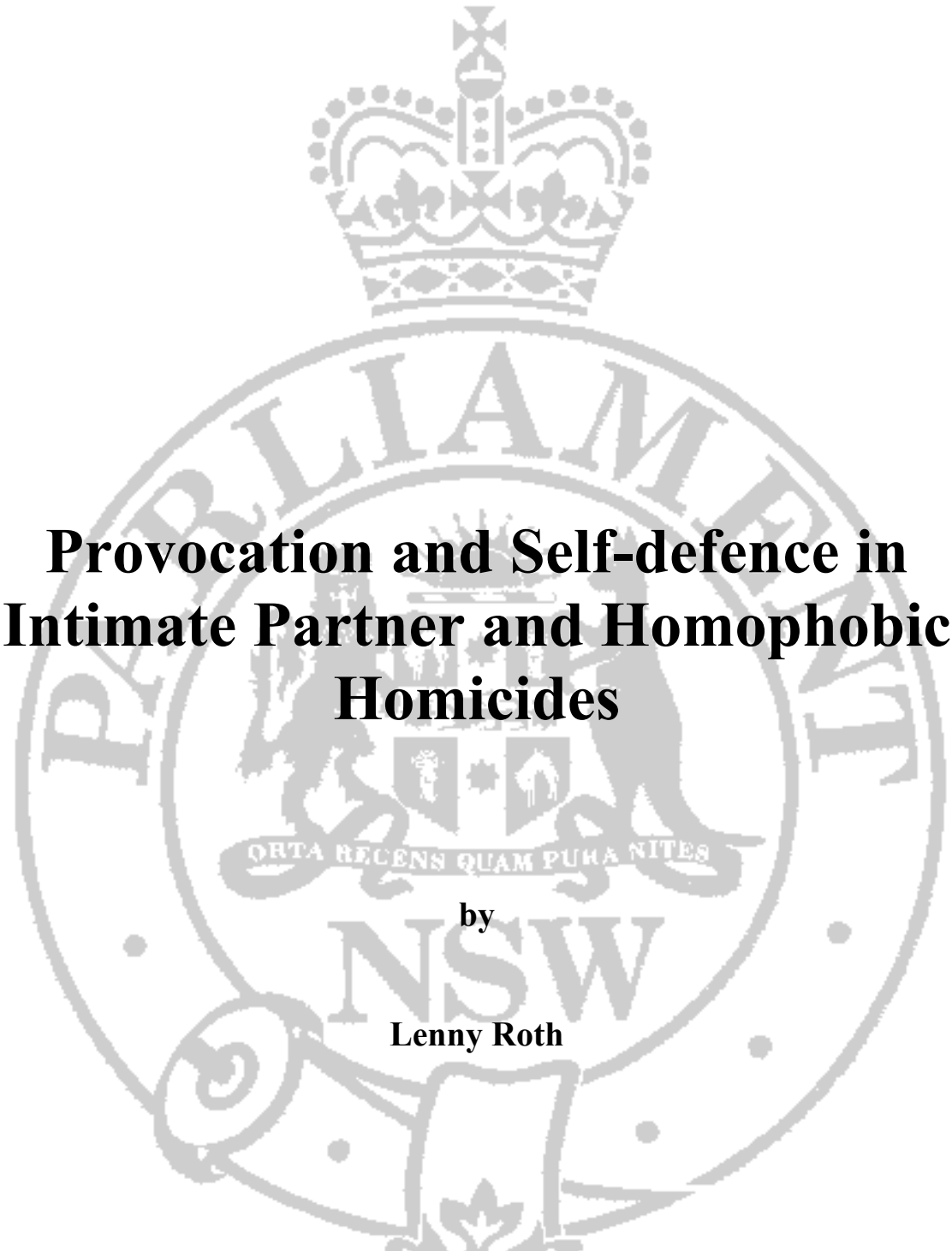


**NSW PARLIAMENTARY LIBRARY
RESEARCH SERVICE**



**Provocation and Self-defence in
Intimate Partner and Homophobic
Homicides**

by

Lenny Roth

Briefing Paper No 3/07

RELATED PUBLICATIONS

- *Self Defence and Provocation: Implications for battered women who kill and for homosexual victims*, Briefing Paper No 33/96.

ISSN 1325-5142

ISBN 978 0 7313 18186

March 2007

© 2007

Except to the extent of the uses permitted under the *Copyright Act 1968*, no part of this document may be reproduced or transmitted in any form or by any means including information storage and retrieval systems, without the prior written consent from the Librarian, New South Wales Parliamentary Library, other than by Members of the New South Wales Parliament in the course of their official duties.

**Provocation and Self-defence in
Intimate Partner and Homophobic
Homicides**

by

Lenny Roth

NSW PARLIAMENTARY LIBRARY RESEARCH SERVICE

David Clune (MA, PhD, Dip Lib), Manager (02) 9230 2484

Gareth Griffith (BSc (Econ) (Hons), LLB (Hons), PhD),
Senior Research Officer, Politics and Government / Law (02) 9230 2356

Talina Drabsch (BA, LLB (Hons)), Research Officer, Law (02) 9230 2768

Roza Lozusic (BA, LLB), Research Officer, Law (02) 9230 2003

Lenny Roth (BCom, LLB), Research Officer, Law (02) 9230 3085

Stewart Smith (BSc (Hons), MELGL), Research Officer, Environment ... (02) 9230 2798

John Wilkinson (MA, PhD), Research Officer, Economics (02) 9230 2006

Should Members or their staff require further information about this publication please contact the author.

Information about Research Publications can be found on the Internet at:

www.parliament.nsw.gov.au/WEB_FEED/PHWebContent.nsf/PHPages/LibraryPublications

Advice on legislation or legal policy issues contained in this paper is provided for use in parliamentary debate and for related parliamentary purposes. This paper is not professional legal opinion.

CONTENTS

EXECUTIVE SUMMARY

1. INTRODUCTION	1
2. THE DEFENCES IN 1996	1
2.1 Provocation.....	1
2.2 Self-defence.....	1
3. DISCUSSION ABOUT THE DEFENCES IN 1996	2
4. RECENT DATA ON INTIMATE PARTNER HOMICIDES.....	4
4.1 Number of these homicides	4
4.2 Characteristics of these homicides	4
5. RECENT DATA ON USE OF THE DEFENCES	5
5.1 Data on use of the provocation defence in NSW	5
5.2 Data on use of the provocation defence in Victoria	7
5.3 Data on use of self defence in Australia and Victoria.....	8
5.4 Data on use of other defences in NSW.....	8
6. EXAMPLES OF SUCCESSFUL PROVOCATION DEFENCES.....	10
6.1 <i>Ramage</i> : A man kills his estranged female partner.....	10
6.2 <i>Green</i> : A man kills in response to a homosexual advance.....	11
7. LAW REFORM IN NEW SOUTH WALES	12
7.1 Law Reform Commission report (1997)	12
7.2 Working party report on homosexual advance defence (1998)	16
7.3 Reforms to the law of self-defence (2001).....	17
7.4 Finlay review of the law of manslaughter (2003)	19
8. LAW REFORM IN OTHER AUSTRALIAN JURISDICTIONS	19
8.1 Overview	19
8.2 Model Criminal Code	20
8.3 Tasmania.....	22
8.4 Australian Capital Territory	23
8.5 Victoria.....	23
8.6 Northern Territory	28
8.7 Western Australia	28
9. LAW REFORM PROPOSALS IN OTHER COUNTRIES	29
9.1 New Zealand.....	29
9.2 United Kingdom	32
10. CONCLUSION.....	35

EXECUTIVE SUMMARY

This paper updates a 1996 briefing paper, which examined the defences of provocation and self-defence in the context of homicides involving intimate partners and homicides in response to homosexual advances.

Recent data on intimate partner homicides

Nationally, there were on average 77 intimate partner homicides each year in the period from 1989 to 2002. In 2004/05, there were 66 intimate partner homicides in Australia, which represented 20 per cent (one in five) of all homicides in Australia. Since 1996, more new studies have been published on the characteristics of intimate partner homicides. These studies confirm findings in earlier studies, namely that men are more likely to kill their female partners (or sexual rivals) out of jealousy, possessiveness or control whereas women are more likely to kill their male partners in response to violence from them.

Recent data on use of the defences

A report published by the Judicial Commission of NSW contains data on the use of provocation in NSW in the period from 1990 to 2004. The report found:

- There were 11 male offenders that successfully relied on provocation in the context of infidelity or the breakdown of an intimate relationship.
- There were 11 offenders who successfully relied on provocation in the context of an alleged homosexual advance. In at least two cases, the advance was not violent.
- There were 10 cases where a woman who had killed her husband after a history of physical abuse successfully relied on provocation.

A study by Rebecca Bradfield on homicide cases in NSW from 1985 to 2000 found that there were 16 cases where females who had killed their spouses successfully relied on the partial defence of a lack of intent. A separate study by Bradfield of 65 cases of women who killed their violent spouses across Australia in the period from 1980 to 2000 found that self-defence was raised in 21 cases and in 9 of these cases the defence was successful.

Examples of successful provocation cases

There was a controversial case in Victoria in 2004 (*Ramage*), where a male successfully relied on the defence of provocation after killing his estranged female wife who had told him that sex with him repulsed her. He was convicted of manslaughter and sentenced to 11 years imprisonment. In the NSW case of *Green*, a male offender relied on a defence of provocation after killing his male “friend” who got into bed with him and touched and grabbed him. He was initially convicted of murder and was sentenced to 15 years imprisonment. However, the High Court upheld his appeal by a majority of 3 to 2. At the second trial, he was convicted of manslaughter and sentenced to 10.5 years.

Law reform in New South Wales

In 1997, the NSW Law Reform Commission published its report on provocation, which recommended retaining the defence but reformulating it in a way that would leave it up to the jury to decide whether the offender should be partially excused for having lost self-control and killing. The Commission rejected the option of specifically excluding the operation of the defence in cases where men killed female partners after a relationship

breakdown, or in cases of killings in response to homosexual advances. It also rejected the option of removing the “loss of self-control” requirement in the defence to make the defence more available to battered women who kill. In 1998, a Working Party published its report on killings in response to homosexual advances, which recommended an amendment to the provocation defence but not to self-defence. Recommendations made by the Law Reform Commission and the Working Party to modify the provocation defence have not yet been implemented. In 2001, the Government enacted laws to clarify the law of self-defence and to reintroduce the partial defence of excessive self-defence.

Law reform in other Australian jurisdictions

In 1998, the Model Criminal Code Officers Committee recommended that the defence of provocation be abolished and that the defence of excessive self-defence not be reintroduced. In 2003, Tasmania became the first state to abolish the defence of provocation. In 2005, Victoria also abolished provocation along with other reforms including clarifying the defence of self-defence to make it more available to battered women who kill, introducing legislative guidance on the relevance of family violence evidence in relation to a defence of self-defence, and reintroducing the partial defence of excessive self-defence. The ACT (2004) and the Northern Territory (2006) have both enacted provisions to exclude non-violent sexual advances from forming the basis of a defence of provocation. In 2006, the Law Reform Commission of Western Australia published an issues paper on the law of homicide, which considers reform of provocation and self-defence generally and in relation to battered women who kill.

Law reform in overseas jurisdictions

New Zealand: In 2001, the NZ Law Commission published its report on defences with particular reference to battered defendants. It recommended abolishing provocation and clarifying the law of self-defence to make it more available for battered defendants. The report also discussed the use of expert evidence on family violence to support a defence of self-defence. The Commission rejected the options of creating a separate defence for battered defendants and introducing a defence of excessive self-defence. In 2004, the Government asked the Law Commission to consider further issues arising from its 2001 report. The Commission is expected to report by the end of June 2007.

United Kingdom: The UK Law Commission recently reviewed the defence of provocation and recommended that it be reformulated. The Commission rejected the option of specifically excluding the defence in cases where men kill female partners after a relationship breakdown. However, it proposed amending the defence to require the defendant to have acted in response to *gross* provocation that caused them to have a *justifiable* sense of being wronged. With respect to battered women, the Commission proposed removing the “loss of self-control” requirement in the provocation defence and it also recommended incorporating excessive self-defence into the defence.

