



Partial Defences to Murder in NSW 1990–2004

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Summary of findings

Introduction

The partial defences of provocation, substantial impairment (formerly diminished responsibility) and excessive self-defence reduce a crime that would otherwise be murder to manslaughter. In New South Wales until 1955 and in England until 1957, a conviction for murder carried a mandatory sentence of death. It was in this rigid punitive environment that the common law developed the partial defence of provocation. In 1974 the New South Wales Parliament introduced a partial defence of diminished responsibility to accommodate offenders suffering a mental abnormality, who would otherwise be convicted of murder. Partial defences reflect a rationale that, in some cases, the extenuating circumstances in which a person commits murder may warrant a conviction for the less serious offence of manslaughter.¹ A conviction for murder is the most severe offence in the criminal calendar, attracting the longest sentences and the greatest community outrage.

Partial defences are understandably a contentious topic. In a criminal trial, these difficult issues are decided by the jury as fact finder or, in rare cases, by a judge alone. In some cases, the Director of Public Prosecutions (NSW) may decide to accept a plea of guilty to manslaughter on the basis of a partial defence in full satisfaction of an indictment for murder. But in equivocal or borderline cases it is *the jury* as fact finder at trial who decides whether a partial defence should reduce a crime of murder to manslaughter. In a trial for murder, the judge must leave a partial defence to the jury whenever there is a “viable case”, regardless of the tactical decisions made by the defence. The House of Lords explained the Australian position in *R v Coutts*:

“In Australia, as here, the trial judge’s duty to direct the jury on alternative verdicts which there is evidence to support is not removed by the decisions of trial counsel.”²

¹ *Attorney General for Jersey v Holley (Jersey)* [2005] UKPC 23 at [3].

² [2006] UKHL 39 at [21].

Many legal commentators argue that partial defences are biased against some classes of offenders or victims, or that they represent an historical anachronism.³ However, commentary is often anecdotal and does not refer to empirical evidence. This study provides a comprehensive empirical picture of partial defences in New South Wales for the period 1990–2004. It collects information on all cases raising a partial defence in the 14 year period, including:

- The number of offenders who had a partial defence accepted or rejected.
- Features of offenders who were convicted and sentenced for manslaughter on the basis of a partial defence.
- Sentencing results for offenders sentenced for manslaughter based on a partial defence.

Background

New South Wales is the only Australian State or Territory in which all three partial defences operate. *Table 1* details which partial defences are available in each jurisdiction.

Table 1: Partial defences to murder in Australian jurisdictions

	NSW	VIC	QLD	SA	WA	TAS	ACT	NT
Substantial impairment/diminished responsibility	✓	X	✓	X	X	X	✓	✓
Provocation	✓	X	✓	✓	✓	X	✓	✓
Excessive self-defence	✓	✓	X	✓	X	X	X	X

³ For an overview of the criticisms, see New South Wales Law Reform Commission, *Report 83: Partial Defences to Murder—Provocation and Infanticide* (1997), Sydney, at [2.7], [2.15] and Victorian Law Reform Commission, *Defences to Homicide: Final Report* (2004), Melbourne, at 26–35.

Provocation first emerged in the context of affronts to a man's honour in 17th Century England. As Gleeson CJ put it in *R v Chhay*⁴:

“... the law on this subject emerged from a multiplicity of rulings in single instances, which in turn were given over a period during which the law of culpable homicide underwent considerable change and development. The modern law recognises provocation as a circumstance in which an accused person is ‘less to blame morally than for what he does deliberately and in cold blood’: *Parker* at 651. This has been explained as a concession to human frailty.”

Diminished responsibility operates where an offender suffers a mental health condition not sufficiently severe enough to raise a defence of mental illness, but nevertheless substantially impairs the offender at the time of the killing. The offender is evaluated using medical and non-medical criteria first established in 1957.⁵ When New South Wales reformed diminished responsibility in 1997 to emphasise “community values”, the Attorney General explained the rationale for the continuing existence of the partial defence in the following terms:

“The reason for a defence of this kind is that the legal system should punish people only for the acts for which they are responsible.”⁶

Excessive self-defence has an ephemeral history as a partial defence. After a number of lower court rulings, the High Court confirmed it as a partial defence in *Viro*⁷ in 1978, but later abolished it in *Zecevic*⁸ in 1987. It was resurrected by Parliament in New South Wales in 2002,⁹ and in South Australia. It has not been accepted as a defence in England and New Zealand.

Reform

In recent years, many common law jurisdictions embarked on review and reform of their partial defences.¹⁰ In 2003, Tasmania abolished provocation, followed by Victoria in 2005. The law of provocation in England remains unclear. In 2004, the Law Commission for England and Wales completed a report into partial defences to murder and commenced a wide-ranging review of the law of homicide. In *Holley*, in 2005, the Privy Council extraordinarily sat nine of the 12 Lords of Appeal in Ordinary

4 (1994) 72 A Crim R 1 at 7.

5 *Homicide Act* 1957 (UK) s 2; enacted in substantially the same terms in New South Wales by the insertion of s 23A *Crimes Act* 1900 in 1974.

6 The Honourable JW Shaw MLC, Attorney General, Second Reading Speech, Crimes Amendment (Diminished Responsibility) Bill, *New South Wales Parliamentary Debates (Hansard)*, Legislative Council, 25 June 1997, 11064–11065.

7 *Viro v The Queen* (1978) 141 CLR 88.

8 *Zecevic v DPP (Vic)* (1987) 162 CLR 645 at 664.

9 *Crimes Amendment (Self-Defence) Act* 2002 .

10 See Appendix B: Australian and international reports on partial defences.

and held that the House of Lords had wrongly decided *R v Smith*.¹¹ The House of Lords in *Smith* had held that, in any given case, the personal characteristics of the accused can be taken into account in determining whether a “reasonable man” could have lost self-control.¹² The Privy Council’s view was that the “reasonable man” is limited to a person of the same gender and age as the accused, but no other personal attributes may be added. The Privy Council held that:

“the widely held view is that the law relating to provocation is flawed to an extent beyond reform by the courts ... Their Lordships share this view. But the law on provocation cannot be reformulated in isolation from a review of the law of homicide as a whole.”¹³

When the lower English appeal court was faced with these conflicting decisions it decided to apply *Holley* rather than *Smith*.¹⁴

In New South Wales, the Law Reform Commission published two reports¹⁵ on partial defences in 1997, recommending reform of diminished responsibility and provocation. Parliament amended provocation in 1982, reformulated diminished responsibility as substantial impairment in 1997 and introduced excessive self-defence in 2002.

Questions posed

This study seeks to answer empirically some of the recurring questions posed by the ongoing scrutiny and reform of partial defences:

- How frequently are partial defences relied upon for persons charged with murder?
- When partial defences are relied upon, what are the success rates for each?
- Do juries accept partial defences?
- What proportion of cases involve the Crown accepting a plea of guilty on the basis of a partial defence in full satisfaction of an indictment for murder?
- What are the predominant factual scenarios in which partial defences are accepted by a fact finder at trial or via a plea of guilty?
- What factors are taken into account when a judge sentences for manslaughter on the basis of a partial defence?
- What are the range of sentences imposed?
- How are disadvantaged or vulnerable groups affected by partial defences?

11 *Attorney General for Jersey v Holley (Jersey)* [2005] UKPC 23; *R v Smith* [2001] 1 AC 146; [2000] 4 All ER 289.

12 Section 3 of the *Homicide Act 1957* (UK) states that “the question whether the provocation was enough to make a reasonable man do as he did shall be left to be determined by the jury.”

13 *Attorney General for Jersey v Holley (Jersey)* [2005] UKPC 23 at [27].

14 *R v James; R v Karimi* [2006] 1 All ER 759.

15 New South Wales Law Reform Commission, *Report 82: Partial Defences to Murder—Diminished Responsibility*, 1997, Sydney; and *Report 83: Partial Defences to Murder—Provocation and Infanticide*, 1997, Sydney. See www.lawlink.nsw.gov.au/lrc.nsf/pages/R82TOC <accessed 14 June 2006>.

The Data

Study period

This study covers the period 1 January 1990 to 21 September 2004.

In this period, according to the Commission's Judicial Information Research System (JIRS), there were 460 manslaughter convictions overall and 437 murder convictions, or a total of 897 offenders convicted of murder or manslaughter.

Sources

The data in this study was obtained from JIRS. Detailed information about partial defence cases was extracted principally from the remarks on sentence of the judge and the appeal judgment (where applicable). Citations for all identified cases in the study period involving partial defences are listed in Appendix A.

Procedural routes

When an accused pleads not guilty to murder but raises a partial defence, their case is dealt with in one of two ways:

1. The Director of Public Prosecutions (NSW) may decide, based on DPP Guidelines,¹⁶ to accept a lesser plea of guilty to manslaughter in full satisfaction of the indictment for murder.
2. If the Director of Public Prosecutions (NSW) rejects an accused's offer to plead guilty to manslaughter on the basis of a partial defence, or the accused pleads not guilty, they stand trial for murder. The accused may then raise a partial defence before a jury (or, in some circumstances, in a judge-alone trial).

In a murder trial, the burden is always on the prosecution to prove the elements of the offence beyond reasonable doubt. Prior to 1998, s 23A(2) *Crimes Act* 1900 provided that it was for the accused to prove more probably than not that they suffered from diminished responsibility. Section 23A(4) requires the same for substantial impairment. In *Melbourne v The Queen*, McHugh J suggested that a plea of diminished responsibility:

“like a plea of insanity, is a plea of confession and avoidance. Any person, relying on the plea, must prove it ... Until an accused person tenders evidence in support of the claim of diminished responsibility, the Crown has no issue to meet.”¹⁷

¹⁶ Available from the website of the Office of the Director of Public Prosecutions: www.odpp.nsw.gov.au/guidelines/guidelines.html <accessed 20 June 2006>.

¹⁷ (1999) 198 CLR 1 at [9].

On the other hand, provocation under s 23(4) requires that the onus is on the prosecution to prove beyond reasonable doubt that the killing of the victim was not done under provocation. Where excessive self-defence is raised, the Crown must prove beyond reasonable doubt that the accused did not believe they were acting in self-defence. As discussed above, the High Court decision of *Pemble* obliges the trial judge to leave a partial defence to the jury whenever there is a viable case.¹⁸

For convenience, this study describes cases where the offender was convicted and sentenced for manslaughter on the basis of a partial defence in terms of the defence being “successfully raised” or “accepted”. These terms are used as shorthand, despite the different proof requirements for each defence.

Raising a partial defence

Between 1 January 1990 and 21 September 2004, 232 of 897 homicide offenders (26%) raised a partial defence:

- 88 offenders (38%) had a plea of guilty to manslaughter based on a partial defence accepted by the Crown.
- 142 offenders (61%) raised a partial defence at trial.
- Two offenders (1%) had a verdict of manslaughter based on diminished responsibility substituted on appeal, after being convicted of murder at trial.

In the study period, 126 offenders raised either diminished responsibility or substantial impairment:

- 57 offenders (45%) had a plea of guilty to manslaughter accepted by the Crown.
- 67 offenders (53%) raised a partial defence at trial.
- Two offenders (2%) had a verdict of guilty to manslaughter substituted on appeal.

There were 115 offenders who raised provocation:

- 32 offenders (28%) had a plea of guilty to manslaughter accepted by the Crown.
- 83 offenders (72%) raised an issue of provocation at trial which the Crown had to negative.

¹⁸ *Pemble v The Queen* (1971) 124 CLR 107 at 117–118 per Barwick CJ: “Whatever course counsel may see fit to take, no doubt bona fide but for tactical reasons in what he considers the best interest of his client, the trial judge must be astute to secure for the accused a fair trial according to law. This involves, in my opinion, an adequate direction both as to the law and the possible use of the relevant facts upon any matter upon which the jury could in the circumstances of the case upon the material before them find or base a verdict in whole or in part.”

These figures include 16 offenders who claimed both provocation and either diminished responsibility or substantial impairment.

Only seven offenders raised excessive self-defence, all successfully:

- Four offenders had a plea of guilty to manslaughter accepted by the Crown.
- Three offenders raised excessive self-defence at trial.

Partial defence convictions

There were 156 offenders who successfully raised a partial defence, either through the Crown accepting a plea of guilty to manslaughter, or through the offender succeeding at trial:¹⁹

- 74 offenders were sentenced on the basis of diminished responsibility or substantial impairment.
- 65 offenders were sentenced based on provocation.
- Ten offenders were sentenced on both provocation and either diminished responsibility or substantial impairment.
- Seven offenders were sentenced based on excessive self-defence.

Success rates

Successful partial defences (156) account for 17% of the total number of homicide convictions (897) and 34% of manslaughter convictions (460).

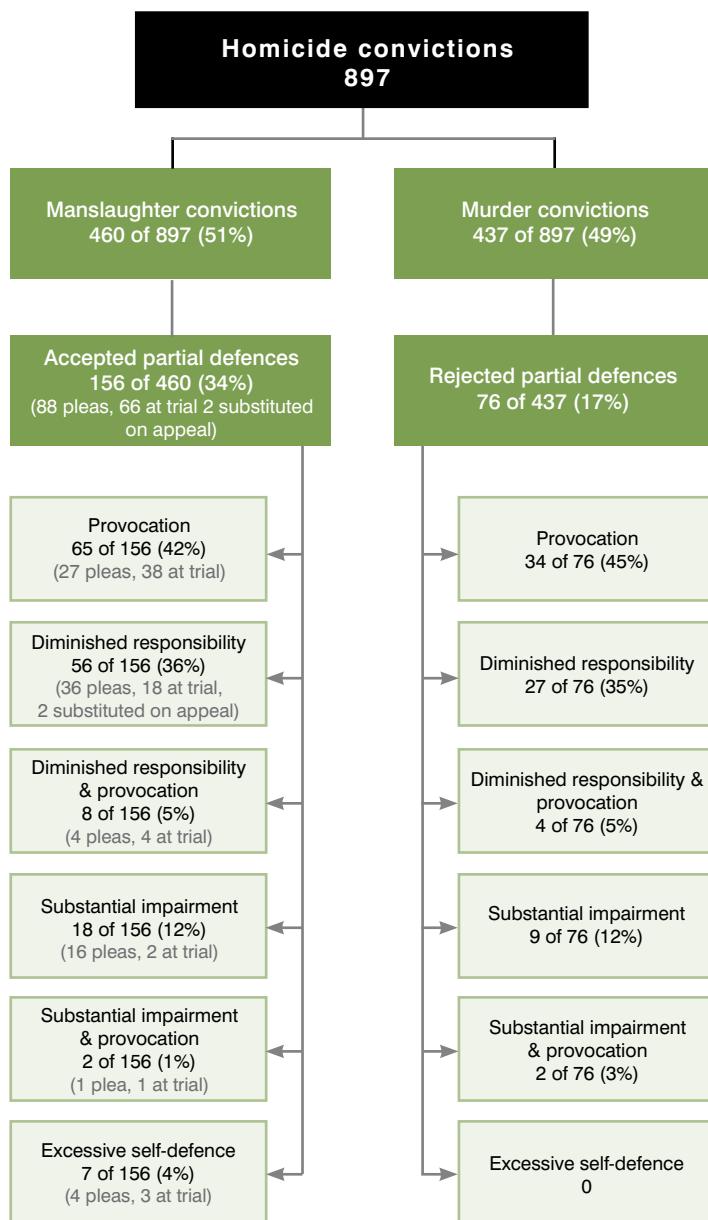
The 156 offenders who were sentenced on the basis of a partial defence (out of the 232 who raised the issue) represent an overall success rate of 67%. There was little difference in success rates by type of defence: diminished responsibility (67%), substantial impairment (65%) and provocation (65%). The 100% success rate for excessive self-defence cases is likely affected by the relatively short period in which the defence has been operating and the resulting small sample size.

Out of the 142 offenders who raised a partial defence at trial (either before a jury or judge alone), 66 were convicted and sentenced for manslaughter on the basis of that partial defence (46%).

Figure 1 illustrates the full breakdown of offenders who raised a partial defence in the study period.

¹⁹ As stated above, there were also two offenders who had a manslaughter verdict substituted on appeal.

Figure 1 Offenders convicted of homicide, 1 January 1990 – 21 September 2004²⁰



20 The figures for rejected partial defences exclude two murder cases where it was not possible to ascertain whether the offenders (who pleaded not guilty to murder but were ultimately convicted by a jury of that charge) relied upon a partial defence. Note also that excessive self-defence was only available as a defence from 22 February 2002.

Gender characteristics

Out of the 156 offenders who successfully claimed a partial defence, 119 were male (76%) and 37 were female (24%). This figure is slightly higher than the general proportion of female manslaughter offenders found in the Judicial Commission's 1994–2001 homicide study.²¹ In that study, 20% of all manslaughter offenders were female.²² Victims were also predominantly male in cases where a partial defence was successfully claimed. Among 165 victims, 118 were male (72%) and 47 were female (28%).

Sentences for offenders who successfully raise a partial defence

Offenders sentenced on the basis of partial defences received a broad range of sentences. This reflects the wide variety of circumstances in which the crime of manslaughter is committed.

In the most extreme cases, sentences other than full-time custody were imposed on 14 out of 156 offenders (9%).²³ These sentences were more common in diminished responsibility/substantial impairment cases than in provocation cases, and were most prevalent among the small sample of cases in which both diminished responsibility/substantial impairment and provocation were established (three out of ten instances).

Findings

Diminished responsibility and substantial impairment

- The reform of s 23A in 1997 appears to have achieved its stated aim. The introduction of the notion of community standards has resulted in a stricter test. We found that, since the reforms, fewer offenders are raising the defence and fewer offenders are succeeding than under the previous diminished responsibility regime.²⁴ This has occurred in circumstances where the overall homicide offending rate has remained stable throughout the period under review.²⁵
- Offenders who successfully claimed the partial defence under both diminished responsibility and substantial impairment generally displayed severe mental health conditions.²⁶

²¹ J Keane & P Poletti, *Sentenced Homicides in New South Wales 1994-2001*, 2004, Judicial Commission of NSW, Sydney.

²² Including two infanticide outcomes.

²³ There were 11 s 558 or s 9 bonds, two sentences of periodic detention and one s 12 suspended sentence. These figures exclude *R v Low* (1991) 57 A Crim R 8 in which the Crown successfully appealed against a s 558 bond.

²⁴ See below at 16–17.

²⁵ Australian Institute of Criminology, *Australian crime: facts and figures 2005, 2006*, Canberra.

²⁶ See below at 20–21.

- Although the numbers are relatively small, success rates in jury trials are lower for the defence of substantial impairment than for diminished responsibility.²⁷
- There have been no severity of sentence appeals and one Crown appeal against sentence since the introduction of substantial impairment.²⁸

Provocation

- The defence is most commonly raised in the context of violent confrontations between men, often involving alcohol.²⁹
- Since at least 1990, there have been no New South Wales cases similar to the Victorian case of *Ramage*, which led to the abolition of provocation in that State.³⁰
- There have been no offenders convicted of manslaughter based on provocation following a non-violent homosexual advance since *Green* in 1998.³¹
- Sentences reflect the wide variations in the objective and subjective features of each case.³²

Excessive self-defence

- There are only a small number of cases because the provisions reintroducing the defence commenced in 2002.³³
- Similar to provocation, a number of cases involved violent confrontations between men in circumstances of intoxication.³⁴
- Relatively small case numbers warrant caution in identifying broad sentencing trends.³⁵

27 See below at 16–17.

28 See below at 67.

29 See below at 39–40.

30 See below at 42. In *R v Ramage* [2004] VSC 508, the offender killed his estranged wife after she ended their relationship and said she had found a new partner. The offender successfully claimed provocation. *Ramage* led to a reference to the Victorian Law Reform Commission and, following that Commission's report *Defences to Homicide: Final Report* (2004), op cit n 3, the abolition of provocation in Victoria.

31 See below at 43–45. *Green v The Queen* (1997) 191 CLR 334. Following a successful High Court appeal against his conviction for murder, Green was convicted at a new trial in 1998 of manslaughter based on provocation. See *R v Green* [1999] NSWCCA 97. Since 1998, however, there have been two cases where more ambiguous evidence of an aggressive or violent homosexual advance has been accepted as provocation: *R v Marlow* [2003] NSWSC 1130; *R v Ladd* [2001] NSWSC 1055.

32 See below at 69–70.

33 See below at 51.

34 See below at 53.

35 See below at 74.



Diminished responsibility and substantial impairment

Background

Diminished responsibility

According to the Model Criminal Code Officers' Committee, the rationale for the partial defence of diminished responsibility is:

"the desire for increased flexibility in dealing with defendants who display some kind of mental dysfunction, albeit not serious enough to establish the complete defence of insanity. As its name suggests, diminished responsibility partially excuses such persons on the basis that the fault element necessary to found a murder conviction, although present, is of diminished quality."³⁶

The partial defence of diminished responsibility was introduced in New South Wales in 1974 under s 23A of the *Crimes Act* 1900.

"23A Diminished responsibility

- (1) Where, on the trial of a person for murder, it appears that at the time of the acts or omissions causing the death charged the person was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired his or her mental responsibility for the acts or omissions, the person shall not be convicted of murder.
- (2) It shall be upon the person accused to prove that the person is by virtue of subsection (1) not liable to be convicted of murder.
- (3) A person who but for subsection (1) would be liable, whether as principal or as accessory, to be convicted of murder shall be liable instead to be convicted of manslaughter.
- (4) The fact that a person is by virtue of subsection (1) not liable to be convicted of murder in respect of a death charged shall not affect the question whether any other person is liable to be convicted of murder in respect of that death.

³⁶ Model Criminal Code Officers' Committee, *Report of the Model Criminal Code Officers' Committee*, 1998, Attorney General's Department (Cth), ACT, "Chapter 5: Offences Against the Person," 113.

- (5) Where, on the trial of a person for murder, the person contends:
- (a) that the person is entitled to be acquitted on the ground that the person was mentally ill at the time of the acts or omissions causing the death charged, or
 - (b) that the person is by virtue of subsection (1) not liable to be convicted of murder,
- evidence may be offered by the Crown tending to prove the other of those contentions, and the court may give directions as to the stage of the proceedings at which that evidence may be offered.”

Section 23A was modelled on s 2 of the *Homicide Act* 1957 (UK). As originally formulated, a finding of diminished responsibility was heavily reliant on expert medical evidence. Expert evidence was required to show that the abnormality of mind of the offender arose from one of the causes listed in parentheses in s 23A(1).

