" and so retaliates with lethal violence.⁶²
58. WLS NSW submits the label of "loss of control" in such circumstances tacitly condones and legitimises violence against women. Fitz-Gibbon argues that, "when the law is seen to legitimise the use of male violence in a particular context, a standard of acceptable violence against women is enforced."⁶³ As Morgan notes, such decisions reinforce the

⁵⁷ Lenny Roth and Lynsey Blayden, *Provocation and self-defence in intimate partner and sexual advance homicides*, Briefing Paper No 5/2012, NSW Parliamentary Research Service, July 2012 accessed on 4 August 2012.

⁵⁸ Provocation began as a partial defence to acts done in anger. In NSW provocation is defined in s23 *Crimes Act 1900* (NSW).

⁵⁹ R. Emerson Dobash and Russell P. Dobash, 'What Were They Thinking? Men Who Murder an Intimate Partner', *Violence Against Women* 2011 Vol 17 at 112-113.

⁶⁰ VLRC *Final Report*, Note 8, at [2.28].

⁶¹ VLRC *Final Report*, Note 8, at [2.28].

⁶² Coss, *Provocative reforms*, Note 29, at 143.

⁶³ Fitz-Gibbon, Note 1 at 161.

inequality of women.⁶⁴ WLS NSW is concerned that in such instances offenders are given the benefit of a conviction of manslaughter instead of murder and thus a lesser sentence than they would otherwise have received.

59. We are also concerned that it is often when the killing is most vicious and extreme that this fact is used to exemplify the alleged "loss of control" on the part of the (often male) defendant. This is seen, for example in the recent matter of *R v Singh* where the offender first strangled his wife and then cut her throat at least eight times with a box-cutter.⁶⁵ Rather than this extreme act of violence being considered to increase the defendant's culpability, it was held to exemplify or reinforce the circumstances in which provocation is applicable as a partial defence to murder.

The development of the partial defence of provocation for victims of domestic violence

60. The Judicial Commission of NSW notes that early cases of provocation were restricted to physical contact, such as "an assault on the offender or witnessing a man in the act of adultery with the offender's wife".⁶⁶ This was later expanded to include "grossly insulting language or gestures."⁶⁷ A further change was made in 1982 when the "suddenness" requirement of the act causing death was removed.⁶⁸ This was in response to the 1981 *Report of the NSW Task Force on Domestic Violence to NSW Premier Wran*.
61. The Judicial Commission of NSW argues the removal of the suddenness requirement "paved the way for acceptance of cumulative provocation over a long period of time, often in cases of domestic violence."⁶⁹ They refer to *R v Chhay*⁷⁰ as an example of a woman victim of violence who was able to succeed with the provocation defence once the suddenness requirement was removed.
62. In *R v Chhay* the defendant was a Cambodian migrant women who killed her husband after many years of violence and abuse. On the day of the killing, he got drunk and threatened her with a knife. There was an interval of some time between his threat and her response.
63. The trial judge put the defence of provocation very narrowly: to be successful the attack by the husband on the defendant must be immediately before her killing. The High Court of Australia rejected this narrow view of the defence of provocation:

"Times are changing, and people are becoming more aware that a loss of self-control can develop even after a lengthy period of abuse, and without the necessity of a triggering event."⁷¹

64. WLS NSW questions the appropriateness of describing such killings as a "loss of

⁶⁴ Jenny Morgan, "Provocation Law and Facts: Dead Women Tell No Tales, Tales are Told About Them," *Melbourne University Law Review*, Vol 21, 1997 at 273.

⁶⁵ *Singh v R* [2012] NSWSC 637 at 30.

⁶⁶ Sam Indyk, Hugh Donnolly, Jason Keane, *Partial Defences to Murder in NSW 1990-2004*, Judicial Commission of NSW, 2006 at 29(32) accessed on 2 August 2012 at:

<http://www.judcom.nsw.gov.au/publications/research-monographs-1/monograph28/monograph28.pdf>.

⁶⁷ *Ibid* at 29(32).

⁶⁸ The changes took effect through the *Crimes (Homicide) Amendment Act 1982* (NSW).

⁶⁹ Judicial Commission, Note 66 at 31(34).

⁷⁰ *R v Chhay* (1994) 72 A Crim R 1.

⁷¹ Gleeson CJ in *R v Chhay* cited in Judicial Commission at 34.

control” and views these cases as more about defensive responses. As Yeo argues, the gender bias in the law has the effect that “female defendants whose experience ... fall outside the male-inspired defences are confronted with the prospect of either failing to plead them successfully or having to distort their experiences in an effort to fit them into the defence.”⁷²

65. The NSW Law Reform Commission refers to the Judicial Commission’s examination of the incidence of killing of intimate partners amongst sentenced homicide offenders in NSW within the period 1990 to 1993:

“The Judicial Commission’s study revealed that 47 sentenced male offenders in that period killed their sexual partners. For five of those 47 male offenders, the defence of provocation was successfully raised to reduce liability from murder to manslaughter. In two of those five cases, the victim had allegedly provoked the male offender by hitting him. In the three remaining cases, the killing was the consequence of the victim leaving or threatening to leave the offender. In contrast, the study revealed that nine sentenced female offenders killed their sexual partners, eight of those nine female offenders having killed in response to physical abuse or threats by the victim immediately prior to the killing. All nine women were convicted of manslaughter, five of those nine having relied on the defence of provocation. The Judicial Commission concluded from these findings that there was little support for the proposition that juries routinely accept provocation defences by men who kill their female partners.”⁷³

66. WLS NSW refers to Annexure A for a summary of recent reported NSW cases of murder between 2002 and 2012 in which the defence of provocation was raised in an intimate partner context. This Annexure suggests a growing increase in successful use of the partial defence of provocation by men who kill their female partners.
67. Additionally, in response to the Judicial Commission’s study, WLS NSW submits another question to be asked is - did the women victims of violence run the complete and/or partial defence of self-defence and if not, what prevented them from doing so?

Recent reform of the law of provocation

68. In 1998, the Model Criminal Code Officers Committee recommended that provocation be abolished.⁷⁴ The partial defence of provocation has been abolished in Tasmania (2003), Victoria (2005) Western Australia (2008) and New Zealand (2009). Additionally, it has been carved out to exclude the use of the partial defence in response to non-violent sexual advances in the Australian Capital Territory (2002) and Northern Territory (2006).
69. In the United Kingdom, provocation was abolished in 2010 to be replaced by the partial defence to murder of “loss of control” triggered by:
- (1) fear of serious violence;⁷⁵ or
 - (2) circumstances of an extremely grave character that caused the defendant to have a

⁷² Yeo cited in Fitz-Gibbon, Note 1 at 30.

⁷³ J Donnelly, S Cumines and A Wilczynski, *Sentenced Homicides in New South Wales 1990-1993: A Legal and Sociological Study*, Judicial Commission of New South Wales, Monograph Series No 10, 1995 cited in the NSW Law Reform Report at 2.115.

⁷⁴ Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code—Chapter 5, Fatal Offences Against the Person: Discussion Paper*, June 1998 at 87.

⁷⁵ Section 55(3), *Coroners and Justice Act 2009* (UK).

justifiable sense of being wronged.⁷⁶

Significantly, “the fact that a thing done or said constituted sexual infidelity is to be disregarded”.⁷⁷

70. The continued use of “loss of control” has been criticised for the same reasons that provocation has been criticised. Moreover, some have argued that in the case of “fear of serious violence”, “loss of control” is unnecessary.⁷⁸
71. Of great concern is the fact that in spite of the explicit exclusion of sexual infidelity as a trigger in the reformed UK law, the Court of Appeal decided in *R v Clinton* that infidelity can be considered if it is one of multiple triggering events.⁷⁹
72. This highlights the need for ongoing monitoring and evaluation of any changes made to homicide defences so that the weaknesses Parliament seeks to remedy are not replicated in a new form.

The partial defence of provocation in NSW

73. For the reasons outlined in the introduction, WLS NSW is of the view that the continued use of the partial defence of provocation is deeply problematic and in particular circumstances is inconsistent with Australia’s human rights obligations, including under Article 2 *CEDAW* and Article 14 of the *International Covenant on Civil and Political Rights (ICCPR)*, to which Australia is a signatory, and the Government’s commitment to the *National Plan to Reduce Violence Against Women and their Children*.⁸⁰ Where the defence is upheld in cases where men kill their partners in jealous rages or in circumstances of a change in relationship, violence against women is effectively being legitimised by the state.
74. WLS NSW submits further that the operation of the partial defence of provocation fails to accord with obligations under *CEDAW*, articulated in *General Recommendation 25*,⁸¹ to ensure substantive rather than mere formal equality of men and women. In essence, while the law of provocation applies to both men and women equally in NSW (formal equality), it does not achieve equality of results (substantive equality). Rather, the law of provocation is used to reduce the consequences of the extreme violence perpetrated by men who kill their female intimate partners in jealousy or rage, while it remains difficult to use for many women who have killed their intimate partners after a history of severe and unrelenting domestic violence due to the “non-confrontational” manner in which the latter frequently occurs.
75. For these reasons, the NSW Government should be working towards abolishing provocation.
76. However, as we acknowledge throughout this submission, the present inadequacy of the

⁷⁶ Section 55(4), *Coroners and Justice Act 2009* (UK).

