Case Notes

The homosexual advance defence: 'Yeah, I killed him, but he did worse to me' *Green v R.*[1]

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I. Introduction — the emergence of the homosexual advance defence

In the past six years, Australian law has seen the emergence of a 'new' criminal defence: the homosexual advance defence (HAD). This defence is grounded in two alternative substantive defences — self-defence and provocation. In advancing the defence, the defendant argues that:

> the victim's sexual advance was either sufficiently provocative for the accused to lose self-control and commit murder, or the advance justified the use of deadly force. The underlying basis of this line of argument is that the use of fatal force is excusable/justifiable under the principles of provocation or self-defence. In this way, defence counsel have successfully reduced the charge from murder to manslaughter, or have successfully produced a verdict of 'not guilty.'[2]

The emergence of this defence can be traced to a cluster of cases in New South Wales between 1993 and 1995.[3] Undoubtedly the most notorious of these — and the one which provided a focal point for the 'alarm and outrage'[4] of the gay press and for a concerted campaign to try to bring about some form of government intervention — was the 1993 decision in *R v McKinnon*.[5] McKinnon had killed a homosexual man by punching him and repeatedly ramming his head against a wall, and despite evidence being admitted that he had discussed the killing with friends and told them that he had 'rolled a fag,' he was acquitted, the jury apparently having accepted, on the evidence presented in McKinnon's unsworn statement, that he had acted in self-defence when confronted with an unwanted (homo)sexual advance. With the decision in May 1995 in *R v Bonner*[6] — another case in which the defendant was acquitted — it had become clear that the defence was now well-established. In response, in July 1995, the Attorney-General set up a Working Party to inquire into the operation of the HAD in relation to both self-defence and provocation.

1 *Green v R* (1997) 191 CLR 334 at 391 per Kirby J.

2 Hodge N, 'Transgressive Sexualities and the Homosexual Advance' (1998) 23(1) *Alternative Law Journal* 30 at 31.

3 Nathan Hodge provides references to these cases (all unreported decisions of the NSW Supreme Court) and details their outcomes: *R v Jacky*, 5 March 1993, Campbell J; *R v Chaouk*, 11 August 1993; *R v McGregor*, 9 October 1993, Newman J; *R v McKinnon*, 24 November 1993, Studdert J; *R v Turner*, 6 to 11 April 1994, Grove J; *R v G Diamond*, 15 April 1994; *R v Chapman*, 4 October 1994; *R v Stevenson*, 15 to 18 October 1994, Studdert J; *R v PA*, 10/2/95; *R v Bonner*, 19 May 1995, Dowd J; *R v Dunn*, 21 September 1995, Ireland J; *R v CD*, 10 December 1995; *R v Green*, 7 June 1995, Abadee J, and then on appeal before the NSW Court of Criminal Appeal, Priestly JA and Ireland J and Smart J in dissent, 8 November, 1995. Of these thirteen cases, two resulted in outright acquittals (*McKinnon* and *Bonner*); three resulted in a verdict of not guilty of murder but guilty of manslaughter (*Turner, Dunn* and *Chaouk*); and two resulted in murder verdicts (*CD* and *Green*). The other six cases were disposed by pleas of guilty to murder (*McGregor*), manslaughter (*Jacky, G Diamond, PA* and *Chapman*) and malicious wounding (*Stevenson*): Note 2 at 30.

4 Howe A, 'More Folk Provoke Their Own Demise (Homophobic Violence and Sexed Excuses — Rejoining the Provocation Law Debate, Courtesy of the Homosexual Advance Defence)' (1997) 19 *Sydney Law Review* 336 at 346. See also Kiley D, 'I Panicked So I Hit Him With A Brick' (1994) 1 *Law, Text, Culture* 81 at 81–2, 84, 87, 89, 92–4.