In *Chayna v The Queen*,³⁷ seven psychiatrists offered conflicting opinions on the mental state of the accused at the time she killed her two daughters and sister-in-law. The jury was directed to consider only the evidence of the final psychiatrist. The jury returned a verdict of murder. In a successful appeal to the New South Wales Court of Criminal Appeal, Gleeson CJ remarked that s 23A “depends upon concepts which medical experts find at least ambiguous and, perhaps, unscientific.”³⁸

The remarks of the Chief Justice were the basis of a reference to the New South Wales Law Reform Commission. The New South Wales Law Reform Commission’s report in 1997, *Partial Defences to Murder: Diminished Responsibility*, recommended reform of s 23A, rather than abolition.³⁹

Further impetus for reform arose from community anger following the case of Graham Cassel, in 1997.⁴⁰ Cassel killed another man, Michael McPake, after McPake and his friends stumbled upon Cassel’s suicide attempt. The Crown accepted a plea of guilty to manslaughter by reason of diminished responsibility.

Substantial impairment by abnormality of mind

Following the New South Wales Law Reform Commission report and pressure surrounding the decision in *Cassel*, the New South Wales Parliament passed the *Crimes Amendment (Diminished Responsibility) Act* 1997.⁴¹ A new s 23A was enacted to replace diminished responsibility. The section contained a new test of substantial impairment by abnormality of mind:

37 (1993) 66 A Crim R 178.

38 (1993) 66 A Crim R 178.

39 New South Wales Law Reform Commission, op cit n 15.

40 *R v Cassel* (unrep, 14/3/97, NSWSC); see also A Peterson, “Family’s rage at five years for killer,” *The Daily Telegraph*, 15 March 1997.

41 Act No 106 of 1997; assented to 1 December 1997; commenced 3 April 1998.

“23A Substantial impairment by abnormality of mind

- (1) A person who would otherwise be guilty of murder is not to be convicted of murder if:
 - (a) at the time of the acts or omissions causing the death concerned, the person's capacity to understand events, or to judge whether the person's actions were right or wrong, or to control himself or herself, was substantially impaired by an abnormality of mind arising from an underlying condition, and
 - (b) the impairment was so substantial as to warrant liability for murder being reduced to manslaughter.
- (2) For the purposes of subsection (1)(b), evidence of an opinion that an impairment was so substantial as to warrant liability for murder being reduced to manslaughter is not admissible.
- (3) If a person was intoxicated at the time of the acts or omissions causing the death concerned, and the intoxication was self-induced intoxication (within the meaning of section 428A), the effects of that self-induced intoxication are to be disregarded for the purpose of determining whether the person is not liable to be convicted of murder by virtue of this section.
- (4) The onus is on the person accused to prove that he or she is not liable to be convicted of murder by virtue of this section.
- (5) A person who but for this section would be liable, whether as principal or accessory, to be convicted of murder is to be convicted of manslaughter instead.
- (6) The fact that a person is not liable to be convicted of murder in respect of a death by virtue of this section does not affect the question of whether any other person is liable to be convicted of murder in respect of that death.
- (7) If, on the trial of a person for murder, the person contends:
 - (a) that the person is entitled to be acquitted on the ground that the person was mentally ill at the time of the acts or omissions causing the death concerned, or
 - (b) that the person is not liable to be convicted of murder by virtue of this section,evidence may be offered by the prosecution tending to prove the other of those contentions, and the Court may give directions as to the stage of the proceedings at which that evidence may be offered.
- (8) In this section: ‘underlying condition’ means a pre-existing mental or physiological condition, other than a condition of a transitory kind.”

The key change in the reforms was to render inadmissible opinions, usually expressed by psychologists or psychiatrists, that the accused's impairment was so substantial that liability for murder be reduced to manslaughter: s 23A(2). The effect of the amendment was to make clear that it is the *role of the jury* to make the final assessment of the offender's liability under s 23A(1)(b). Hunt CJ at CL had made this point earlier in a judge-alone trial in *R v Trotter*:

“... doctors are obviously qualified to say whether the extent of the particular impairment to the accused's perceptions, judgment and self-control is slight, moderate or extensive, or somewhere in between, but whether that impairment to the accused's mental responsibility for his actions may ‘properly’ be called substantial (in the sense of being such as to warrant the reduction of the crime from murder to manslaughter) is *not* a matter within the expertise of the medical profession. That is a task for the tribunal of fact, which must approach that task in a broad commonsense way: *R v Byrne* (at 404); *Walton v The Queen* (at 793). It involves a value judgment by the jury representing the community (or by a judge where there is no jury), not a finding of medical fact.”⁴²

The objective of the reform was summarised by the Attorney General to be a “new and stricter defence.”⁴³

Experts may still provide evidence as to the existence of impairment, abnormality of mind and an underlying condition, but under s 23A(2) no evidence is admissible to show that the impairment was so substantial as to reduce murder to manslaughter. This is a *moral assessment* for the jury.

The New South Wales Director of Public Prosecutions amended prosecution guidelines to take account of the fundamental role of the jury in the new test. *Prosecution Guideline 20* now requires:

“If a prosecutor is contemplating accepting a plea of guilty to manslaughter on the basis of substantial impairment by an abnormality of mind arising from an underlying condition pursuant to s 23A of the *Crimes Act* 1900, the community values inherent in the requirement of s 23A(1)(b) are to be taken into consideration.”⁴⁴

According to the Attorney General, the defence was still formulated to capture those offenders affected by mental abnormality who retain some responsibility for their crime:

“The reason for a defence of this kind is that the legal system should punish people only for the acts for which they are responsible. Everyone would agree that to do otherwise would be unfair. Some people are so mentally ill as not to

42 (1993) 35 NSWLR 428 at 431.

43 JW Shaw, op cit n 6, 11064–11065.

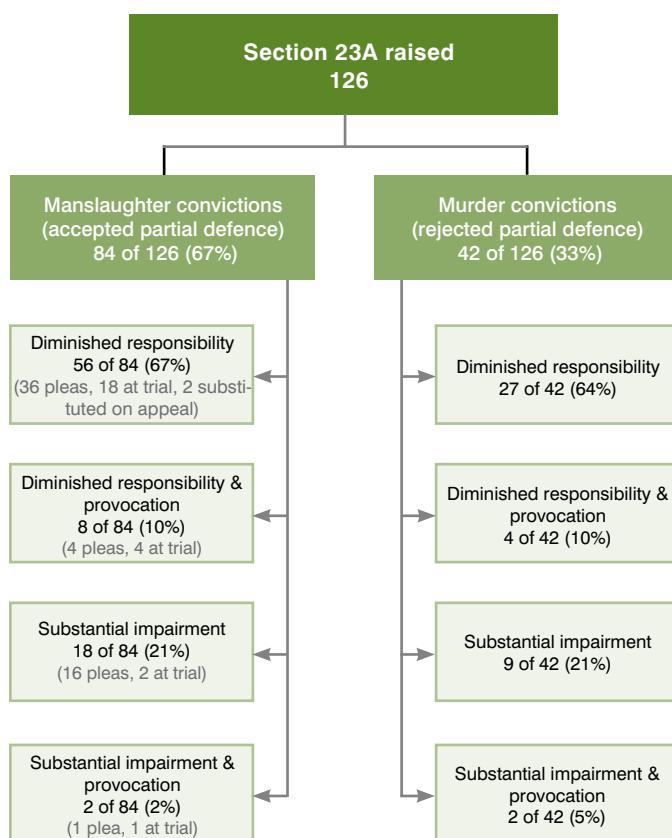
44 op cit n 16 .

be responsible at all. The law provides that if they are found not guilty by reason of mental illness they are to be detained in mental hospitals. Other people, while not completely mentally ill, have had their mental functioning affected by some kind of underlying condition, and they can raise this new defence.”⁴⁵

Overview

Between 1 January 1990 and 21 September 2004, 84 offenders were convicted on at least one count of manslaughter and sentenced on the basis of the partial defence of diminished responsibility or substantial impairment by abnormality of mind. Ten of the offenders were sentenced on the basis of both this partial defence and provocation.⁴⁶ During this time, 42 offenders unsuccessfully raised either diminished responsibility or substantial impairment at trial and were subsequently convicted of murder. *Figure 2* illustrates the breakdown of these cases.

**Figure 2 Offenders raising substantial impairment/diminished responsibility (s 23A)
1 January 1990–21 September 2004**



45 JW Shaw, op cit n 6.

46 See Appendix A for list of cases claiming both defences.

The majority of manslaughter convictions from either diminished responsibility or substantial impairment rose from pleas accepted by the Crown:

- 55 offenders had a plea of guilty to manslaughter accepted by the Crown;
- two offenders pleaded guilty on an indictment for manslaughter;
- 20 offenders were found guilty of manslaughter following a jury trial;
- five offenders successfully raised the defence in judge-only trials; and
- two offenders had a substituted verdict of manslaughter entered on appeal (one on the basis of fresh evidence), following a jury trial in which they were found guilty of murder.

The 84 offenders who successfully raised a s 23A defence killed 93 victims. In 79 cases, there was a single victim; in three cases there were two victims; in one case there were three victims; and in one case there were five victims. It is a partial defence successfully raised primarily by male offenders in the context of killing other men, although the gender difference is less pronounced among victims:

- 62 offenders were male, 22 were female; and
- 54 victims were male, 39 were female.

The over-representation of male offenders and victims is similar to the general pattern across all homicides. Men are offenders in 86% of homicide cases and victims in 67%.⁴⁷

The effect of the April 1998 reforms

Fewer s 23A cases

Section 23A(1)(b) now requires a jury to make a final moral assessment whether the “impairment was so substantial as to warrant liability for murder being reduced to manslaughter.” A similar assessment based on community values must be considered by the Crown in accepting a plea under s 23A.

The new test of substantial impairment by abnormality of mind commenced on 3 April 1998. Fewer offenders are raising the new partial defence. Under the diminished responsibility statutory regime, 95 offenders raised the defence over a period of eight years and three months — an average of 12 cases per year.⁴⁸ Under substantial impairment, 31 offenders raised the defence over almost six years and six months — an average of five per year.

⁴⁷ Keane & Poletti, op cit n 21.

⁴⁸ Including 14 offenders sentenced after 3 April 1998 under diminished responsibility because the new legislation did not apply to their proceedings.

Numerically fewer offenders are also succeeding under the new test. Under the previous statutory regime, 64 offenders successfully raised the defence — an average of almost eight cases per year. Since April 1998, under the current version of s 23A, 20 offenders have successfully raised the defence — an average of only three cases per year.

Lower success rates in jury trials

In total, 126 offenders raised a partial defence based on s 23A and 84 succeeded (67%). The success rate under diminished responsibility (64 succeeded out of 95 raised, or 67%) was similar to the success rate under substantial impairment (20 succeeded out of 31 raised, or 65%).

However, as *Table 2* shows, the success rate when substantial impairment was put to the jury (three succeeded out of 14 raised, or 21%) was almost half the success rate of jury trials under diminished responsibility (17 succeeded out of 43 raised, or 40%).⁴⁹

Table 2: Success rates in jury trials for diminished responsibility and substantial impairment

	Number raised	Raised in jury trial	Accepted by jury
Diminished responsibility	95	43 of 95 (45%)	17 of 43 (40%)
Substantial impairment	31	14 of 31 (45%)	3 of 14 (21%)

Jury trials and plea rates

Jury trials constituted 57 of the 126 cases (45%) in which a s 23A defence was raised. Pleas accepted by the Crown made up the same proportion (57 cases, or 46%). There were also ten judge-alone trials under diminished responsibility (five where the defence was successfully raised). Two verdicts of manslaughter were substituted on appeal.

Jury involvement has not changed with the introduction of substantial impairment. Under the old regime, there were 43 jury trials out of 95 cases (45%). With the introduction of substantial impairment, there have been 14 jury trials out of 31 cases (45%). However, plea rates have increased. Under diminished responsibility, the Crown accepted a plea of guilty to manslaughter in 40 out of 95 cases (42%). Under substantial impairment, the Crown accepted guilty pleas in 17 out of 31 cases (55%).

⁴⁹ There were also ten judge-alone trials under diminished responsibility, five where the defence was successfully raised.

Section 23A and mental health

The new s 23A remains a species of those mental health “defences” which also includes mental illness, infanticide and fitness to plead:

“This defence has been created because the criminal system requires that people be punished according to their mental culpability.”⁵⁰

That s 23A is engaged only at the higher end of the spectrum of mental health conditions was suggested by Spigelman CJ in *R v Cheatham*:

“In many, if not most cases, a defence of mental illness will result in a body of evidence being adduced which would support a finding of substantial impairment under s 23A.”⁵¹

Similarly, in *R v Jennings* — a judge-alone trial in the New South Wales Supreme Court — Kirby J examined the operation of mental illness and the law:

“... there are degrees of mental illness. A person may be totally impaired at the time they commit a breach of the law, or their impairment may be less than total, although still substantial ... were the court to find that the impairment suffered by the accused through mental illness was not total, but was nonetheless substantial, the partial defence of substantial impairment by reason of abnormality of mind may then be available.”⁵²

On this view, the defence of substantial impairment operates close below the threshold of the defence of mental illness to capture those offenders who suffer severe mental health issues, but whose impairment does not come within the M’Naghten Rules.⁵³ This may include offenders whose mental condition is treatable, rather than permanent.

The use of medical evidence

Expert evidence on the offender’s mental health retains an important role in the defence of substantial impairment, despite the reforms to s 23A.

Evidence is still available in the new defence to assist in identifying an abnormality of mind and its underlying condition. “Underlying condition” is defined in s 23A(8) as “a pre-existing mental or physiological condition, other than a condition of a transitory kind.” Evidence may also be adduced to show whether the offender was substantially impaired at the time.

It is only in the final “moral assessment” of whether the impairment was so substantial as to warrant murder being reduced to manslaughter that no medical evidence may be admitted.

50 JW Shaw, op cit n 6.

51 [2000] NSWCCA 282 at [62].

52 [2005] NSWSC 789 at [25] and [29].

53 Under the *Mental Health (Criminal Procedure) Act* 1990 (NSW), mental illness is a full defence resulting in a special verdict, as provided for under s 22 and Pt 4. Mental illness is not defined and is determined according to the M’Naghten Rules (1843) 10 CL & Fin 200.

Mental health conditions of offenders who successfully raise s 23A

The diagnosis and categorisation of mental health conditions is an imprecise science. According to Dan Howard and Bruce Westmore in *Crime and Mental Health Law in New South Wales*:

“The formulation of psychiatric diagnoses is an evolving process which develops as more is understood about various psychiatric disorders.”⁵⁴

In many of the cases in this study there were multiple or conflicting psychiatric evaluations of the offender.

The 84 offenders who successfully claimed a s 23A defence have been grouped using diagnostic categories suggested by the above authors,⁵⁵ based on the widely used and accepted *Diagnostic and Statistical Manual of Mental Disorders*:⁵⁶

- Mental disorder due to a general medical condition.
- Substance related disorders.
- Schizophrenia and other psychotic disorders.
- Mood disorders such as depression or bipolar disorder.
- Dissociative disorders.
- Psychosocial, response or adjustment conditions.
- Personality disorders (including paranoia).

Cases were grouped according to the medical evidence accepted by the sentencing judge. Where the evidence was inconsistent, assessment was based on the condition given most weight by the sentencing judge as a contributing factor to the s 23A defence. There were four cases in which insufficient information prevented a clear assessment.

As *Figure 3* reveals, across both diminished responsibility and substantial impairment, the most common mental conditions identified in offenders who successfully claimed the defence were:

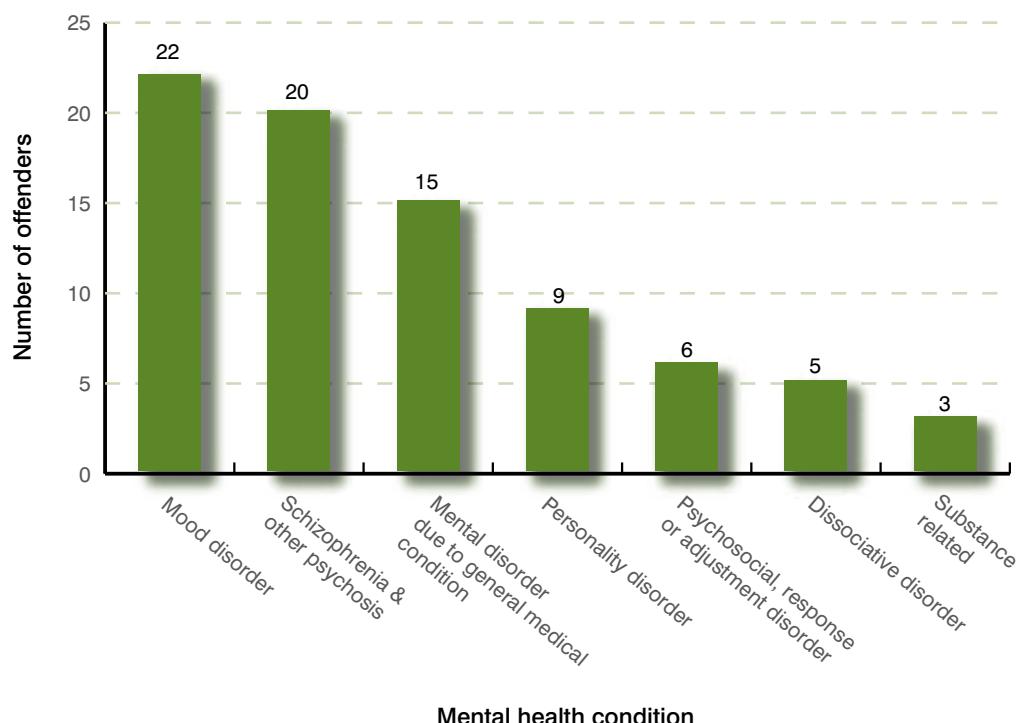
- mood disorders (22 offenders);
- schizophrenia and other psychosis (20 offenders); and
- mental disorder due to general medical condition (15 offenders).

⁵⁴ D Howard & B Westmore, *Crime and Mental Health Law in New South Wales*, 2005, Butterworths, Sydney, 1.

⁵⁵ ibid 1–29.

⁵⁶ American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders*, Fourth Edition, Text Revision (2000), Washington DC, USA.

Figure 3 Mental health conditions relied on to successfully raise diminished responsibility or substantial impairment



Analysis of mental health within the operation of s 23A is complicated by multiple psychiatric reports and the ultimate non-medical assessment of a judge, jury or the Crown. As the New South Wales Law Reform Commission pointed out in its assessment of the previous regime under s 23A, abnormality of mind is based on “neither medical nor legal concepts.”

With these cautions in mind, a number of conclusions may be drawn from analysis of the mental conditions successfully claimed under s 23A.

Severity of conditions

It is immediately apparent that, as suggested above by Spigelman CJ and Kirby J, s 23A captures the most severe kinds of mental impairment:

- Almost one-quarter of those successfully claiming the defence suffered from schizophrenia or another form of psychosis.
- Twenty-six per cent of offenders presented with mood disorders, such as depression or bipolar disorder, which, in many cases, was characterised as severe.

*R v Hucker*⁵⁷ is illustrative of the point. In *Hucker*, Howie J discharged the jury after the Crown accepted a plea of guilty to manslaughter. He commented on the overwhelming evidence of a serious mental condition:

“While s 23A gives rise to an issue which is quintessentially one for the determination of a jury, it would have been perverse for the jury to have convicted the offender of murder in light of the undisputed evidence before them as to the circumstances of the killing and the offender’s mental state at the time ...”

It is clear that he has been suffering from schizophrenia for some years... The killing of the deceased was undoubtedly a direct result of the effect of the offender’s mental abnormality. It occurred during a florid psychotic episode when the offender was deluded ...”⁵⁸

Depression

Across the 84 cases, depression was often specifically mentioned as a factor, even where evidence pointed to another non-mood related disorder as the decisive condition raising the defence.

Depression was cited for 38 offenders or 45% of all cases in which a s 23A defence was successfully claimed.

Substantial impairment and mental health

The new test in s 23A appears to have applied a different filter to those offenders who can successfully claim the defence (as detailed in *Figure 4*).

Under the old regime, the most common conditions were schizophrenia, mood disorders and those caused by a general medical condition.

Under the new s 23A, schizophrenia and mood disorders remain in a high proportion of cases, but there was a substantial fall in those offenders suffering a mental disorder arising from a general medical condition or a personality disorder.

With the renewed emphasis on community values in s 23A, it may be that personality disorders are less persuasive in establishing the defence. According to Howard and Westmore, “personality disorders are quite common within the general population.”⁵⁹ The Western Australian Court of Criminal Appeal has held that personality disorders do not amount to a “disease of the mind.”⁶⁰

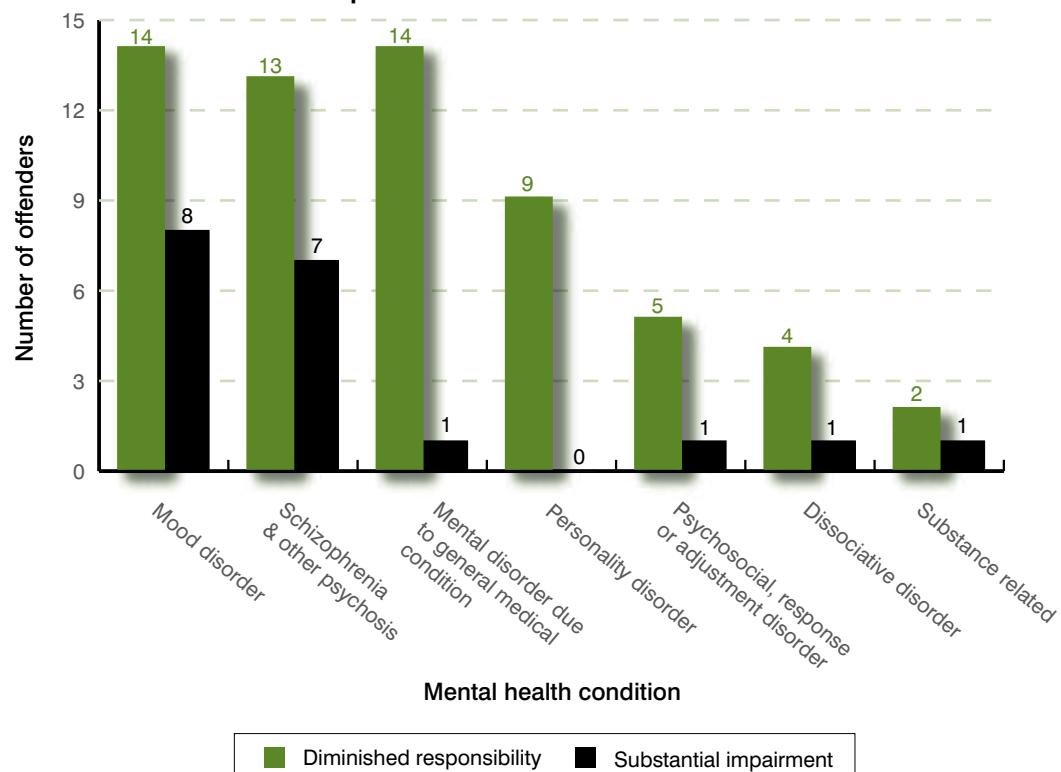
57 [2002] NSWSC 1068.