⁷⁷ Section 55(6)(c), *Coroners and Justice Act 2009* (UK).

⁷⁸ Anna Carline, “Reforming Provocation: Perspectives from the Law Commission and the Government,” *Web Journal of Current Legal Issues*, 2009 at 6.

⁷⁹ *R v Clinton* [2012] EWCA Crim 2

⁸⁰ We note the NSW Government is currently developing a jurisdictional framework through which to implement the National Plan to Reduce Violence against Women and their children.

⁸¹ UN Committee on the Elimination of Discrimination Against Women (*CEDAW*), *CEDAW General Recommendation No. 25: Article 4, Paragraph 1, of the Convention (Temporary Special Measures)*, 2004, accessed on 17 August 2012 at: <http://www.unhcr.org/refworld/docid/453882a7e0.html>

defence of self-defence means that victims of violence who ultimately kill their violent intimate partners in self-defence do not have adequate defences available to them. This means that they are also potentially reliant on the partial defence of provocation. This is why WLS NSW proposes a phased approach to the abolition of the partial defence of provocation – precluding the use of the partial defence in particular circumstances, while at the same time undertaking a comprehensive review of all aspects of homicide defences so to ensure an adequate defence for victims of violence who ultimately kill their violent intimate partners. Below we outline the circumstances in which the partial defence of provocation should be precluded.

Jealousy, sexual infidelity or change in relationship

77. The NSW Judicial Commission conducted a study of murder and manslaughter convictions in NSW over the period of 1 January 1990 to 21 September 2004. Of 897 offenders, 460 were convicted of manslaughter.⁸² Seventy-five (75) of 115 offenders who raised provocation either at trial or through a plea were successful with this partial defence.⁸³ Forty one (41) offenders were convicted of manslaughter following a trial by jury, 2 offenders were convicted of manslaughter following a judge only trial, 30 offenders pleaded guilty to manslaughter with the Crown accepting their plea and two offenders entered a plea of guilty to manslaughter having been indicted for manslaughter.⁸⁴
78. There were 11 convictions of manslaughter on the grounds of provocation based on a breakdown in the relationship or infidelity.⁸⁵ Four (4) were jury verdicts and 7 were guilty pleas accepted by the Crown.⁸⁶ In each case the offender was male.⁸⁷ In 7 of the cases the victim was a male thought by the offender to be involved with the intimate partner. In 2 cases the victim was the wife of the offender. In a further 2 cases the victim was the homosexual partner of the offender.⁸⁸
79. Referring again to the recent examination of reported NSW cases of murder between 2002 and 2012 in which the defence of provocation was raised in an intimate partner context, of the 12 cases which involved male defendants, 6 cases were in the context of breakdown of relationship or infidelity and 5 resulted in a conviction of manslaughter.⁸⁹
80. Allowing the partial defence of provocation to continue on the grounds of jealousy or relationship breakdown, as Coss notes, ignores the reality that “in millions of hurtful breakdowns a miniscule [though significant] number of men actually kill.”⁹⁰ In challenging the “ordinary person test” of provocation Coss argues this highlights that “the ordinary person does not kill. Only the *most extraordinary* person does.”⁹¹
81. Additionally, as Gorman argues the successful use of provocation in the Canadian context “rewards men who are so possessive of their spouses that they are willing to kill in

⁸² Judicial Commission, Note 66 at 5.

⁸³ Judicial Commission, Note 66 at 37(40).

⁸⁴ Judicial Commission, Note 66 at 37(40).

⁸⁵ Fitz-Gibbon, Note 1 at 161.

⁸⁶ Judicial Commission, Note 66 at 42(45).

⁸⁷ Judicial Commission, Note 66 at 42(45).

⁸⁸ Judicial Commission, Note 66 at 42(45).

⁸⁹ *Singh v R* [2012] NSWSC 637; *R v Goundar* [2010] NSWSC 1170; *R v Gabriel* [2010] NSWSC 13; *R v Lovett* [2009] NSWSC 1427; *R v Stevens* [2008] NSWSC 1370. See Annexure A for a summary of these cases.

⁹⁰ Coss, *Provocative reforms*, Note 29 at 142.

⁹¹ *Ibid.*

order to ensure their spouse does not leave them for another man.”⁹² WLS NSW submits that rather than showing a “concession for human frailty”⁹³ one of the defence’s ostensible aims, this has the effect of legitimising violence against women.

82. Additionally, the Victorian Law Reform Commission in reviewing homicide defences noted its particular concern about the continued use of the provocation defence “when this behaviour is in response to a person who is exercising his or her personal rights, for instance, to leave a relationship or to start a new relationship with another person.”⁹⁴ Such grounds should also be excluded from the use of self-defence as a defence.
83. In the NSW Law Reform Commission’s review of the partial defence of provocation, several submissions recommended the exclusion of the defence “where men kill their female partners out of jealousy or following a woman’s confession of infidelity or taunts about the man’s sexual inadequacies.”⁹⁵ The NSW Law Reform Commission rejected this on the basis:

“It would be extremely difficult to identify specific categories of conduct which should be excluded without potentially requiring a long list of other types of conduct which should also be excluded. Moreover, automatic legislative exclusion prevents proper consideration of the merits of each individual case.”⁹⁶

84. WLS NSW submits it is due time to review the proposal of exclusions.

Non violent homosexual advance defence

85. We refer to the ‘Homosexual Advance Defence’ Working Party set up by the NSW Attorney-General’s Department in 1995 to consider the defence of provocation as a homosexual advance defence. In 1998, the Working Group recommended amending the defence of provocation to preclude its use as a homosexual advance defence.⁹⁷ Almost 15 years later, this recommendation is yet to be implemented.
86. In addition to the Australian jurisdictions which have abolished provocation, we note that both the Australian Capital Territory⁹⁸ and the Northern Territory⁹⁹ exclude the use of the partial defence of provocation in response to non-violent sexual advances.
87. WLS NSW believes the continued availability of this defence sanctions discrimination and legitimises vilification. This partial defence should be expressly precluded in circumstances where a male makes a non-violent sexual advance on another male.

⁹² Gorman cited in Fitz-Gibbon, Note 1 at 25.

⁹³ Gleeson CJ providing a rationale for provocation cited in *R v Chhay* (1994) 72 A Crim R 1 at 11.

⁹⁴ VLRC, *Defences to Homicide: Final Report*, Note 8 at [2.95].

⁹⁵ NSW Law Reform Commission, *Partial Defences to Murder: Provocation and Infanticide*, Report 83, October 1997 at para 2.111 and footnote 153 accessed on 3 August 2012 at:

<http://www.lawlink.nsw.gov.au/lrc.nsf/pages/R83CHP2>.

⁹⁶ *Ibid* at para 2.116.

⁹⁷ NSW Attorney General’s Department, *Final Report of the ‘Homosexual Advance Defence’ Working Party*, September 1998, Recommendation 1.

⁹⁸ Section 13(3), *Crimes Act 1900* (ACT).

⁹⁹ Section 158(5), *Criminal Code* (NT).

Words alone

88. *R v Lees* is authority for the application of the partial defence of provocation based on words alone.¹⁰⁰ Wood CJ outlined the high threshold for the use of such a defence:

“[Words, do however, need to be of sufficient[ly] violent, offensive or otherwise aggravating character ... Mere words of abuse or insult would not normally qualify.”

89. The report by the Judicial Commission of NSW found that between 1990-2004 there was only one successful provocation defence on the grounds of words alone.¹⁰¹
90. Fitz-Gibbon, in examining successful provocation defences in NSW from January 2005 to December 2010, notes that of the 15 cases identified, five were on the basis of words alone: 3 involving the killing of female intimate partners by their male partner or ex-partner; 1 a male victim who was in a sexual relationship with the defendant's estranged wife; 1 a female victim, killed by a male close acquaintance she was living with.¹⁰²
91. Fitz-Gibbon in discussing the defence of provocation in Victoria in the five years prior to its abolition also notes that in 9 of the 14 cases in which provocation was successfully raised “the nature of the provocation was cited as a verbal exchange, and in one of these cases only, also a threat of violence”.¹⁰³ As she notes and as supported by others, provocation raised on the basis of words alone is difficult to challenge when often the only other witness has been killed.¹⁰⁴
92. WLS NSW is concerned by the apparent increasingly successful use of the partial defence of provocation based on words alone. We note the disproportionate use of this defence in situations of intimate partner homicide where the male kills his female intimate partner. However, we also note that words can be used as part of exercising power and control in a violent relationship. We therefore submit this highlights the need for and importance of social framework evidence to determine the context and intention of the claim for the partial defence of provocation on “words alone” and when the partial defence of provocation should be precluded on the basis of “words alone”.