1. INTRODUCTION

This paper updates a 1996 briefing paper, which examined the defences of provocation and self-defence in the context of homicides involving intimate partners and homicides in response to homosexual advances.¹ This paper refers to recent data on intimate partner homicides and on the use of these defences. It also outlines law reform developments in NSW and in other Australian and overseas jurisdictions.

2. THE DEFENCES IN 1996

2.1 Provocation

Provocation is only a partial defence to murder. If the jury accepts the defence it results in a conviction for manslaughter instead of murder.² The provocation defence, as set out in section 23 of the *Crimes Act 1900* (NSW), has not changed since 1996. Under section 23, the partial defence of provocation is established if:

- The act causing death was the result of *a loss of self-control* on the part of the accused that was induced by any conduct of the deceased (including grossly insulting words or gestures) towards or affecting the accused; and
- That conduct of the deceased was such as could have induced *an ordinary person in the position of the accused* to have so far lost self-control as to have formed an intent to kill, or to inflict grievous bodily harm upon, the deceased.

Section 23 states that the partial defence of provocation can be relied upon even if the conduct of the deceased did not occur immediately before the act causing death. The section also provides that provocation is not negated merely because the act causing death was not done suddenly; or because there was not a reasonable proportion between the act causing death and the conduct of the deceased that induced the act.

2.2 Self-defence

In contrast to provocation, self-defence is a complete defence to murder. If the jury accepts the defence, it results in an acquittal. In NSW in 1996, the defence of self-defence was defined by the common law. Self-defence was established if the accused believed upon reasonable grounds that it was necessary in self-defence to do what he or she did.³

¹ Manning F, 'Self-Defence and Provocation: Implications for battered women who kill and for homosexual victims', *Briefing Paper No. 33/96*, December 1996.

² The maximum penalty for murder is life imprisonment whereas the maximum penalty for manslaughter is 25 years imprisonment: sections 19A, 24, *Crimes Act 1900* (NSW).

³ *Zecevic v DPP* (1987) 162 CLR 645 at 661.

3. DISCUSSION ABOUT THE DEFENCES IN 1996

Discussion about the defences in 1996 is summarised below:⁴

- ***Domestic homicides:*** According to a study by Wallace (1986), women were three times more likely than men to be the victim of a spouse homicide. In nearly half of the wife killings, the woman had either left or was in the process of leaving her husband when she was killed. In the majority of these cases, it was the consequence of separation that prompted the killing. Women killed in different circumstances to men. The majority of women who killed did so after a sustained period of abuse.
- ***Historical development of the defences:*** The shape and requirements of the defences of provocation and self-defence were said to be a product of the historical context in which they arose. It was argued that the defences were developed to suit typically male responses to situations. The scenarios contemplated by the defences were isolated episodes, sudden quarrels, when hostility erupted into violence. These scenarios did not bear any resemblance to the dynamics operating in domestic violence, which is the context in which most women kill.
- ***Use of provocation defence by men who kill female partners:*** There was controversy about the use of the provocation defence by men who killed their female partners. Critics argued that the defence operated to partially excuse male violent behaviour, which was often motivated by sexual jealousy, possessiveness and assertion of power. It was also argued that the circumstances of these killings were distorted because the only evidence of provocation came from the accused and rules of evidence could exclude a history of domestic violence from being revealed.
- ***Use of provocation defence by battered women:*** Developments in the law had made the provocation defence increasingly amenable to battered women who kill. Amendments introduced in NSW in 1982 removed the requirement of suddenness and also allowed cumulative provocation to be considered. Despite these changes, it was suggested that there had been gender bias in the interpretation of the defence throughout various stages of the criminal process. This bias was said to exist because of myths and stereotypes about domestic violence and battered women, which resulted in misunderstandings of women's experiences.
- ***Use of self-defence by battered women:*** The defence of self-defence had also progressively been modified in a way that better accommodated battered women who killed their male partners. However, the interpretation of the law of self-defence continued to pose problems for women in this situation. Because the circumstances in which battered women kill had for so long been excluded from the ambit of self defence, the prevailing conceptions about what could amount to an occasion when killing was reasonable or necessary had become hard to displace.

⁴ This section is based on Briefing Paper No. 33/96, note 1.

- ***Options for recognising women's experiences:*** The options included:
 - (i) Admitting expert evidence as to *battered woman syndrome* (BWS) in support of a defence of self-defence or provocation. However, BWS evidence had been criticised for a number of reasons including that the reconstruction of the woman's experience in a manner consistent with scientific or medical discourse reinforced the notions of irrationality or disorder, and denied the rationality of the woman's actions.
 - (ii) Admitting expert evidence about the *general dynamics of domestic violence* in support of provocation or self-defence. Such evidence would include an examination of the reasons why the woman did not leave the relationship and evidence to support the reasonableness of her fear. The traditional limitations preventing testimony of this nature from being admissible had been somewhat relaxed in new evidence laws in NSW.
 - (iii) Creating a separate defence for battered women who kill their partners. Reports in South Australia (1987) and in Western Australia (1994) recommended the creation of a new defence. A number of issues would need to be considered in formulating such a defence.
- ***The homosexual advance defence:*** There were concerns about the use of the defences of provocation or self-defence by persons who had killed in response to a non-violent sexual advance by a homosexual person. Many people were alarmed about the success of these pleas despite the presence of several factors prima facie inconsistent with the requirements of self-defence or provocation. The Attorney General had set up a Working Party on this issue and it had released a discussion paper. The Discussion Paper identified three issues: (i) whether the allegation of a homosexual advance, without more, ought to be sufficient to raise self defence and/or provocation; (ii) the difficulty in disproving such an allegation given that the accused is almost inevitably the only source of information on the circumstances giving rise to the homosexual victim's death; and (iii) the treatment of homosexuality and gay victims by the criminal justice system.
- ***Provocation law reform proposals:*** The NSW Law Reform Commission had been asked to review the partial defences to murder, including provocation. In its 1993 Discussion Paper, the Commission canvassed a number of options for reform of provocation including abolition and reformulation. It invited submissions on the desirability of making provision for evidence of BWS to be called.
- ***Self-defence law reform proposals:*** There had been some moves to codify the law of self-defence. In 1993, the Model Criminal Code Officers Committee of the Standing Committee of Attorneys General had published its report on general principles of criminal responsibility, which recommended codification of self-defence. This had been implemented at the Commonwealth level.

4. RECENT DATA ON INTIMATE PARTNER HOMICIDES

4.1 Number of these homicides

Nationally, there were, on average, 77 intimate partner homicides each year in the period from 1989 to 2002.⁵ In 2004/05, there were 66 intimate partner homicides in Australia, which represented 20 per cent (one in five) of all homicides in Australia. In the same year, intimate partner homicides represented 23 per cent of all homicides in NSW.⁶

4.2 Characteristics of these homicides

In 2002, the Victorian Law Reform Commission published an occasional paper prepared by Jenny Morgan, which summarised Australian data on homicide, with a focus on intimate partner homicide.⁷ The paper primarily referred to a study by the Australian Institute of Criminology on homicide in Australia from 1989 to 1998 and a study by Kenneth Polk of homicides in Victoria from 1985 to 1989.⁸ Morgan concluded:

The sociological studies suggest not only that women are much less likely than men to be the perpetrators of homicide in sexually intimate homicides, but also that when women do kill, they usually kill for different reasons than men. Men are much more likely than women to kill their female partners (or sexual rivals) out of jealousy, possessiveness or control. Women are much more likely to kill their male partners in response to violence from them.⁹

In 2003, the Victorian Law Reform Commission published a study of homicide prosecutions in Victoria over a four-year period from 1 July 1997 to 30 June 2001.¹⁰ This study found that the majority of intimate partner homicides involved men killing women and also that “when men killed in this context it was most likely to be in circumstances of jealousy or control; whereas for women it was most likely to be in response to alleged violence that had been perpetrated against her by a male deceased”.¹¹

⁵ Mouzos J and Rushforth C, ‘Family Homicide in Australia’, Australian Institute of Criminology, *Trends and Issues in Crime and Criminal Justice*, No. 265, June 2003, p2.

⁶ Mouzos J and Houliaras T, *Homicide in Australia: 2004/05 National Homicide Monitoring Program (NHMP) Annual Report*, Australian Institute of Criminology, 2006, p60. See the definition of intimate partners on p20 (it includes boyfriends and girlfriends).

⁷ Morgan J, *Who Kills Whom and Why: Looking Beyond Legal Categories*, Victorian Law Reform Commission, 2002.

⁸ Morgan, note 7, p5-6.

⁹ Morgan, note 7, p30.

¹⁰ Victorian Law Reform Commission, *Defences to Homicide: Options Paper*, 2003, Ch 2.

¹¹ VLRC Options Paper, note 10, pxiv.

In 2003, the Australian Institute of Criminology in 2003 published a report on family homicide in Australia, which examined national homicide data over the 13-year period from 1989 to 2002.¹² The report found that the vast majority of intimate partner homicides involved males killing female partners (75 per cent).¹³ It also found that “a quarter of the intimate partner homicides occurred between separated, former, or divorced couples”; and, of these, 84 per cent involved women as victims”.¹⁴ According to the report, 29 per cent of intimate partner homicides “were believed to stem from jealousy, or desertion/termination of the relationship (actual or pending)”.¹⁵ Another finding was that 39 per cent of intimate homicides occurred “between partners with a known history of domestic violence”.¹⁶ The report also found that indigenous persons accounted for a disproportionate number of intimate partner homicides – just under a quarter (as both victims and offenders).¹⁷

5. RECENT DATA ON USE OF THE DEFENCES

5.1 Data on use of the provocation defence in NSW

In 2006, the Judicial Commission of NSW published a report on the use of partial defences to murder in NSW in the period from 1 January 1990 to 21 September 2004.¹⁸ Outlined below is a summary of the report’s findings on the use of provocation in intimate partner homicide cases, and on sentencing outcomes where the partial defence was successful.

- ***Homicides by men after infidelity or relationship breakdown***¹⁹: The Commission found that “there were 11 cases where provocation was successfully claimed in a factual context of infidelity or the breakdown of an intimate relationship”.²⁰ In all cases, the offender was male. In two cases, the victim was the offender’s wife²¹; in two cases, the victim was the homosexual

¹² Mouzos J and Rushforth C, ‘Family Homicide in Australia’, Australian Institute of Criminology, *Trends and Issues in Crime and Criminal Justice*, No. 265, June 2003.

¹³ Mouzos and Rushforth, note 12, p2.

¹⁴ Mouzos and Rushforth, note 12, p2.

¹⁵ Mouzos and Rushforth, note 12, p3.

¹⁶ Mouzos and Rushforth, note 12, p3. For data on the characteristics of intimate partner homicide in Australia in 2004/05, see Mouzos J and Houliaras T, note 6, p20-21.

¹⁷ Mouzos and Rushforth, note 12, p2.

¹⁸ Judicial Commission of NSW, *Partial Defences to Murder in NSW 1990-2004*, June 2006.

¹⁹ This information was sourced from Judicial Commission 2006 report, note 18, p42.

²⁰ Four of the 11 cases were jury verdicts and seven were guilty pleas accepted by the Crown.