58 [2002] NSWSC 1068 at [2], [14]–[16].

59 Howard & Westmore, op cit n 54, 166.

60 *R v Hodges* (1985) A Crim R 129. See also Howard & Westmore, op cit n 54, 166.

Figure 4 Comparison of conditions successfully claimed under diminished responsibility and substantial impairment



In *R v Maxwell*, a judge-only trial under diminished responsibility, Grove J found an offender guilty of murder, despite his attempt to establish a personality disorder as the basis for a s 23A defence. Expert evidence differed on the degree of mental impairment. After referring to the language of the new s 23A, which had commenced but did not apply to the trial, Grove J held that:

“I am not persuaded on the evidence that the accused has proved that he was at the time suffering from a relevant abnormality of mind... Further, assuming to the contrary of my findings that the accused did suffer an abnormality of mind in the relevant sense, I would not assess impairment of mental responsibility as substantial. I recognize that such is a value judgment... I do not consider any impairment warrants reduction of his crime to manslaughter.”⁶¹

In *R v Matheson*⁶² a jury rejected the defence of substantial impairment arising from a personality disorder. Two psychiatrists who gave evidence before the jury differed in their opinion of the severity of the condition.⁶³ There was also evidence of a prior history of domestic violence by the offender against the victim.

61 [1999] NSWSC 1085 at [84]–[85].

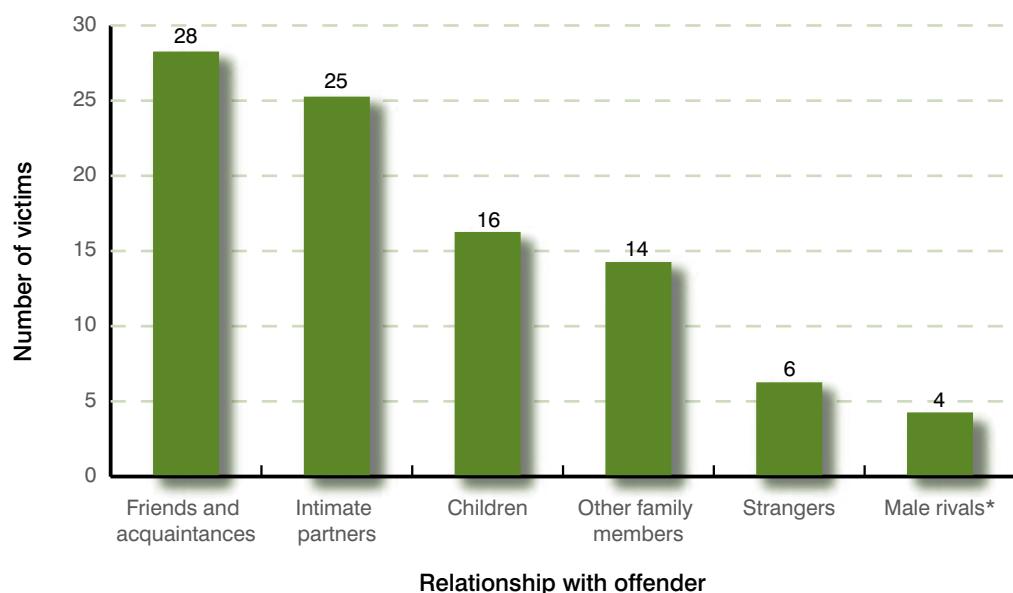
62 [2001] NSWSC 332.

63 [2001] NSWSC 332 at [34].

Offender and victim relationships

As *Figure 5* shows, in cases where s 23A is accepted, the most common relationship between offender and victim was friends and acquaintances, followed by intimate partners and parent-child relationships.

Figure 5 Successful partial defence cases — offender and victim relationships



* Cases where a male victim had formed a relationship with the offender's current or former intimate partner.

Section 23A and intimate partner homicide

There were 25 victims who were killed by an intimate partner, including current and former spouses, de facto partners, or sexual intimates. In these cases, women were more likely to be the victim of a male offender. There were 17 cases where the victim was female and the offender was male, and eight cases where the victim was male and the offender was female.

In considering the operation of partial defences in 2004, the Victorian Law Reform Commission cited evidence from the United Kingdom which suggested that diminished responsibility was used in the context of domestic violence “typically by men who have killed their partners or wives.”⁶⁴ The present study identified at least four cases where a male offender was sentenced under s 23A for killing a female partner in a

64 Victorian Law Reform Commission, op cit n 3.

relationship characterised by domestic violence.⁶⁵ All were heard under the previous diminished responsibility regime. There have been no cases under the new s 23A of male offenders killing partners in the context of domestic violence.⁶⁶ There were, however, at least four cases where a woman killed a male partner following prolonged domestic violence.⁶⁷ Two of these cases occurred under the new s 23A. In three of the four cases, the offender also successfully claimed provocation and was sentenced on the basis of both partial defences.

The Victorian Law Reform Commission also heard a suggestion from United Kingdom academic Dr Jeremy Horder that “diminished responsibility and provocation [are] being run together in cases where men have killed their wives at the end of a relationship.”⁶⁸

There was one case in the present study, heard over 15 years ago, where a man successfully claimed both provocation and diminished responsibility after killing his de facto wife. Following a jury trial, the sentencing judge imposed a s 558 bond (the previous version of a s 9 bond under the *Crimes (Sentencing Procedure Act)* 1999). Although the jury’s finding in relation to diminished responsibility was unclear, the judge sentenced the offender on the basis that the defence had been made out. He based his reasoning on evidence that the offender suffered temporary brain damage after his partner hit him with a hammer. The New South Wales Court of Criminal Appeal upheld a Crown appeal against sentence, imposing a two year non-parole period with a two year balance of term. Lee CJ at CL strongly criticised the finding of diminished responsibility:

“If I were deciding the matter … I would consider that, on the evidence, there are powerful reasons for concluding that any brain damage that did occur was so fleeting and ephemeral that realistically it played no part in the killing at all.”⁶⁹

The case was heard in 1991, prior to the introduction of substantial impairment. There have been no further cases of a male offender convicted of manslaughter for an intimate partner killing on the basis of both defences. Among those offenders who unsuccessfully raised a partial defence during the study period, there were six who raised both provocation and a defence under s 23A, but were convicted of murder. Two cases involved intimate partner killings by a man in circumstances of domestic violence.⁷⁰

65 *R v Kable* (unrep, 1/8/90, NSWSC), *R v Keceski* (unrep, 9/10/92, NSWSC), *R v Carlson* (unrep, 16/10/95, NSWSC), *R v Lever* [2001] NSWSC 1131.

66 In the case of *R v Connolly* [2001] NSWSC 787, the sentencing of the offender did not expressly indicate any circumstances of domestic violence. However the offender held a delusional belief that his wife was unfaithful.

67 *R v Spencer* (unrep, 18/12/92, NSWSC), *R v Gardner* (unrep, 27/3/92, NSWSC), *R v Ko* [2000] NSWSC 1130; *R v Mabbott* [2002] NSWSC 502.

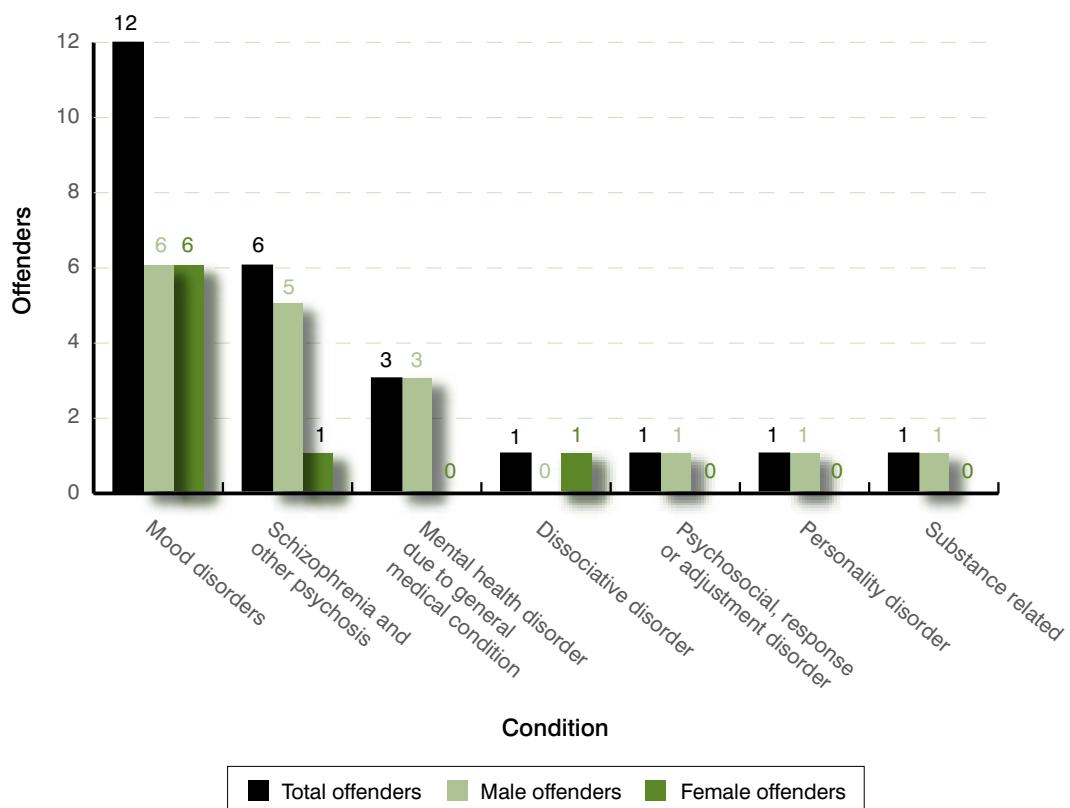
68 Victorian Law Reform Commission, op cit n 3, 240.

69 *R v Low* (1991) 57 A Crim R 8 at 18.

70 *R v Toki* [2003] NSWCCA 125; *R v M* (unrep, 28/3/95, NSWCCA).

It has also been suggested that male offenders raise depression (a mood disorder) as a s 23A defence to killing their intimate partner. As *Figure 6* shows, mood disorders were the most common condition accepted in successful s 23A defences for intimate partner killings. The prevalence of mood disorders was evenly distributed between male and female offenders.

Figure 6 Successful partial defence cases — Mental health conditions of offenders in intimate partner killings

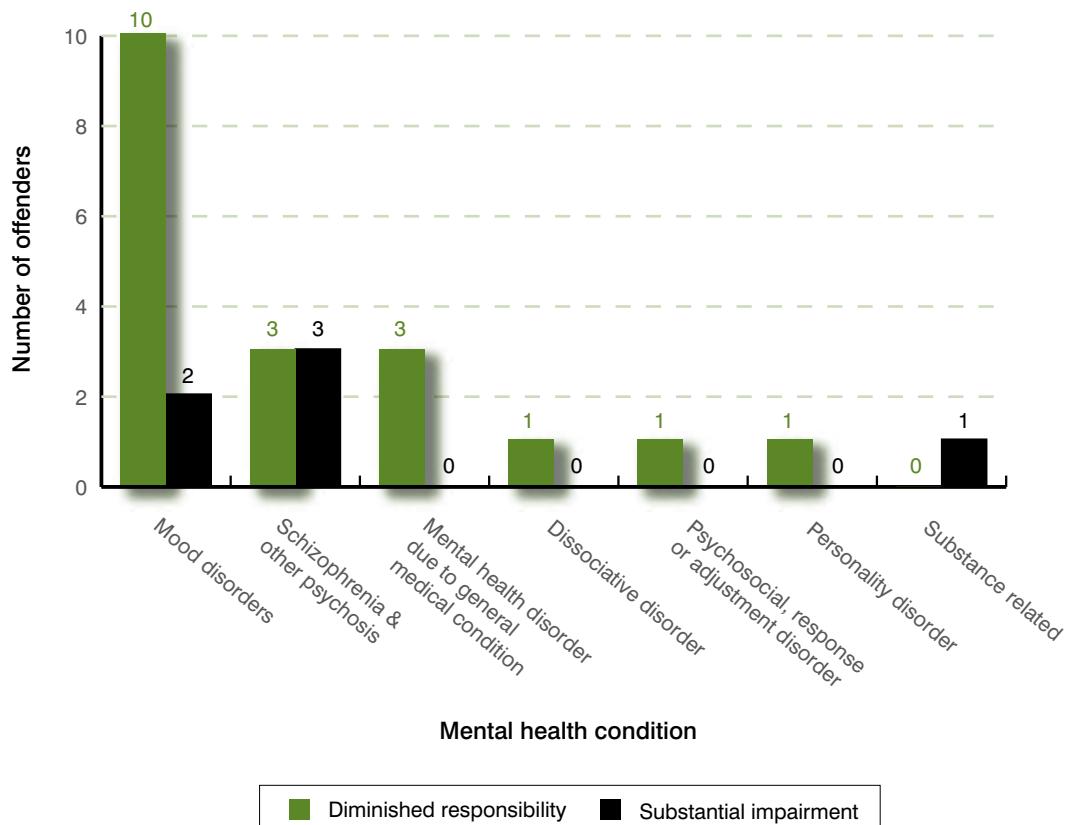


As suggested above, and depicted in *Figure 7*, the new test of substantial impairment has resulted in a different range of conditions successfully claimed by offenders under s 23A. Since the 1998 reforms, only two offenders have successfully relied on mood disorders following an intimate partner killing. One of the offenders was female. The male offender received a s 558 bond, indicating the strong subjective circumstances of the case.

Since 1998, there have been a total of six cases where an offender successfully raised substantial impairment after killing an intimate partner. All were pleas of guilty to manslaughter accepted by the Crown. In two cases, women claimed the defence after killing abusive partners.⁷¹

71 *R v Ko* [2000] NSWSC 1130; *R v Mabbott* [2002] NSWSC 502.

Figure 7 Mental health conditions of intimate partner offenders successfully claiming diminished responsibility and substantial impairment



The remaining four intimate partner cases, since 1998, where male offenders killed their female partners, generally involved unusual subjective features:

*Jans*⁷²

The offender's wife was suffering Huntington's Chorea, manifesting in dementia and verbal and physical abuse of the offender. The judge found that, as a result, the offender developed major depressive and dissociative disorders.

*Bateman*⁷³

The offender and victim had been married for over 50 years. Both were suffering poor health and financial difficulties that contributed to the offender experiencing psychotic depression.

72 *R v Jans* [2000] NSWSC 525.

73 *R v Bateman* [2000] NSWSC 867.

*Hawkins*⁷⁴

The offender strangled his wife after taking an over-dose of the anti-depressant Zoloft. The sentencing judge accepted that the offender was a “good husband” and the offence was “inconsistent with the loving, caring, relationship which existed between him and his wife and with their happy marriage of almost 50 years.”

*Connolly*⁷⁵

In this case, the subjective circumstances in relation to the severe objective gravity of the crime were more equivocal. The offender suffered from delusional jealousy that caused him to suspect his wife of infidelity, which extended to hiring a private investigator. He had experienced similar misconceptions with his first wife, leading to divorce. A defence psychiatrist considered that the offender may have had a defence of mental illness open to him, with the Crown accepting a plea of guilty to manslaughter based on s 23A. The court heard evidence from a psychologist that:

“the prisoner demonstrated … no insight and although not a danger to the general public, his delusional beliefs are well entrenched, and he will continue to be a significant danger to any woman with whom he forms an intimate relationship.”⁷⁶

Among those 42 offenders who unsuccessfully claimed diminished responsibility or substantial impairment and were convicted by the jury or judge alone of murder, at least seven had killed an intimate partner following a breakdown in the relationship.⁷⁷

Male rivalry

There were also four cases where a male offender killed a rival following the breakdown of an intimate relationship, two heard under the new s 23A test.⁷⁸ In one of the four cases, the offender was initially declared unfit to be tried, in another the offender was suffering from an earlier injury which had caused brain damage.

In *R v Murphy*,⁷⁹ the weight of the objective seriousness of the crime was more apparent. The offender was unable to cope with the ending of his marriage and had attempted self-harm on a number of occasions. He went to his estranged wife’s house armed with a knife and stabbed the victim while he was lying in bed.

74 *R v Hawkins* [2001] NSWSC 420.

75 *R v Connolly* [2001] NSWSC 787.

76 *R v Connolly* [2001] NSWSC 787 at [30].

77 *R v Dean* (unrep, 18/9/1998, NSWSC), *R v Majdalawi* (2000) 113 A Crim R 241, *R v Maxwell* [2001] NSWCCA 362, *R v N* (unrep, 20/3/98, NSWCCA), *R v Hurley* [2001] NSWSC 1007, *R v Matheson* [2001] NSWSC 332, *R v Toki* (2000) 116 A Crim R 536.

78 *R v Aliano* (unrep, 16/10/91, NSWSC), *R v Erdogan* (unrep, 6/8/99, NSWSC), *R v Santos* [2001] NSWSC 923, *R v Murphy* [2002] NSWSC 150.

79 *R v Murphy* [2002] NSWSC 150.

Section 23A and child homicide

Sixteen of the 93 victims were aged 12 years or younger (17%). There were ten female offenders compared with three male offenders. All the offenders were either the parent or step-parent of the victim.

The wide range of sentences imposed on this group of offenders is an indication of the array of objective and subjective considerations. Sentences ranged from a s 12 suspended sentence of two years to a non-parole period of eight years and six months, with a four-and-a-half year balance of term.



Provocation

Background and legislative reform

In *Chhay*, Gleeson CJ cited one rationale for the law of provocation as “a concession to human frailty.”⁸⁰ In the recent Privy Council decision of *Holley*, the dissenting judges described the law as:

“a humane concession to human infirmity and imperfection, acknowledgement ‘that by reason of the frailty of our nature we cannot always stand upright.’”⁸¹

The *Model Criminal Code Officers’ Committee Report* notes the tension between a recognition that “in some circumstances society should not expect persons to act dispassionately” and the law’s refusal to accept an entirely subjective test for provocation.⁸²

In its early history, provocation was strictly a common law defence. It developed in the 17th and 18th Centuries to reduce murder to manslaughter at a time when the penalty for the former was death. Reflecting the social order in England at the time, early cases of provocation were restricted to physical conduct such as an assault on the offender or witnessing a man in the act of adultery with the offender’s wife.⁸³

In New South Wales, the *Criminal Law Amendment Act* 1883 abolished the common law of provocation and enacted a statutory regime for the defence. The legislation reflected a 19th Century common law trend towards wider forms of provocative conduct.

“Criminal Law Amendment Act 1883

[Section 370 stated that:]

Where on the trial of a person for murder it appears that the act causing death was induced by the use of grossly insulting language or gestures on the part of the deceased the jury may consider the provocation offered as in the case of provocation by a blow ...”

80 *R v Chhay* (1994) 72 A Crim R 1 at 11.

81 *Attorney General for Jersey v Holley (Jersey)* [2005] UKPC 23 at [44].

82 op cit n 36 at 75.

83 *R v Mawgridge* (1707) Kel 119.

The Act expanded provocation to include “grossly insulting language or gestures” in addition to the previous requirement of physical conduct.

The provocation provision was re-enacted in substantially the same form under the *Crimes Act 1900*.

“23 [as introduced in 1900]

- (1) Where, on the trial of a person for murder, it appears that the act causing death was induced by the use of grossly insulting language, or gestures, on the part of the deceased, the jury may consider the provocation offered, as in the case of provocation by a blow.
- (2) Where, on any such trial, it appears that the act or omission causing death does not amount to murder, but does amount to manslaughter, the jury may acquit the accused of murder, and find him guilty of manslaughter, and he shall be liable to punishment accordingly:

Provided always that in no case shall the crime be reduced from murder to manslaughter, by reason of provocation, unless the jury find:

- (a) That such provocation was not intentionally caused by any word or act on the part of the accused;
- (b) That it was reasonably calculated to deprive an ordinary person of the power of self-control, and did in fact deprive the accused of such power, and
- (c) That the Act causing death was done suddenly, in the heat of passion caused by such provocation, without intent to take life.”

The statutory version of the defence of provocation remained largely unchanged for much of the 20th Century. Then, in 1982, the requirement that the act causing death be a “sudden” response was removed by the *Crimes (Homicide) Amendment Act 1982*.

This change was precipitated by the 1981 report of the New South Wales Taskforce on Domestic Violence.

In the context of women who kill abusive husbands after suffering prolonged periods of physical and psychological violence, the Taskforce found that both self-defence and provocation:

“place too much emphasis on behaviour immediately before the killing, and do not allow appropriate weight to be given to events occurring over a long period of time prior to the killing ...”⁸⁴

⁸⁴ *Report of the New South Wales Taskforce on Domestic Violence*, 1981, Attorney General’s Department of NSW, Sydney, 68.

Parliament acted on these recommendations by introducing the 1982 reforms. The element of suddenness was removed from the law of provocation in New South Wales:

“The new s 23 says that conduct may be provocative, in the legal sense, whether it occurred immediately before the act or omission causing death, or at any previous time. Under the new law, it matters not when the provocation occurred.”⁸⁵

Since 1982 there has been no requirement for a temporal nexus between the alleged provocative conduct and the act occasioning death.⁸⁶

This legislative amendment has had far-reaching effects on the operation of the defence. Courts in New South Wales have accepted provocation defences in cases where hours, days, months and even years have elapsed between the time of the provocative conduct on the part of the victim and the time of the act causing death.

The removal of the suddenness requirement paved the way for acceptance of cumulative provocation over a long period of time, often in cases of domestic or family violence against women.

There have been no further legislative amendments to s 23 since 1982. The current legislative form of the partial defence of provocation reads:

“23 Trial for murder — provocation

- (1) Where, on the trial of a person for murder, it appears that the act or omission causing death was an act done or omitted under provocation and, but for this subsection and the provocation, the jury would have found the accused guilty of murder, the jury shall acquit the accused of murder and find the accused guilty of manslaughter.
- (2) For the purposes of subsection (1), an act or omission causing death is an act done or omitted under provocation where:
 - (a) the act or omission is the result of a loss of self-control on the part of the accused that was induced by any conduct of the deceased (including grossly insulting words or gestures) towards or affecting the accused, and
 - (b) that conduct of the deceased was such as could have induced an ordinary person in the position of the accused to have so far lost self-control as to have formed an intent to kill, or to inflict grievous bodily harm upon, the deceased,
 whether that conduct of the deceased occurred immediately before the act or omission causing death or at any previous time.

85 The Honourable F Walker MP, Attorney General, Second Reading Speech, Crimes (Homicide) Amendment Bill, *New South Wales Parliamentary Debates (Hansard)*, Legislative Assembly, 11 March 1982, 2482–2486.

86 Although lapse of time remains relevant to the consideration of whether, at the time of the offence, the offender was suffering from a loss of self-control: see *R v Chhay* (1994) 72 A Crim R 1.