Sentencing and provocation as a mitigating factor

93. We note that the jurisdictions in which provocation has been abolished are jurisdictions in which the sentence for murder is not a mandatory life sentence. We also note that in NSW while the maximum sentence for murder is life imprisonment, judicial discretion can be exercised.¹⁰⁵
94. We also submit that care should be taken so as to avoid transferring the problems inherent in the partial defence of provocation to a sentencing stage by allowing judges and juries to routinely consider the notion that the “the defendant was provoked” to be a mitigating factor.
95. Due to the short time frame of this inquiry, WLS NSW has not formed a position on

¹⁰⁰ *R v Lees* [1999] NSWCCA 301.

¹⁰¹ Judicial Commission, Note 66 at 38(41).

¹⁰² Fitz-Gibbon, Note 1, Table 6.2 at 160 and footnote 52.

¹⁰³ Fitz-Gibbon, Note 1 at 112-113.

¹⁰⁴ Ibid.

¹⁰⁵ Section 21, *Crimes (Sentencing Procedure) Act 1999* (NSW).

sentencing. However, we believe sentencing should be considered in a more comprehensive review of homicide defences.

D. Developments in the law of self-defence in NSW and continued barriers to victims of violence using this defence

Gender bias

96. It has been frequently asserted that self-defence is a masculine construct designed to address the once-off encounter between two males of equal strength, for example, a pub brawl, thus the focus on discrete incidents.¹⁰⁶
97. We note there have been developments in the law of self-defence, including as a result of concerns raised by advocates with expertise in the areas of domestic violence. For example, the element of the imminence of the threat in the defence of self-defence was removed in 1982 following the 1981 *Report of the NSW Task Force on Domestic Violence to NSW Premier Wran*¹⁰⁷. However, as Sheehy et al note, while Western Australia and Victoria explicitly state in legislation that it is not necessary to prove the accused is responding to an imminent threat in self-defence, this is not stated in NSW legislation.¹⁰⁸
98. Similarly, as noted in the Briefing Paper by the NSW Parliamentary Research Service, the current self-defence provision does not require the response to be proportionate,¹⁰⁹ though if the conduct is “not a reasonable response in the circumstances as the defendant perceives them”¹¹⁰ this is excessive self-defence, a partial rather than a complete defence to murder.¹¹¹ Moreover, as Bradfield acknowledges, the issue of proportionality is relevant to whether the response was reasonably necessary.¹¹²
99. Additionally, as is also noted in the Briefing Paper “the application of the defence in this context is still problematic because [imminence and proportionality] continue to be significant factors in determining whether the defence has been made out.”¹¹³ This is further supported by Sheehy et al.¹¹⁴
100. Moreover, unlike provocation, which allows for cumulative effect: “conduct ... occurred immediately before the act or omission causing death or *at any previous time*”¹¹⁵ self-defence does not provide for this.
101. Disparity in physical stature and strength between male and female intimate partners, combined with learning from past experience that hand-to-hand combat is ineffective and a

¹⁰⁶ VLRC *Final Report*, Note 8 at [3.8].

¹⁰⁷ Recommendation 24, cited in *VLRC Final Report*, Note 8 at 51(107).

¹⁰⁸ Sheehy et al, *Defences to Homicide*, Note 54 at 3, footnotes 10,11.

¹⁰⁹ Roth and Blayden, *Briefing Paper No 5/2012*, Note 57 at 9.

¹¹⁰ Section 421(1)(b), *Crimes Act 1900* (NSW).

¹¹¹ Excessive self-defence through legislative provision in NSW took effect in 2002.

¹¹² Bradfield cites *R v Zecevic* (1987) 162 CLR 645 as an example. See: Rebecca Bradfield, *The treatment of women who kill their violent intimate partners within the Australian criminal justice system*, PhD Thesis, University of Tasmania, 2002 (Bradfield, thesis) at 202. The VLRC also notes that while immediacy, proportionality and necessity were not expressed requirements of self-defence in Victoria they could influence the jury's decision about whether the accused believed that her actions were necessary and whether this was reasonable in the circumstances. See *VLRC Final Report* at [3.13].

¹¹³ Roth and Blayden, *Briefing Paper No 5/2012*, Note 57 at 9.

¹¹⁴ Sheehy et al, *Defences to Homicide*, Note 54 at 2.

¹¹⁵ Section 23(2), *Crimes Act 1900* (NSW) Emphasis added.

dangerous way for women to respond are two good reasons why women generally do not immediately respond to the violence of their intimate partners,¹¹⁶ (which may otherwise allow for self-defence to be raised). However, another barrier to satisfying the defence of self-defence is the fact that when women respond in a non-confrontational manner, such as attacking their violent partner while he sleeps or using a weapon, such as a knife, this is viewed as calculated and pre-meditated. This is viewed as contrary to the rules of engagement that would be considered reasonable in the traditional self-defence context of for example a pub brawl.¹¹⁷

102. Additionally, when a woman victim of violence fights back with physical violence and has done this on occasion(s) prior to using lethal force, this is often viewed as "mutual violence".¹¹⁸ This is concerning because a label of "mutual violence" does not take into account the use of coercion and control in the relationship and can mask the true identity of the primary aggressor. Further research and consideration is required regarding the operation of the defence of self-defence in these circumstances.¹¹⁹
103. Significantly, in 5 of the 8 cases in Bradfield's study where women successfully raised self-defence, it was in the immediate confrontational context that conforms to the traditional paradigm of self-defence.¹²⁰
104. Additionally, as Bradfield notes, due to the ongoing continuum of violence experienced by women, which may result in the woman perpetrating homicide in "non-provocative" or seemingly innocuous circumstances, it is easy to construct a woman's killing of their violent partner as revenge or an act of unreasonable anger.¹²¹
105. This highlights again the role and significance of the use of social framework evidence as discussed above and the importance of education about domestic violence for police, law students, legal practitioners, judiciary and the jury as discussed below.

Focus on discrete incidents

106. Additionally, as Sheehy et al note, the focus on discrete incidents in the law of self-defence can limit the evidence which is admitted in a murder trial on the basis that it is not considered relevant to the particular incident which is considered to give rise to the killing.¹²² This highlights the importance of social framework evidence, as discussed above.

¹¹⁶ Bradfield cites the Wallace study to highlight that a man's fists can potentially be a lethal weapon. See Bradfield thesis, Note 33 at 205.

¹¹⁷ Bradfield thesis, Note 33 at 204; VLRC *Final Report*, Note 8 at [3.8].

¹¹⁸ Stubbs and Tolmie, *Falling Short of the Challenge?* Note 15 at 738. See also *Lock* (1997) 91 A Crim R 356.

¹¹⁹ We understand that the NSW Police Force is currently working in partnership with Julie Stubbs and others on a research project about identifying the primary aggressor. See *Submission on behalf of the New South Wales Police Force to the NSW Legislative Council Standing Committee on Social Issues: Inquiry into domestic violence issues and trends in NSW* at 19, accessed on 12 August 2012. We believe this research could also help inform the operation of the defence of self-defence for victims of violence who may previously have responded with violence.

¹²⁰ Bradfield thesis, Note 33 at 207.

¹²¹ Bradfield thesis, Note 33 at 200.

¹²² Elizabeth Sheehy et al, *Defences to Homicide*, Note 54 at 3.

Duty to retreat and blaming the victim

107. Another element that indirectly applies to self-defence is the duty to retreat. In a contemporary context, Bradfield suggests this includes avoiding a confrontation by leaving, calling the police or seeking some kind of assistance.¹²³ While the duty to retreat is not included in the legislation, Bradfield argues it is relevant to the question of whether the “conduct is a reasonable response in the circumstances as he or she perceives them.”¹²⁴
108. Significantly, juries and judges often do not understand why women simply do not leave a violent relationship. There is a lack of understanding of the conflicting emotions victims of violence feel,¹²⁵ the barriers to leaving as outlined above and a failure to acknowledge that the most dangerous point of a violent relationship is at the point at which the woman leaves as outlined above. This lack of understanding again highlights the very strong need and value of social framework evidence during trials and education for police, legal practitioners, judiciary and others.
109. At the heart of the duty to retreat is the notion that the victim is to blame for the violence she suffers due to her inability or unwillingness to appropriately address the violence by leaving the relationship or contacting police when violence escalates. WLS NSW submits that this victim-blaming is unsupportable where systems continue to fail women experiencing domestic violence in NSW. This is particularly relevant in the case of Indigenous women who have experienced domestic violence, and who may have received inadequate or inappropriate police responses in the past when they have attempted to seek assistance, and are therefore reluctant to contact police when threatened by their partner.
110. Indeed, the 2011 Performance Audit into NSW Responses to Domestic and Family Violence stated that:¹²⁶

“There are no standard ways to access services for victims and perpetrators that might help prevent ongoing violence. Unlike Victoria, Western Australia and parts of England, New South Wales does not have a common framework to identify domestic and family violence, assess risk, prioritise need and refer people to services. The lack of coordination is a particular problem for repeat victims and perpetrators, many of whom have complex mental health, drug and alcohol problems and are difficult to work with.”