²¹ In one of these cases (*R v Panozzo*, 1990) the offender shot his estranged wife after he found a letter written by her to a new lover; and in the other case (*R v Khan*, 1996), the offender witnessed a sexual act between his wife and a third person (see report at p42).

partner of the offender; and in the other seven cases, the victim was a male who was thought to be having a relationship with the offender's partner. The Commission's report does not note the number of cases where provocation was *unsuccessfully* claimed in a similar factual context.²²

- ***Homicides by men who had perpetrated domestic violence***²³: The Commission stated that, "the high rate of homicides where a male offender with a history of perpetrating domestic violence kills a female partner is a matter of ongoing concern". However, the Commission found that "very few of these male offenders are able to successfully claim provocation". In the period under review, there were five cases in which provocation was successfully claimed and four of these cases occurred between 1990 and 1992.
- ***Homicides in response to homosexual advances***²⁴: The Commission found that there were 11 offenders "who successfully relied on provocation in a factual context where an alleged homosexual advance was in issue". In five of the 11 cases, the provocative conduct included an alleged sexual assault (either immediately before the killing or some weeks, months or years prior to the killing) and in a further three cases there was some evidence of prior aggressive contact. In "two of the 11 cases the offender relied on evidence of a non-violent homosexual advance. In both cases, the jury accepted that the offender had been provoked".²⁵ In a more recent case, the jury rejected a provocation defence that was based on a non-violent homosexual advance.
- ***Homicides by women who killed their male partner after a history of abuse***: The Commission found that there were 10 cases where a woman who had killed her husband after a history of physical abuse successfully relied on provocation.²⁶ The Commission does not state whether there were any cases of this type where a defence of provocation was *unsuccessful*.
- ***Sentencing outcomes for offenders who successfully relied on provocation***: The Commission reported that three female offenders who had killed their

²² Two such cases in NSW are: *R v Leonard* [1999] NSWSC 510; and *R v Mankotia* [1998] NSWSC 295 [see also the appeals: *R v Mankotia* [2001] NSWCCA 52; and *Mankotia v The Queen* (S61 of 2001, 21 November 2001)].

²³ This information was sourced from Judicial Commission 2006 report, note 18, p46.

²⁴ This information was sourced from Judicial Commission 2006 report, note 18, p43-44. For further data on homicides in response to homosexual advances, see Tomsen S, *Hatred, Murder and Male Honour: Anti-homosexual Homicides in New South Wales, 1980-2000*, Australian Institute of Criminology Research and Public Policy Series No. 43, 2002.

²⁵ The two cases are *T* (unrep, 14/7/94) and *Dunn* (unrep, 28/10/97, NSWCCA). See also *Green v The Queen* (1997) 191 CLR 334 (which is included in the Commission's list of 11 cases where a defence of provocation was successful). *Green* is discussed below.

²⁶ Judicial Commission 2006 report, note 18, p45.

husband or de facto did not receive a full-time custodial sentence (in two of these cases the woman killed her husband after a history of domestic violence).²⁷ It did not otherwise report on sentencing outcomes in intimate partner homicide cases.²⁸ However, in relation to all homicide cases, the Commission found that of the 55 male offenders who successfully relied on provocation, the prison sentences ranged from 16 months to 15 years; and that of the 14 female offenders who successfully relied on provocation, the prison sentences ranged from 3 years to 10.5 years.²⁹

5.2 Data on use of the provocation defence in Victoria

In 2003, the Victorian Law Reform Commission published a study of homicide prosecutions in Victoria over a four-year period from 1 July 1997 to 30 June 2001.³⁰ The study included an examination of the use of defences in homicide cases, and specifically in sexual intimacy homicide cases³¹, although the Commission noted that the information it had collected about defences was “far from complete”.³² The Commission found that provocation was raised in 14 out of the 38 sexual intimacy homicide trials.³³ In 12 of these cases, the offender was male, “11 [of which] involved men killing women in circumstances of jealousy or control, while the remaining case involved a man killing his sexual rival”.³⁴ In four of these cases, the male offender was successful in claiming provocation.³⁵ The two cases where female offenders raised provocation both involved an alleged response to male violence.³⁶ In neither of these two cases was the defence successful.³⁷

²⁷ Judicial Commission 2006 report, note 18, p69.

²⁸ For data on sentencing outcomes for homosexual advance cases, see Judicial Commission of NSW, *Sentenced Homicides in New South Wales 1994-2001*, January 2004, p100.

²⁹ Adapted from Judicial Commission 2006 report, note 18, p70. Note that these figures do not include six non-custodial sentences (three for females and three for males). By way of general comparison with sentences for murder, a study of sentenced homicides in NSW in the period from 1994 to 2001 found that the median head sentence for murder was 18 years and the median non-parole period was 13.5 years: see Judicial Commission of NSW, *Sentenced Homicides in New South Wales 1994-2001*, January 2004, p 22.

³⁰ Victorian Law Reform Commission, *Defences to Homicide: Options Paper*, 2003, Ch 2.

³¹ This included “killings by partners or former partners because of jealousy or a desire to control the deceased, incidents involving the killing of sexual rivals and incidents where a person kills a violent partner or former partner: VLRC Options Paper, note 30, p24.

³² VLRC Options Paper, note 30, p41.

³³ VLRC Options Paper, note 30, p41 (use of provocation), p55 (number of trials).

³⁴ VLRC Options Paper, note 30, p51.

³⁵ VLRC Options Paper, note 30, p52.

³⁶ VLRC Options Paper, note 30, p51-52.

³⁷ VLRC Options Paper, note 30, p52.

Although not a statistical study, it is worth also noting here that an article published by Graeme Coss in July 2006 refers to a number of cases in Victoria over the previous eight years where men had relied on the defence of provocation after killing their female partner.³⁸ In most cases the female victim had left the relationship and an alleged insult was the basis for the defence; in other cases, the female victim was seen having an affair or was believed to be having an affair. In some cases the defence failed but in other cases it succeeded and the offender was convicted of manslaughter. According to Coss, successful pleas of provocation reduce sentences “from a potential 20 years or so (for a murder conviction) to about 6 or 8 years (for a manslaughter conviction)”.³⁹

5.3 Data on use of self defence in Australia and Victoria

A study by Rebecca Bradfield of 65 cases of women who killed their violent spouses across Australia in the period between 1980 and 2000 found that self-defence was raised in 21 cases and in 9 of these cases the defence was successful.⁴⁰ Bradfield noted that her sample was limited as it was selected from cases that were reported.⁴¹ The Victorian Law Reform Commission’s study of homicide prosecutions in Victoria between July 1997 and June 2001 (referred to above) found that two women had raised self-defence in sexual intimacy homicide cases and both were unsuccessful.⁴² In both cases, the female alleged that the deceased had sexually assaulted her.⁴³ The Commission’s study also reported that three men had unsuccessfully raised self-defence in sexual intimacy homicide trials.⁴⁴

5.4 Data on use of other defences in NSW

Lack of intention to kill or inflict grievous bodily harm

Murder is only established if the act causing death was done with an intention to kill or inflict grievous bodily harm, or was done with reckless indifference to human life.⁴⁵ If this is not proven, the accused is not guilty of murder but may be guilty of manslaughter.

³⁸ Coss G, ‘The Defence of Provocation: An Acrimonious Divorce from Reality’, (2006) 18(1) *Current Issues in Criminal Justice* 51.

³⁹ Coss G, note 38, p57.

⁴⁰ Bradfield R, *The Treatment of Women Who Kill Their Violent Male Partners Within the Australian Criminal Justice System*, PhD Thesis, University of Tasmania, 2002); cited in VLRC Options Paper, note 30, p109.

⁴¹ VLRC Options Paper, note 30, p109 (footnote 491).

⁴² VLRC Options Paper, note 30, p108-109.

⁴³ VLRC Options Paper, note 30, p108.

⁴⁴ VLRC Options Paper, note 30, p108-109.

⁴⁵ See section 18(1)(a), *Crimes Act 1900* (NSW).

A study by Rebecca Bradfield on intimate homicide cases in NSW in the period from 1985 to 2000 found that there were 16 cases where females who had killed their spouses successfully relied on a lack of intent for murder (ie lack of intent to kill or inflict grievous bodily harm) and, as a result, were convicted of manslaughter instead of murder.⁴⁶

In many of these cases, the inference was open that the accused had the requisite intent for murder.⁴⁷ In ten cases, the woman stabbed her partner in the chest, in three cases the woman shot her husband at close range and in one case, the woman tied cord and tape around her husband's neck and pulled the cord until he stopped moving.⁴⁸ Bradfield comments:

My reading of the cases suggests that lack of intent was being used as a defacto defence of 'domestic violence'. In 14 out of the 16 lack of intent cases in the study where women killed their male partner, there was a history of male violence and/or an actual impending assault by the man as the precipitating event. In 14 out of those 16 cases, the woman's plea of guilty to manslaughter was accepted. There is no legal defence of 'domestic violence', so the deceased's violence does not directly provide grounds for reduced culpability.⁴⁹

Diminished responsibility/substantial impairment

The partial defence of diminished responsibility was introduced in 1974 and was replaced in 1998 by the similar defence of "substantial impairment by abnormality of mind".⁵⁰ The Judicial Commission of NSW study referred to above, which covered the period from 1 January 1990 to 21 September 2004, made the following findings:

- *Male offenders who killed female partners:* There were 17 cases where a male offender successfully relied on the partial defence of diminished responsibility/substantial impairment after killing a female intimate partner.⁵¹ In at least four of these cases (all heard under the previous diminished responsibility defence), the relationship was characterised by domestic violence.⁵²
- *Male offenders killing sexual rivals:* There were four cases where a male offender successfully relied on the partial defence of diminished responsibility/substantial

⁴⁶ Bradfield R, 'Women Who Kill: Lack of Intent and Diminished Responsibility as the Other 'Defences' to Spousal Homicide', (2001) 13(2) *Current Issues in Criminal Justice* 143.

⁴⁷ Bradfield R, note 46, p151.

⁴⁸ Bradfield R, note 46, p151.

⁴⁹ Bradfield R, note 46, p151.

⁵⁰ The defence is outlined in section 23A, *Crimes Act 1900* (NSW).

⁵¹ Judicial Commission 2006 report, note 18, p23.

⁵² Judicial Commission 2006 report, note 18, p23-24.

impairment after killing his former partner's new partner.⁵³

- *Female offenders who killed male partners:* There were 8 cases where a female offender successfully relied on the partial defence of diminished responsibility/substantial impairment after killing a male partner.⁵⁴ In at least four of these cases, the killing followed a prolonged history of domestic violence.⁵⁵ In three of these four cases, the female offender also successfully claimed provocation and was sentenced on the basis of both partial defences.⁵⁶

6. EXAMPLES OF SUCCESSFUL PROVOCATION DEFENCES

6.1 *Ramage*: A man kills his estranged female partner

Coss describes the recent Victorian case of *R v Ramage* as follows (in part):

James Ramage was a wealthy businessman...[His wife] finally left him after years of coping with the intimidation of a manipulative man, and fear arising from initial violence in the marriage. He lured her to the former matrimonial home, and then bashed and strangled her to death. He alleged that she sneered at the renovations he had arranged, and confessed that sex with him repulsed her. By that stage he knew that she had found a new partner. He claimed he simply lost control and killed her...The jury accepted the provocation defence, convicting Ramage of only manslaughter, and he was sentenced to 11 years imprisonment.⁵⁷

According to Coss, if Ramage's provocation defence had failed, similar cases indicate that he would have received a sentence of around 20 years.⁵⁸ The *Ramage* case was highly controversial and it was covered widely in the media.⁵⁹

Coss argues that men should not be able to rely on the provocation defence when they kill their female partners in circumstances such as those in the *Ramage* case and in other

⁵³ Judicial Commission 2006 report, note 18, p27.

⁵⁴ Judicial Commission 2006 report, note 18, p23.

⁵⁵ Judicial Commission 2006 report, note 18, p24.

⁵⁶ Judicial Commission 2006 report, note 18, p24.

⁵⁷ Coss G, note 38, p54. The sentencing citation is *R v Ramage* [2004] VSC 508.

⁵⁸ Coss G, note 38, p55. Coss notes that Ramage's sentence of 11 years was "above the more common 6 to 8 years" (p55).