- (3) For the purpose of determining whether an act or omission causing death was an act done or omitted under provocation as provided by subsection (2), there is no rule of law that provocation is negated if:
 - (a) there was not a reasonable proportion between the act or omission causing death and the conduct of the deceased that induced the act or omission,
 - (b) the act or omission causing death was not an act done or omitted suddenly, or
 - (c) the act or omission causing death was an act done or omitted with any intent to take life or inflict grievous bodily harm.
- (4) Where, on the trial of a person for murder, there is any evidence that the act causing death was an act done or omitted under provocation as provided by subsection (2), the onus is on the prosecution to prove beyond reasonable doubt that the act or omission causing death was not an act done or omitted under provocation.
- (5) This section does not exclude or limit any defence to a charge of murder.”

The current prerequisites

In *Heron v The Queen*,⁸⁷ the High Court considered the defence in the context of a bar room brawl. Callinan J identified eight prerequisites that must be satisfied in establishing a provocation defence:

“Section 23 requires the Crown to exclude or negate beyond reasonable doubt one or more of the matters to which the section refers.

1. The accused lost self-control.
2. The loss of self-control caused the act or omission causing the death.
3. The provocative conduct was the conduct of the victim.
4. The provocative conduct consisted of grossly insulting words or gestures (not, it may be observed, looks or expressions).
5. The provocative conduct was directed towards or affected the accused.
6. The provocative conduct could cause the formation of an intent to kill or to inflict grievous bodily harm.
7. The provocative conduct could have induced an ordinary person in the position of the accused to think and act as the accused did.
8. The provocative conduct was of such a kind as to cause the accused, not merely to lose some self-control, but to so far lose self-control as to form the requisite intent.”

This list remains the most current statement on the required elements of the defence in New South Wales.

87 (2003) 197 ALR 81 at [82].

Recent developments

Although the law on provocation in New South Wales is similar to the common law test which existed in Victoria, courts in New South Wales are limited to the statutory language of s 23. The primacy of the specific legislative terms was confirmed by the High Court in *Green v The Queen* in relation to the ordinary person test in s 23(2)(b).⁸⁸ Nevertheless, there have been judicial decisions on the application and reach of provocation in New South Wales.

Hearsay provocation

According to *R v Quartly*⁸⁹ and *R v Davis*,⁹⁰ the provocative conduct must be seen or heard firsthand by the accused. It is not enough that the offender has witnessed the distress of another caused by the victim.

The rule against “hearsay provocation” was cast into doubt when the High Court refused Davis special leave to appeal. McHugh J commented that “[w]e think that there is a strong case for saying that *Quartly* was wrongly decided” on the point of the “hearsay provocation” rule.⁹¹ Section 23(2)(a) employs the phrase “any conduct of the deceased … towards or affecting the accused.”

In an unreported case decided two years before *Davis*, the offender was told by a friend that, while the offender had been unconscious, another man had attempted sexual contact with the offender. The offender later confronted this other man and killed him. A jury found the offender not guilty of murder but guilty of manslaughter due to provocation.⁹²

Words alone

In *R v Lees*, Wood CJ at CL said:

“It is now accepted, it would seem, whether the law as to provocation is governed by the common law or by statute or code, that words, particularly those of ‘an appropriately violent character’ can qualify as provocation in law.”⁹³

His Honour held that the words in parentheses in s 23(2)(a) — “including grossly insulting words or gestures” — did not limit the range of other verbal conduct that might raise the defence:

“Other kinds of words may qualify as provocative conduct, such as words of threatened violence, blackmail, extortion and so on. They are equally capable

88 (1997) 191 CLR 334 at 339–340 (Brennan J), 355–356 (Toohey J), 368 (McHugh J), 382 (Gummow J), 410 (Kirby J).

89 (1986) 22 A Crim R 252.

90 (1998) 100 A Crim R 573.

91 Transcript of proceedings, *Davis v The Queen* (High Court, McHugh J, 20 November 1998).

92 *R v Richards* (unrep, 30/8/96, NSWSC) per Sully J.

93 [1999] NSWCCA 301 at [30].

of provoking strong feelings, and they may or may not be accompanied by physical acts.”⁹⁴

However, Wood CJ at CL stressed the high threshold which would be required to satisfy the ordinary person test:

“[Words] do, however, need to be of a sufficient[ly] violent, offensive, or otherwise aggravating character ... Mere words of abuse or insult would not normally qualify.”⁹⁵

Cumulative conduct

A reform which is commonly expressed to avail women offenders in situations of domestic violence was originally formulated in *R v Moffa*, where the offender killed his wife following her confession of infidelity and refusal of any further sexual relationship with him. The majority of the High Court accepted that he was provoked. Although in dissent, Gibbs J summarised the view of the court that it is necessary to view the provocative conduct in its totality and not as discrete incidents:

“In any case, in deciding whether there is sufficient evidence of provocation, it is necessary to have regard to the whole of the [victim’s] conduct at the relevant time, for acts and words which considered separately could not amount to provocation may *in combination, or cumulatively*, be enough to cause a reasonable person to lose his self-control and resort to the kind of violence that caused the death.”⁹⁶ (emphasis added)

Following the legislative reform which removed the suddenness requirement in 1982, courts began to accept that provocative conduct can develop over a long period of time in cases of sexual abuse or domestic violence perpetrated by male offenders against women.

In *R v Chhay*, the New South Wales Court of Criminal Appeal relied on the removal of the “suddenness” requirement to find that the offender had killed her husband after a lengthy period of abuse. Gleeson CJ said:

“Times are changing, and people are becoming more aware that a loss of self-control can develop even after a lengthy period of abuse, and without the necessity for a specific triggering incident.”⁹⁷

The Ordinary Person test

In determining whether the conduct could have induced “an ordinary person in the position of the accused” to lose self-control, only the personal features of youth and immaturity can be taken into account.

94 [1999] NSWCCA 301 at [37].

95 [1999] NSWCCA 301.

96 *Moffa v The Queen* (1977) 138 CLR 601 at 615.

97 *R v Chhay* (1994) 72 A Crim R 1 at 22.

In *Stingel v The Queen* the High Court put it in these terms:

“On balance, it seems to us that the preferable approach is to attribute the age of the accused to the ordinary person of the objective test, at least in any case where it may be open to the jury to take the view that the accused is immature by reason of youthfulness.”⁹⁸

Other features such as sexual preference, ethnicity, religious background or physical disability are relevant to the assessment of the gravity of the conduct said to constitute provocation and whether the offender actually lost control, but these attributes are *not* to be imputed to the ordinary person.⁹⁹ The High Court refused special leave to appeal in *Mankotia v The Queen* where the applicant sought to import ethnic and cultural background into the ordinary person test.¹⁰⁰

In the earlier appeal to the New South Wales Court of Criminal Appeal, Smart J acknowledged the difficulty of juries in comprehending and applying the ordinary person test:

“In practice the gravity of [the] provocation/self-control distinction has proved hard to explain to a jury in terms which are intelligible to them...

Juries struggle with the distinction and find it hard to grasp. Many do not do so. The directions on provocation and the distinction frequently lead to a series of questions indicating that these issues are causing difficulty, prolonged deliberation by juries and, not infrequently, to juries being unable to agree whether the accused is guilty of murder or manslaughter.”¹⁰¹

But the Privy Council in *Holley*, in the course of effectively overruling the House of Lords decision in *Smith*, described the difficulties faced by juries in considering the ordinary person test as exaggerated — “the question is largely one of presentation.”¹⁰²

There does not need to be proportionality between the provocative conduct and the response of the offender, only that the provocative conduct could have caused a loss of self-control. Section 23(3)(a) makes clear that provocation does not require “a reasonable proportion between the act or omission causing death and the conduct of the deceased that induced the act or omission.”

98 (1990) 171 CLR 312 at 331.

99 *Stingel; Baraghith v The Queen* (1991) 54 A Crim R 240 (special leave to appeal refused by the High Court).

100 Transcript of proceedings, *Mankotia v The Queen* (High Court, Gleeson CJ and Callinan J, 20 November 2001).

101 *R v Mankotia* (2001) 120 A Crim R 492 at [18]–[19].

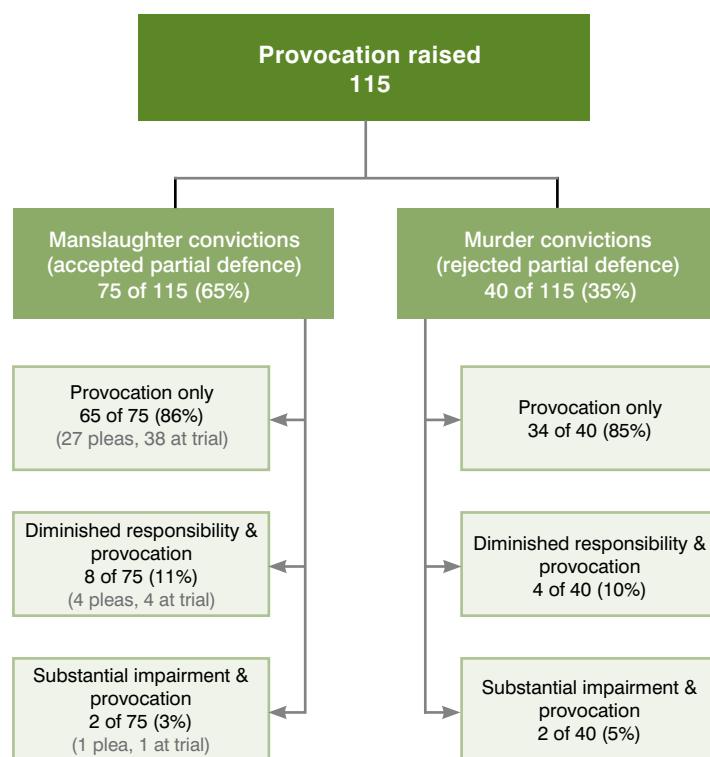
102 *Attorney General for Jersey v Holley (Jersey)* [2005] UKPC 23 at [26].

This approach was examined by the High Court in *Green*¹⁰³ and by the New South Wales Court of Criminal Appeal in *R v Khalouf* and *R v Disano*.¹⁰⁴ There is also no requirement that the manner of killing would be that of an ordinary person.¹⁰⁵

Overview

Between 1 January 1990 and 21 September 2004, 75 offenders were convicted of manslaughter on the basis of the partial defence of provocation. This figure includes ten offenders convicted and sentenced on the basis of both provocation and diminished responsibility/substantial impairment. During this time, 40 offenders unsuccessfully raised provocation at trial and were subsequently convicted of murder. *Figure 8* illustrates the breakdown of provocation cases.

Figure 8 Offenders raising provocation, 1 January 1990–21 September 2004



¹⁰³ (1997) 191 CLR 334 at 378 per Gummow J.

¹⁰⁴ *R v Khalouf* [2005] NSWCCA 395 at [77]–[79], *R v Disano* [2006] NSWCA 125.

¹⁰⁵ *R v Jamieson* (unrep, 3/10/86, NSWCCA) per Street CJ, Slattery CJ at CL and Lee J.

A large proportion of the 115 provocation cases did not have a plea accepted by the Crown and, instead, went to trial:

- 32 offenders (28%) had a plea of guilty to manslaughter accepted by the Crown.
- 83 offenders (72%) raised provocation at trial (including two judge-alone trials).

Out of the 81 jury trials, 41 offenders succeeded in raising the defence and were convicted of manslaughter (51%).

The overall success rate for provocation saw the partial defence succeed in 75 out of the 115 cases in which it was raised (65%):

- 41 offenders were convicted of manslaughter following a jury trial.
- Two offenders were convicted of manslaughter following a judge-alone trial.
- 30 offenders had a plea to manslaughter accepted by the Crown.
- Two offenders entered a plea of guilty having been indicted for manslaughter only.¹⁰⁶

The 75 offenders who successfully raised provocation killed 76 victims. There was a single case in which an offender killed two victims.

Both offenders and victims were far more likely to be men, in higher proportions than under diminished responsibility and substantial impairment. Fifty-eight offenders and 67 victims were men.

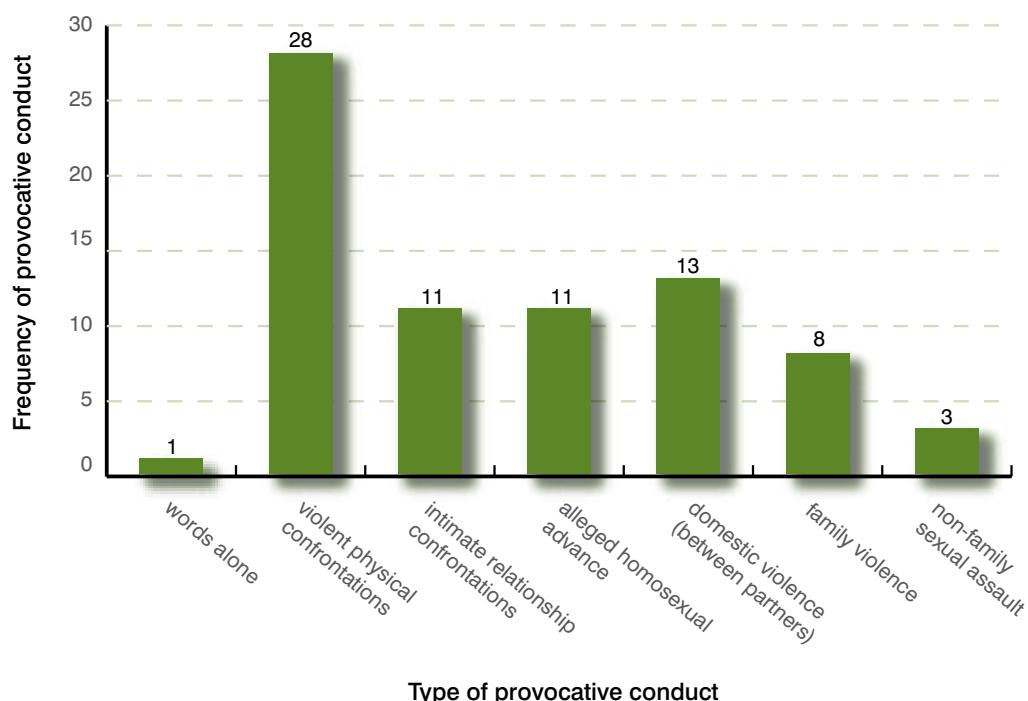
Provocative conduct

As depicted in *Figure 9*, among those offenders who successfully raised the defence, the conduct claimed to have provoked them to lose self-control fell into seven broad categories:

1. Words alone.
2. Violent physical confrontations.
3. Intimate relationship confrontations.
4. Alleged homosexual advance.
5. Domestic violence (between partners).
6. Family violence.
7. Non-family sexual assault.

¹⁰⁶ *R v Godwin* (unrep, 22/8/91, NSWSC) and *R v Welsh* (unrep, 7/5/99, NSWDC).

Figure 9 Accepted provocation cases — Types and frequency of provocative conduct



Words alone (one case)

Only one out of 75 offenders successfully relied on provocative conduct involving words alone. The scarcity of this form of conduct in raising provocation is unsurprising, considering the requirement of satisfying the ordinary person test in s 23(2)(b) and statements of Wood CJ at CL in *R v Lees* that “words need to be of a sufficient violent, offensive or otherwise aggravating character to be *capable* of satisfying” the ordinary person test.¹⁰⁷

The single case of words alone successfully raising the defence of provocation was *R v Alexander*.¹⁰⁸ In this case, the wife of the offender had “taunted the prisoner with threats to take the three children of his present marriage away from him, suggested that his only solution to the situation was to shoot her, and accused him of being gutless.” Hunt CJ at CL found that the “gutless” taunt, combined with the culmination of ten years of “extraordinary conduct” by the victim towards two children from the offender’s first marriage, caused Alexander to lose control. Hunt CJ at CL found that “the conduct

107 *R v Lees* [1999] NSWCCA 301 at [37].

108 (1995) 78 A Crim R 141 at 142.

of the prisoner's wife towards and affecting him amounted to very extreme and grave provocation."

Even in this case, it appears that the verbal taunt amounted to provocation only when combined with the victim's history of conduct towards the offender's children.

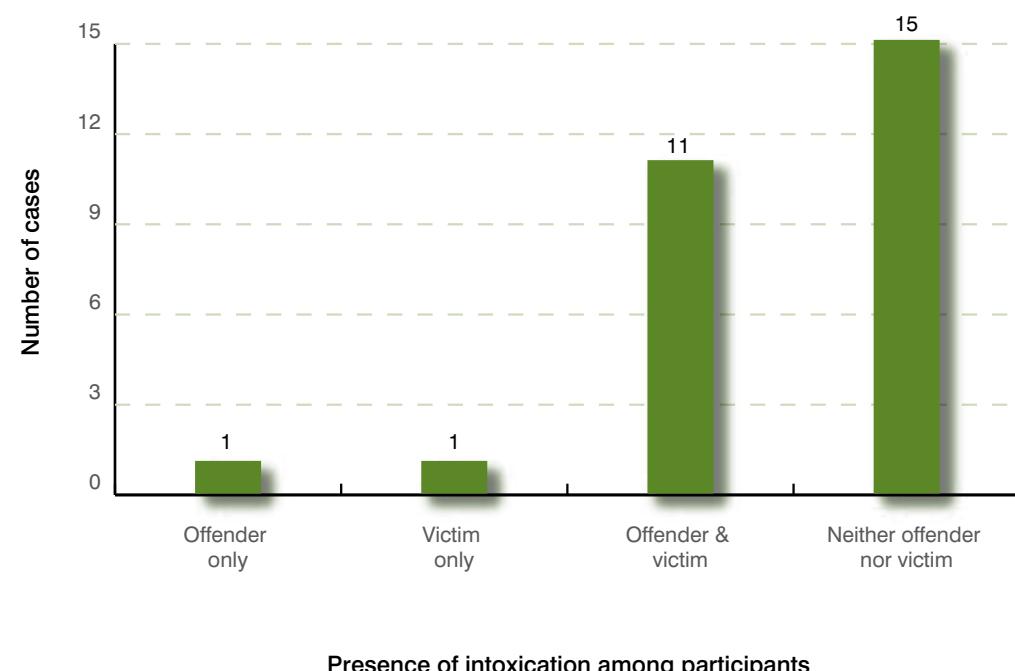
Violent physical confrontations (28 cases)

This category includes cases where the provocative conduct arose from a violent argument between the offender and the victim. It does not include cases where the provocative conduct stemmed from an intimate relationship or domestic violence (these are dealt with separately). Violent physical confrontation was the most common category of provocative conduct that offenders successfully claimed, appearing in over one-third of cases.

The offenders and victims were overwhelmingly male. There was one case of a female offender and male victim, one case of a male offender and female victim, and one case where both offender and victim were female.

As *Figure 10* shows, a second common feature was the prevalence of intoxication among either the offender, the victim, or both.

Figure 10 Accepted provocation cases — Intoxication in violent confrontation provocation



Alcohol and/or drugs were consumed by either or both the offender and victim in 46% of the violent confrontation provocation cases.

The fact that the accused was intoxicated cannot be considered in deciding whether the ordinary person in the position of the accused could have lost self-control. In addition to the High Court's approach to the ordinary person in *Stingel*, in *R v Katarzynski* Howie J explained the relevance of the accused's intoxication to provocation in the following way:¹⁰⁹

“The accused’s state of intoxication must be taken into account when considering whether the accused was provoked by the acts of the deceased and the effect of the provocation upon him; [but it] must not be taken into account when considering the possible effect of the provocative conduct, as perceived by the accused, on an ordinary person.”

This direction appears in the Commission’s *Criminal Trial Courts Bench Book*.¹¹⁰

Part 11A of the *Crimes Act* was introduced in 1996 to deal with crimes involving intoxication. Sections 428B and 428E of the *Crimes Act* 1900 provide that self-induced intoxication may be taken into account in determining whether a defendant is guilty of murder, for the purposes of determining whether the accused formed the specific intent to kill or inflict grievous bodily harm. However, it may *not* be considered in assessing manslaughter. Section 428F provides that, where it is necessary to compare the conduct of the defendant to a reasonable person, the reasonable person is taken to be not intoxicated. However, in many cases, it could be argued intoxication plays such an intrinsic role in the factual context that it would be difficult for a jury to completely remove this factor from their consideration.

In *Dimond*, for example, the offender had passed out following a night of drinking. In an altercation with a group of men later in the evening, the offender lost his shirt and hat. He returned with a knife and stabbed one of the men. In sentencing the offender for manslaughter on the basis of provocation, Badgery-Parker AJ acknowledged that intoxication was “clearly a significant factor in producing his criminal conduct.”¹¹¹

Intimate relationship provocation (11 cases)

In the early categories accepted as provocative conduct in the 17th and 18th centuries, the hearing of an admission of adultery could not constitute provocation. Provocation was restricted to physical conduct such as an assault, or witnessing an act of adultery by an intimate partner.

109 [2002] NSWSC 613 at [26].

110 *Criminal Trial Courts Bench Book*, (1990), Judicial Commission of NSW, Sydney, at [5–1220] at: www.judcom.nsw.gov.au <accessed 14 June 2006>.

111 *R v Dimond* (2000) 118 A Crim R 188 at [33].

With the acceptance that words alone may constitute provocation, some Australian courts have accepted a confession of adultery as an issue of provocation which should be left to the jury. In *Moffa v The Queen*, the offender killed his estranged wife after she said she was ending the relationship and admitted to extra-marital affairs. Barwick CJ, in the majority, held that the cumulative conduct of the victim was properly left to the jury as provocation.¹¹²

In the recent Victorian case of *R v Ramage*,¹¹³ the victim told her estranged husband that sex with him repulsed her and that she had formed a better relationship. He killed her and successfully claimed provocation. The case sparked community anger and a reference from the Victorian Government to the Victorian Law Reform Commission to review the law of defences to homicide. Following the Victorian Law Reform Commission report,¹¹⁴ the Victorian Government abolished provocation in that State.

A second line of authority suggests that a confession of adultery or ending an intimate relationship will never amount to provocation. In dissent in *Moffa*, Gibbs J held that “a confession of adultery — even a sudden confession — without more is never sufficient to reduce to manslaughter an offence which would otherwise be murder.”¹¹⁵

Other Australian courts have continued to doubt whether an assertion that a relationship is over or a new relationship has been formed can ever amount to provocation. In *Arrowsmith v The Queen*, the Federal Court unanimously held:

“The ‘ordinary person’ test provides an objective and uniform standard of the extent to which the law will countenance that the killing of another person can be mitigated from murder to manslaughter through provocation.