WLS NSW submits that the admissibility of social framework evidence is therefore crucial to explaining why, at a systemic as well as subjective level, victims of violence may not successfully address the violence they face before their situation escalates to homicide.

Bradfield's draft self-defence provision

111. While any amendments to the substantive law of self-defence of themselves will be insufficient to ensure the adequacy of the defence for victims of domestic violence who kill their violent partners, WLS NSW submits that legislative changes are important to consider. Stakeholders should be given adequate time to consider such changes and WLS

¹²³ Bradfield thesis, Note 33 at 217.

¹²⁴ Section 418(2), *Crimes Act 1900* (NSW).

¹²⁵ See Bradfield thesis, Note 33 at 200.

¹²⁶ NSW Auditor General, *Performance Audit – Responding to Domestic and Family Violence*, November 2011 at 3 accessed on 17 August at <http://www.audit.nsw.gov.au/Publications/Performance-Audit-Reports/2011-Reports/Responding-to-domestic-and-family-violence>,

NSW recommends this occur through a process which includes the release of an Issues Paper with proposals on which to comment.¹²⁷

112. In considering potential reform of the law of self-defence, it is important to consider whether any proposals have been made and what is happening in other jurisdictions. For example, we note that Bradfield proposed a draft self-defence provision in her thesis in 2002. We do not analyse this provision but instead draw the Committee's attention to the existence of this draft provision.
113. We also note that this was 10 years ago and Bradfield may have additional suggestions and amendments to propose to this draft provision. Bradfield and others may be able to provide information on whether this provision has been considered, adapted or adopted in other jurisdictions. What is important is that consideration be given to what should be included in a legislative provision which acknowledges the gender bias of the current defences and seeks to remove barriers to victims of violence accessing self-defence where defensive elements are present.
114. The draft provision, including Bradfield's footnotes, is extracted in full below.¹²⁸

6.5.1 DRAFT PROVISION¹²⁹

- A person is not criminally responsible for an offence if the conduct constituting the offence is carried out by him or her in self-defence or in defence of another.¹³⁰
- Conduct is carried out by a person in self-defence or in defence of another if the person believed that the conduct was necessary to defend himself or herself or another person and his or her conduct was a reasonable response in the circumstances as perceived by him or her.¹³¹
- In considering whether a response was reasonable in the circumstances as perceived by a person, that person's personal history, attributes and characteristics are relevant.
- For the purpose of determining whether a person was acting in self-defence or defence of another, there is no rule of law that self-defence is negated if –
 - (a) the person was responding to a history of personal violence against himself or herself or another rather than a single isolated attack;
 - (b) the person has not pursued other options other than the use of force; or
 - (c) the person used a weapon against an unarmed person.
- If a person is responding to a history of violence against himself or herself or another person, consideration should be given to the cumulative effect of such violence in assessing whether the force used was reasonable.¹³²

¹²⁷ We note the VLRC *Issues Paper* included three proposed new defences. See VLRC *Final Report*, Note 8 at [3.14].

¹²⁸ Bradfield thesis, Note 33 at 245-246.

¹²⁹ This draft provision is based on [Rebecca Bradfield's] submission to the Taskforce on Women and the Criminal Code. It is noted that the formulation of self-defence set out by Taskforce on Women and the Criminal Code relies extensively on my recommendations, Taskforce on Women and the Criminal Code, *Taskforce on Women and the Criminal Code Report of the Task Force on Domestic Violence to the Queensland Government*, Report, Brisbane: Department of Justice and Attorney-General, 2000 at 163-164.

¹³⁰ This provision is taken from the MCCOC recommendation, see Model Criminal Code Officers Committee of the Standing Committee of the Attorney-General, above n 179 at 66-68.

¹³¹ This provision is taken from the MCCOC recommendation, see *ibid*.

¹³² This provision is taken from the Taskforce on Women and the Criminal Code, however this formulation was based largely on my submission, see Taskforce on Women and the Criminal Code, above at 163-168.

Self-defence as a partial defence

115. WLS NSW notes that since 1982 in NSW, both the partial and complete defence of self-defence have been provided through legislative provision.¹³³ Excessive self-defence is also a partial defence in South Australia¹³⁴ and Western Australia.¹³⁵ Both Victoria and Queensland have introduced new partial defences with defensive elements: Victoria in the form of defensive homicide¹³⁶ and in Queensland in the form of “killing for preservation in an abusive domestic relationship.”¹³⁷ While some argue that the existence of partial defences such as provocation help prevent victims of violence being convicted of murder,¹³⁸ others argue that the existence of partial defences such as provocation and excessive self-defence impede acquittals on the basis of complete self-defence in appropriate circumstances.¹³⁹ WLS NSW raises this issue to highlight that any review of homicide needs to consider all partial and complete defences.

Guilty pleas, continued reliance on the partial defence of provocation and limited reported appeal decisions

116. In a study of homicide cases involving women who killed their violent intimate partners, Sheehy et al identified 67 cases in Australia from 2000 – 2010. Eight-five per cent (85%) of the women defendants were indicted for murder.¹⁴⁰ Sixty-three per cent (63%) of cases were resolved by guilty pleas, generally to manslaughter.¹⁴¹ Nineteen point four per cent (19.4%) of cases resulted in no conviction - 11 cases of acquittal on the basis of self-defence and 2 matters not proceeding to trial.¹⁴²
117. Of the matters that proceeded to trial, 6 convictions of manslaughter were made on the grounds of provocation or excessive self-defence.¹⁴³ Of those matters in which the Crown accepted a guilty plea to manslaughter, 13 were on the basis of provocation or excessive self-defence, that is, 45% of guilty pleas.¹⁴⁴
118. Similarly, in Bradfield's research referred to above women successfully relied on the defence of provocation in 40% of cases.¹⁴⁵
119. Sheehy et al express concern about the abolition of provocation in some Australian jurisdictions given the reliance on provocation as outlined above and in the “absence of clear empirical evidence that the defence of self-defence is operating effectively ... particularly [in cases] involving non-traditional self-defence scenarios.”¹⁴⁶ They also warn an unintended consequence of the abolition of provocation could include a larger number

¹³³ See ss 418 and 421 respectively *Crimes Act 1900 (NSW)*

¹³⁴ Section 15(2), *Criminal Law Consolidation Act 1935 (SA)*.

¹³⁵ Section 248(3), *Criminal Code (WA)*.

¹³⁶ Section 9AD, *Crimes Act 1958 (Vic)*

¹³⁷ Section 304B, *Criminal Code Qld*,

¹³⁸ Helen Brown cited in VLRC, *Defences to Homicide Issues Paper*, VLRC, Melbourne 2002 at [6.13]

¹³⁹ Submission made to the VLRC Inquiry cited in Danielle Tyson, “Victoria's New Homicide Laws: Provocative Reforms or More Stories of Women ‘asking for it’?” *Current Issues in Criminal Justice*, Vol 23(2), November 2011 at 211.

¹⁴⁰ Sheehy et al, *Defences to Homicide*, Note 54 at 21.

¹⁴¹ Sheehy et al, *Defences to Homicide*, Note 54 at 22.

¹⁴² Sheehy et al, *Defences to Homicide*, Note 54 at 21 -22

¹⁴³ Sheehy et al, *Defences to Homicide*, Note 54 at 21.

¹⁴⁴ Sheehy et al, *Defences to Homicide*, Note 54 at 21.

¹⁴⁵ Bradfield thesis, Note 33 at 27.