⁵⁹ For an example of media articles, see 'Ramage manslaughter verdict under attack', *The Age*, 30/10/04; 'Honour Killing in the Suburbs', *The Age*, 6/11/04; 'Provoked' wife killer gets 11 years', *Sydney Morning Herald*, 9/12/04. Note also that two books have been written about the case: Cleary P, *Getting Away with Murder: The True Story of Julie Ramage's Death*, Allen & Unwin, Australia, 2005; and Kissane K, *Silent Death: The Killing of Julie Ramage*, Hodder, Australia and New Zealand, 2006.

similar cases to which he refers.⁶⁰ He suggests the offenders in these cases were proprietary and controlling males who had killed not because they ‘lost self control’ but because they had lost control of their women.⁶¹ He also argues that ordinary people do not respond to relationship breakdowns and insults from their former partner with lethal violence. He points out that there are over 200,000 divorces and relationship breakdowns each year in which insults and hurtful remarks would be exchanged yet “only 50 men kill their intimate partners each year when affronted by assaults, separations or confessions”.⁶² In light of these concerns, Coss has called for the provocation defence to be abolished.⁶³

6.2 *Green*: A man kills in response to a homosexual advance

In this NSW case in 1993, a 22-year-old male (Green) killed a 36-year-old male friend (Don). On the night of the killing, Don had invited Green to dinner and after dining, drinking and watching television, Don asked Green if he would like to stay overnight. Don said that he would sleep in his mother’s bedroom and that Green could sleep in Don’s room. In a record of interview, Green said (in part):

After a while when I was fully unclothed Don entered the room I was in, slid in beside me in the bed and started talking to me how a great person I was. Then he started touching me. I pushed him away. He asked what was wrong. I said “What do you think is wrong? I’m not like this.” He started grabbing me with both hands around my lower back. I pushed him away. He started grabbing me harder. I tried and forced him to the lower side of me. He still tried to grab me. I hit him again and again on top of the bed until he didn’t look like Don to me. He still tried to grope and talk to me that’s when I hit him again and saw the scissors on the floor on the right hand side of the bed. When I saw the scissors he touched me around the waist shoulders area and said “Why?” I said to him “Why, I didn’t ask for this”. I grabbed the scissors and hit him again. He rolled off the bed as I struck him with the scissors. By the time I stopped I realised what had happened. I just stood at the foot of the bed with Don on the floor laying face down in blood.⁶⁴

At the first trial, Green was convicted of murder and was sentenced to a minimum term of 10 years and an additional term of five years. Green appealed to the NSW Court of Criminal Appeal on the basis that the trial judge had misdirected the jury in relation to the defence of provocation. The trial judge had told the jury that Green’s claim that he was particularly sensitive to matters of sexual abuse (because his father had allegedly sexually assaulted his sisters) was not relevant to the defence of provocation.

⁶⁰ Coss G, note 38.

⁶¹ Coss G, note 38, p52, p54, p56.

⁶² Coss G, note 38, p53.

⁶³ Coss G, note 38, p71.

⁶⁴ *Green v The Queen* (1997) 191 CLR 334 at 360.

The Court of Criminal Appeal (by 2:1 majority) dismissed the appeal⁶⁵ and Green appealed to the High Court. In 1997, the High Court (by 3:2 majority) upheld the appeal and ordered a new trial.⁶⁶ The majority held that Green's special sensitivity to sexual assault was relevant to the provocation defence.⁶⁷ It was relevant to the subjective limb of the defence and to the ordinary person's assessment of the gravity of the provocation, but not to the issue of whether the ordinary person could have lost self-control. Justice Gummow, in dissent, agreed that Green's "family history" was relevant to the ordinary person's assessment of the gravity of the provocation but held that the provocation could not have caused the ordinary person to lose self-control. Similarly, Justice Kirby stated in dissent:

In my view, the "ordinary person" in Australian society today is not so homophobic as to respond to a non-violent sexual advance by a homosexual person as to form an intent to kill or inflict grievous bodily harm.⁶⁸

At the second trial, Green was found guilty of manslaughter and was sentenced to a minimum term of eight years and an additional term of two and a half years.⁶⁹

7. LAW REFORM IN NEW SOUTH WALES

7.1 Law Reform Commission report (1997)

Background and report in brief

In March 1993, the then Attorney General, Hon JP Hannaford MLC, asked the NSW Law Reform Commission to review the partial defences of infanticide, provocation and diminished responsibility; and to develop proposals for reform and clarification of the defences. In October 1997, the Commission published its report on provocation.⁷⁰ It recommended that the defence be retained but reformulated.⁷¹ The Government has not yet implemented this recommendation to reformulate the defence. A summary of relevant aspects of the Commission's report is presented below.

⁶⁵ *R v Green* (unreported, Court of Criminal Appeal of NSW, 8 November 1995).

⁶⁶ *Green v The Queen* (1997) 191 CLR 334.

⁶⁷ This summary of the judgment draws on a summary in Brown D et al, *Criminal Laws: Materials and Commentary on Criminal Law and process of New South Wales*, The Federation Press, 4th edition, 2006, p618-619.

⁶⁸ *Green v The Queen* (1997) 191 CLR 334 at 409.

⁶⁹ For a list of various articles on the case, see Brown D et al, note 67, p620.

⁷⁰ NSW Law Reform Commission, *Partial Defences to Murder: Provocation and Infanticide*, Report 83, October 1997.

⁷¹ NSWLRC report, note 70, p22 (recommendation 1), p76 (recommendation 2).

Reasons for retaining the defence

The Commission's explanation for retaining the defence was as follows (in part):

Where a person's mental state is significantly impaired by reason of a loss of self-control, it is appropriate that the person not be treated as a "murderer". The question of whether a person's culpability for an unlawful killing is so significantly reduced because of a loss of self-control is an issue which should be decided by a jury, as representatives of the community, and reflected in a conviction for murder or for manslaughter. The sentencing judge will then impose a sentence which reflects the jury's finding on the level of culpability involved. This ensures public confidence in the administration of criminal justice.⁷²

The Commission noted that retention of the defence was consistent with "the view adopted in a number of other jurisdictions" that had reviewed the defence of provocation.⁷³

Proposed reformulation of the defence

The Commission recommended that the defence of provocation be reformulated. An important part of this reformulation was the replacement of the "ordinary person" test (the second limb of the provocation defence) with a different test. Under the proposed new test, the defence would be available if the jury formed the view that "the accused, taking into account all of his or her characteristics and circumstances, should be excused for having so far lost self-control as to have formed an intent to kill or to inflict grievous bodily harm...as to warrant the reduction from murder to manslaughter".⁷⁴

No specific exclusion of the defence where men kill female partners

The Commission noted that a number of submissions expressed concern that:

... certain conduct is wrongly regarded by the law as amounting to provocation, which may result in the defence being used inappropriately to reduce legal culpability and sentences. Submissions focused specifically on cases 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. It was submitted by some that legislation should expressly exclude this type of conduct from the definition of provocation, so that male offenders would not be able to rely on the defence where they killed women in such circumstances.⁷⁵

However, the Commission concluded that "the imposition of legislative restrictions

⁷² NSWLRC report, note 70, p30-31.

⁷³ NSWLRC report, note 70, p23.

⁷⁴ NSWLRC report, note 70, p76,

⁷⁵ NSWLRC report, note 70, p66.

precluding specific categories of conduct, such as acts of infidelity, taunts, or threats to leave, from amounting to provocation” was not an appropriate solution.⁷⁶ It stated:

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 individual cases.⁷⁷

The Commission also stated that the risk of spurious claims of provocation in the context of domestic killings had been reduced due to the abolition of unsworn statements in criminal trials.⁷⁸ It also noted that “there are other evidential provisions which should permit evidence of prior violent conduct, threats or a history of domestic abuse to be admitted in order to assist...in rebutting the accused’s claim of provocation”.⁷⁹ In addition, the Commission stated that under the *reformulated* defence of provocation, the jury would have the final task of evaluating whether “the accused should be excused for losing self-control so as to warrant reducing the charge from murder to manslaughter”.⁸⁰

No specific exclusion of the defence where men kill after homosexual advances

The Commission noted that concern had been raised about:

...the possible application of the defence of provocation to provide a partial excuse for homophobic violence against homosexuals in a society in which such violence is said to be increasing. The term “homosexual advance defence” has evolved to refer to cases where an accused claims to have killed the victim either in self-defence or under provocation, in response to a homosexual advance made by the victim. The primary concern is whether, in relation to the defence of provocation, a non-violent homosexual advance...should ever be sufficient to amount to provocation....⁸¹

The Commission did not discuss this issue in detail because it was the subject of a separate inquiry (namely, an inquiry by a Working Party set up by the Attorney General in 1995 – see below). The Commission expressed the view that “non-violent homosexual advances should not generally be regarded as conduct sufficient to amount to provocation”.⁸² However, for the same reasons as those given in relation to domestic killings of women, it

⁷⁶ NSWLRC report, note 70, p69.

⁷⁷ NSWLRC report, note 70, p69-70.

⁷⁸ NSWLRC report, note 70, p70.

⁷⁹ NSWLRC report, note 70, p70.

⁸⁰ NSWLRC report, note 70, p70.

⁸¹ NSWLRC report, note 70, p71.

⁸² NSWLRC report, note 70, p71.

did not consider that there should be any specific legislative exception.⁸³

Consideration of how the defence applies to battered women who kill

The Commission noted that:

There has been a significant amount of criticism directed against the current formulation of the defence of provocation in respect of a perceived gender bias in its operation. There is concern that the defence is not readily accessible to women who kill their assailant partners because it is not defined in terms which are appropriate to those women's experiences of domestic violence.⁸⁴

The Commission considered that its proposed replacement of the ordinary person test (as outlined above) would mean that "all factors which may affect a woman's power of self-control, including a long history of being abused, [would] be considered by the jury in arriving at their verdict".⁸⁵ However, the Commission recognised that:

One difficulty which some female offenders may continue to face when seeking to raise the defence...under the recommended reformulation is the requirement of a loss of self-control, which remains central to the defence. While some women may kill their aggressors as a result of losing self-control, others may not. Some women may kill in cold blood, but in an attempt at self-preservation...⁸⁶

The Commission concluded that this issue could not be addressed unless the defence was "changed beyond recognition". It stated, "the primary feature of, and rationale for, the defence of provocation is loss of self-control. In our view, the nature of the defence should not be altered to the extent that loss of self-control ceases to be an element".⁸⁷

The Commission then referred to alternative defences open to battered women, namely diminished responsibility and self-defence. In relation to self-defence, it stated:

It has been suggested that the defence of self-defence may often be the most appropriate defence for women who kill following a history of domestic violence, since self-defence recognises that many of these women are acting in self-preservation rather than as a result of loss of self-control or a disturbed mind. Moreover, a successful plea of self-defence results in a complete acquittal, whereas a successful plea of provocation results in a conviction for manslaughter...At present, women may have difficulty in successfully pleading the defence of self-

⁸³ NSWLRC report, note 70, p71.

⁸⁴ NSWLRC report, note 70, p86.

⁸⁵ NSWLRC report, note 70, p89.

⁸⁶ NSWLRC report, note 70, p89.

⁸⁷ NSWLRC report, note 70, p89.

defence. However, a review of the law of self-defence and its ability to meet these women's experiences lies outside the Commission's present terms of reference.⁸⁸

7.2 Working party report on homosexual advance defence (1998)

As noted in the 1996 paper, in July 1995, the Attorney-General, Hon Jeff Shaw QC, MLC, directed that a Working Party be established to review the operation of the defences of provocation and self-defence in the context of homicides in response to homosexual advances (referred to as the "homosexual advance defence" or "HAD"). In September 1998, the Working Party published its final report, which made nine recommendations.⁸⁹

Recommendation to amend the law of provocation

One of the Working Party's recommendations was to enact an amendment to specifically exclude non-violent homosexual advances from forming the basis of a defence of provocation.⁹⁰ The Working Party expressed its disagreement with the NSW Law Reform Commission's (LRC's) approach, stating:

Ultimately, the Working Party is of the opinion that the solution suggested by the LRC is not appropriate in relation to HAD. Even if the re-formulated test works the way the LRC intends it to, and the jury reflects the community's sympathies and concerns, the problems with HAD will still exist. A jury might apply the standards of a prejudiced community, thus reflecting and perpetuating the idea that homosexual victims deserve the violence they receive.⁹¹

The Working Party's recommendation has not yet been implemented.