In Australia in the 1990s it would be entirely out of line with that standard if the mere telling of a partner that a relationship is over, whether accompanied or not by an admission of infidelity, were taken as potentially sufficient to induce an ordinary person to so lose control as to deliberately or recklessly inflict fatal violence on the other.”¹¹⁶

In *Blake*, the Queensland Court of Appeal similarly dismissed a conviction appeal where the victim had told her husband that she wanted to end the relationship and had been having an affair. The court held:

“No doubt what she said cannot be viewed in isolation from the events from the time the appellant woke to find that the deceased had not returned or from the context of their relationship up to that time which appeared to the appellant to

¹¹² *Moffa v The Queen* (1977) 138 CLR 601 at 606.

¹¹³ [2004] VSC 508.

¹¹⁴ op cit n 3.

¹¹⁵ *Moffa v The Queen* (1977) 138 CLR 601 at 616 per Gibbs J, citing *Holmes v Director of Public Prosecutions* (1946) AC 588.

¹¹⁶ *Arrowsmith v The Queen* (1994) 55 FCR 130 at [14]–[15].

be a good one. But even in that context the speaking of those words could not have been of such a nature as to be sufficient to provoke an ordinary person to lose his self-control to such an extent as to intentionally kill.”¹¹⁷

In the present study, there were 11 cases where provocation was successfully claimed in a factual context of infidelity or the breakdown of an intimate relationship. Four were jury verdicts and seven were guilty pleas accepted by the Crown. In all cases the offender was male.

In seven of the 11 cases, the victim was a third person thought by the offender to have been involved with an intimate partner. All of these victims were men. In two of the 11 cases, the victim was the offender’s wife, in another two cases the victim was the homosexual partner of the offender.

There was one case which could be said to square with the lower threshold of hearing of adultery or a new relationship accepted in *Moffa and Ramage*. In *R v Panozzo* the offender shot his estranged wife after he found a letter written by her to a new lover.¹¹⁸ *Panzozzo*, a jury trial, was heard in 1990. *R v Pavia*, decided in 1993, involved a violent sexual relationship between the offender and another man.¹¹⁹ The jury returned a verdict of guilty to manslaughter based on provocation, even though the offender denied any provocative conduct took place. For another case in which a low level of provocative conduct was accepted by the jury in circumstances where a male offender killed a female partner, see *R v Williams*¹²⁰ under “Domestic Violence,” below.

Two other cases that involved verbal assertions of infidelity or the ending of a relationship occurred in the context of unusual factual circumstances.¹²¹

Of the seven other cases where the provocative conduct arose from an intimate relationship, three offenders successfully claimed the defence after witnessing a sexual act between their intimate partner and a third person.¹²² In *R v Khan*, the offender waited to surprise his wife with her lover. In upholding a Crown appeal against sentence, the New South Wales Court of Criminal Appeal found that “the respondent had far more time than often is the case in tragedies of this type within which to prepare himself to cope with the provocation without resorting to the taking of human life.”¹²³ Four offenders claimed provocation in circumstances involving a violent altercation with a victim who was currently, or had been involved with, their intimate partner.¹²⁴

117 *The Queen v Blake* (unrep, 31/3/94, QCA) at [5].

118 *R v Panozzo* (unrep, 18/10/90, NSWSC).

119 *R v Pavia* (unrep, 9/12/94, NSWCCA).

120 [2004] NSWSC 189.

121 *R v Brophy* (unrep, 22/3/91, NSWSC) *R v Prasad* (unrep, 20/11/92, NSWSC).

122 *R v Khan* (1996) 86 A Crim R 552; *R v Butcher* [2000] NSWSC 92; *R v Lynch* [2002] NSWSC 1140.

123 *R v Khan* (1996) 86 A Crim R 552 at 557.

124 *R v Vimpany* (unrep, 27/7/90, NSWSC); *R v Killiby* (unrep, 13/11/98, NSWSC); *R v Shillingsworth* (unrep, 13/8/98, NSWCCA); *R v Popovic* [2001] NSWSC 1118.

Alleged homosexual advance (11 cases)

The term “homosexual advance defence” refers to “cases in which an accused person alleges that he or she acted either in self-defence or under provocation in response to a homosexual advance made by another person.”¹²⁵

In *Green v The Queen*, Kirby J argued that:

“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 to inflict grievous bodily harm.”¹²⁶

In that case, Kirby J characterised the situation as “a ‘gentle’, ‘non-aggressive’ although persistent sexual advance.” In contrast, McHugh J described the alleged advance as one which, “although initiated in a non-violent manner, soon became quite rough and aggressive.”¹²⁷

In 1998, the *Final Report* of the New South Wales Government’s Working Party on the Homosexual Advance Defence recommended:

“the exclusion of a non-violent homosexual advance from forming the basis of the defence of provocation, by way of legislative reform.”¹²⁸

There are recorded cases prior to this study where the offender has framed his provocation defence around a non-violent homosexual advance, but the jury has rejected this as provocation.¹²⁹

In the present study there were 11 offenders (including Green) who successfully relied on provocation in a factual context where an alleged homosexual advance was in issue.

However, as depicted in *Table 3*, five of the 11 cases involved the jury or judge as fact finder accepting evidence that the provocative conduct included a sexual assault.

125 *Homosexual Advance Defence: Final Report of the Working Party*, 1998, Criminal Law Review Division, Attorney General’s Department of NSW, Sydney, at [2.1].

126 *Green v The Queen* (1997) 191 CLR 334; 148 ALR 659 at 714.

127 *Green v The Queen* (1997) 191 CLR 334; 148 ALR 659 at 719 per Kirby J and 683 per McHugh J.

128 *Homosexual Advance Defence: Final Report*, op cit n 125, at [6.7]. See also I Potas, “Sexuality-related hate crime” (2004) 16(3) *Judicial Officers’ Bulletin* 18. In 2004, the Australian Capital Territory amended its statutory test for provocation to expressly provide that a non-violent sexual advance towards the accused, by itself, cannot constitute provocative conduct: s 13(3) *Crimes Act* 1900 (ACT).

129 *R v Wait* (unrep, 23/9/83, NSWCCA).

Table 3 Evidence of provocation amounting to sexual assault

Case	Conduct
Chaouk ¹³⁰	Evidence that the victim had raped the offender at the age of 16. Seven years later, the offender sought out the victim and killed him.
Jacky ¹³¹	Offender alleged he woke to find the victim performing oral sex on him.
Diamond ¹³²	Some evidence that the victim had raped the offender four months prior to the killing.
K ¹³³	Victim had raped the offender one week before the killing.
Johnson ¹³⁴	Victim had sexually abused the offender at age 13.

As noted by the New South Wales Working Party on the Homosexual Advance Defence, caution is required in assessing factual circumstances:

“it should be remembered that in [homosexual advance defence] cases the deceased is often the only person present during the killing, and so no contradictory version of events will be available.”¹³⁵

In a further three cases there was some evidence of prior aggressive contact. In *Richards*,¹³⁶ the victim had tried to engage in sexual contact with the offender while the offender was unconscious. In *Marlow*, there was evidence of a sexual assault on the offender by the victim 11 years previously, with further evidence of consensual but “unenthusiastic” sexual contact in the months prior to the killing.¹³⁷ In the case of *Ladd*,¹³⁸ the offender and his nine year old son had been living with the victim. The offender came home to find the victim in bed with his son. Ladd killed the victim. There was no evidence that an assault on his son had occurred.¹³⁹

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. In *T*¹⁴⁰

130 *R v Chaouk* (unrep, 17/8/93, NSWSC) per Gleeson CJ.

131 *R v Jacky* (unrep, 10/6/93, NSWSC).

132 *R v Diamond* (unrep, 15/4/94, NSWSC).

133 *R v K* [1999] NSWSC 933.

134 *R v Johnson* [2003] NSWCCA 129.

135 *Homosexual Advance Defence: Final Report of the Working Party* (1998), op cit n 125, at [4.15].

136 *R v Richards* (unrep, 30/8/96, NSWSC).

137 *R v Marlow* [2003] NSWSC 1130.

138 *R v Ladd* [2001] NSWSC 1055.

139 *R v Ladd* [2001] NSWSC 1055.

140 (unrep, 14/7/94, NSWSC).

the victim had grabbed the offender on the buttocks. The offender responded by bashing and then stabbing the victim. In *Dunn*,¹⁴¹ the offender claimed he had been cycling with a friend when a third man approached, allegedly dressed as a woman and masturbating. Although the offender claimed the victim had acted aggressively, there was evidence from his friend that the offender had bashed the victim for around 40 minutes.

T and *Dunn* occurred in 1994 and 1995, before the High Court's focus on the issue of a homosexual advance defence in *Green*.

In the more recent case of *R v Hodge*,¹⁴² the jury rejected a non-violent homosexual advance as provocation and found the offender guilty of murder. The offender had fallen asleep at the victim's house; when the offender awoke he found the victim touching the offender's genitals. In concurring with the finding of the jury, Dunford J said:

“I am satisfied that the prisoner did form the intention to at least cause the deceased grievous bodily harm, and that he did so when he lost his self control as a result of provocation by the deceased in the form of an unwanted sexual advance, and at a time when he was affected to a degree by alcohol and possibly by drugs, but that the approach by the deceased was not such as would have caused an ordinary person of the prisoner’s sex, age and maturity, unaffected by alcohol or drugs, to have so lost his self-control to that degree.”¹⁴³

Domestic violence between intimate partners (13 cases)

There were 13 cases where an offender successfully relied upon provocation in the context of violence committed by the victim against the offender in a domestic setting.

In ten of these cases, the offender was a woman who killed her husband or de facto following a history of physical abuse. Five of these offenders were sentenced before the judgment in *R v Chhay* and five after the judgment, indicating that there has been no increase in the number of women successfully claiming the defence following the recognition of domestic violence as “cumulative provocation.”

These cases emphasise the serious effects of domestic violence on mental health. Across the 149 offenders who successfully claimed provocation or diminished responsibility/substantial impairment, only ten relied on both defences. Three of those ten were women who killed their partners following a history of domestic violence.

There were also three cases in which a man killed his de facto wife. In each case, the offender claimed the victim hit him during an argument. Two of these cases occurred

141 (unrep, 28/10/97, NSWCCA).

142 [2000] NSWSC 897.

143 *R v Hodge* [2000] NSWSC 897 at [13].

in 1991. In the more recent case of *Williams*, the evidence of provocative conduct was apparently minor — the offender claimed that a threat by the victim to smash his car windows and an alleged assault caused him to beat her with a dumb-bell and a weight-lifting bar. The jury found the offender guilty of manslaughter, which — according to the sentencing judge's findings — was based on provocation. At sentence, O'Keefe J commented that "the provocation asserted by the prisoner was not great" and the "manslaughter of [the victim] by the prisoner is at the high, indeed very high, end of the spectrum of culpability."¹⁴⁴ The non-parole period imposed on Williams (ten years and six months) was the highest among all provocation cases, and his full term (14 years) the equal second-highest.

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. According to the Australian Institute of Criminology, intimate partner killings made up over 25% of all homicides in Australia between 1989 and 1996. In almost four out of five cases (80%) the offender was male and the victim female.¹⁴⁵ Recent media reports have suggested that the frequency of domestic violence homicides is rising.¹⁴⁶

Very few of these usually male offenders are able to successfully claim provocation — this study found only one in the last 13 years.¹⁴⁷ Four other cases occurred between 1990 and 1992.¹⁴⁸ But these findings must be read against the recognition that domestic violence is present in a wide range of offences against women, of which homicide is the most extreme. Many crimes against women, such as assault, are often never reported.¹⁴⁹

Family violence (eight cases)

There were eight cases in which the offender successfully claimed provocation in a factual context of family violence not involving an intimate partner.

Five cases involved abuse by an older relative against the offender. One case involved inappropriate sexual behaviour towards the offender's young daughter. In another case, the victim was physically violent towards his wife, the offender's daughter.

144 *R v Williams* [2004] NSWSC 189 at [42].

145 C Carcach and M James, "Homicide Between Intimate Partners in Australia," 1998, 90 *Trends and Issues in Crime and Criminal Justice* 1: www.aic.gov.au/publications/tandi/ti90.pdf <accessed 18 June 2006>.

146 Ruth Pollard, "Call for action as domestic killings soar", *The Sydney Morning Herald*, 27 May 2006.

147 *R v Williams* [2004] NSWSC 189.

148 *R v Panozzo* (unrep, 18/10/90, NSWSC), *R v Prasad* (unrep, 20/11/1992, NSWSC) (referred to under the heading "Intimate Relationship Provocation", above), *R v Godwin* (unrep, 22/08/1991, NSWSC) and *R v Low* (1991) 57 A Crim R 8.

149 See, for example, Australian Bureau of Statistics, *Crime and Safety 2005*, 2006, Canberra, 14; Australian Bureau of Statistics, *Women's Safety in Australia*, 1996, Canberra, 7.

In *R v Gilham*,¹⁵⁰ the Crown accepted a plea on the basis that the offender claimed he arrived home to find his brother standing over the burned bodies of his dead parents. He killed his brother and successfully claimed provocation. However, an inquest in 2000 recommended new charges against a “known person” for the killing of the parents. In February 2006, Gilham was charged with the murder of his parents.¹⁵¹

Non-Family sexual assault (three cases)

There were three cases where an offender killed following an incident of sexual assault by a victim who was not a family member. In two cases, the victim was an acquaintance whom the offender believed had assaulted his young daughter. In one case, the offender was a woman who had been sexually assaulted by the victim.

Provocation and diminished responsibility/substantial impairment

Provocation and diminished responsibility/substantial impairment are generally considered separate and distinct defences. However, in *Holley*, the Privy Council suggested that both provocation and diminished responsibility will be particularly relevant to women provoked by domestic violence:

“the defendant will in principle have available to her the defence of diminished responsibility. The potential availability of this defence in these cases underlies the importance of not viewing the defence of provocation in isolation from the defence of diminished responsibility. These two defences must be read together to obtain an overall, balanced view of the law in this field.”¹⁵²

In the present study, there were ten cases where the offender successfully established and was sentenced on the basis of both provocation and diminished responsibility/substantial impairment.¹⁵³ There were another six offenders who unsuccessfully raised both partial defences and were convicted of murder.

As held by the full bench of the New South Wales Court of Criminal Appeal in *R v Isaacs*,¹⁵⁴ trial judges should refrain from asking a jury the basis for a manslaughter verdict, save in exceptional cases. This approach was approved by the High Court in *Cheung v The Queen*.¹⁵⁵ The cases in the present study were identified on the basis of sentencing remarks which indicated the judge accepted that both partial defences had been successfully raised.

¹⁵⁰ *R v Gilham* (unrep, 7/4/95, NSWSC).

¹⁵¹ S Gibbs, ‘Son stabbed his parents, says Crown’, *The Sydney Morning Herald*, 8 April 2006.

¹⁵² *Attorney General for Jersey v Holley (Jersey)* [2005] UKPC 23 at [25].

¹⁵³ There were no cases involving the successful use of a second partial defence in conjunction with excessive self-defence.

¹⁵⁴ (1997) 41 NSWLR 374.

¹⁵⁵ *Cheung v The Queen* (2001) 209 CLR 1 at [18].

In cases where both partial defences are established, it has been suggested that the sentences imposed will generally be more lenient. In *R v Low* it was said by Lee CJ at CL that:

“Had the element of diminished responsibility not been present at all and had the matter gone forward on the footing that the verdict was a verdict of manslaughter on the ground of provocation, it would be my view that such a sentence would need to be greatly increased.”¹⁵⁶

This proposition was adopted in *R v Ko*¹⁵⁷ and *R v K*, where Hulme J said:

“I do regard both of those factors as arguing with significant weight for a sentence towards the lower end of the range.”¹⁵⁸

There were six male offenders and four female offenders who were convicted and sentenced on the basis of both provocation and diminished responsibility or substantial impairment. As stated above, three female offenders killed in response to domestic violence by the victim. A fourth female offender killed her son-in-law in circumstances where the victim had subjected his wife (the offender’s daughter) to prolonged abuse, as well as violence directed to the offender herself.

Four of the six male offenders who successfully raised both defences also killed after being abused by their victim.

¹⁵⁶ (1991) 57 A Crim R 8 at 19.

¹⁵⁷ *R v Ko* [2000] NSWSC 1130 at [4] per Kirby J.

¹⁵⁸ *R v K* [1999] NSWSC 933 at [121].



Excessive self-defence

Background

Since 22 February 2002, a legislative regime of excessive self-defence has operated in New South Wales.

Amended by the *Crimes Amendment (Self-defence) Act 2002*, the *Crimes Act* provides for both a full acquittal for self-defence and a verdict of manslaughter in cases of excessive self-defence.

“418 Self-defence — when available”

- (1) A person is not criminally responsible for an offence if the person carries out the conduct constituting the offence in self-defence.
- (2) A person carries out conduct in self-defence if and only if the person believes the conduct is necessary:
 - (a) to defend himself or herself or another person, or
 - (b) to prevent or terminate the unlawful deprivation of his or her liberty or the liberty of another person, or
 - (c) to protect property from unlawful taking, destruction, damage or interference, or
 - (d) to prevent criminal trespass to any land or premises or to remove a person committing any such criminal trespass,
and the conduct is a reasonable response in the circumstances as he or she perceives them.”

“420 Self-defence — not available if death inflicted to protect property or trespass to property”

This Division does not apply if the person uses force that involves the intentional or reckless infliction of death only:

- (a) to protect property, or
- (b) to prevent criminal trespass or to remove a person committing criminal trespass.”

“421 Self-defence — excessive force that inflicts death

- (1) This section applies if:
- (a) the person uses force that involves the infliction of death, and
 - (b) the conduct is not a reasonable response in the circumstances as he or she perceives them,
- but the person believes the conduct is necessary:
- (c) to defend himself or herself or another person, or
 - (d) to prevent or terminate the unlawful deprivation of his or her liberty or the liberty of another person.
- (2) The person is not criminally responsible for murder but, on a trial for murder, the person is to be found guilty of manslaughter if the person is otherwise criminally responsible for manslaughter.”¹⁵⁹

Common law

The partial defence of excessive self-defence had previously existed under common law in New South Wales. In its early form, excessive self-defence was based on principles outlined by the High Court in *Viro v The Queen*.¹⁶⁰ In *Zecevic v DPP (Vic)*¹⁶¹ the High Court removed the partial defence of excessive self-defence from the common law. Wilson, Dawson and Toohey JJ stated that:

“The question to be asked in the end is quite simple. It is whether the accused believed upon reasonable grounds that it was necessary in self-defence to do what he did. If he had that belief and there were reasonable grounds for it, or if the jury is left in reasonable doubt about the matter, then he is entitled to an acquittal ...

As we have expressed the law, the use of excessive force in the belief that it was necessary in self-defence will not automatically result in a verdict of manslaughter. If the jury concludes that there were no reasonable grounds for a belief that the degree of force used was necessary, the defence of self-defence will fail and the circumstances will fall to be considered by the jury without reference to that plea.”¹⁶²

159 *Crimes Amendment (Self-Defence) Act* 2002; commenced on 22 February 2002. Section 421(1)(a) initially required “force that involves the intentional or reckless infliction of death”. Under this anomaly, an intention to inflict grievous bodily harm would have been excluded from s 421. This was amended by *Crimes Legislation Amendment Act* 2002, commencing 13 January 2003, which removed “intentional or reckless”. The effect was that s 421 now covers any conduct which would otherwise amount to murder.

160 (1978) 141 CLR 88.

161 (1987) 162 CLR 645 at 664.

162 (1987) 162 CLR 645 at 661, 664.

As explained by the Attorney General, the introduction of the *Crimes Amendment (Self-defence) Act* was intended to reintroduce a partial defence of excessive self-defence similar to the common law position “as previously stated by the High Court in *Viro*.¹⁶³

In *Katarzynski*, the New South Wales Supreme Court summarised the operation of the new legislative elements of self-defence:

“The questions to be asked by the jury under s 418 are: (1) is there a reasonable possibility that the accused believed that his or her conduct was necessary in order to defend himself or herself; and, (2) if there is, is there also a reasonable possibility that what the accused did was a reasonable response to the circumstances as he or she perceived them.

The first issue is determined from a completely subjective point of view considering all the personal characteristics of the accused at the time he or she carried out the conduct. The second issue is determined by an entirely objective assessment of the proportionality of the accused’s response to the situation the accused subjectively believed he or she faced ...

... It will be a matter for the jury to decide what matters it should take into account when determining whether the response of the accused was reasonable in the circumstances in which he or she found himself or herself. The jury is not assessing the response of the ordinary or reasonable person but the response of the accused. In making that assessment it is obvious tha[t] some of the personal attributes of the accused will be relevant just as will be some of the surrounding physical circumstances in which the accused acted. So matters such as the age of the accused, his or her gender, or the state of his or her health may be regarded by the jury. Whether or not some particular personal characteristic of the accused is to be considered will depend largely upon the particular facts of the case.”¹⁶⁴

Excessive self-defence is entirely subjective. It operates where the response of the offender, although they believed it necessary, is not a reasonable response.

All that is required is that the offender believed that their response was necessary in order to defend themselves or to prevent unlawful deprivation of liberty.

Overview

Since the introduction of the new legislative regime in 2002, there have been only a small number of offenders who have raised excessive self-defence. From 2002 to 21 September 2004, seven offenders raised the partial defence. All succeeded and were convicted and sentenced for manslaughter.

¹⁶³ The Honourable Bob Debus MP, Attorney General, Second Reading Speech, Crimes Amendment (Self-Defence) Bill, *New South Wales Parliamentary Debates (Hansard)*, Legislative Assembly, 28 November 2001, 19093.

¹⁶⁴ *R v Katarzynski* [2002] NSWSC 613 at [22]–[25].

In *R v Vuni*, Hoeben J noted that “the statistical sample of sentences for the offence of manslaughter where excessive defence is involved is too small to be of any real practical value.”¹⁶⁵

For the purpose of increasing the sample of excessive self-defence cases, the study period was extended, for this partial defence alone, from 22 September 2004 to 29 June 2005. This yielded five additional cases where an offender successfully claimed excessive self-defence. There was one case where the offender’s attempt to claim excessive self-defence failed, among other failed defences, and the offender was convicted of murder.¹⁶⁶

Of the 12 offenders who successfully claimed excessive self-defence, five had a plea of manslaughter accepted by the Crown. Seven offenders entered not guilty pleas to murder and were subsequently found guilty of manslaughter following a trial by jury.

The high proportion of not guilty pleas suggests that defendants were initially aiming for a full acquittal based on self-defence, with excessive self-defence providing a fall-back position.

Circumstances in which excessive self-defence is successfully claimed

Domestic violence and battered woman syndrome

In *Osland*,¹⁶⁷ the High Court considered the relevance of abusive relationships to self-defence. The court rejected an argument that evidence of “battered woman syndrome” could found a discrete defence. However, Kirby J suggested areas where expert evidence of the effect of domestic violence would be relevant:

“it might be offered as relevant to questions such as (1) why a person subjected to prolonged and repeated abuse would remain in such a relationship; (2) the nature and extent of the violence that may exist in such a relationship before producing a response; (3) the accused’s ability, in such a relationship, to perceive danger from the abuser; and (4) whether, in the evidence, the particular accused believed on reasonable grounds that there was no other way to preserve herself or himself from death or grievous bodily harm than by resorting to the conduct giving rise to the charge.”¹⁶⁸

Two of the 12 offenders in the present study were women. Although both offenders killed in response to male violence, only *Scott*¹⁶⁹ involved issues of “battered woman syndrome.”