¹⁴⁶ Sheehy et al, *Defences to Homicide*, Note 54 at 24.

of women defendants who kill their violent intimate partners being convicted of murder and receiving longer sentences.¹⁴⁷

120. Additionally, a discount for an early guilty plea may see more women defendants who kill their violent intimate partners pleading guilty to manslaughter rather than risk running the complete defence of self-defence which could result in a conviction for murder.¹⁴⁸
121. Sheehy et al cite 9 of 15 NSW cases which resulted in plea bargains to manslaughter on indictments to murder in circumstances in which the defendant claimed she was responding to a physical attack or threat from her intimate partner. Each of these 9 cases “demonstrated strong defensive elements suggesting self-defence may have been successful had the case proceeded to trial.”¹⁴⁹ Bradfield raised similar concerns in her research.¹⁵⁰
122. Additionally, Bradfield argues that the number of guilty pleas to manslaughter means there are only limited appeal decisions that are reported and thus available regarding self-defence for battered women.¹⁵¹ This, combined with the fact that acquittals are not reported, makes it difficult for defence counsel to be aware of how and when self-defence may be a plausible option for their clients.¹⁵² As a solution, Bradfield proposes the publishing of case comments in the “significant criminal law publications” and that “relevant portions of the transcript” be included on AUSTLII or Butterworths Online.¹⁵³ Ways to improve transparency of and access to decisions should be included in a more extensive review of NSW homicide defences.

Prosecutorial guidelines

123. Sheehy et al note their grave concern about the Prosecution charging an accused with murder and then accepting guilty pleas to manslaughter in circumstances where defensive elements are present.¹⁵⁴ WLS NSW shares this concern. As Sheehy argues, this highlights the strong need for prosecutorial guidelines for plea negotiations, particularly where there is “some evidence of self-defence”.¹⁵⁵ In some circumstances where defensive elements are present it may be appropriate not to proceed with any charges. In other circumstances where defensive elements are present the Crown should consider proceeding to trial on manslaughter rather than murder so as “to reduce the pressure on the woman to plead guilty [to manslaughter] and thus allow the self-defence evidence to be heard by the trier of

¹⁴⁷ Sheehy et al, *Defences to Homicide*, Note 54 at 24.

¹⁴⁸ Sheehy et al, *Defences to Homicide*, Note 54 at 25.

¹⁴⁹ Sheehy et al, *Defences to Homicide*, Note 54 at 25. See also footnote 166 for an outline of these cases.

¹⁵⁰ Bradfield thesis, Note 33 at 196.

¹⁵¹ Bradfield thesis, Note 33 at 196.

¹⁵² Bradfield thesis, Note 33 at 196.

¹⁵³ Bradfield thesis, Note 33 at 196.

¹⁵⁴ Sheehy et al, *Defences to Homicide*, Note 54 at 26-27.

¹⁵⁵ This was a recommendation by Judge Ratushny who conducted the Canadian Self-Defence Review, cited in Sheehy et al, *Defences to Homicide*, Note 43 at 27. It has also been recommended in the VLRC *Final Report*, Note 8 at [3.126] and Recommendation 11. We note that the NSW Prosecution Guidelines state: “An alternative plea will not be considered where its acceptance would produce a distortion of the facts and create an artificial basis for sentencing ... or where the accused person intimates that he or she is not guilty of any offence.” ODP, *Prosecution Guidelines of the Office of the Director of Public Prosecutions for New South Wales*, 2003 at 38 accessed on 12 August 2012. It would be helpful to understand how this is working in practice. A review of Prosecutorial Guidelines should be part of a comprehensive review of defences to homicide.

fact.”¹⁵⁶ This is consistent with Recommendation 11 in the VLRC *Defences to Homicide Final Report*.

Ongoing education about family violence

124. Stubbs and Tomlie’s earlier research indicated another barrier included “reluctance by defence counsel to argue self-defence.”¹⁵⁷ Education is key to overcoming this barrier. The Victorian Law Reform Commission’s (VLRC) *Defences to Homicide - Final Report* recommended professional education for police, legal practitioners and judiciary on the broader social context in which homicide takes place, the nature and dynamics of domestic violence and its long term effects¹⁵⁸ as well as the interrelationship between family violence and use of fatal force and a “continuous improvement approach in ensuring family violence is properly understood and taken into account.”¹⁵⁹ This education needs to begin at law school. The VLRC felt this was “essential to the effective operation of defences and informed decisions being made concerning pleas and sentencing.”¹⁶⁰ Additionally, the VLRC argued that a proper understanding by police, legal practitioners and judiciary of the interrelationship between family violence and use of fatal force would “have a significant impact at a number of stages of the legal process.”¹⁶¹ This includes at the preliminary and investigations stage, pre-trial, trial and at sentencing.¹⁶²
125. The VLRC also recommended that any future training for police examine particular barriers for disclosing violence and accessing effective assistance, particularly for people from Indigenous or CALD backgrounds, people with a disability, people in same-sex relationships and people in regional and remote areas.¹⁶³ These issues need to be explored more fully.
126. Benchbooks and jury directions would also need to be reviewed and amended.

E. Conclusion

127. In conclusion, immediate steps should be taken to preclude the partial defence of provocation in circumstances of a change in a relationship including an indication of separation, attempt to leave, separation or in the context of sexual jealousy; and non-violent homosexual advance. Such action is consistent with our human rights obligations and the aims and objectives of the *National Plan to Reduce Violence Against Women and their Children*.
128. At the same time a more comprehensive and holistic review of homicide defences should be undertaken which is cognisant of the existing gender bias and the need to reform homicide defences with a particular focus on victims of domestic violence who ultimately kill their violent partners.

¹⁵⁶ This was a recommendation by Judge Ratushny who conducted the Canadian Self-Defence Review, cited in Sheehy, et al, *Defences to Homicide*, Note 54 at 27. It has also been recommended in the VLRC *Final Report*, Note 8 at 3.126 and Recommendation 11.

¹⁵⁷ Julie Stubbs & Julia Tomlie, “Battered Women Syndrome in Australia: A Challenge to Gender Bias in the Law?” in J. Stubbs (ed) *Women, Male Violence*, The Institute of Criminology, Sydney, 1994 cited in Bradfield thesis at 195.

¹⁵⁸ VLRC *Final Report*, Note 8 at [4.169].

¹⁵⁹ VLRC *Final Report*, Note 8 at [4.174].

¹⁶⁰ VLRC *Final Report*, Note 8 at [4.169].

¹⁶¹ VLRC *Final Report*, Note 8 at [4.154].

¹⁶² See VLRC *Final Report*, Note 8 at [4.154] for a detailed explanation.

¹⁶³ VLRC *Final Report*, Note 8 at [4.173].

129. Both the law and its implementation in practice are problematic, and reform will not be achieved simply by legislative change. This complex question of the operation of the partial defence of provocation and of self-defence needs to be seen in context. It illuminates the failure of the government and our society generally, to eliminate violence against women. That women lose their lives at the hands of violent intimate partners, or feel that they have no choice to protect the lives of themselves and their children, but to kill their intimate violent partners is a telling sign that we are systemically failing to address this serious human rights abuse.
130. As well as changes to the law, NSW needs a holistic and sustained response to the broader problem of violence against women.

Annexure A

USE OF PROVOCATION IN NSW 2002-2012

Summary of Case Law in NSW 2002 - 2012

Note: This summary does not include the recent NSW Supreme Court decision where the jury found Joachim Won guilty of manslaughter on the grounds of provocation after he stabbed the victim seven times upon discovering the victim having sexual intercourse with his wife. A copy of the sentencing judgment for this case is not yet available.

Case name and citation	Brief outline	Plea/trial	Defence(s) raised at trial	Defendant gender – victim gender	Relations hip between victim and offender	Defence made out	Sentence max/min
<i>Singh v R</i> [2012] NSWSC 637	<p>The defendant and the victim were married, but the relationship was not a happy one. The defendant suspected the victim was having an affair which caused many arguments:</p> <p>On the evening of victim's death, the defendant and victim had another argument in which the victim told him that she never loved him, that she loved another man and that she would ensure he was removed from the country. The defendant became very angry, lost self-control and strangled and then slit the victim's throat with a box cutter that was in the room causing her death.</p>	<p>Pleaded not guilty to murder but guilty to manslaughter on the grounds of provocation.</p> <p>Crown did not accept this plea and the matter proceeded to trial with a jury.</p>	Provocation	<p>Defendant – male</p> <p>Victim – female</p>	Married	<p>Yes – the jury found the defendant was guilty of manslaughter on the grounds of provocation.</p> <p>At sentencing, the McClellan CJ was satisfied that the actions of the victim were provocative and were sufficient to have occasioned an ordinary person in the defendant's position to have lost his self-control.</p> <p>McClellan CJ found the defendant</p>	Sentenced to imprisonment for 8 years; non-parole period of 6 years.