Note that the Working Party also outlined the arguments for retaining and abolishing the defence of provocation in NSW and it put this issue forward for further consideration.⁹²

Conclusion not to change the law of self-defence

The Working Party considered that the law of self-defence was appropriate so long as it retained "the requirement of reasonable grounds for the belief of the accused".⁹³ However, it expressed concerns about the operation of the defence in practice:

⁸⁸ NSWLRC report, note 70, p90.

⁸⁹ NSW Attorney General's Department, *Final Report of the 'Homosexual Advance Defence' Working Party*, September 1998.

⁹⁰ Working Party Final Report, note 89, p4, Recommendation 2.

⁹¹ Working Party Final Report, note 89, p30.

⁹² Working Party Final Report, note 89, p5 and p37-39.

⁹³ Working Party Final Report, note 89, p18.

...in HAD cases a jury may equate a homosexual advance with a homosexual attack, with no distinction being drawn between an offensive, but innocuous remark or action, and a real sexual assault involving physical force and which calls for the use of self-defence. The Working Party suspects that the former appears to have been sufficient to permit a claim of self defence to succeed in at least one case. That is a matter of profound concern.⁹⁴

In contrast to its approach to provocation, the Working Party did not recommend law reform to address this concern. The Working Party stated:

To the extent that misinformation, ignorance and myth in the community at large allow self-defence to be raised and accepted by the jury in such circumstances, a coordinated and strategic community education campaign can do much to ensure that claims of self defence are critically examined in this context.⁹⁵

Other recommendations

Other recommendations made by the Working Party included:

- A direction to juries to the effect that criminal courts are not “courts of morals” and that juries should not hold prejudices on the basis of sexual orientation.
- Monitoring of HAD cases by Justice Agencies, including the DPP and police; and the establishment of an ongoing Monitoring Committee within the Attorney General’s Department with regard to HAD.
- A community education campaign against the use of homophobic violence in response to non-violent homosexual advance.
- Continuing judicial education with regard to HAD.⁹⁶

7.3 Reforms to the law of self-defence (2001)

In 2001, legislation was enacted in NSW to:

- (1) Clarify and simplify the law of self-defence, and
- (2) Reintroduce the partial defence of excessive self-defence.⁹⁷

⁹⁴ Working Party Final Report, note 89, p19.

⁹⁵ Working Party Final Report, note 89, p20.

⁹⁶ Working Party Final Report, note 89, p4.

⁹⁷ *Crimes Amendment (Self-Defence) Act 2001* (NSW). The reasons for legislation are outlined in Hon Bob Debus MP, *NSW Parliamentary Debates*, 28/11/01, p19,093.

Clarification and simplification of self-defence

The 2001 reforms codified the defence of self-defence, based on provisions developed by the Model Criminal Code Officers Committee. Under the new section 418 of the *Crimes Act 1900* (NSW) a person carries out conduct in self-defence if:

- The person believes the conduct is necessary to defend himself or herself or another person; and
- The conduct is a reasonable response in the circumstances as he or she perceives them.

Reintroduction of partial defence of excessive self-defence

Excessive self-defence is a modified version of self-defence and, like the defence of provocation, it is a partial defence, which only reduces murder to manslaughter. The history of excessive self-defence in Australian common law has been summarised as follows:

At common law, excessive self-defence has had a relatively short though controversial history. It was first introduced into Australian law by the High Court in 1958, but was abolished when the Privy Council considered the issue in 1971. The State courts applied the law as determined by the Privy Council until the issue came before the High Court of Australia again in 1978. In *Viro's case*, the High Court overturned the Privy Council's decision, thereby re-establishing the doctrine of excessive self-defence. The High Court's reasoning, however, was lengthy and convoluted, making it difficult for State courts to instruct juries on the issue. The opportunity again arose for the High Court to reconsider the position in 1987 in *Zecevic's case*. That case represents the High Court's formal concession to criticisms of the defence by State courts. By a five to two majority, the High Court abolished the excessive self-defence doctrine. This represents the current position in all common law jurisdictions, except South Australia.⁹⁸

The 2001 reforms in NSW reintroduced the partial defence of excessive self-defence, it being the Government's view that "a person who honestly believes he is acting in self-defence but who uses more force than is reasonable in the circumstances should not be liable for murder but be liable for the lesser offence of manslaughter".⁹⁹

⁹⁸ Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code – Discussion Paper – Chapter 5 – Fatal Offences Against the Person*, June 1998, p109. South Australia reintroduced this defence in 1991, and amended it in 1997: see *Criminal Law Consolidation (Self Defence) Amendment Act 1991* and *Criminal Law Consolidation (Self Defence) Amendment Act 1997*

⁹⁹ Hon Bob Debus MP, *NSW Parliamentary Debates*, 28/11/01, p19,093.

The partial defence of excessive self-defence is now set out in section 421 of the *Crimes Act 1900*, which provides for murder to be reduced to manslaughter where:

- The person uses force that involves the infliction of death; and
- The conduct is not a reasonable response in the circumstances as he or she perceives them; but
- The person believes the conduct is necessary to defend himself or herself or another person.

When enacting the 2001 reforms, the Government made no mention of the applicability of this partial defence to battered women who kill. According to the Judicial Commission of NSW, as at 29 June 2005, two women who had killed their male partners had successfully relied on excessive self-defence.¹⁰⁰ In both of these cases, the female offender was under attack when she killed her partner.¹⁰¹ One of these female offenders received a sentence of 5 years and the other received a sentence of 7.5 years.¹⁰²

7.4 Finlay review of the law of manslaughter (2003)

In October 2002, the NSW Attorney General, Hon Bob Debus MP, appointed Mervyn Finlay QC to conduct a review of the law of manslaughter. His report was published in April 2003.¹⁰³ It considered the partial defences to murder, including recent developments in other jurisdictions, and it suggested that “any further consideration of the abolition or retention of the partial defences...be deferred until the report of the Victorian Law Reform Commission on “*Defences to Homicide*” is published later in the year”.¹⁰⁴

8. LAW REFORM IN OTHER AUSTRALIAN JURISDICTIONS

8.1 Overview

Since 1996, there have been a number of law reform developments in other Australian jurisdictions relating to the defences of provocation and self-defence. A summary of these developments is shown in the Table below.

¹⁰⁰ Judicial Commission 2006 report, note 18, p52. It appears that there were no cases in which a female offender had *unsuccessfully* relied on excessive self-defence. The case of *Katarzynski* referred to in the report (p52) involved a male offender and male victim.

¹⁰¹ See *R v Scott* [2003] NSWSC 627 and *R v Trevenna* [2003] NSWSC 463.

¹⁰² Judicial Commission 2006 report, note 18, p74.

¹⁰³ Mervyn D Finlay QC, *Review of the Law of Manslaughter in New South Wales*, April 2003.

¹⁰⁴ Finlay report (2003), note 103, p57.

Jurisdiction	Developments
Model Criminal Code	In 1998, the Model Criminal Code Officers Committee recommended that provocation be abolished and that excessive self-defence not be reintroduced.
Tasmania	In 2003, provocation was abolished.
ACT	In 2002, self-defence was modified in accordance with the Model Criminal Code provision. In 2004, provocation was amended in relation to homosexual advances.
Victoria	In 2005, the following reforms were enacted: <ul style="list-style-type: none"> • Provocation abolished; • Excessive self-defence reintroduced; • Self-defence modified; • Legislative guidance introduced on relevance of family violence evidence in relation to self-defence.
Northern Territory	In 2001, self-defence was modified in accordance with the Model Criminal Code. In 2006, provocation was amended in line with the law in NSW. In addition, provocation was amended in relation to homosexual advances.
Western Australia	In 2006, the Law Reform Commission published an Issues Paper on the law of homicide that considers reform of provocation and self-defence generally and particularly in relation to battered women who kill.

These developments are outlined in more detail below.¹⁰⁵

8.2 Model Criminal Code

In June 1998, the Model Criminal Code Officers Committee (MCCOC) of the Standing Committee of Attorneys General published a discussion paper on *Fatal Offences Against the Person*, which considered the partial defences to murder. The discussion paper recommended that the partial defence of provocation be abolished and that the partial defence of excessive self-defence not be reintroduced.¹⁰⁶

¹⁰⁵ Note that reforms in other jurisdictions that are consistent with the law in NSW are not outlined in more detail below: eg, modification of the law of self-defence based on the Model Criminal Code provision and the reintroduction of excessive self-defence.

¹⁰⁶ MCCOC Discussion Paper, note 98, p107, p113.

Provocation

MCCOC concluded that the defence of provocation suffered from conceptual problems and that it operated in a gender biased fashion, but it stated that, “the real issue in deciding whether the partial defence of provocation should be retained is one of culpability – whether the defendant should be culpable for murder, or for the lesser crime of manslaughter”.¹⁰⁷ In relation to this question, MCCOC noted that “some, perhaps even most, [provoked killers] are morally just as culpable as their cold-blooded counterparts”; and some provoked killers are “morally as culpable as the worsts of murderers”.¹⁰⁸ MCCOC also pointed out that “provocation is only one among a variety of considerations which reduce the culpability of persons who kill intentionally”.¹⁰⁹ MCCOC then concluded that it was more appropriate for the differences in culpability to be reflected in the sentencing process than to maintain the partial defence of provocation.¹¹⁰

In relation to the issue of the defence’s gender bias, MCCOC stated:

The need for the defendant to kill while still out of control incorporates a suddenness requirement which is most often reflective of male patterns of aggressive behaviour. This is hardly surprising given the historical foundations of the doctrine which reveal it to be a reaction to the prevalence of certain forms of male aggression (drunken pub brawls and duels). While provocation has served men well, perhaps too well, one has to question the appropriateness of the defence for women, bearing in mind it was never designed for them.¹¹¹

MCCOC added that, “any argument that it is murder for a battered woman driven to desperation to kill her partner but only manslaughter for a man to do the same after discovering her committing adultery is offensive to common sense”.¹¹²

MCCOC noted that developments in the law had attempted to make it easier for battered women to rely on the defence of provocation but it concluded that:

...the relative inaccessibility of the provocation partial defence by women is more deep-rooted than these cosmetic changes to the operation of the doctrine. Relaxing the requirements of the provocation partial defence does not redress the injustice as any discrimination against women will probably stem from [its] very structure.¹¹³

¹⁰⁷ MCCOC Discussion Paper, note 98, p103.

¹⁰⁸ MCCOC Discussion Paper, note 98, p105.

¹⁰⁹ MCCOC Discussion Paper, note 98, p105.

¹¹⁰ MCCOC Discussion Paper, note 98, p105.

¹¹¹ MCCOC Discussion Paper, note 98, p89.

¹¹² MCCOC Discussion Paper, note 98, p91.

¹¹³ MCCOC Discussion Paper, note 98, p91.

MCCOC referred to empirical studies by the Victorian Law Reform Commission and the NSW Judicial Commission, which did not find gender bias.¹¹⁴ It noted that the Victorian study examined a small number of cases and could not make conclusive findings.¹¹⁵

Excessive self-defence

In recommending that the partial defence of excessive self-defence should not be re-introduced, MCCOC stated:

...on balance, the Committee is not in favour of re-introducing excessive self-defence, particularly in the context of abolishing provocation. As a concept, excessive self-defence is inherently vague. This aspect has to date resulted in no satisfactory test being promulgated.¹¹⁶

Note that when considering whether this partial defence should be reintroduced, the Committee did not refer to the situation of battered women who kill.

8.3 Tasmania

In 2003, Tasmania became the first State to abolish the partial defence of provocation.¹¹⁷ According to the Minister for Justice, Hon J Jackson MHA:

The main argument for abolishing the defence stems from the fact that people who rely on provocation intend to kill. An intention to kill is murder. Why should the fact that the killing occurred when the defendant was acting out of control make a difference? All the ingredients exist for the crime of murder.¹¹⁸

The Minister for Justice also referred to several other reasons for abolishing the defence, including that provocation could be adequately considered as a factor during sentencing, and that the defence was gender biased. Mrs Jackson stated:

The defence was not designed for women and it is argued that it is not an appropriate defence for those who fall into the 'battered women syndrome'. While Australian courts and laws have not been insensitive to this issue, it is better to abolish the defence than try to make a fictitious attempt to distort its operation to accommodate the gender-behavioural differences.¹¹⁹

¹¹⁴ MCCOC Discussion Paper, note 98, p93-97. These studies are discussed in the 1996 briefing paper at p9-10.