165 *R v Vuni* [2006] NSWCCA 171 at [31].

166 *R v Katarzynski* [2002] NSWSC 924.

167 *Osland v The Queen* (1998) 197 CLR 316.

168 *Osland v The Queen* (1998) 197 CLR 316 at 378.

169 *R v Scott* [2003] NSWSC 627.

However, in *Scott*, the court was “not satisfied on the probabilities that the offender was at the relevant time exhibiting the responses and features of battered woman syndrome.” On sentencing, Whealy J found that domestic violence “although undoubtedly it occurred from time to time, was not a normal part of their relationship.”¹⁷⁰

Intoxication and male violence

Similar to provocation, a large proportion of excessive self-defence cases occurred in circumstances of physical altercations between men, often involving alcohol.

Ten of the 12 offenders were men, as were all victims. In four of the ten cases involving men, either the offender or both men were intoxicated with alcohol. Three of the four cases were decided by juries.

In *Katarzynski*, in relation to intoxication and self-defence, Howie J directed the jury that it:

“must take into account the accused’s intoxication when considering whether he might have believed that it was necessary to act as he did in defence of himself and when considering the circumstances as he perceived them, but not when assessing whether his response to those circumstances was reasonable.”¹⁷¹

Part 11A directs that the reasonable person is not intoxicated. It does not clearly apply to s 418, which asks whether the actions of the accused were a reasonable response. However, Howie J held that:

“if the policy enunciated in Part 11A were not adopted in construing s 418, the result would be to create an illogical and unacceptable inconsistency in the criminal law of this State with regard to the relevance of intoxication to criminal responsibility.”¹⁷²

While reasonableness is a consideration in self-defence under s 418, there is no such element in excessive self-defence under s 421. Because it is entirely subjective, the accused’s state of intoxication can play a crucial role in their belief that their conduct was necessary.

Under Part 11A, intoxication is relevant in assessing the intention of an accused charged with murder and may result in a lesser verdict of manslaughter. However, excessive self-defence, with its bare requirement that the accused believed that the response was necessary, may be a less demanding avenue to reduce murder to manslaughter in some cases.

¹⁷⁰ *R v Scott* [2003] NSWSC 627 at [76].

¹⁷¹ *R v Katarzynski* [2002] NSWSC 613 at [28].

¹⁷² *R v Katarzynski* [2002] NSWSC 613 at [27].

Sentencing offenders convicted on partial defences

Manslaughter — a protean crime

A good starting point for this discussion is the statement by Brennan, Deane and Dawson JJ in *Wilson v The Queen* that “one principle which stands higher than all others in the criminal law is the sanctity of human life.”¹⁷³

In *R v Forbes*, Spigelman CJ reiterated the protean nature of the crime of manslaughter and, in particular, manslaughter arising from partial defences:

“... although manslaughters can be characterised in different ways, particularly in the various contexts which may reduce what would otherwise be a murder to manslaughter, the degree of variation within any such category is generally also over a wide range. Matters of fact and degree arise in all categories of manslaughter.

For example, where diminished responsibility is relied upon, the extent to which culpability is ‘diminished’ can vary considerably from case to case. Similarly, although it is possible to characterise a number of cases as ‘child-killing by a parent or carer,’ it may never be possible to identify a sentencing pattern or tariff from the whole body of such cases... This is not only because the number of cases in a particular category may be too few to establish a pattern or tariff. It is also because, within any such category, the relevant circumstances can vary over a wide range. This is also true in the case of manslaughter by reason of excessive self-defence.”¹⁷⁴

In *R v Isaacs*, a five-judge bench decision, the court refused to draw a bright line between the relative seriousness of the forms of manslaughter for the purposes of sentencing. The court said:

“The argument for the appellant advanced on this appeal appeared to assume that a case of provocation manslaughter is necessarily, or at least ordinarily, worse than a case of manslaughter by an unlawful and dangerous act. We do not accept that. Each case depends upon its own circumstances. The range of

¹⁷³ (1992) 174 CLR 313 at 341.

¹⁷⁴ *R v Forbes* [2005] NSWCCA 377 at [134].

sentencing available in the case of manslaughter is notoriously wide. There have been cases where provocation manslaughter has resulted in non-custodial sentences.”¹⁷⁵

In 1925 Street CJ observed:

“There is no offence in which permissible degrees of punishment cover so wide a range, and none perhaps in which the exercise of so large a discretion is called for in determining the appropriate penalty.”¹⁷⁶

Dunford J collects some of the authorities reinforcing this principle in *R v Dawes*,¹⁷⁷ particularly *R v Edwards*, where Gleeson CJ said:

“Manslaughter involves the felonious taking of human life. This may involve a wide variety of circumstances, calling for a wide variety of penal consequences. Even so, unlawful homicide, whatever form it takes, has always been recognised by the law as a most serious crime. The protection of human life and personal safety is a primary objective of the system of criminal justice. The value which the community places upon human life is reflected in its expectations of that system.”

Diminished responsibility and substantial impairment

Sentencing a person suffering from either diminished responsibility or substantial impairment is a complex discretionary decision.

Felonious taking of human life

The New South Wales Court of Criminal Appeal has repeatedly emphasised that, in sentencing an offender for manslaughter on the basis of s 23A, judges must consider the fact that a human life has been taken and that the offender intended to kill or at least commit grievous bodily harm.

In *R v Blackledge*¹⁷⁸ Gleeson CJ said that a finding of diminished responsibility under s 23A involves accepting that:

“... the offender is responsible for a deliberate act which took the life of another person, and which, but for the abnormality of mind, would bear the character of murder.”¹⁷⁹

175 (1997) 41 NSWLR 374 at 381.

176 *R v Withers* (1925) 25 SR (NSW) 382 at 389. See also *R v Schelberger* (unrep, 2/6/88, NSWCCA) and *R v Bolt* (2001) 126 A Crim R 284.

177 [2004] NSWCCA 363 at [32].

178 (unrep, 12/12/95, NSWCCA).

179 (unrep, 12/12/95, NSWCCA) at 4–5.

Later his Honour observed, after reviewing several diminished responsibility cases, that “quite severe sentences have been passed” and that the sentences imposed:

“... proceeded upon a clear recognition that, notwithstanding the diminished responsibility, it was necessary to impose a sentence which reflected the objective seriousness of the case and, in particular, the circumstance that what was involved was the felonious taking of human life with intent to kill or cause grievous bodily harm.”¹⁸⁰

More recently, Dunford J in *R v Dawes* reiterated the significance of the elements of manslaughter by diminished responsibility:

“When the basis of a finding of manslaughter is diminished responsibility (now substantial impairment), pursuant to s 23A of the *Crimes Act* what is nevertheless ordinarily involved, and what is involved in the present case, is a conclusion that the taking of human life was the consequence of a deliberate and voluntary act, performed with intent to kill or cause grievous bodily harm, or with reckless indifferent to human life. The abnormality of mind diminishes the offender’s responsibility for his or her act but it does not negate such responsibility.”¹⁸¹

It has been said that lower sentences among manslaughter offenders convicted on the basis of diminished responsibility should not generally be expected. According to Lee CJ at CL:

“... it is quite wrong to take the view that, merely because there is an element of diminished responsibility, which substantially impairs a person’s judgment, that is an end of the matter and that a light sentence must inevitably follow.”¹⁸²

Taking account of mental abnormality at sentence

The High Court in *Veen (No 2)* directly addressed the question of how a sentencing judge is to treat a mental abnormality for the purposes of s 23A:

“... a mental abnormality which makes an offender a danger to society when he is at large but which diminishes his moral culpability for a particular crime is a factor which has two countervailing effects: one which tends towards a longer custodial sentence, the other towards a shorter. These effects may balance out, but consideration of the danger to society cannot lead to the imposition of a more severe penalty than would have been imposed if the offender had not been suffering from a mental abnormality.”¹⁸³

¹⁸⁰ (unrep, 12/12/95, NSWCCA) at 6.

¹⁸¹ [2004] NSWCCA 363 at 34.

¹⁸² *R v Low* (1991) 57 A Crim R 8 at 19.

¹⁸³ *Veen v The Queen (No. 2)* (1988) 164 CLR 465 at 477.

The phrase “may balance out”, as used by the court, indicates that sentencing a person suffering from a mental abnormality is a discretionary decision involving extremely variable facts and circumstances. It is common for such a person to suffer from a continuing or persistent mental condition.

Sentencing such an offender calls for a “sensitive discretionary decision.”¹⁸⁴ The particular facts and circumstances of the case are applied for the purposes of criminal punishment. It requires a recognition that the purposes of punishment overlap and often point in different directions. As Gleeson CJ put it in *R v Engert*, it is erroneous in principle to approach sentencing:

“... as though automatic consequences follow from the presence or absence of particular factual circumstances. In every case, what is called for is the making of a discretionary decision in the light of the circumstances of the individual case, and in the light of the purposes to be served by the sentencing exercise.”¹⁸⁵

In *R v Hemsley*, Sperling J set out the following principles:

“Mental illness may be relevant ... in three ways. *First*, where mental illness contributes to the commission of the offence in a material way, the offender’s moral culpability may be reduced; there may not then be the same call for denunciation and the punishment warranted may accordingly be reduced: *Henry* at [254]; *Jiminez* [1999] NSWCCA 7 at [23]; *Tsiaras* [1996] 1 VR 398 at 400; *Lauritsen* (2000) 114 A Crim R 333 at [51]; *Israel* [2002] NSWCCA 255 at [23]; *Pearson* [2004] NSWCCA 129 at [43].

Secondly, mental illness may render the offender an inappropriate vehicle for general deterrence and moderate that consideration: *Pearce* (NSWCCA, 1 November 1996, unreported); *Engert* (1995) 84 A Crim R 67 at 71 per Gleeson CJ; *Letteri* (NSWCCA, 18 March 1992, unreported); *Israel* at [22]; *Pearson* at [42].

Thirdly, a custodial sentence may weigh more heavily on a mentally ill person: *Tsiaras* at 400; *Jiminez* at [25]; *Israel* at [26].

A fourth, and countervailing, consideration may arise, namely, the level of danger which the offender presents to the community. That may sound in special deterrence; *Israel* at [24].”¹⁸⁶ (emphasis added)

The same passage was quoted with approval in *R v Arnold*.¹⁸⁷ Adams J added, applying *R v George*,¹⁸⁸ that these observations extend to the sentencing of an offender with significant mental disabilities of any kind.

¹⁸⁴ *R v Engert* (1996) 84 A Crim R 67 at 67.

¹⁸⁵ *R v Engert* (1996) 84 A Crim R 67 at 68.

¹⁸⁶ [2004] NSWCCA 228 at [33]–[36].

¹⁸⁷ [2004] NSWCCA 294 at [68].

¹⁸⁸ (2004) 149 A Crim R 39.

R v Hemsley has been referred to with approval in more than 20 recent cases, including *R v Haines*,¹⁸⁹ *R v Wicks*,¹⁹⁰ *R v Pham*¹⁹¹ and *R v Hughes*.¹⁹²

Protection of society as a factor

Section 3A of the *Crimes (Sentencing Procedure) Act* sets out the purposes for which a court may impose a sentence.

Section 3A(c) states that such a purpose includes the need “to protect the community from the offender.” In *R v Aslett*¹⁹³ it was confirmed that, in enacting s 3A(c) of the *Crimes (Sentencing Procedure) Act*, Parliament did not intend to introduce a system of preventive detention that was contrary to the principles expressed by the High Court in *Veen v The Queen (No 2)*. *Veen (No 2)* conclusively established that sentencing judges are required to have “regard to the protection of society as a factor in determining a proportionate sentence” and, in appropriate cases, are entitled to “attach great weight” to that factor.¹⁹⁴ The joint judgment in *Veen (No 2)* had earlier made clear how the principle was to be used:

“It is one thing to say the principle of proportionality precludes the imposition of a sentence extended beyond what is appropriate to the crime merely to protect society; it is another thing to say that the protection of society is not a material factor in fixing an appropriate sentence. The distinction in principle is clear between an extension merely by way of preventive detention, which is impermissible, and an exercise of the sentencing discretion having regard to the protection of society among other factors, which is permissible.”¹⁹⁵

In *Fardon v Attorney General (Qld)* Gleeson CJ affirmed these principles.¹⁹⁶ In *R v A*, a case where the offender had a fascination with knives and suffered from a severe personality disorder of an antisocial type, the court held that there was a “compelling need to have regard to the protection of the community.”¹⁹⁷ The range of conditions under s 23A are numerous and not all attract leniency.

189 [2004] NSWCCA 295 at [15].

190 [2005] NSWCCA 213 at [24]–[26] and [33]–[34].

191 [2005] NSWCCA 314 at [27]–[35].

192 [2005] NSWCCA 117 at [24]–[29].

193 [2006] NSWCCA 49 at [137].

194 *Veen v The Queen (No 2)* (1988) 164 CLR 465 at 476, 477 (per Mason CJ, Brennan, Dawson and Toohey JJ).

195 *Veen v The Queen (No 2)* (1988) 164 CLR 465 at 473.

196 (2004) 78 ALJR 1519 at [20].

197 [2002] NSWCCA 448 at [54].

Spigelman CJ in *R v Lawrence*¹⁹⁸ said that it should not be assumed that all the mental conditions recognised by DSM(IV)¹⁹⁹ attract the sentencing principle that less weight is given to general deterrence: some conditions do not attract the principle. Spigelman CJ cited literature on the limitations of DSM(IV) and said:

“Weight will need to be given to the protection of the public in any such case. Indeed, one would have thought that element would be of particular weight in the case of a person who is said to have what a psychiatrist may classify as an Antisocial Personality Disorder.”²⁰⁰

In *Hucker*, Howie J summarised the often competing principles:

“the fact that the offender is mentally ill points in two different directions in the determination of the appropriate sentence: one path indicates a shorter sentence to mark the reduced criminal responsibility of the offender, the other is the necessity of imposing a sentence commensurate with the seriousness of the offence and to protect the public from the effects of the illness upon the offender.”²⁰¹

Alternatives to full-time custodial sentences

In the present study, not all of the 84 offenders sentenced for the offence of manslaughter on the basis of diminished responsibility or substantial impairment received full-time custodial sentences.

Eleven of the 84 offenders received sentencing options other than full-time custody.²⁰² This proportion is similar to wider manslaughter sentencing patterns. According to the Commission’s Judicial Information Research System, there is a 90% imprisonment rate among the 219 manslaughter offenders sentenced between January 1998 and December 2004.

The sentences passed on the 11 offenders comprised:

- eight bonds under s 9 of the *Crimes (Sentencing Procedure) Act 1999* (or equivalent bonds as they previously existed under s 558 of the *Crimes Act 1900*);
- two sentences of periodic detention; and
- one suspended sentence under s 12 of the *Crimes (Sentencing Procedure) Act 1999*.

198 [2005] NSWCCA 91.

199 op cit n 56.

200 [2005] NSWCCA 91 at [23] and [24].

201 [2002] NSWSC 1068 at [18].

202 A 12th offender received a s 558 bond at first instance, but a Crown appeal was subsequently allowed by the Court of Criminal Appeal in *R v Low* (1991) 57 A Crim R 8 and a full-time custodial sentence was imposed. Considering the final outcome, this case is included among the 73 cases in which a custodial sentence was imposed.

Three of the 11 offenders were sentenced on the basis of having established (or had accepted by the Crown) both the partial defences of diminished responsibility/substantial impairment *and* provocation.²⁰³

Ten of the 11 offenders proceeded directly to sentence following a guilty plea; only one offender was tried before a jury.²⁰⁴

Of the 11 offenders, ten were diagnosed as suffering from schizophrenia, mood or dissociative disorders. The degree of impairment in these cases was generally high; for instance, offenders were noted as suffering from “major,” “severe” or “psychotic” depression in seven cases. Other descriptions of diagnostic conditions used by sentencing judges in these cases included “gross psychiatric disturbance” and “significant disturbance.”

In each case, the sentencing judge was careful to outline the reasons for not imposing a custodial sentence:

- In *K*:
“[the offender’s] upbringing was so different from the norm that it seems to me it would be wrong simply to judge his actions by the standards one would apply to a person who had enjoyed a normal, loving and reasonably emotionally stable upbringing.”²⁰⁵
- In *L*:
“a sentence of full-time imprisonment would not accord with the moral sense of the community and would not accord with the personal circumstances of the offender in the context of this case. There is no basis for future dangerousness in the sense of possible criminal behaviour. There is little basis for general deterrent in terms of denunciation.”²⁰⁶
- In *Jans*:
The offender and victim were married, with the victim suffering from Huntington’s Chorea manifesting itself in dementia, delusions and violence towards her husband, the offender. Her illness contributed to the offender developing major depression and a dissociative state “of such scale and extent as also to markedly reduce the level of his culpability.”²⁰⁷

²⁰³ *R v K* [1999] NSWSC 933, *R v Spencer* (unrep, 18/12/92, NSWSC), *R v Gardner* (unrep, 27/3/92, NSWSC).

²⁰⁴ *R v K* [1999] NSWSC 933.

²⁰⁵ *R v K* [1999] NSWSC 933 at [126].

²⁰⁶ *R v L* [2000] NSWSC 1088 at [15]–[16].

²⁰⁷ *R v Jans* [2000] NSWSC 525 at [23].

The effect of the new substantial impairment s 23A on non-custodial sentencing

Since the introduction of the substantial impairment test on 3 April 1998, six out of 20 offenders sentenced did not receive full-time custodial sentences. Under the previous diminished responsibility statutory regime only five out of 64 offenders did not receive full-time custodial sentences.

This trend appears to confirm that the new formulation of s 23A is providing a stricter test for offenders to pass in order to successfully raise the defence. Only those cases in which the impairment is severe, or the moral circumstances are highly compelling, appear to be accepted. A greater proportion of these offenders are assessed as being poor vehicles for punishment and deterrence, of greatly reduced culpability, or presenting a low level of threat to the community.

The New South Wales Court of Criminal Appeal has, however, recently stressed the importance of a full-time custodial sentence, even where the subjective circumstances are highly unusual or tragic. In *R v Dawes*, the offender received a five year s 9 bond after she killed her ten year old autistic son.²⁰⁸ On appeal, the court held that the sentence was inadequate and a custodial term ought to have been imposed:

“his Honour failed to have sufficient regard to the courts’ responsibility to uphold the sanctity of human life and some of the important purposes of sentencing as set out in s 3A of the Act namely, denouncing the conduct of the offender, making the offender accountable for her actions and ensuring adequate punishment for the offence. It appears that his Honour allowed these factors to be outweighed by the strong subjective case presented on behalf of the respondent, and in so doing, fell into error.”²⁰⁹

The court, however, exercised its residual discretion not to intervene on the basis of the principle of double jeopardy and the Crown’s failure to press for a custodial sentence at first instance.²¹⁰ The case remains the most recent authority on the use of non-custodial sentences for manslaughter offenders in circumstances of substantial impairment.

Custodial sentences

Table 4 shows the range of custodial sentences imposed on offenders convicted on the basis of diminished responsibility/substantial impairment. *Figure 11* details the full terms and non-parole periods of sentences imposed on these offenders. Both *Table 4* and *Figure 11* provide a gender breakdown of their respective data.

²⁰⁸ *R v Dawes* [2004] NSWCCA 363.

²⁰⁹ *R v Dawes* [2004] NSWCCA 363 at [40].

²¹⁰ *R v Dawes* [2004] NSWCCA 363 at [41].

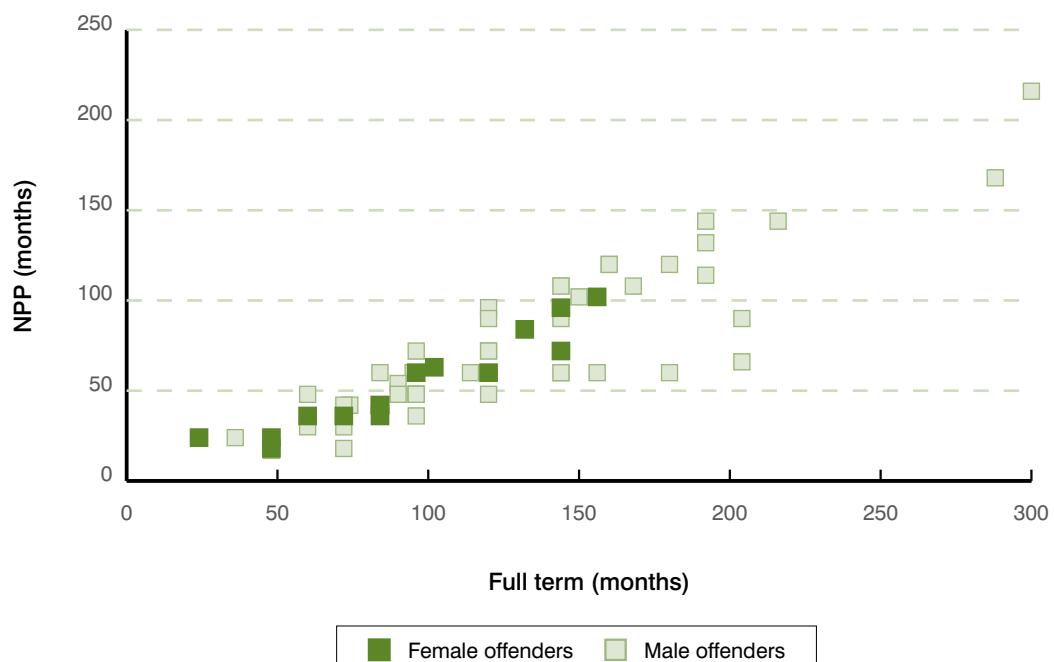
Table 4 Sentence range in diminished responsibility/substantial impairment cases 1990–2004

	Female offenders N = 15		Male offenders N = 58		All offenders N = 73	
	Head	NPP	Head	NPP	Head	NPP
Range (months)	24–156	18–102	36–300	17–216	24–300	17–216

Table excludes seven cases of non-custodial sentences for female offenders and four for male offenders.

NPP = Non-parole period.

Hunt CJ at CL has noted that, because of the element of intention, the upper limit for sentencing offenders with diminished responsibility is “a high one.”²¹¹

Figure 11 Sentences imposed on male and female offenders in diminished responsibility/substantial impairment manslaughter cases 1990–2004

211 *R v Carlson* (unrep, 16/10/95, NSWSC) at 9.