5 NSW SC, 24 November 1993, Studdert J, unreported.

6 NSW SC, 19 May 1995, Dowd J, unreported.

In the context of self-defence, the Working Party observed that the chief difficulty raised by the HAD is that it might tend to obscure the difference between a sexual advance and a sexual attack: that is, in this context, the HAD risks treating a homosexual advance as a form of sexual aggression, not because it is aggressive but because it is homosexual. This is all the more likely in circumstances where (as was alleged in the New South Wales cases) rejection of an initial sexual advance lead to a violent struggle 'in which the victim was the primary aggressor.'[7] Nevertheless, the Working Party concluded that the law of self-defence itself, and the requirement that the jury must make an assessment on the whole of the evidence as to whether self-defence has been disproved, provides adequate safeguard against this risk.[8]

In the context of provocation, the operation of the HAD raised a much more problematic and fundamental issue: might it not be argued that a non-violent (homo)sexual advance should *never* be considered a sufficient basis to support a defence of provocation? The Working Party did not go so far as to accept this proposition, partly because the then recent New South Wales Supreme Court decision in *R v Green*[9] appeared to provide judicial support for the proposition that a non-violent homosexual advance will not be sufficient to ground a provocation defence. It did, however, recommend a form of jury direction, to follow the direction on the 'ordinary person' that would serve to first, ensure that the distinction between a sexual advance and a sexual attack be clearly maintained and second, limit the influence of any homophobic prejudice amongst jury members.[10] Addressing the first of these objectives, the direction was to the effect that 'an ordinary person would not act violently as a result of homophobia' and that the 'law does not treat a homosexual advance ... made by the deceased as an act of provocation to any lesser or greater degree than if he had made a comparable sexual advance upon woman.'[11] Addressing the question of jury prejudice, the direction was to be in terms that:

> if jurors disagree morally with the deceased's behaviour and sexual orientation, they need to remember that 'this is a Court of Law and not a court of morals'; that 'prejudice and emotion have no place in a court of law'; that everyone is equal before the law; that, 'on the question of sexuality', a person's background is 'not of the slightest relevance', and that there should be no prejudice against the deceased or the accused on the basis of sexual orientation.[12]

As the first High Court decision in which consideration has been given to the operation of the HAD in relation to provocation, *Green v R*[13] provides a timely opportunity to re-examine the issues addressed by the Working Party and to make a critical assessment of the adequacy of its proposed judicial directions.

II. Lying face down in a pool of his own blood

1. The players

Malcom Green (the appellant) had undoubtedly grown up in a violent and dysfunctional family. He had been subjected to violence by his father and had witnessed some violent assaults by his father on his mother and sisters. He believed that his father had sexually

7 Note 4 at 348.
8 Note 4 at 348. This does not really address one of the other key issues identified by the Working Party, and relevant to both self-defence and provocation — namely, that, as the accused will be likely to be the only witness to the circumstances of the victim's death, it will be difficult to disprove the allegation that a homosexual advance was ever made.
9 Unreported, Priestley JA and Ireland J and Smart J in dissent, 8/11/95. Note 4 at 349.
10 Note 4 at 349.
11 Note 4 at 349; references omitted.
12 Note 4 at 349; references omitted.
13 (1997) 191 CLR 334.

assaulted his sisters, although he had not witnessed this himself. His father had left the home when Green was only nine or ten years old, and apart from one visit to his father when he was about fifteen, there had been no other contact between them. On his own evidence, he hated his father and wanted to kill him. Green had known the deceased, Don Gilles, for about six years before the killing. Their friendship had been warm and firm: they shared certain leisure activities — swimming, diving, drinking and jogging; they worked together at a local church, Gilles had helped Green obtain work and had lent him sums of money; he had been something of a confidant of Green and Green had trusted him, admired him and sought and valued his advice; one of Green's sisters described Gilles as someone who was always there to help Green. At no point prior to the killing had Gilles indicated any sexual interest in Green.

2. The killing

On the day before the killing, Green had visited some friends, Mr and Mrs Sirola. There was some uncertainty as to what was said during this visit, but there was a suggestion that Green had referred to wanting to 'knock somebody off.' There was also a reference to going jogging with Gilles the next morning, although it was by no means clear that the comments were related. Green asserted that the comments were in reference to his father. There was no suggestion in any of the evidence that Green had any animosity towards Gilles.

On the day of the killing, Gilles invited Green to his home: they shared a meal and then drank a considerable amount of alcohol and watched television. Later in the evening, Gilles invited Green to stay the night so that he would not have to walk to his sister's home, where he was staying. Gilles suggested that Green sleep in his bed, while he, Gilles, would sleep in another room normally occupied by his mother. When Green was lying in bed, having removed his upper garment but still clothed from the waist down, Gilles apparently entered the room, naked, and lay down on the bed. Green alleged that he made a sexual advance which was rejected. When the advances were repeated, and with greater insistence, Green lost self-control and attacked Gilles.