¹¹⁵ MCCOC Discussion Paper, note 98, p97.

¹¹⁶ MCCOC Discussion Paper, note 98, p103. See also p113.

¹¹⁷ *Criminal Code Amendment (Abolition of Defence of Provocation) Act 2003* (Tas).

¹¹⁸ Mrs Jackson, *Tasmania Parliamentary Debates*, 20/3/03, p59.

¹¹⁹ Mrs Jackson, *Tasmania Parliamentary Debates*, 20/3/03, p60.

Mrs Jackson did not think that the abolition of the defence would be detrimental to battered women who kill, because their circumstances would be considered in sentencing.

8.4 Australian Capital Territory

In 2004, the ACT Government enacted an amendment to “address the issue of the availability of the defence of provocation in the case of a non-violent, homosexual advance”.¹²⁰ Under the amendment to the provocation defence, a non-violent sexual advance (or advances) towards the accused is not sufficient, by itself, to be conduct which could have induced an ordinary person in the position of the accused to have so far lost self-control as to have formed an intent to kill the deceased.¹²¹

8.5 Victoria

Overview

In 2005, the Victorian Government enacted changes to defences to homicide based on recommendations made by the Victorian Law Reform Commission in 2004.¹²² The main changes that were enacted (relevant to this paper) were:

- (i) Abolition of the defence of provocation;
- (ii) Codification and clarification of the law of self-defence;
- (iii) Legislative guidance on relevant family violence evidence in relation to a defence of self-defence;
- (iv) Reintroduction of excessive self-defence (in line with the law in NSW).¹²³

Changes (i), (ii) and (iii), and other relevant recommendations made by the Law Reform Commission (eg as to sentencing), are discussed below.

Abolition of the partial defence of provocation

The Law Reform Commission’s recommendation that the defence of provocation be abolished was based primarily on its view that, other than self-defence, “factors that decrease a person’s culpability for an intentional killing should be taken into account at sentencing rather than form the basis of a separate partial defence”.¹²⁴ In support of this view, the Commission stated, “it seems illogical to single out one scenario – a loss of self-control caused by provocation – as deserving of a partial defence while leaving all other

¹²⁰ Hon J Stanhope MP, *ACT Parliamentary Debates*, 20/11/03, p4380.

¹²¹ Section 13 *Crimes Act 1900* (ACT), as amended by the *Sexuality Discrimination Legislation Amendment Act 2004* (ACT).

¹²² Victorian Law Reform Commission, *Defences to Homicide: Final Report*, October 2004.

¹²³ *Crimes (Homicide) Act 2005* (Vic)

¹²⁴ VLRC Report, note 122, p55.

circumstances as matters to be taken into account at sentencing”.¹²⁵

Another reason for abolishing the defence was that its moral basis was “inconsistent with contemporary community values on what is excusable behaviour”.¹²⁶ It stated:

The continued existence of provocation as a separate partial defence to murder partly legitimates killings committed in anger. It suggests there are circumstances in which we, as a community, do not expect a person to control their impulses to kill or to seriously injure a person. This is of particular concern 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.¹²⁷

The Commission commented on the consequences of the abolition of the defence of provocation for battered women who kill their violent partners:

We are confident the recommendations made in this Report in relation to self-defence and the introduction of social framework evidence are likely to result in better outcomes for women than the attempted reform of what is already a conceptually confused and complex defence. Further, with its strong emphasis on a loss of self-control, provocation does not, nor has it ever, truly reflected the reality of women’s experiences and responses to prolonged and serious violence. The retention of provocation and the continued distortion of women’s experiences to fit within the defence; or the distortion of the defence to fit women’s experiences, are in our view neither sustainable nor satisfactory solutions.¹²⁸

No special defence for women who kill

The Law Reform Commission outlined three possible models for a special defence for women who kill in response to prior violence. These included:

- The ‘battered woman syndrome’ model – which would require a woman to establish she was suffering from ‘battered women syndrome’;
- The ‘self preservation’ model – which would apply in circumstances where a woman honestly believes there is no protection or safety from the abuse and is convinced the killing is necessary for her self-preservation; and
- The ‘coercive control’ model – which would focus on a person’s need to free himself or herself from circumstances of coercive control.¹²⁹

¹²⁵ VLRC Report, note 122, p55.

¹²⁶ VLRC Report, note 122, p55.

¹²⁷ VLRC Report, note 122, p55.

¹²⁸ VLRC Report, note 122, p57-58.

¹²⁹ VLRC Report, note 122, p64.

However, the Commission ultimately recommended against creating a special defence:

In the Commission's view, the focus of reforms in this area should be on ensuring self-defence properly accommodates women's experiences, rather than on creating a special defence for women who kill in response to family violence. We believe it is possible to ensure that self-defence is defined and understood in a way that takes adequate account of women's experiences of violence through reforms to evidence and clarification of the scope of the defence.¹³⁰

Codification and clarification of self-defence

As recommended by the Law Reform Commission, the law of self-defence has been codified, similar to the law in NSW.¹³¹ In addition, a provision has been enacted to clarify that, in circumstances where family violence is alleged, a person may have reasonable grounds for believing that his or her conduct is necessary to defend himself or herself even if he or she is responding to a harm that is not immediate; or his or her response involves the use of force in excess of the force involved in the harm or threatened harm.¹³² The Law Reform Commission considered that this provision would ensure that appropriate directions would be given to juries in cases where women have killed abusive partners.¹³³

Legislative guidance on relevant family violence evidence in relation to self-defence

The Law Reform Commission stated that for a defence of self-defence:

... the jury must be satisfied that the accused had an honest belief in the need to use force in self-protection, and his or her conduct was reasonable in the circumstances. Neither the honesty of the accused's belief, nor the reasonableness of the accused's action, can be properly evaluated unless the jury is aware of, and understands, the broader context of violence between the accused and the deceased and the accused's situation. It is important the evidence provides the jury with as complete a picture of the accused's situation leading up to the homicide as possible so the jury can put themselves in the accused's position. Relevant evidence might include:

- Evidence of prior acts of violence against the accused and threats made;
- Evidence demonstrating the ongoing nature and extent of abusive behaviour and escalation of the violence over time;
- Evidence of past attempts by the accused to leave or get the assistance of others, and the outcome; and
- The accused's personal circumstances, including whether the accused was employed and had a means to support himself or herself...

¹³⁰ VLRC Report, note 122, p68.

¹³¹ Section 9AE, *Crimes Act 1958* (Vic).

¹³² Section 9AH, *Crimes Act 1958* (Vic).

¹³³ See VLRC Report, note 122, p80; and p83-84.

The courts already recognise much of this evidence as relevant and admissible. The problem is that little guidance is provided to judges or defence lawyers about just what evidence may be useful for juries in these cases.

To assist this evidence to be more readily identified, and to avoid any possible arguments concerning its relevance, the Commission recommends...that a new evidentiary provision be introduced...¹³⁴

The Commission also recommended enacting a provision to clarify that expert evidence:

...is admissible about the general nature and dynamics of abuse and social factors that impact on people in violent relationships. This evidence could be given by people with expertise on family violence...and would assist jurors to better understand what it is like to live in a situation of ongoing abuse, and what may be reasonable for a person living in this situation.¹³⁵

In response to the Commission's recommendations, the Government enacted a provision, which states that the following types of evidence may be relevant when a person relies on self-defence in circumstances where family violence is alleged:

- (a) The history of the relationship between the person and a family member, including violence by the family member towards the person.
- (b) The cumulative effect, including psychological effect, on the person of that violence;
- (c) Social, cultural or economic factors that impact on the person 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.¹³⁶

Commission's recommendations about family violence education

It is relevant to also note here that the Law Reform Commission made recommendations concerning professional and judicial education in relation to family violence.¹³⁷

¹³⁴ VLRC Report, note 122, pxxxiv.

¹³⁵ VLRC Report, note 122, pxxxiv-xxxv

¹³⁶ Section 9AH, *Crimes Act 1958* (Vic).

¹³⁷ VLRC Report, note 122, Recommendations 35 and 36

Commission's recommendations about sentencing

The Law Reform Commission considered the sentencing implications of abolishing the partial defence of provocation. It noted some concerns:

One of the purposes of our recommendations for change to the substantive law is to overcome the gender bias which exists in the law relating to defences to homicide. It would defeat this purpose if abolishing provocation meant that women convicted of murder, in circumstances involving domestic violence, received longer sentences than they would under the present law if they successfully raise provocation. The purpose of reducing gender bias would also be undermined if men who kill their sexual partners were to receive significantly reduced murder sentences on the sole ground they were 'provoked' to kill because they suspected their partner was unfaithful or was threatening to leave the relationship.¹³⁸

One of the Commission's sentencing recommendations was that "in sentencing an offender for murder in circumstances where the accused might previously have been convicted of manslaughter on the grounds of provocation, judges should consider the full range of sentencing options".¹³⁹ In relation to this recommendation, the Commission stated:

Sentencing judges should be prepared to use the full range of options available when the offender has been subjected to violence by the victim. Where an offender is convicted of murder, the court should consider whether the violence experienced by the offender, combined with other factors, justifies imposing a very short custodial sentence or even suspending it altogether.¹⁴⁰

The Commission also made other recommendations in relation to sentencing including:

- When an appropriate case arises, the Court of Appeal should consider indicating the principles which should apply in sentencing an offender who has been subjected to abuse by the deceased and how these should be taken into account.
- The Sentencing Advisory Council should establish a statistical database to monitor sentencing trends in homicide cases. This database should be developed in consultation with members of the judiciary. Construction of the database should allow monitoring of sentencing trends in cases where:
 - The offender killed a person who subjected him/her to family violence;
 - The offender had previously subjected the deceased to violence;
 - The offender acted under provocation from the deceased.¹⁴¹

¹³⁸ VLRC Report, note 122, p270.

¹³⁹ VLRC Report, note 122, Recommendation 50 (p293).

¹⁴⁰ VLRC Report, note 122, p290.

¹⁴¹ VLRC Report, note 122, Recommendations 51-54 (p293). See also Recs. 55-56 (p294).

8.6 Northern Territory

In 2000, the Attorney General requested the NT Law Reform Committee to inquire into and report on “whether the partial defence of provocation should be amended to extend its operation to cover what is sometimes known as the ‘battered wife’ syndrome”.¹⁴² The Law Reform Committee’s report in 2000 recommended deleting the requirement in the defence for the offender to have “acted on the sudden and before there was time for his passion to cool”.¹⁴³ This proposed amendment was consistent with the law in NSW. The NT Government did not act on this recommendation at the time.

In April 2006, the Department of Justice released a criminal code reform issues paper in relation to homicide and other offences.¹⁴⁴ The paper discussed whether the defence of provocation should be abolished or reformulated.¹⁴⁵ It did not specifically refer to problems associated with the defence in the context of intimate partner homicide. In November 2006, the NT Government amended the defence of provocation as part of its reform of the criminal code.¹⁴⁶ The new provision is very similar to the way the defence is expressed in NSW. However, the new provision also expressly states that a non-violent sexual advance is not, by itself, a sufficient basis for the defence of provocation.¹⁴⁷

8.7 Western Australia

In April 2005, the Law Reform Commission of Western Australia received terms of reference to examine the law of homicide, including the defences of self-defence and provocation. In May 2006, the Commission published an Issues Paper.¹⁴⁸ The paper asks a number of questions including whether provocation should be abolished, whether self-defence should be simplified, and whether a partial defence of excessive self-defence (which may have particular relevance for battered women) should be introduced.¹⁴⁹ In relation to battered women, the Commission also asks the following questions:

- Should the defences of provocation and self-defence be amended to enable battered women to rely upon them in relation to homicide of a partner?

¹⁴² NT Law Reform Committee, *Self-Defence and Provocation*, October 2000.

¹⁴³ NT Law Reform Committee report (2000), note 142, p49.

¹⁴⁴ Department of Justice, *Criminal Code Reform Issues Paper*, 28 April 2006.