Special circumstances and the ratio between the full term of sentence and the non-parole period

The *Crimes (Sentencing Procedure) Act 1999*, s 44(2) provides that when a custodial sentence is imposed the “balance of the term of the sentence must not exceed one-third of the non-parole period for the sentence, unless the court decides that there are special circumstances for it being more.”

In the Second Reading Speech for the Crimes (Sentencing Procedure) Bill, the Attorney General said:

“In the ordinary course of events, the non-parole period will be three-quarters of the term of sentence unless the court decides there are special circumstances, in which case it can impose a lesser non-parole period.”²¹²

An analysis of sentences for s 23A offenders reveals a frequent departure from the presumptive ratio. This is unsurprising in light of Judicial Commission findings in 2004,²¹³ recorded by the New South Wales Court of Criminal Appeal in *Fidow*.²¹⁴ For 63 of the 73 offenders who received full-time custodial sentences (86%), the non-parole period was less than 75% of the total sentence.

On only ten occasions (14% of those imprisoned) did the non-parole period equal or exceed the statutory ratio. This figure includes a fixed term of sentence of two years imposed on one offender, concurrently with a sentence for a second (non-partial defence) manslaughter. The effective sentence in that case was six years, with a non-parole period of four years. If this case were excluded, there would be only nine instances in which the statutory ratio was applied.

The 73 custodial sentences imposed had the following ratios between the total sentence and the non-parole period:

- NPP ≤ 50% of total sentence: 32 cases (44% of those imprisoned).
- NPP > 50% but ≤ 60%: 11 cases (15%).
- NPP > 60% but ≤ 75%: 20 cases (27%).
- NPP ≥ 75%: ten cases (14%).

Bearing in mind that there were also 11 occasions on which sentences other than full-time imprisonment were imposed, it may be said that a finding of special circumstances was made in 74 out of 84 diminished responsibility/substantial impairment cases (88%).

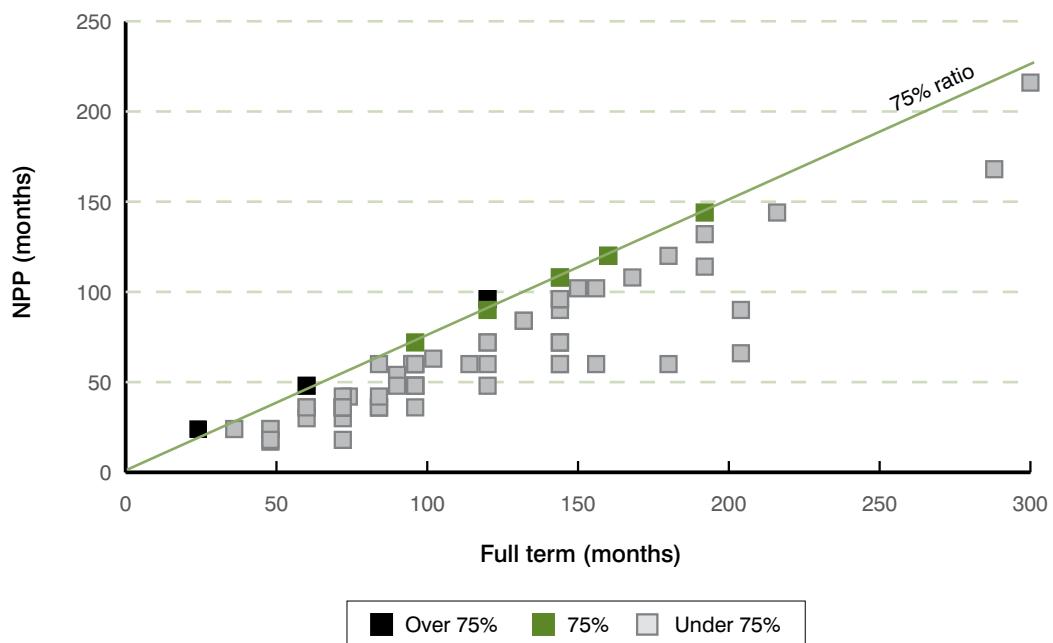
The diagonal line in *Figure 12*, below, represents a 75% ratio between the non-parole period and the full term. The data points that fall on or above the line are the ten cases in which the ratio was equal to or exceeded 75%.

212 The Honourable Bob Debus MP, Attorney General, Second Reading Speech, Crimes (Sentencing Procedure) Bill, *New South Wales Parliamentary Debates (Hansard)*, Legislative Assembly, 28 October 1999, 2326.

213 J Keane, P Poletti & H Donnelly, “Common offences and the use of imprisonment in the District and Supreme Courts in 2002” (2004) 30 *Sentencing Trends & Issues* 1.

214 *R v Fidow* [2004] NSWCCA 172 at [20]–[22].

Figure 12 Departure from presumptive statutory ratio between full term and non-parole period in diminished responsibility/substantial impairment sentences



The change from diminished responsibility to substantial impairment: sentencing comparison

Table 5 and Figure 13, below, indicate that there was a marked difference in sentencing patterns between offenders sentenced under diminished responsibility and those sentenced under the new substantial impairment test.

Table 5 Range of sentences imposed on offenders before and after the amendment of s 23A of the *Crimes Act 1900*

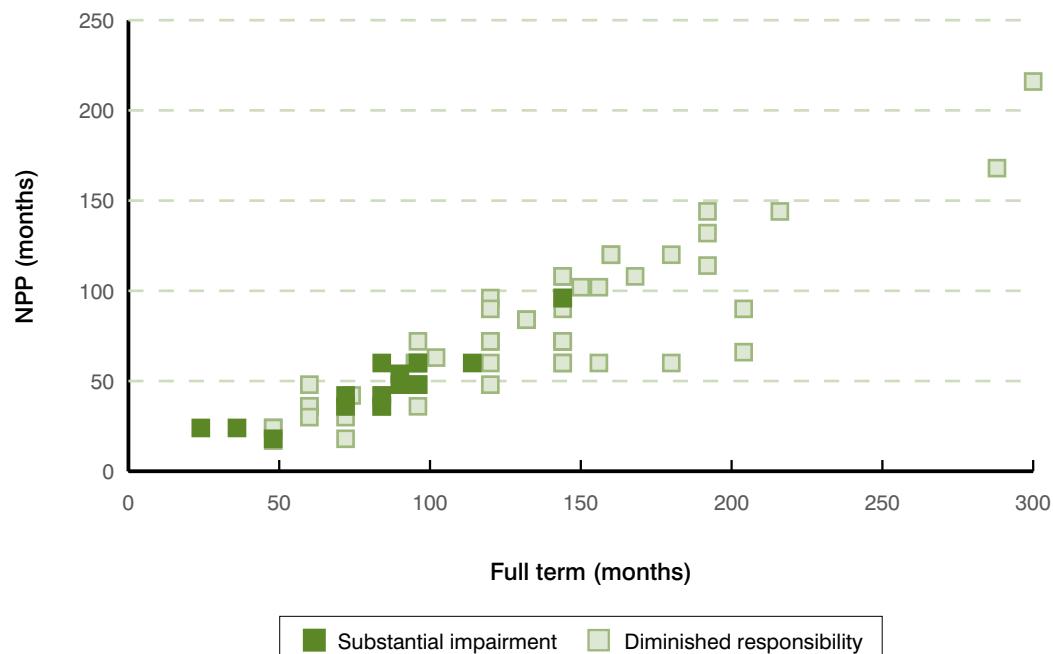
	Diminished responsibility N = 59*		Substantial impairment N = 14†	
	Head	NPP	Head	NPP
Range (months)	48–300	17–216	24–144	18–96

* Excludes five non-custodial sentences.

† Excludes six non-custodial sentences.

NPP = Non-parole period.

Figure 13 Sentences imposed under diminished responsibility and substantial impairment



Appellate review and intervention

Fourteen of the 84 offenders appealed to the Court of Criminal Appeal against the purported manifestly excessive severity of their sentence. The Crown appealed against inadequacy of sentence on four occasions.

In a further two cases, offenders convicted of murder successfully appealed against their convictions, with the New South Wales Court of Criminal Appeal substituting a verdict of guilty to manslaughter by reason of diminished responsibility. These cases are not included in the following analysis.

The 18 appeals included:

- Ten appeals against sentence dismissed.²¹⁵
- Four appeals against sentence allowed.
- Two Crown appeals dismissed.
- Two Crown appeals allowed with sentences increased.

The New South Wales Court of Criminal Appeal upheld appeals and adjusted sentence on only six occasions. This indicates that, for the most part, the sentences imposed were appropriate, despite the fact that they were so broad in their range.

215 Includes appeals against conviction and sentence.

Sentence appeals allowed

The four cases in which sentence appeals were allowed involve first instance sentences at the high end of the range: between 16 and 20 years. All four sentences also included lengthy parole periods of between five and ten years. One of the factors was to provide extended periods of supervision upon the offender's release in order to monitor the offender's mental health and to ensure compliance with therapy and treatment regimes.

In all four cases the issue of future dangerousness and the protection of the community was central to the appeal. The application of the principles in *Veen v The Queen (No 2)*²¹⁶ were discussed in each case.

Balancing a sentence that ensures the protection of the community but does not involve preventative detention or extend the sentence beyond the appropriate range is a difficult task, and one in which "error very easily can be made, no matter what care is taken."²¹⁷

There was a finding in two of the four successful appeals that the sentence initially imposed went beyond what was required to protect the community and involved an element of "preventative detention."²¹⁸ These sentences ultimately lacked proportionality and were manifestly excessive.

Of note is the fact that the most recent successful appeal was heard in 1998, relating to an offence committed in February 1996. All four appellants were sentenced under the earlier diminished responsibility regime.

No offenders sentenced for substantial impairment have appealed their sentence.

Crown appeals against inadequacy of sentence

The 84 sentences in the diminished responsibility/substantial impairment group generated four Crown appeals against inadequacy of sentences, two of which were granted. In both cases in which the Crown appeal succeeded, the identified error involved a failure to give due weight to the objective gravity of the offence, whilst giving undue emphasis to subjective circumstances.

Similarly, in one of the two unsuccessful Crown appeals, the same error was identified, however the court declined to re-sentence the respondent on discretionary grounds, despite the inadequacy of the sentence passed at first instance.²¹⁹

Unsurprisingly, three of the four occasions on which the Crown appealed involved non-custodial sentences at first instance.

216 (1988) 164 CLR 465.

217 *R v Barton* (unrep, 28/7/95, NSWCCA) per Allen J.

218 *R v Ulgun* (unrep, 5/3/91, NSWCCA) and *R v Barton* (unrep, 28/7/95, NSWCCA).

219 *R v Dawes* [2004] NSWCCA 363.

Provocation

It has always been recognised that provocative conduct can range from extreme to slight and that the range of sentences imposed should reflect that fact. In *R v Alexander* Gleeson CJ held:

“It has been pointed out in many cases that sentencing for manslaughter can be an extremely difficult discretionary exercise because of the wide range of circumstances that might exist. Where the felonious taking of human life is found to involve, not murder, but manslaughter, on the ground of provocation, what is necessarily involved is a loss of self-control and a concession made by the law, in the interests of compassion, to human frailty.”²²⁰

In *Bolt*, Greg James J said of manslaughter:

“It may be committed by reason of provocation in circumstances evoking the deepest sympathy where there is no conceivable possibility of similar re-offending; it may be committed under the grossest provocation as a result of a total or near total loss of control on an instant, but it remains the fact that in every case of manslaughter a human life has been taken and the legislature contemplated that fact would be common to the offences to which were applicable such a breadth of available penalties in the exercise of a proper discretion.”²²¹

In the first instance judgment of *R v Alexander*, Hunt CJ at CL proposed three issues to be considered in sentencing offenders on the basis of provocation:²²²

- (1) The degree of provocation offered (or, alternatively, the extent of the loss of self-control suffered), which when great has the tendency of reducing the objective gravity of the offence.
- (2) The time between the provocation (whether isolated or cumulative in its effect) and the loss of self-control, which when short also has the tendency of reducing the objective gravity of the offence.
- (3) The degree of violence or aggression displayed by the prisoner, which when excessive has the tendency of increasing the objective gravity of the offence.

In the United Kingdom in November 2005, the United Kingdom Sentencing Guidelines Council released a definitive guideline on sentencing offenders based on provocation. The guideline identifies factors to be considered in setting an appropriate sentence, including the degree of provocation, the extent and timing of the offender’s retaliation, post-offence behaviour, and use of a weapon. The guideline also establishes sentencing starting points and ranges for particular levels of provocation, such as where the provocative conduct is of a low degree over a short period.²²³

220 (unrep, 24/2/95, NSWCCA).

221 *R v Bolt* (2001) 126 A Crim R 284 at [58].

222 *R v Alexander* (1994) 78 A Crim R 141 at 144.

223 The guideline is available at: www.sentencing-guidelines.gov.uk/guidelines/council/final.html <accessed 2 June 2006>.

In *Marlow*, Studdert J commented on the apparent widening of the range of sentences imposed on provocation cases. He cautioned against drawing broad conclusions from these figures:

“No useful purpose would be served by my embarking upon a review of all those cases since, obviously, so much depends upon the particular facts and circumstances of each case.”²²⁴

Extreme provocation cases

Six out of 75 offenders in the present study did not receive full-time custodial sentences.²²⁵

The sentences imposed on the six offenders comprised:

- five bonds under s 558 of the *Crimes Act* 1900 (all were imposed prior to the introduction of s 9 bonds under the *Crimes (Sentencing Procedure) Act* 1999); and
- one sentence of periodic detention.

Only one of the six offenders was convicted at trial.²²⁶ The other five offenders all proceeded directly to sentence following a guilty plea.

Three of the six offenders were female. All were convicted in respect of killing their husband or de facto. In two cases, the killing followed a history of domestic violence by the victim.

Three of the six offenders were sentenced on the basis of having established (or had accepted by the Crown) both the partial defences of diminished responsibility/substantial impairment and provocation.²²⁷

The use of sentences other than full-time imprisonment has become increasingly rare in provocation cases. Of the six offenders, three were sentenced in 1992, one in 1993, one in 1995 and one in 1999. No instances of non-custodial sentences were found after 1999.

In *Gilham*, the sentencing judge accepted that the provocative conduct on the part of the victim, the offender’s brother, was killing their parents. Abadee J described the case as being “most unusual and tragic.”²²⁸ However, in February 2006, Gilham was charged with the murder of his parents.

224 [2003] NSWSC 1130 at [59].

225 A seventh offender received a s 558 bond at first instance, but a Crown appeal was subsequently allowed by the Court of Criminal Appeal in *R v Low* (1991) 57 A Crim R 8 and a full-time custodial sentence was imposed. This case is included among the 69 cases in which a custodial sentence was imposed.

226 *R v K* [1999] NSWSC 933.

227 *R v K* [1999] NSWSC 933, *R v Spencer* (unrep, 18/12/92, NSWSC) and *R v Gardner* (unrep, 27/3/92, NSWSC).

228 *R v Gilham* (unrep, 7/4/95, NSWSC, at 22) per Abadee J.

Custodial sentences

Table 6 details the range of custodial sentences imposed on offenders convicted on the basis of provocation, while *Figure 14* illustrates the sentences imposed on male and female offenders in provocation cases.

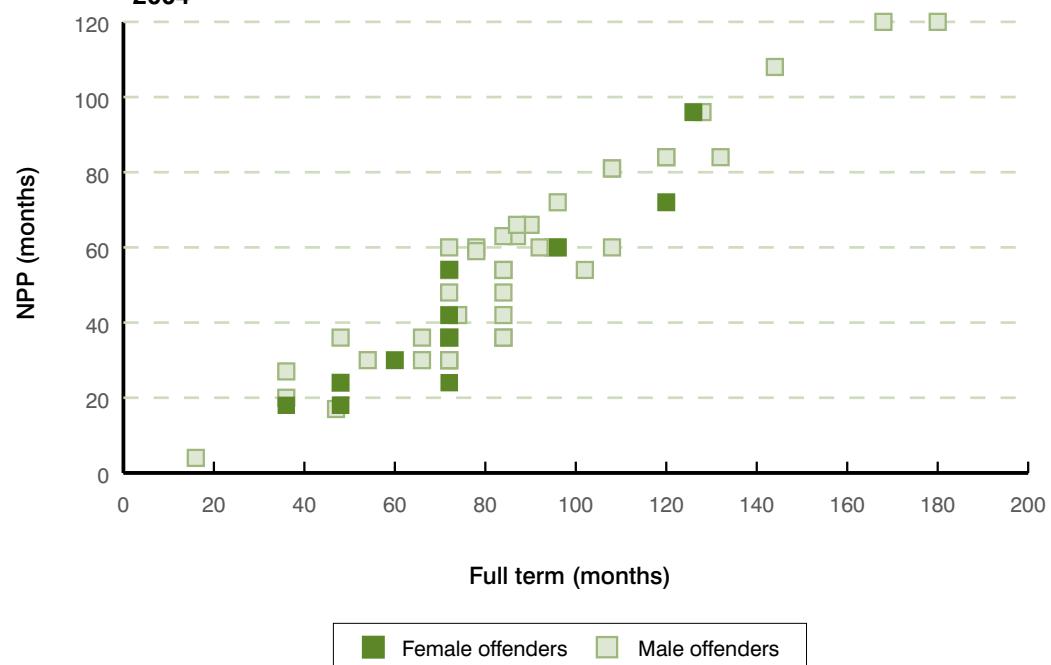
Table 6 Sentence range in provocation cases 1990–2004

	Female offenders N = 14		Male offenders N = 55		All offenders N = 69	
	Head	NPP	Head	NPP	Head	NPP
Range (months)	36–126	18–96	16–180	4–120	16–180	4–120

Excludes three non-custodial sentences for female offenders and three non-custodial sentences for male offenders.

NPP = Non-parole period.

Figure 14 Sentences imposed on male and female offenders in provocation cases 1990–2004



The wide range of sentences is indicative of the variable objective and subjective circumstances in which provocation offences occurred. The sentences bear out the judicial axiom that manslaughter is a protean offence which attracts a broad sentencing discretion.

Special circumstances and the ratio between the full term of sentence and the non-parole period

Fifty-one of the 69 offenders who received full-time custodial sentences (74%) received non-parole periods that were less than 75% of the total sentence.

On 18 occasions (26%) the non-parole period was equal to or exceeded the statutory ratio.

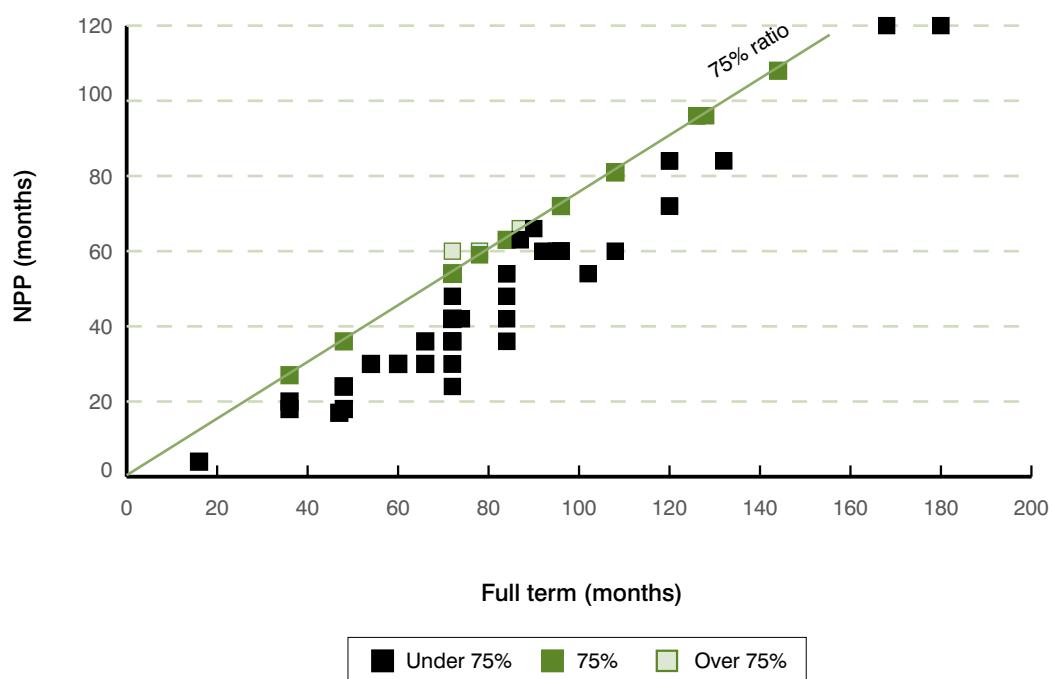
The 69 custodial sentences imposed had the following ratios between the total sentence and the non-parole period:

- NPP \leq 50% of total sentence: 24 cases (35%).
- NPP > 50% and \leq 60%: 11 cases (16%).
- NPP > 60% and \leq 75%: 16 cases (23%).
- NPP \geq 75%: 18 cases (26%).

Bearing in mind that there were also six occasions on which sentences other than full-time imprisonment were imposed, it may be said that a finding of special circumstances was made in 57 out of 75 provocation cases (76%).

The diagonal line in *Figure 15* represents a 75% ratio between the non-parole period and the full term. The data points that fall on or above the line are the 18 cases in which the ratio was equal to or exceeded 75%.

Figure 15 Departure from presumptive statutory ratio between full term and non-parole period in provocation sentences (1990–2004)



Appellate review and intervention

The New South Wales Court of Criminal Appeal heard 23 appeals from the 75 cases where provocation was successfully claimed. There were 18 appeals against sentence and five Crown appeals against inadequacy of sentence.

The results of these appeals were:

- 12 appeals against sentence dismissed.²²⁹
- Six appeals against sentence allowed.
- Two Crown appeals dismissed.
- Three Crown appeals allowed.

Sentence appeals allowed

The six cases in which sentence appeals were allowed involved first instance sentences of between six and 14 years.

The six appeals turned on a variety of matters:

- Two cases, both decided in 2003, involved the failure to allow a discount for an offer of a plea of guilty to manslaughter where that offer was not accepted by the Crown.
- One case involved the misapplication of s 21A of the *Crimes (Sentencing Procedure) Act 1999*.
- One case involved an erroneous finding of fact as to the extent of the respondent's involvement in the attacks upon the victim.
- One case turned on conditions of incarceration.
- One case involved an error in sentencing an offender who had not raised provocation at trial. The New South Wales Court of Criminal Appeal held that "the appellant was entitled to be sentenced upon the basis that the jury found provocation irrespective of the fact that the appellant did not raise provocation himself."²³⁰

Crown appeals against inadequacy of sentence

In all three cases where a Crown appeal was upheld and the sentence increased, the Court of Criminal Appeal was of the opinion that the sentence imposed at first instance did not give due weight to the objective gravity of the offence committed.