Case name and citation	Brief outline	Plea/trial	Defence(s) raised at trial	Defendant gender – victim gender	Relations hip between victim and offender	Defence made out	Sentence max/min
						<p>acted with a very great degree of violence toward the victim making, the offence objectively more serious than it might otherwise have been. He both applied force, strangling her, and used the Stanley knife to cut her throat.</p> <p>However, his Honour held:</p> <p><i>"I am satisfied that the offender was an immature individual who became caught up in a situation which he was unable to effectively handle. He was far from his family and friends in India and had no resources to draw upon for emotional support.</i></p>	

Case name and citation	Brief outline	Plea/trial	Defence(s) raised at trial	Defendant gender – victim gender	Relationship between victim and offender	Defence made out	Sentence max/min
						<i>When it became apparent that his marriage had failed, he did not have the personal maturity or capacity to remove himself from the situation and avoid the conflict which ultimately took place."</i>	
<i>R v Biddle</i> [2011] NSWSC 1262	<p>The defendant and victim were married. The marriage deteriorated after the victim found out about the defendant's extra-marital affair. One evening, after a tense family gathering, the defendant struck the victim with an iron bar several times causing her death.</p> <p>The defendant described his loss of temper as triggered by events subsequent to his wife's discovery of his affair, which centred on his disenfranchisement from the family and family home. On the night of the victim's</p>	Pleaded guilty to manslaughter	Provocation Substantial impairment	Defendant – male Victim – female	Married	<p>The jury found neither of the defences were made out and accordingly, the defendant was guilty of murder.</p> <p>During the sentencing hearing, Garling J had regard to provocation but did not consider it sufficient in this case to amount to a mitigating factor. His Honour also noted that he</p>	Sentenced to imprisonment for 27 years; non-parole period of 18 years

Case name and citation	Brief outline	Plea/trial	Defence(s) raised at trial	Defendant gender – victim gender	Relations hip between victim and offender	Defence made out	Sentence max/min
	death, the defendant described the provocative conduct as including verbal altercations with the victim, her direction to return to his caravan and the victim playing loud music to annoy him.					would not have been satisfied that substantial impairment was in any way causally connected to the defendant's conduct.	
<i>R v Williams</i> [2011] NSWSC 583	The defendant strangled the victim after she said it was "a good thing" that the defendant's girlfriend miscarried. At the time, the defendant was telling the victim how devastated he was about losing the baby. In the defendant's account he said he got really angry and something inside him just snapped.	Pleaded guilty to murder	Provocation was raised as a mitigating factor in sentencing	Defendant – male Victim – female	Acquaintances /Friends	Plea accepted At the sentencing hearing, the judge was not persuaded that provocation was established. No further reasons were provided.	Sentenced to imprisonment for 21 years and 3 months; non-parole period of 16 years, 3 months and 23 days.
<i>R v Goundar</i> [2010] NSWSC 1170	The defendant stabbed the victim repeatedly, after learning that he victim was involved in a sexual relationship with his wife.	Pleaded not guilty to murder but guilty to manslaughter. The Crown refused to accept the plea	Provocation	Defendant – male Victim – male	Friends / Victim was having an affair with defendant's wife	Yes, the jury found the defendant guilty of manslaughter on the grounds of provocation. At sentencing, Kirby J found that this was a serious	Sentenced to imprisonment for 10 years and 8 months; non-parole period of 8 years

Case name and citation	Brief outline	Plea/trial	Defence(s) raised at trial	Defendant gender – victim gender	Relations hip between victim and offender	Defence made out	Sentence max/min
						<p>case of manslaughter by provocation. His Honour considered the following factors when sentencing:</p> <ul style="list-style-type: none"> • The defendant was significantly affected by alcohol • The incident leading up to the loss of self-control occurred a few weeks earlier when the defendant first discovered the victim was having an affair with his 	

Case name and citation	Brief outline	Plea/trial	Defence(s) raised at trial	Defendant gender – victim gender	Relationship between victim and offender	Defence made out	Sentence max/min
						wife <ul style="list-style-type: none"> There was very little time between the provocative conduct and the attack The victim was stabbed at least five times which demonstrated an intention to kill 	
<i>Grant v R</i> [2010] NSWCCA 44	The appellant and the victim were in a tumultuous relationship and lived together. One night, after the appellant and victim shared a few drinks, the appellant sought to persuade the victim to have	Pleaded guilty to manslaughter on the grounds of provocation	Provocation	Appellant – male Victim – female	De facto	No. The jury returned a verdict of guilty of murder.	Sentenced to imprisonment for 16 years; non-parole period of 11.5 years.

Case name and citation	Brief outline	Plea/trial	Defence(s) raised at trial	Defendant gender – victim gender	Relationship between victim and offender	Defence made out	Sentence max/min
	sexual intercourse with him. The victim did not wish to do this and the appellant and victim started arguing. The appellant then proceeded to stab the victim 37 times.						
<i>R v Gabriel</i> [2010] NSWSC 13	The defendant and victim were married. During an argument, the defendant struck the victim seven times to the head with a hammer. The defendant claimed that he did not intend to kill his wife with the first blow but was acting in self-defence as his wife had attacked him with a knife. He said, for the six blows which then followed, that he was acting under provocation. He thought that the victim just wanted his money and his children's money, that she had been unfaithful to him and did not love him.	Pleaded not guilty to murder but guilty to manslaughter. Crown did not accept manslaughter plea and trial proceeded on charge of murder.	Provocation Self-defence Substantial impairment	Defendant – male Victim – female	Married	Yes, the jury found the defendant not guilty of murder but guilty of manslaughter on the grounds of provocation. The barrister for the defendant also submitted in sentencing that the jury's verdict was also based on elements of self-defence and provocation. At the sentencing hearing, Price J found that the degree of provocation offered to the offender cumulatively over	Sentenced to imprisonment for 9 years and 3 months; non-parole period of 6 years 3 months

Case name and citation	Brief outline	Plea/trial	Defence(s) raised at trial	Defendant gender – victim gender	Relationship between victim and offender	Defence made out	Sentence max/min
						<p>the years by the victim was not of a high order. The defendant's underlying conditions, however, increased his negative perception of his wife's conduct and the hurt that he experienced.</p> <p>The provocation was materially heightened when the victim placed the knife to the offender's throat which caused the loss of self-control. In His Honour's opinion, these considerations, reduced the objective gravity of the offence</p>	
<i>R v Duncan</i> [2010]	The defendant and the victim were partners. Over	Pleaded guilty to manslaughter on	Neither provocation	Defendant – female	De facto	Plea accepted At the sentencing	Sentenced to imprisonment

Case name and citation	Brief outline	Plea/trial	Defence(s) raised at trial	Defendant gender – victim gender	Relations hip between victim and offender	Defence made out	Sentence max/min
NSWSC 1241	the course of the relationship the defendant was subject to physical and emotional abuse at the hands of the victim. One evening, after a heated argument, the victim intercepted the defendant in the hallway and pushed her, causing her to fall to the floor near the kitchen. The defendant thought the victim was going to continue to assault her, so she seized a knife from the kitchen and stabbed him once in the abdomen. She then looked for somewhere to hide, fearing that he would come after her. The victim died from his injuries.	the grounds she caused death by unlawful and dangerous which was accepted by the Crown.	or self-defence were raised as defences but were considered by the court as mitigating factors.	Victim - male		hearing, Hidden J considered that while the basis of manslaughter in her case was not excessive self-defence or provocation, there were elements of both in the defendant arming herself with the knife and striking as she did. She acted quickly and impulsively in the heat of a violent incident which, was not of her choosing.	for 3 years; non-parole period of 1 year and 4 months
<i>R v Joyce Mary Chant</i> [2009] NSWSC 593	The defendant and victim were married. The victim had "been bashing" and verbally abusing the offender regularly for many years. On the night of the victim's death the victim and the defendant had an argument during which, the	Pleaded not guilty to murder but guilty of manslaughter. Crown accepted this plea.	Provocation	Defendant – female Victim – male	Married	Plea accepted. During the sentencing hearing, Howie J expressed misgivings about the veracity and the basis upon which Crown	Sentenced to imprisonment for 4 years and 9 months; non-parole period of 3 years and 9 months Sentenced to

Case name and citation	Brief outline	Plea/trial	Defence(s) raised at trial	Defendant gender – victim gender	Relations hip between victim and offender	Defence made out	Sentence max/min
	victim produced a rifle. There was a struggle and a bullet was discharged. At some point the victim dropped the rifle. The defendant believed the victim was going to kill her so she picked up the rifle and killed him. She later dismembered the body and disposed of it in various locations.					<p>accepted the facts. His Honour did not take into account provocation as a mitigating factor because the defendant was being sentenced for manslaughter by reason of provocation and it could not be considered twice.</p> <p>Howie J noted that generally there was extreme leniency where the killing occurred after a long period of abuse. His Honour did not find this was the case here although he accepted it was a physically abusive relationship. He found that the threatening use of the rifle was highly provocative</p>	a further 10 months for improperly interfering with human remains

Case name and citation	Brief outline	Plea/trial	Defence(s) raised at trial	Defendant gender – victim gender	Relations hip between victim and offender	Defence made out	Sentence max/min
						conduct in the circumstances of this case but noted that the interference with the human remains was a serious offence.	
<i>R v Lovett</i> [2009] NSWSC 1427	The defendant stabbed the victim after he found the victim having sexual intercourse with his partner.	Unclear	Accident Self-defence Provocation	Defendant – male Victim – male	Victim was having an affair with defendant's partner	The jury found the defendant was guilty of manslaughter. At the sentencing hearing, Barr AJ noted that the verdict showed there was no reasonable possibility that the victim's death was caused by accident. Self-defence was not available because the defendant took the knife where he expected the victim to be.	Sentenced to imprisonment for 10 years and 8 months; non-parole period of eight years.