¹⁴⁵ Criminal Code Reform Issues Paper, note 144, p4-6.

¹⁴⁶ *Criminal Code Reform Amendment (No.2) Act 2006* (NT), which inserted the new section 158 of the *Criminal Code Act* (NT).

¹⁴⁷ See subsection 158(5), *Criminal Code Act* (NT).

¹⁴⁸ Law Reform Commission of Western Australia, *Review of the Law of Homicide: An Issues Paper*, May 2006.

¹⁴⁹ Issues Paper, note 148, p6-8.

- Alternatively, should a separate defence be established for women who kill in response to serious and prolonged domestic violence or abuse?
- If so, should such a defence extend to others in abusive relationships?¹⁵⁰

The Commission does not expect to publish a report before May 2007.¹⁵¹

9. LAW REFORM PROPOSALS IN OTHER COUNTRIES

9.1 New Zealand

In 2001, the New Zealand Law Commission published a report on criminal defences and “battered defendants” (meaning persons who kill their partners after a history of being abused).¹⁵² The Commission recommended:

- Abolishing the defence of provocation;
- Not introducing excessive self-defence;
- Not introducing a separate defence for battered women who kill;
- Clarifying the law of self-defence.

These recommendations are discussed below. Note that the recommendations relating to the partial defences were connected to the Commission’s recommendation that the mandatory life sentence for murder be replaced with a sentencing discretion.¹⁵³

Abolition of provocation

In recommending that that the partial defence of provocation be abolished, the Commission concluded that it would be better for matters of provocation to be taken into account as part of the sentencing process.¹⁵⁴ The Commission noted that “there are many circumstances that may reduce the culpability of an intentional killer and it seems unfair and illogical to single out one particular situation”.¹⁵⁵ The Commission also stated that the defence “diverged from modern values in significant respects”, including in the way it partially excused killings arising from sexual jealousy and possessiveness.¹⁵⁶

¹⁵⁰ Issues Paper, note 148, p8 (question 18).

¹⁵¹ Telephone communication with Law Reform Commission of Western Australia, 19/3/07.

¹⁵² New Zealand Law Commission, *Some Criminal Defences with particular reference to Battered Defendants*, Report 73, 2001.

¹⁵³ NZLC report, note 152, p52.

¹⁵⁴ NZLC report, note 152, p42, p56.

¹⁵⁵ NZLC report, note 152, p41.

¹⁵⁶ NZLC report, note 152, p42.

Excessive self-defence should not be introduced

Although acknowledging the strength of arguments in support of introducing a partial defence of excessive self-defence, the Commission recommended against this.¹⁵⁷ It preferred that excessive self-defence be considered as part of the sentencing process.¹⁵⁸

No separate defence for battered women who kill

The Commission recommended against the creation of a separate *partial* defence for battered women who kill because it favoured the use of a sentencing discretion over partial defences.¹⁵⁹ The Commission also recommended against the creation of a *complete* defence for battered women who kill, concluding that:

It is preferable that the general requirement of reasonableness in self-defence be interpreted so that it can incorporate the use of force in self-defence against violence that may not be imminent but which is necessary to save life or limb. We accept that the historical background to the defence may make this difficult, but we believe this difficulty can be overcome by the calling of relevant evidence, judicial directions and the reforms we propose.¹⁶⁰

Clarification of law of self-defence

The Commission recommended clarifying the law of self-defence to “make it clear that there can be fact situations in which the use of force is reasonable where the danger is not imminent but is inevitable”.¹⁶¹ The Commission stated:

In many, perhaps most, situations, the use of force will be reasonable only if the danger is imminent because the defendant will have an opportunity to avoid the danger or seek *effective* help. However, this is not invariably the case. In particular, it may not be the case where the defendant has been subject to ongoing physical abuse within a coercive intimate relationship and knows that further assaults are inevitable, even if help is sought and the imminent danger avoided.

We agree that the terms of the [current section] do not require courts to exclude self-defence where danger is inevitable but not imminent. However, we think it preferable to make this explicit by legislative reform...¹⁶²

¹⁵⁷ NZLC report, note 152, p25-26.

¹⁵⁸ NZLC report, note 152, p26, p56.

¹⁵⁹ NZLC report, note 152, p30.

¹⁶⁰ NZLC report, note 152, p29-30.

¹⁶¹ NZLC report, note 152, p12.

¹⁶² NZLC report, note 152, p12.

The Commission also discussed the use of expert evidence to support a defence of self-defence. It stated, “expert evidence on the social context, nature and dynamics of domestic violence is vital to ensure that the law on self-defence is applied flexibly and fairly”.¹⁶³ In the Commission’s view, evidence concerning:

... the behaviour of battered women, patterns of violence in battering relationships, social and economic factors, the psychological effects of battering, separation violence and evidence concerning the battered defendant’s appraisal of the danger she is in may all be relevant and substantially helpful to the fact finder.¹⁶⁴

The Commission expressed the view that juries “are likely to be assisted by clear directions linking the different aspects of the expert evidence on battering relationships to the various elements of” self-defence; and it recommended that “consideration be given to including some guidance on suitable directions in the Criminal Jury Trial Bench Book”.¹⁶⁵

Government’s response to the Commission’s report

In 2002, the New Zealand Government enacted new sentencing laws, which introduced a sentencing discretion for murder.¹⁶⁶ In 2003, the Ministry of Justice “drafted a Cabinet paper recommending repeal of provocation”.¹⁶⁷ In October 2004, the Government asked the Law Commission to consider further issues arising from its 2001 report, including:

- Will the repeal of partial defences unduly disadvantage persons with mental illness or disability, battered defendants, and any other minority groups who may be particularly reliant on such defences?
- Undertake a gender analysis of the current operation of partial defences, and in light of this, consider the gender implications of the recommendation for partial defence repeal.
- Is there a risk of unduly harsh sentences under section 102 of the Sentencing Act as currently drafted (and should the section therefore be amended) if partial defences are repealed?
- Is the stigma of a murder conviction appropriate for persons who have acted by reason of adverse circumstances for which society may feel some sympathy?
- Should there be a separate defence for battered defendants, in addition to or instead of current defences?¹⁶⁸

¹⁶³ NZLC report, note 152, p15.

¹⁶⁴ NZLC report, note 152, p15. The Commission discussed this in more detail at p15-19.

¹⁶⁵ NZLC report, note 152, p8.

¹⁶⁶ *Sentencing Act 2002* (NZ).

¹⁶⁷ New Zealand Law Commission, *Report of the Law Commission for the year ended 30 June 2005*, October 2005, p8.

¹⁶⁸ New Zealand Law Commission, *Criminal Defences (Insanity and Partial Defences) – Terms of Reference*, 1 October 2004. Accessed on website: <http://www.lawcom.govt.nz/ProjectTermsOfReference.aspx?ProjectID=118>

The Commission's work on this project was deferred after it was asked to also review the sentencing and parole framework.¹⁶⁹ The Commission's annual report for 2005/06 states that work on the criminal defences project "will recommence early in the new financial year and is due for completion at the end of June 2007".¹⁷⁰

9.2 United Kingdom

Overview of proposals

In August 2004, the Law Commission published a report on partial defences to murder, which recommended retaining a reformulated partial defence of provocation.¹⁷¹ The report also commented that the "law of murder in England and Wales is a mess" and it recommended that it be asked to conduct a review of the law of murder. The Home Secretary subsequently asked it to conduct such a review and in November 2006, the Law Commission published its report on murder, manslaughter and infanticide.¹⁷² This report recommended a new structure of homicide offences and it affirmed the previous recommendation in relation to the provocation defence. The Commission did not review the defence of self-defence on the basis that it applied to many crimes other than homicide and would need to be looked at as part of a review of the general law.¹⁷³

A new structure of homicide offences

The Commission recommended that the two-tiered structure of murder (mandatory life sentence) and manslaughter (discretionary life sentence) be replaced by a three-tiered structure of first degree murder (mandatory life sentence), second degree murder (discretionary life sentence; guidelines on minimum terms) and manslaughter (discretionary life sentence).¹⁷⁴ First degree murder would encompass intentional killing or killing with an intention to cause serious injury, in the awareness that there is a risk of causing death. Second degree murder would encompass killing with an intent to do serious injury, or killing with intent to cause some injury or fear or risk of injury, in the awareness that there is a serious risk of causing death.¹⁷⁵ The provocation defence (which previously reduced murder to manslaughter) would reduce first degree murder to second degree murder.¹⁷⁶

¹⁶⁹ New Zealand Law Commission, *Annual Report 2005-2006*, 2006, p17.

¹⁷⁰ New Zealand Law Commission, *Annual Report 2005-2006*, 2006, p17.

¹⁷¹ The Law Commission, *Partial Defences to Murder: Final Report*, August 2004

¹⁷² The Law Commission, *Murder, Manslaughter and Infanticide*, November 2006.

¹⁷³ Law Commission 2006 report, note 172, p2.

¹⁷⁴ Law Commission 2006 report, note 172, p16-17.

¹⁷⁵ Law Commission 2006 report, note 172, p16-17.

¹⁷⁶ Law Commission 2006 report, note 172, p17.

Retaining a reformulated provocation defence

The Commission recommended retaining the partial defence of provocation on the basis that murder (first degree murder under the Commission's proposals) carried a mandatory sentence of life imprisonment.¹⁷⁷ The Commission also recommended that the provocation defence be reformulated. The main changes are outlined below.

No requirement for loss of self-control

The Commission recommended removing the "loss of self-control" requirement and allowing the defence to be relied on when the defendant acted in response to "gross provocation... which caused the defendant to have a justifiable sense of being wronged"¹⁷⁸; but not allowing the defence to be relied on if the defendant acted "in considered desire for revenge".¹⁷⁹ The Commission stated that the "loss of self-control" requirement:

...has been widely criticised as privileging men's typical reactions to provocation over women's typical reactions. Women's reactions to provocation are less likely to involve a 'loss of self-control', as such, and are more likely to be comprised of a combination of anger, fear, frustration and a sense of desperation. This can make it difficult or impossible for women to satisfy the loss of self-control requirement, even where they otherwise deserve at least a partial defence.¹⁸⁰

Clarification of objective component of the defence

In order to rely on the defence, the defendant would still need to satisfy an objective component of the defence. The Commission recommended that this component be clarified so that it would require the court to be satisfied that "a person of the defendant's age and of ordinary temperament, i.e., ordinary tolerance and self-restraint, in the circumstances of the defendant might have reacted in the same or in a similar way".¹⁸¹

Defence also available if acted in response to fear of serious violence

The Commission also recommended that the defence of provocation be available in circumstances where "the defendant acted in response to...a fear of serious violence towards the defendant or another"; or when the defendant acted in response to a combination of "gross provocation" and "fear of serious violence".¹⁸² As in the case of "gross provocation", the defence would only be available if a person of ordinary

¹⁷⁷ Law Commission 2006 report, note 172, p44, p77-78.

¹⁷⁸ Law Commission 2006 report, note 172, p78-79, p80-84.

¹⁷⁹ Law Commission 2006 report, note 172, p79.

¹⁸⁰ Law Commission 2006 report, note 172, p81.