In *Khan*, the sentence did not reflect the need for specific and general deterrence, while in *Bolt* the sentence failed to reflect the punishment required for the violent nature of the killing.²³¹

229 Includes appeals against both conviction and sentence.

230 *R v Pavia* (unrep, 9/12/94, NSWCCA).

231 *R v Khan* (1996) 86 A Crim R 552; *R v Bolt* (2001) 126 A Crim R 284. The third successful Crown appeal, *R v Low* (1991) 57 A Crim R 8, is discussed in relation to diminished responsibility at n 202.

Provocation and diminished responsibility/substantial impairment

Ten offenders were sentenced on the basis of both provocation and diminished responsibility/substantial impairment.

In *R v Ko*, Kirby J cited the New South Wales Court of Criminal Appeal in *R v Low* on the effect of sentencing based on both defences:

“Had the element of diminished responsibility not been present at all and had the matter gone forward on the footing that the verdict was a verdict of manslaughter on the ground of provocation, it would be my view that such a sentence would need to be greatly increased.”²³²

A more lenient approach to sentencing offenders convicted on the basis of both defences is borne out in the ten cases.

Alternatives to full-time custodial sentences

Three of the ten offenders were dealt with by way of sentencing options other than full-time imprisonment. The sentences passed included a three year term of periodic detention and two s 558 bonds. In addition, there was a fourth offender who was sentenced at first instance to a bond, but this sentence was increased to a full-time custodial sentence by the Court of Criminal Appeal.²³³

Custodial sentences

Table 7 reveals the range of sentences imposed on offenders sentenced for both provocation and diminished responsibility/substantial impairment.

Table 7 Sentence range where both provocation and diminished responsibility/substantial impairment successfully raised 1990–2004

	Female offenders N = 2		Male offenders N = 5		All offenders N = 7	
	Head	NPP	Head	NPP	Head	NPP
Range (months)	48 only	18–24	48–84	24–42	48–84	18–42

Excludes two non-custodial sentences for female offenders and one non-custodial sentence for male offenders.

NPP = Non-parole period.

²³² *R v Ko* [2000] NSWSC 1130 at [4], citing *R v Low* (1991) 57 A Crim R 8.

²³³ *R v Low* (1991) 57 A Crim R 8.

Although the sample size is small, the ranges indicate that offenders sentenced on the basis of both provocation and diminished responsibility receive more lenient sentences than offenders sentenced on the basis of a single defence.

Excessive self-defence

Unlike either provocation or diminished responsibility/substantial impairment, no offender who was sentenced on the basis of excessive self-defence received less than a full-time custodial sentence.

It is difficult to draw firm conclusions from the small sample size, as Hoeben J states in *R v Vuni*.²³⁴ As mentioned above, for excessive self-defence alone, the study period was extended to 29 June 2005. This yielded an overall total of 12 cases of accepted excessive self-defence. In *Trevenna*, Santow JA looked to comparable cases in other jurisdictions to discern relevant sentencing factors for excessive self defence. His Honour outlined a list of generic factors which repeatedly arose in excessive self-defence cases.²³⁵ This approach was rejected by the majority. Barr J held that the three other cases of excessive self-defence in New South Wales “do not make a tariff” and that interstate cases were not relevant: “In my opinion it is not possible to demonstrate error by reference to them collectively because they are so few.”²³⁶

Since the appeal in *Trevenna*, there have been a further eight cases in which an offender was sentenced on the basis of excessive self-defence. *Table 8* details the range of sentences for the excessive self-defence cases.

Table 8 Sentence range in excessive self-defence cases

	Female offenders N = 2		Male offenders N = 10		All offenders N = 12	
	Head	NPP	Head	NPP	Head	NPP
Range (months)	60–90	30–54	68–144	32–96	60–144	30–96

NPP = Non-parole period.

234 [2006] NSWCCA 171 at [31].

235 (2004) 149 A Crim R 505. See (a) – (r) at [45].

236 (2004) 149 A Crim R 505 at [107].

Appellate review and intervention

Two of the 12 cases of excessive self-defence were appealed.

One was a successful sentence appeal. It was held that, in the circumstances of the offence, “including the need for the appellant to act in self-defence to extricate himself from the fearful position he was in, and his powerful subjective features, a head sentence of eight years is manifestly excessive.”²³⁷

The sentence was reduced to six-and-a-half years, with a non-parole period of four years.

The second appeal was *Trevenna*, which involved both an appeal against sentence and a Crown appeal against the inadequacy of sentence.²³⁸ By majority, the court held that the sentence of seven years and six months fell within the permissible range.

237 *R v Cioban* [2003] NSWCCA 304 at [71].

238 *R v Trevenna* (2004) 149 A Crim R 505.



Conclusion

As the Summary of Findings reveals, this study makes an important contribution to informing policy on partial defences. It reports the frequency and factual context of cases where a homicide offender was convicted and sentenced on the basis of a partial defence. It also identifies murder cases where a partial defence was rejected, usually by the jury. These cases may warrant closer analysis.

Any reform proposal should take account of the historical evolution of the partial defences, how they are adapted to current community standards and expectations, and the empirical findings in this study.

As the Privy Council emphasised in *Holley*,²³⁹ the operation of any one partial defence cannot be viewed in isolation from other partial defences, nor from the law of homicide as a whole.

239 *Attorney General for Jersey v Holley (Jersey)* [2005] UKPC 23 at [25] and [27].

Appendix A

Partial defence cases 1990–2004

To assist further research, the most easily accessible citation has been included below. Citations for appeal judgments have been included where applicable. For cases occurring in or after 1999, the remarks on sentence and appeal judgments are available at Caselaw New South Wales via Lawlink: www.lawlink.nsw.gov.au.

Diminished responsibility and substantial impairment

Rejected defences — Diminished responsibility

Case name	Citation
B	(unrep, 21/05/93, NSWSC) per Sharpe J
Cheatham	[2002] NSWCCA 360
Corrigan	(unrep, 15/4/93, NSWSC) per Finlay J
Dean	(unrep, 18/9/98, NSWSC) per McInerney J
Desouza	(1997) 41 NSWLR 656
G	(unrep, 12/11/96, NSWCCA)
Glover	(unrep, 29/11/91, NSWSC) per Wood J
Hort	(unrep, 18/05/92, NSWSC) per Finlay J
Ion	(1996) 89 A Crim R 86
Lee	(unrep, 16/2/90, NSWSC) per McInerney J
L	(unrep, 27/3/95, NSWCCA)
Majdalawi	(2000) 113 A Crim R 241
Maxwell	[2001] NSWCCA 362
N	(unrep, 20/3/98, NSWCCA)
Obholz	(unrep, 18/9/92, NSWSC) per Abadee J
Phillips	(unrep, 14/11/91, NSWCCA)
Preuss	(unrep, 26/8/97, NSWSC) per Barr J

Case name	Citation
Robinson	(unrep, 16/10/92, NSWSC) per McInerney J
Rosevear	(unrep, 27/8/90, NSWSC) per Studdert J; [1999] NSWSC 732
S	(unrep, 24/7/98, NSWCCA)
Trotter	(1993) 35 NSWLR 428
Tumanako	(1992) 64 A Crim R 149
Turner	(unrep, 4/3/94, NSWCCA)
Twala	(unrep, 4/11/94, NSWCCA)
V	(unrep, 23/3/93, NSWCCA)
Welsh	[1999] NSWCCA 386
W	(unrep, 15/11/91, NSWCCA)

Rejected defences — Substantial impairment

Case name	Citation
Azar	[2004] NSWSC 797
Chan Pak Lun	[2002] NSWSC 544
F	[2005] NSWCCA 77
Gosling	[2002] NSWCCA 351
Hurley	[2001] NSWSC 1007
L	(unrep, 07/11/03, NSWSC) per Davidson J
Matheson	[2001] NSWSC 332
O	[2000] NSWSC 1255
Ritchie	[2003] NSWSC 864

Accepted defences—Diminished responsibility

Case name	Citation
Aliano	(unrep, 16/10/91, NSWSC) per James J
Antoniadis	(unrep, 10/10/1991, NSWSC) per Newman J
B	(1994) 71 A Crim R 575
Barton	(unrep, 28/7/95, NSWCCA)
Blackridge	(unrep, 12/12/95, NSWCCA)
Bryant	[2000] NSWSC 245
Bugmy	(unrep, 8/12/94, NSWSC) per Finlay J

Case name	Citation
Buxton	(unrep, 21/09/1990, NSWSC) per Badgery-Parker J
Carlson	(unrep, 25/11/1996, NSWCCA)
Carnovale	(unrep, 8/11/1995, NSWSC) per Badgery-Parker J
Carroll	[2000] NSWSC 410
Cassel	(unrep, 14/3/97, NSWSC) per Bruce J)
Chayna	(1993) 66 A Crim R 178
C	(unrep, 8/6/93, NSWCCA)
Cooper	(unrep, 24/2/98, NSWCCA)
C	(unrep, 6/08/1994, NSWSC) per Smart J
Duthie	[1999] NSWSC 1224
EJ	(unrep, 1/4/97, NSWCCA)
Erdogdu	(unrep, 6/08/1999, NSWSC) per Grove J
Espiritu	(unrep, 17/11/1997, NSWSC) per Smart J
Evers	(unrep, 16/6/93, NSWCCA)
Falconetti	(unrep, 24/3/92, NSWCCA)
F	(unrep, 1/06/2000, NSWSC) per Ireland J
Forsyth	(unrep, 26/07/1994, NSWSC) per Finlay J
Fryer	(unrep, 17/3/92, NSWCCA)
G	(unrep, 28/10/96, NSWCCA)
Grogan	(unrep, 2/03/1994, NSWSC) per Finlay J
Gunes	[1999] NSWSC 130
Hammond	(unrep, 18/08/97, NSWSC) per Badgery-Parker J
H	(unrep, 25/03/1994, NSWSC)
Hickey	(unrep, 26/06/1992, NSWSC) per Hunt CJ at CL
Hollis	(unrep, 27/11/1992, NSWSC) per Loveday J
Hulbert	(unrep, 1/07/1994, NSWSC)
H	(unrep, 2/04/1996, NSWSC) per Hidden J
Josifovski	(unrep, 25/01/1995, NSWSC) per Smart J
Kable	(1996) 138 ALR 577; (unrep, 1/08/1990, NSWSC) per Hunt J
Keceski	(unrep, 10/8/1993, NSWCCA)
Kirby	(unrep, 14/11/1997, NSWSC) per Studdert J
Kontaxakis	(unrep, 30/10/1990, NSWSC) per Enderby J
Lalor	(unrep, 21/07/1995, NSWSC) per Grove J
Laurie	(unrep, 30/04/1992, NSWSC) per Slattery AJ

Case name	Citation
Lenaghan-Britton	(unrep, 23/12/1996, NSWSC) per James J
Lever	[2001] NSWSC 1131
Luu	(unrep, 24/02/1995, NSWSC) per Newman J
O'Bree	(unrep, 16/07/1992, NSWSC) per Finlay J
Philp	(unrep, 18/2/91, NSWSC) per Abadee J
PRFN	[2000] NSWCCA 230
Sims	(unrep, 1/11/1991, NSWSC) per Wood J
S	(unrep, 29/06/1998, NSWSC) per Newman J
Swindale	(unrep, 22/6/98, NSWCCA)
Theil	(unrep, 27/09/1990, NSWSC) per Finlay J
Troja	(unrep, 16/7/91, NSWCCA)
Ulgun	(unrep, 5/3/91, NSWCCA)
White Cotterill	(unrep, 30/10/1992, NSWSC) per Hunt CJ at CL
Wilson, Peter	(unrep, 3/12/1998, NSWSC) per Newman J
Wilson, Rodney	(unrep, 6/03/1997, NSWSC) per Hulme J

Accepted defences — Substantial impairment

Case name	Citation
Bartlett	[2001] NSWSC 685
Bateman	[2000] NSWSC 867
Connolly	[2001] NSWSC 787
Dawes	[2004] NSWCCA 363; (unrep, 2/06/2004, DC) per Ellis J
D	[1999] NSWSC 944
Hawkins	[2001] NSWSC 420
Hucker	[2002] NSWSC 1068
Jans	[2000] NSWSC 525
Laupama	[2001] NSWSC 1082
L	[2000] NSWSC 1088
Mabbott	[2002] NSWSC 502
Murphy	[2002] NSWSC 150
Potts	[2001] NSWSC 753

Case name	Citation
R	[2002] NSWSC 415
Santos	[2001] NSWSC 923
S	[2000] NSWSC 648
Tran, Son	[1999] NSWSC 1146
W	[2000] NSWSC 447

Provocation

Rejected defence

Case name	Citation
Anderson	[2006] NSWCCA 156
Audsley	(unrep, 30/5/97, NSWSC) per Hidden J
Capar	(unrep, 27/10/95, NSWSC) per Smart J
Carter	[2001] NSWSC 1119
Davis	(1998) 100 A Crim R 573
Dimaculangan	(unrep, 30/3/95, NSWCCA)
Dundas	(unrep, 15/4/92, NSWSC) per Studdert J
Dutton	(unrep, 7/12/90, NSWCCA)
Flanjak	[2003] NSWSC 779
H	(unrep, 3/5/96, NSWCCA)
Hodge	[2000] NSWSC 897
Holschier	(unrep, 14/08/91, NSWSC) per McInerney J
Hunter	(unrep, 7/7/92, NSWCCA)
Ide	[2003] NSWSC 1110
Khalouf	[2005] NSWCCA 395
Lamb	[2002] NSWSC 1025
Lees	[1999] NSWCCA 301
Leonard, Richard	(unrep, 7/12/98, NSWCCA)
Leonard, David	[1999] NSWSC 510
Mankotia	(2001) 120 A Crim R 492
McLeod	[1999] NSWSC 78; (unrep, 3/7/90, NSWSC) per Lusher AJ
Mehmet	[2002] NSWSC 1154

Case name	Citation
Rahim	(unrep, 25/8/95, NSWSC) per Sully J
DAR	(unrep, 8/11/95, NSWCCA)
Richards	(unrep, 15/04/92, NSWSC) per Finlay J
Sancar	[1999] NSWCCA 284
Sievers	[2002] NSWSC 1257
Spedding	(unrep, 11/12/97, NSWCCA)
Szabo	[2000] NSWCCA 226
Taouk	[2004] NSWSC 981
Taulu	(unrep, 31/10/98, NSWCCA)
Taylor	[2002] NSWSC 1139
Toma	[1999] NSWCCA 350
Walkington	[2003] NSWSC 517

Accepted defence

Case name	Citation
Alexander	(1994) 78 A Crim R 141
B	(unrep, 9/12/94, NSWSC) per Findlay J
Bolt	[2001] NSWSC 747
Brophy	(unrep, 22/03/91, NSWSC) per Slattery AJ
Butcher	[2000] NSWSC 92
Cardoso	(2003) 137 A Crim R 535
Cheung	(unrep, 12/3/98, NSWCCA)
C	(unrep, 28/06/90, NSWSC) per Hunt J
C	(unrep, 17/09/93, NSWSC) per Hunt CJ at CL
Dally	(2000) 15 A Crim R 582
Dang	[1999] NSWCCA 42
Dimond	[2000] NSWSC 1212
Dunn	(unrep, 28/10/97, NSWCCA)
Gardiner	[2001] NSWSC 1147
Gilham	(unrep, 7/4/95, NSWSC) per Abadee J
Godwin	(unrep, 22/08/91, NSWSC) per Finlay J
Green	(1997) 148 ALR 659; [1999] NSWCCA 97

Case name	Citation
Griffis	[2001] NSWSC 1154
Howard	[1999] NSWSC 1228
Isaacs	(1997) 41 NSWLR 374
Jacky	(unrep, 10/6/93, NSWSC) per Campbell J
Jenkins	(unrep, 14/7/93, NSWCCA)
Johnson	[2001] NSWCCA 517
Kelly	[2000] NSWSC 701
Kerr	(unrep, 15/02/1991, NSWSC) per Badgery-Parker J
Khan	(1996) 86 A Crim R 552
Killiby	(unrep, 13/11/98, NSWSC) per Grove J
King	(unrep, 13/08/98, NSWSC) per Studdert J
KMB	[2005] NSWCCA 185
Ladd	[2001] NSWSC 1055
Ladwig	(unrep, 07/05/98, NSWSC) per Smart J
Lauaki	(unrep, 18/04/97, NSWSC) per Ireland J
Lynch	[2002] NSWSC 1140
M	(unrep, 20/04/99, NSWSC) per James J
Marlow	[2003] NSWSC 1130
McEwan	(unrep, 9/7/98, NSWSC) per Barr J
McIntyre	(unrep, 15/3/96, NSWSC) per McInerney J)
Morabito	(1992) 62 A Crim R 82
Nelson	(unrep, 25/6/96, NSWCCA)
Panozzo	(unrep, 25/3/93, NSWCCA)
Pavia	(unrep, 9/12/94, NSWCCA)
Pello	[2001] NSWSC 650
Peterson	(unrep, 22/05/92, NSWSC) per Enderby J
Popovic	[2003] NSWCCA 103
Prasad	(unrep, 22/11/92, NSWSC) per McInerney J
Richards	(unrep, 30/8/96, NSWSC) per Sully J
See	[2001] NSWSC 776
Shillingsworth	(unrep, 13/8/98, NSWCCA)
Sofokleous	(unrep, 13/12/93, NSWCCA)
Sosefo	(unrep, 06/01/90, NSWSC) per Loveday J

Case name	Citation
Sulieman	(unrep, 01/01/95, NSWSC) per Blanch J
T	(unrep, 09/09/99, NSWSC) per Sperling J
Tindall	[2002] NSWSC 1108
Tran, Coung	(unrep, 17/12/98, NSWSC) per Levine J
T	(unrep, 14/07/94, NSWSC) per Grove J
Vandersee	[2000] NSWSC 916
Veech	[2001] NSWSC 68
Vella	(unrep, 18/11/94, NSWSC) per Allen J
Vimpany	(unrep, 27/7/90, NSWSC) per Loveday J
Walsh	(2004) 142 A Crim R 140
Welsh	(unrep, 07/05/99, DC) per Rummery J
Whalen	(unrep, 5/4/91, NSWCCA)
Williams	[2004] NSWSC 189
Woolsey	(unrep, 19/08/93, NSWSC) per Newman J
Young	(unrep, 20/05/98, NSWSC) per Loveday J

Provocation and diminished responsibility/substantial impairment

Rejected defences

Case name	Citation
Bowhay	(2000) 111 A Crim R 271
M	(unrep, 28/3/95, NSWCCA)
Starr	(unrep, 16/12/1994, NSWSC) per Hunt CJ at CL
Toki (Substantial impairment)	(2000) 116 A Crim R 536
Van Krevel, a.k.a Valera (Substantial impairment)	[2000] NSWSC 1220
Websdale	(unrep, 15/7/97, NSWCCA)

Accepted defences

Case name	Citation
Anthony	(unrep, 23/09/94, NSWSC) per Newman J
Chaouk	(unrep, 17/8/93, NSWSC) per Gleeson CJ
Diamond	(unrep, 15/4/94, NSWSC) per Simpson J
Gardner	(unrep, 27/3/92, NSWSC) per Wood J
Kali	(unrep, 27/5/91, NSWSC) per Campbell J
Ko (substantial impairment)	[2000] NSWSC 1130
K	[1999] NSWSC 933
Low	(1991) 57 A Crim R 8
S (substantial impairment)	(unrep, 27/8/01, NSWSC) per Wood J
Spencer	(unrep, 18/12/92, NSWSC) per Matthews J

Excessive self-defence

(Includes cases up to 29 June 2005. Partial defence accepted in all but *Katarzynski*.)

Case name	Citation
Ali	[2005] NSWSC 334
Boyd	[2004] NSWSC 263
Cioban	(2003) 139 A Crim R 265
WKD	[2005] NSWSC 694
Forbes	[2005] NSWCCA 377
Muddle	[2004] NSWSC 403
Nguyen	[2002] NSWSC 536
Price	[2004] NSWSC 868
Scott	[2003] NSWSC 627
Trevenna	(2004) 149 A Crim R 505
Vuni	[2005] NSWSC 184
Ward	[2005] NSWSC 266
Katarzynski	[2002] NSWSC 924

Appendix B

Australian and international reports on partial defences

The following reports from Australian and international jurisdictions provide valuable analyses of partial defences:

- New South Wales Law Reform Commission, *Report 82: Partial Defences to Murder—Diminished Responsibility*, 1997, Sydney.
- New South Wales Law Reform Commission, *Report 83: Partial Defences to Murder—Provocation and Infanticide*, 1997, Sydney.
- Victorian Law Reform Commission, *Report No 40: Homicide* 1991, Melbourne.
- Victorian Law Reform Commission, *Defences to Homicide: Final Report*, 2004, Melbourne.
- Law Reform Committee of the Northern Territory, *Self-Defence and Provocation*, 2000, Darwin.
- Law Reform Commission of Western Australia commenced a review of the law of homicide in 2005–2006.
- Law Reform Commission of the Republic of Ireland, *Consultation Paper on Homicide: The Plea of Provocation*, 2003, Dublin.
- Law Commission for England and Wales, *Partial Defences to Murder: Final Report*, 2004, London.
- Scottish Law Commission, *Report on Insanity and Diminished Responsibility*, 2004, Edinburgh. A review of provocation and self-defence is part of its current program of law reform.
- Law Commission of New Zealand, *Some Criminal Defences with Particular Reference to Battered Defendants*, 2001, Wellington. The Commission is also reviewing insanity and partial defences.

Select bibliography

American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision*, 2000.

H Donnelly, S Cumines & A Wilczynski, *Sentenced Homicides in New South Wales 1990–1993*, 1995, Judicial Commission of New South Wales, Sydney.

H Donnelly & S Cumines, “From Murder to Manslaughter: Partial Defences in NSW 1990–1993” (1994) 8 *Sentencing Trends* 1.

Homosexual Advance Defence: Final Report of the Working Party, 1998, Attorney General's Department of New South Wales, Sydney.

D Howard & B Westmore, *Crime and Mental Health Law in New South Wales*, 2005, Butterworths, Sydney.

J Keane & P Polletti, *Sentenced Homicides in New South Wales 1994–2001*, 2004, Judicial Commission of New South Wales, Sydney.

Model Criminal Code Officers' Committee, *Report of the Model Criminal Code Officers' Committee*, 1998, Standing Committee of Attorneys General, ACT, “Chapter 5: Offences Against the Person”.

Judicial Commission of New South Wales, *Criminal Trial Courts Bench Book*, 1990, Sydney. Available at www.judcom.nsw.gov.au/publications/publications.php <accessed 2 June >.

New South Wales Taskforce on Domestic Violence, *Report of the New South Wales Taskforce on Domestic Violence*, 1981.

Office of the Director of Public Prosecutions (NSW), *Prosecution Guidelines 20*, 20 October 2003. Available at www.odpp.nsw.gov.au/guidelines/guidelines.html <accessed 20 June 2006>.