Case name and citation	Brief outline	Plea/trial	Defence(s) raised at trial	Defendant gender – victim gender	Relations hip between victim and offender	Defence made out	Sentence max/min
						<p>In relation to provocation, Barr AJ was satisfied that the defendant first suspected and then realised that the victim was interested in his partner. He carried a knife in case he needed it when dealing with the victim. When he discovered the victim and his partner having sexual intercourse, he decided to use the knife.</p> <p>In deciding an appropriate sentence, Barr AJ noted that the defendant's prospects of rehabilitation were not good – continued use of drugs, breach of work orders, lack</p>	

Case name and citation	Brief outline	Plea/trial	Defence(s) raised at trial	Defendant gender – victim gender	Relationship between victim and offender	Defence made out	Sentence max/min
						of remorse.	
<i>R v Stevens</i> [2008] NSWSC 1370	The defendant and the victim were in a violent de facto relationship. The defendant and the victim had a long history of substance use. One evening, the defendant became angry that the victim had a sexual relationship with another man and did not take proper care of their infant children. The defendant killed the victim using a blunt instrument.	Pleaded not guilty to murder but guilty to manslaughter on the grounds of provocation. The Crown accepted this plea.	Provocation	Defendant – male Victim – female	De facto	Yes, plea accepted. At the sentencing hearing, Hall J noted that the degree of violence and gravity of offence in this case was extreme and the provocation was low. There was no evidence from the defendant of any remorse, nor was there a finding of special circumstances to reduce the sentence.	Sentenced to imprisonment for 8 years and 8 months; non-parole period of 6 years and 7 months.
<i>R v O'Connor</i> [2008] NSWSC 1297	The defendant and victim were married. The victim cared for the defendant but they often argued about their future on their property. After one such argument, the defendant shot the victim twice and	Pleaded not guilty to murder but guilty to manslaughter on the grounds of provocation. The Crown did not accept this plea.	Provocation	Defendant – male Victim – female	Married	No, the jury did not find provocation was made out. However, Studdart AJ found that while the defendant did not act under	Sentenced to imprisonment for 21 years; non-parole period of 16 years

Case name and citation	Brief outline	Plea/trial	Defence(s) raised at trial	Defendant gender – victim gender	Relationship between victim and offender	Defence made out	Sentence max/min
	<p>then buried her body. When asked why he decided to shoot her in the head the defendant told the police that "she just got that nasty about any business decisions I made, she tried to overrule me" and that "she use to yell and scream and screech". He added that "she had a real bad speech and it just got very nerve racking. The sound of her voice would drive you up the wall."</p>					<p>provocation as per section 23 of the <i>Crimes Act</i>, on the balance of probabilities the defendant shot the victim after the conduct caused him to lose self-control at the time of the shooting. This was taken into account as a mitigating factor during sentencing.</p> <p>The aggravating features of the case included the fact that commission of the crime involved a weapon and that there were two discrete acts of shooting.</p> <p>In light of this, Studdart AJ held that deterrence and punishment of the defendant</p>	

Case name and citation	Brief outline	Plea/trial	Defence(s) raised at trial	Defendant gender – victim gender	Relations hip between victim and offender	Defence made out	Sentence max/min
						should be adequately addressed.	
<i>R v Ferguson</i> [2008] NSWSC 761	The defendant and victim lived together and developed a sexual relationship. The victim was sexually very demanding, enjoyed humiliating the defendant and accused her of having sexual relations with others. The victim also encouraged the defendant to use illegal drugs which led to sustained drug abuse by the defendant. On one evening, after the defendant had threatened to leave, the victim accused her of sleeping with the drug dealer and started criticising and threatening her. The last words the defendant remembers the victim saying were "you will always have to look over your shoulder." She thought that this meant that if she left, he would come after her. The defendant took a knife	Defendant pleaded not guilty of murder but guilty of manslaughter. Crown accepted this plea.	Provocation Substantial impairment by an abnormality of mind	Defendant – female Victim – male	De facto	Yes, plea accepted. At the sentencing hearing, Barr J said he was satisfied that the victim's conduct was so provocative that the defendant finally and suddenly lost the ability to control herself. Although she intended to kill the deceased, she formed that intention suddenly, a very short time before she committed the act causing death. Afterwards she was just as quickly overcome by remorse. Barr J also noted that the defendant	Sentenced to imprisonment for 7 years; non-parole period of 3 years

Case name and citation	Brief outline	Plea/trial	Defence(s) raised at trial	Defendant gender – victim gender	Relationship between victim and offender	Defence made out	Sentence max/min
	and stabbed the victim at least three times causing his death.					was of good character and unlikely to offend again.	
<i>R v Faehndrich</i> [2008] NSWSC 877	<p>The defendant and victim had been in a turbulent relationship for three months. According to the defendant, on the evening of the victim's death, the victim (who was allegedly self-medicated) approached the defendant with scissors in her hand. The defendant went to grab hold of her, they had a struggle and fell down.</p> <p>The next thing the defendant remembers is the victim bleeding from the neck area and him trying to stem the blood flow.</p> <p>The defendant thought that the victim was trying to stab him and killed her while defending himself.</p>	Defendant pleaded not guilty to murder but guilty to manslaughter. The Crown did not accept this plea.	Provocation Substantial impairment by abnormality of mind	Defendant – male Victim – female	In a relationship	<p>The jury found the defendant guilty of murder and were not satisfied on the balance of probabilities that the partial defences of provocation and substantial impairment by abnormality of mind had been established.</p> <p>During sentencing, Price J did not accept the defendant's account of events and concluded, based on the forensic evidence that the defendant stabbed the victim with scissors as she was coming</p>	Sentenced to imprisonment for 20 years; non-parole period of 15 years

Case name and citation	Brief outline	Plea/trial	Defence(s) raised at trial	Defendant gender – victim gender	Relations hip between victim and offender	Defence made out	Sentence max/min
						<p>out of the bathroom. She was then stabbed at least a further four times with the scissors in the back.</p> <p>His Honour noted that the defendant's mental illness, the limited provocation and the lack of planning were factors which mitigated the objective seriousness of the offence.</p>	
<p><i>R v Cavanough</i> [2007] NSWSC 561</p>	<p>The defendant and victim were in a mutually abusive relationship, even though physical acts of violence were, more often than not, perpetrated by the defendant against the victim. On the night of the victim's death, the defendant and victim got into an argument, during</p>	<p>Defendant pleaded not guilty to murder but guilty to manslaughter. The Crown did not accept this plea.</p>	<p>Provocation</p> <p>Substantial impairment by an abnormality of mind</p>	<p>Defendant – female</p> <p>Victim - male</p>	<p>In a relationship</p>	<p>The jury found the defendant guilty of manslaughter. At the sentencing hearing, Whealy J noted that manslaughter was left before the jury on three possible grounds:</p>	<p>Sentenced to imprisonment for 8 years and 2 months; non-parole period of 5 years</p> <p>In determining the appropriate</p>

Case name and citation	Brief outline	Plea/trial	Defence(s) raised at trial	Defendant gender – victim gender	Relationship between victim and offender	Defence made out	Sentence max/min
	<p>which the defendant demanded the victim return some money and the victim threatened to have DOCS take away the defendant's child.</p> <p>During the argument, the defendant picked up a knife from the kitchen drawer and threatened to stab the victim if he didn't give her the money. He did not comply so the defendant swung the knife at him. Her intention was to cut him on the arm but she instead fatally stabbed him in the back.</p>					<ul style="list-style-type: none"> Manslaughter by an unlawful and dangerous act Provocation Substantial impairment <p>Whealy J found that the facts established manslaughter on the first of these three alternatives.</p> <p>His Honour did not consider that the defendant had lost her self-control as a result of the provocative conduct of the victim. The defendant knew what she was doing – she threatened to stab the victim with a</p>	<p>sentence, Whealy J noted that:</p> <p><i>"It is necessary to impose a sentence which, while taking into account the offender's strong subjective case, reflects the gravity of the crime and makes appropriate allowance for considerations of general and personal deterrence. These latter factors loom large in the present matter particularly because of the use of a knife</i></p>