¹⁸¹ Law Commission 2006 report, note 172, p78-79, p84-87

¹⁸² Law Commission 2006 report, note 172, p78, p87-90.

temperament might have reacted in the same or in a similar way to the defendant.¹⁸³

This proposal therefore incorporates into the defence of provocation what has been described elsewhere as “excessive self-defence”.¹⁸⁴ In taking this approach, the Commission stated, “the frequently close relationship between anger and fear in someone’s reaction makes us confident that it is right to link these elements together in a single partial defence of provocation”.¹⁸⁵ The Commission had particular regard to the situation of battered women who kill when making this recommendation.¹⁸⁶

No restrictions on the kinds of provocation that may be relied upon

The Commission noted concerns that:

There are currently no restrictions on the kinds of provocation that may, in principle, be considered by the jury. So, provocation could in principle include, for example, a confession of adultery, the crying of a baby or a simple refusal by one spouse to obey the other unconditionally. This state of the law is thought to be especially ‘user-friendly’ to men seeking to plead provocation, because they may be more likely than women to lose their temper and respond violently over such matters. When women kill, it tends to be in response to an extreme situation involving a fear of violence to themselves or their children.¹⁸⁷

The Commission considered the way it had formulated the provocation defence was sufficient to meet these concerns.¹⁸⁸ It explained:

The requirement that provocation must be ‘gross’ in that it must be such as to give rise to a justifiable sense of having been *seriously* wronged... is meant to ensure that the kinds of provocation pleas to whose success Justice for Women rightly objected... are not successful. Such pleas should fail either because they are ruled out by the judge right from the start, using the new power [to not leave the defence to the jury unless there is evidence on which a reasonable jury could conclude that it might apply], or because the jury accepts that they cannot satisfy the test.¹⁸⁹

The Commission noted that not confining the provocation defence to cases of excessive self-defence was a “controversial recommendation, even though it received widespread

¹⁸³ Law Commission 2006 report, note 172, p78-79.

¹⁸⁴ Law Commission 2006 report, note 172, p13.

¹⁸⁵ Law Commission 2006 report, note 172, p89.

¹⁸⁶ Law Commission 2006 report, note 172, p87-91.

¹⁸⁷ Law Commission 2006 report, note 172, p91.

¹⁸⁸ Law Commission 2006 report, note 172, p91.

¹⁸⁹ Law Commission 2006 report, note 172, p91-92; see also p92-94.

support”; and that “it may be a matter to be taken further in the next stage of the review”.¹⁹⁰

Implementation of Commission’s proposals

Upon releasing its report on murder, manslaughter and infanticide, the Law Commission stated that, “the Home Office will take over the review of the law and will be consulting in 2007 on broader issues of public policy, such as sentencing”.¹⁹¹

10. CONCLUSION

The 1996 paper referred to concerns about the use of the defences of provocation and self-defence in cases of intimate partner homicide. In particular, there were concerns about:

- (1) Successful defences of provocation in cases where men have killed their female partners after a relationship breakdown or acts of infidelity;
- (2) Successful defences of provocation and self-defence in cases where men have killed a homosexual person in response to a sexual advance.
- (3) Difficulties for women in relying on provocation and self-defence in cases where they have killed their male partners after a prolonged period of abuse.

Data on defences to murder in NSW from 1990 to 2004 shows that there were two cases of the type referred to in (1) as well as seven cases where men successfully relied on provocation after killing other men who had formed a relationship with their former or current partner. There were 11 cases of the kind referred to in (2), including at least two cases involving non-violent sexual advances. In NSW, a number of battered women who killed their partners had been able to rely on the partial defences of provocation and lack of intent (the latter apparently being used in many cases as a de facto defence of domestic violence). It is not clear how many battered women have been unsuccessful in relying on provocation. With respect to self-defence, Bradfield’s national study found that battered women raised self-defence in 21 of 65 cases and it succeeded in 9 cases.

In NSW, no changes have been made to the defence of provocation to address the concerns referred to above. In 1997, the NSW Law Reform Commission recommended against abolishing the defence or amending the defence to specifically exclude its operation in cases of the kind referred to in (1) and (2) above. However, the Commission recommended amending the defence in a way that would leave it up to the jury to decide whether the offender should be partially excused for having lost self-control. The Commission noted that the requirement of a ‘loss of self-control’ made it difficult for battered women who kill to rely on the provocation defence. However, the Commission considered that this requirement should remain part of the defence. In 1998, a Working Party set up by the

¹⁹⁰ Law Commission 2006 report, note 172, p93.

¹⁹¹ Law Commission, ‘Bringing the law of homicide into the 21st century’, *Press Release*, 29 November 2006.

Attorney General recommended amending the provocation defence to specifically exclude its operation in cases of homicide following a non-violent homosexual advance.

In NSW in 2001, the defence of self-defence was codified and clarified and the partial defence of excessive self-defence was reintroduced. The latter reform has increased the *partial* defence options for battered women who kill in response to domestic violence.

There have been a number of relevant law reform developments in other jurisdictions. Tasmania and Victoria have recently abolished the defence of provocation and the NZ Law Commission has also recommended its abolition. These jurisdictions have taken the view that matters of provocation should be taken into account in sentencing rather than forming the basis of a partial defence. The UK Law Commission has not recommended abolition but this was because there is a mandatory life sentence for murder in the UK.

It should be noted that abolition of provocation takes away one of the partial defence options for battered women who kill. Tasmania considered that battered women could have their circumstances considered in sentencing, while the Victorian Law Reform Commission was of the view that battered women would receive better outcomes through reforms it proposed to self-defence. The NZ Government has recently asked the NZ Law Commission to consider how abolition would impact on battered defendants.

In 2004, the ACT enacted an amendment to exclude the defence of provocation from applying in cases of homicide following a non-violent homosexual advance. In 2006, the Northern Territory enacted a similar amendment.

The UK Law Commission recently reviewed the defence of provocation and recommended that it be reformulated. The Law Commission considered that its new formulation would be sufficient to address concerns about cases of the type referred to in (1) above and it decided not to propose a provision that would *specifically* exclude the defence from operating in such cases. The Law Commission is also of the view that concerns about cases of the type referred to in (3) above will be addressed by its proposal to remove the “loss of control” requirement in the provocation defence and to incorporate in that defence what has been described elsewhere as a defence of excessive self-defence.

Victoria has attempted to address concerns about battered women not being able to rely on self-defence by clarifying the law of self-defence and enacting legislative guidance on family violence evidence that may be relevant to support a claim of self-defence. Victoria has rejected the option of creating a special defence for battered women who kill. In its 2001 report, the NZ Law Commission took a similar approach to Victoria. It has since been asked to reconsider the option of creating a special defence for battered women.

The Law Reform Commission of Western Australia is currently examining the defences of provocation and self-defence, including considering whether these defences should be amended to better accommodate battered women who kill their partners, or whether a separate defence should be established for these defendants.

Recent Research Service Publications



*To anticipate and fulfil the information needs of
Members of Parliament and the Parliamentary
Institution.*

[Library Mission Statement]

Note: For a complete listing of all Research Service Publications
contact the Research Service on 9230 2093. The complete list
is also on the Internet at:

<http://www.parliament.nsw.gov.au/prod/web/PHWebContent.nsf/PHPages/LibraryPublist>

BACKGROUND PAPERS

<i>Principles, Personalities, Politics: Parliamentary Privilege Cases in NSW</i> by Gareth Griffith	1/04
<i>Indigenous Issues in NSW</i> by Talina Drabsch	2/04
<i>Privatisation of Prisons</i> by Lenny Roth	3/04
<i>2004 NSW Redistribution: Analysis of Draft Boundaries</i> by Antony Green	4/04
<i>2004 NSW Redistribution: Analysis of Final Boundaries</i> by Antony Green	1/05
<i>Children's Rights in NSW</i> by Lenny Roth	2/05
<i>NSW By-elections, 1965-2005</i> by Antony Green	3/05
<i>The Science of Climate Change</i> by Stewart Smith	1/06
<i>NSW State Electoral Districts Ranked by 2001 Census Characteristics</i> by Talina Drabsch	2/06
<i>NSW Electorate Profiles: 2004 Redistribution</i> by Talina Drabsch	3/06
<i>Parliamentary Privilege: Major Developments and Current Issues</i> by Gareth Griffith	1/07

BRIEFING PAPERS

<i>Infrastructure</i> by Stewart Smith	1/04
<i>Medical Negligence: an update</i> by Talina Drabsch	2/04
<i>Firearms Restrictions: Recent Developments</i> by Rowena Johns	3/04
<i>The Future of Water Supply</i> by Stewart Smith	4/04
<i>Plastic Bags</i> by Stewart Smith	5/04
<i>Tourism in NSW: after September 11</i> by John Wilkinson	6/04
<i>Drug Offences: An Update on Crime Trends, Diversionary Programs and Drug Prisons</i> by Rowena Johns	7/04
<i>Local Development Assessment in NSW</i> by Stewart Smith	8/04
<i>Indigenous Australians and Land In NSW</i> by Talina Drabsch	9/04
<i>Medical Cannabis Programs: a review of selected jurisdictions</i> by Rowena Johns	10/04
<i>NSW Fishing Industry: changes and challenges in the twenty-first century</i> by John Wilkinson	11/04
<i>Ageing in Australia</i> by Talina Drabsch	12/04
<i>Workplace Surveillance</i> by Lenny Roth	13/04
<i>Current Issues in Transport Policy</i> by Stewart Smith	14/04
<i>Drink Driving and Drug Driving</i> by Rowena Johns	15/04
<i>Tobacco Control in NSW</i> by Talina Drabsch	1/05
<i>Energy Futures for NSW</i> by Stewart Smith	2/05
<i>Small Business in NSW</i> by John Wilkinson	3/05
<i>Trial by Jury: Recent Developments</i> by Rowena Johns	4/05
<i>Land Tax: an Update</i> by Stewart Smith	5/05
<i>No Fault Compensation</i> by Talina Drabsch	6/05
<i>Waste Management and Extended Producer Responsibility</i> by Stewart Smith	7/05
<i>Rural Assistance Schemes and Programs</i> by John Wilkinson	8/05
<i>Abortion and the law in New South Wales</i> by Talina Drabsch	9/05
<i>Desalination, Waste Water, and the Sydney Metropolitan Water Plan</i> by Stewart Smith	10/05
<i>Industrial Relations Reforms: the proposed national system</i> by Lenny Roth	11/05
<i>Parliament and Accountability: the role of parliamentary oversight committees</i> by Gareth Griffith	12/05
<i>Election Finance Law: an update</i> by Talina Drabsch	13/05

<i>Affordable Housing in NSW: past to present</i> by John Wilkinson	14/05
<i>Majority Jury Verdicts in Criminal Trials</i> by Talina Drabsch	15/05
<i>Sedition, Incitement and Vilification: issues in the current debate</i> by Gareth Griffith	1/06
<i>The New Federal Workplace Relations System</i> by Lenny Roth	2/06
<i>The Political Representation of Ethnic and Racial Minorities</i> by Karina Anthony	3/06
<i>Preparing for the Impact of Dementia</i> by Talina Drabsch	4/06
<i>A NSW Charter of Rights? The Continuing Debate</i> by Gareth Griffith	5/06
<i>Native Vegetation: an update</i> by Stewart Smith	6/06
<i>Parental Responsibility Laws</i> by Lenny Roth	7/06
<i>Tourism in NSW: Prospects for the Current Decade</i> by John Wilkinson	8/06
<i>Legal Recognition of Same Sex Relationships</i> by Karina Anthony and Talina Drabsch	9/06
<i>Uranium and Nuclear Power</i> by Stewart Smith	10/06
<i>DNA Evidence, Wrongful Convictions and Wrongful Acquittals</i> by Gareth Griffith and Lenny Roth	11/06
<i>Law and Order Legislation in the Australian States and Territories: 2003-2006</i> by Lenny Roth	12/06
<i>Biofuels</i> by Stewart Smith	13/06
<i>Sovereign States and National Power: Transition in Federal- State Finance</i> by John Wilkinson	14/06
<i>Reducing the Risk of Recidivism</i> by Talina Drabsch	15/06
<i>Recent Developments in Planning Legislation</i> by Stewart Smith	16/06
<i>Commonwealth-State Responsibilities for Health – ‘Big Bang’ or Incremental Reform?</i> by Gareth Griffith	17/06
<i>The Workplace Relations Case – Implications for the States</i> by Lenny Roth and Gareth Griffith	18/06
<i>Crystal Methamphetamine Use in NSW</i> by Talina Drabsch	19/06
<i>Government Policy and Services to Support and Include People with Disabilities</i> by Lenny Roth	1/07
<i>Greenhouse Gas Emission Trading</i> by Stewart Smith	2/07
<i>Provocation and Self-defence in Intimate Partner and Homophobic Homocides</i> by Lenny Roth	3/07
<i>Living on the Edge: Sustainable Land Development in Sydney</i> by Jackie Ohlin	4/07