Case name and citation	Brief outline	Plea/trial	Defence(s) raised at trial	Defendant gender – victim gender	Relations hip between victim and offender	Defence made out	Sentence max/min
						knife and then proceeded to actually stab him. His Honour was also not satisfied that the defendant's capacity to control herself and to know right from wrong were substantially impaired by her disorder of mind. She was suffering from a depressive disorder and was under the influence of alcohol and drugs but there was no evidence to suggest that her capacities were impaired in any substantial way.	<i>in the resolution of a domestic dispute."</i>
<i>Goebel-McGregor v R</i> [2006] NSWCCA 390	The defendant and the victim were formerly in a de facto relationship, and had two children together. After the relationship ended, the	Defendant pleaded not guilty to murder, but guilty of manslaughter.	Provocation	Defendant – male Victim – female	Former de facto	No. The jury returned a verdict of guilty of murder.	Sentenced to imprisonment for twenty years; non-parole period

Case name and citation	Brief outline	Plea/trial	Defence(s) raised at trial	Defendant gender – victim gender	Relations hip between victim and offender	Defence made out	Sentence max/min
	victim complained several times about the violent attitude of the defendant, and commenced proceedings against the defendant for apprehended domestic violence orders. Prior to the killing, the victim had told the defendant that he "[couldn't] win" custody of the children. Immediately prior to the killing, the victim told the defendant that before the outcome of the custody case was announced, she and her new partner "[would] be going, taking the boys and going to England and you'll never see your boys again." The defendant had taken a shotgun with him when he went to meet the victim, and he shot her in the head from about 2-3 metres behind the victim.	The Crown did not accept this plea.					of fifteen years
<i>R v Russell</i> [2006] NSWSC 722	The defendant and victim were in an abusive relationship. On one	Initially pleaded not guilty to murder, but later	Provocation	Defendant – female Victim –	De facto	Not relevant as the Crown accepted the defendant's	Sentenced to imprisonment for six years;

Case name and citation	Brief outline	Plea/trial	Defence(s) raised at trial	Defendant gender – victim gender	Relations hip between victim and offender	Defence made out	Sentence max/min
	evening, the victim started to argue with the defendant because she was on the phone to her daughter. He asked the defendant: "Why is she on the phone? She is nothing but a slut". After the defendant ended the conversation with her daughter, the victim told the defendant that he would "kill [her] stone dead" and taunted her to "stab [him] bitch, [you] haven't got the balls." She then stabbed him once in the chest.	pleaded guilty of manslaughter on the basis of provocation. The Crown accepted this plea.		male		plea of manslaughter. Nevertheless, Newman AJ found that since "provocation...in the ambit of s 23 [of the Crimes Act] could not be negated", this "gave rise to a proper acceptance by the Crown of a plea of manslaughter."	non-parole period of three years
<i>R v Weatherall</i> [2006] NSWSC 486	The victim had sexually abused the defendant's nine-year-old niece (brought up as the couple's daughter) at least twice. The defendant knew about the first time, but was told by her niece later that the defendant had assaulted her a second time. After her niece told her in detail about the victim's conduct, the defendant surprised him at the pub and stabbed him	Initially pleaded not guilty to murder, later accepted guilty plea for manslaughter. The Crown accepted this plea.	Provocation Substantial impairment Intoxication	Defendant – female Victim – male	Married	No. Judge held that there was some provocation by the victim, but not such as to fall within s 23. However, the provocation did serve to mitigate the defendant's sentence under s 22 of the <i>Crimes (Sentencing Procedure) Act</i>	Sentenced to imprisonment for three years; non-parole period of eighteen months

Case name and citation	Brief outline	Plea/trial	Defence(s) raised at trial	Defendant gender – victim gender	Relations hip between victim and offender	Defence made out	Sentence max/min
	once.					<p>1999 (NSW).</p> <p>The defendant succeeded in her claim of substantial impairment. The discovery that her daughter had suffered abuse at the hands of her partner led her to develop post-traumatic stress disorder, meaning that her capacity to understand events or to judge whether her actions were right or wrong, or to control herself, was substantially impaired. This substantial impairment warranted liability for murder being reduced to manslaughter.</p>	
<i>R v Scott</i> [2003] NSW	The defendant and the victim had been living	Pleaded not guilty to murder, but	Excessive	Defendant	De facto	Whealy J accepted that this killing	Sentenced to imprisonment

Case name and citation	Brief outline	Plea/trial	Defence(s) raised at trial	Defendant gender – victim gender	Relationship between victim and offender	Defence made out	Sentence max/min
C 627	<p>together in a de facto relationship. The defendant had a long history of alcohol abuse, and prior to March 2002, the victim had often expressed to friends his desire to end the relationship because he could no longer handle the defendant's drinking. According to the victim, the defendant left the victim for another woman in early March 2002. In fact, in March 2002, the victim visited the defendant, and took a knife with him. He stood behind the defendant with a knife and said "I've fucking had it." The defendant tried to leave, but the victim put his hand on her throat and began to choke her. She then picked up an iron that was nearby, and hit the defendant over the head with it three times until he slackened his hold on her neck and fell onto the ground.</p>	<p>guilty of manslaughter. The Crown accepted this plea on the basis of excessive self-defence.</p>	self-defence	<p>– female Victim – male</p>		<p>occurred in the circumstances of self-defence and without planning or premeditation.</p> <p>Despite psychiatric evidence to the contrary, Whealy J did not accept that the defendant was at the relevant time exhibiting the responses and features of battered woman syndrome.</p>	for five years; non-parole period of two years and six months

Case name and citation	Brief outline	Plea/trial	Defence(s) raised at trial	Defendant gender – victim gender	Relationship between victim and offender	Defence made out	Sentence max/min
<i>R v Trevenna</i> [2003] NSWSC 463	The defendant and the victim were married. The victim was controlling and frequently abusive towards the defendant. On the night of the killing, the victim had accused the defendant of sleeping with another man. Although she denied it, the victim then said that she was a "fucking bitch" and that he was "going to kill [her]." The victim grabbed the defendant by the throat and said "I'll kill you, you bitch" several times. He got a cricket bat, held it towards her and said that he would "smash [her] face in so no one will ever know [her]" and told her that she would never see her son again. The defendant reached for a shotgun that she knew was under the bed, and shot the victim once.	Pleaded not guilty to murder but guilty to manslaughter on the basis of excessive self-defence. The Crown accepted the plea.	Excessive self-defence	Defendant – female Victim – male	Married	Yes. Crown accepted the plea to manslaughter on the basis of excessive use of force in self-defence. At the sentencing hearing, Buddin J considered that a jury would not necessarily have been persuaded in all the circumstances of the case that the Crown had negated self-defence and that it may accordingly have acquitted the offender altogether. Coupled with the defendant's plea of guilty, these were mitigating factors to be considered in sentencing.	Sentenced to imprisonment for seven and a half years; non-parole period of two years and six months

Case name and citation	Brief outline	Plea/trial	Defence(s) raised at trial	Defendant gender – victim gender	Relations hip between victim and offender	Defence made out	Sentence max/min
<i>R v Anderson</i> [2002] NSWCCA 194	The defendant and the victim were once married. The victim visited the defendant's home, and proceeded to insult the defendant, including by telling her that she "had nothing anymore and no fellow would want [her] with half a tit." The defendant had just had a breast removed after surgery for breast cancer. The victim also told the defendant that her son was "gutless" and "a little smart arse." He also repeatedly tried to have sex with the victim, and suggested that he "tie [her] up, fuck [her] up the arse and then pee all over [her]." The victim picked up a piece of cord or twine and told the defendant that he would choke her as he had choked his last wife. She then took the cord, tied it around his neck and pulled it. Once he fell to the ground, she left the house, and returned two hours later to find the victim	Pleaded not guilty to murder	Provocation	Defendant – female Victim – male	Married	No. Although the trial judge indicated the alleged conduct of the victim "could well have amounted to provocation in the relevant sense", the jury did not accept that the events these events occurred as the defendant had related them, and convicted the defendant of murder.	Sentenced to imprisonment for seventeen years; non-parole period of thirteen years

Case name and citation	Brief outline	Plea/trial	Defence(s) raised at trial	Defendant gender – victim gender	Relations hip between victim and offender	Defence made out	Sentence max/min
	dead.						
<i>R v Sievers</i> [2002] NSWSC 1257	The defendant and the victim had an argument, during which the victim approached the defendant with a small knife. The defendant took the knife, struggled with the victim and then stabbed her fatally with the knife. In the days prior to the killing, the victim had verbally abused the defendant, assaulted him with a hammer on one occasion and a shoe on another occasion, and threw wine and cordial over him.	Pleaded not guilty to murder, but guilty of manslaughter. The Crown did not accept the plea.	Provocation	Defendant – male Victim – female	De facto	No. The jury found the defendant guilty of murder. The defendant appealed the decision to the Court of Criminal Appeal on the basis that the judge had made an error in his directions on provocation, but his appeal was dismissed.	Life imprisonment