He punched Gilles about thirty-five times, rammed his head repeatedly against a wall and stabbed him ten times with a pair of scissors as he, Gilles, rolled off the bed. He was left lying face-downward, in a pool of his own blood. The post mortem evidence makes chilling reading:

> [T]here were three large grazes on the left side of the head in the area of the temple. . . . In addition there was an area of grazing and bruising over the left temple and an area of grazing immediately behind the left ear. There was an area of bruising and grazing in the left cheek and there was a triangular graze on the left cheek. . . . There were black eyes and under the eyelid, on the eyelid there were a number of very small grazes. . . . There was a superficial cut in the skin of the bridge of the nose which I determined had not been caused by a sharp object like a knife or scissors but was, in fact splitting of the skin as the result of a blunt object. The entire nose, in fact was bruised and there was a large area of bruising on the right side of the face . . . Both lips were very swollen as a result of the bruising and finally there was an area of bruising and grazing on the back of the head. . . . Now, when I performed a further dissection of the head in addition I found that there was fracturing to the . . . anterior cranial fossa. Now that is that part of the skull between the eyes and the brain . . . that separates the brain itself from the face. I considered that this fracture was in fact a very severe form of that fracture. . . . In addition to those injuries to the head I noted that there was a fracture of the hyoid bone which is a small bone in the Adam's apple. . . . I noticed fractures of the second and third ribs on the left side and the second rib on the right in front so these were not related to the stab wounds and I noted that in fact there was a large amount of blood loss in that all the organs of the body were very pale relevant [sic] to what would usually be expected. On thorough examination of the brain I noted that there was blood on the surface of the brain as well as small areas of bruising within the brain itself . . ..[14]

14 (1997) 191 CLR 334 at 390 per Kirby J.

If I have lingered on these details, it is not out of prurience or morbid obsession. Rather, my point is that in the 'extensive and brutal nature of the injuries inflicted,'[15] in the 'ferocity and brutality'[16] of Green's attack, in the 'excessive[ly] frenzied'[17] and 'savage'[18] nature of the killing *Green* is entirely consistent with other HAD cases.[19] There is nothing exceptional about it. I have also insisted on these details because they serve to underline the contrast between the outrageous and extreme violence of Green's attack and the non-violent nature of Gilles' sexual advance, as that advance is described by Green himself. And finally, I have insisted on these details in order to make the point (and it is one to which I will return) that there is something at stake, discursively and doctrinally, in effacing this violence — with the notable exception of Kirby's judgement, nowhere are these details recounted and, as we shall see in the following section, they are certainly not part of Green's narrative.

3. The sexual advance

After the killing, Green somewhat half-heartedly attempted to remove his fingerprints from the scene of the crime. He then called his brother-in-law, related to him what had happened and requested that he come and collect him. Later, he instructed his brother-in-law to drive him to the police station. He admitted that he had killed the deceased, asserting that the deceased 'did worse to me,' and stating he had killed him 'because he tried to root me.'[20] In his record of interview, Green recounted the events as follows:

> After a while . . . Don [Gilles] entered the room I was in, slid in beside me in the bed and started talking to me about how a great person I was. Then he started touching me. I pushed him away. He asked what was wrong. I said, 'What do you think is wrong? I'm not like this.' He started grabbing me with both hands around my lower back. I pushed him away. He started grabbing me harder, I tried and forced him to the lower side of me. He still tried to grab me. I hit him again and again on top of the bed until he didn't look like Don to me. He still tried to grope and talk to me that's when I hit him again and saw the scissors on the floor on the right side of the bed. When I saw the scissors he touched me around the waist shoulders area and said 'Why'? I said to him, 'Why I didn't ask for this.' I grabbed the scissors and hit him again. He rolled off the bed as I struck him with the scissors. By the time I stopped I realised what had happened. I just stood at the foot of the bed with Don on the floor lying face down in blood.[21]

It is difficult to interpret this narrative. It contains some notable gaps: the forensic evidence showed that the pattern of grazing on the defendant's head and face combined with the blood spatter patterns on the wall were consistent with the deceased's head having been rammed repeatedly against the wall. And to assert that he 'struck [the deceased] with the scissors' as he rolled off the bed in certainly an understatement. It also appears in some ways to be a rather incoherent and implausible account of the sequencing of events. Is it conceivable, given the nature and extent of the deceased's injuries that when the deceased 'touched [Green] around the waist shoulders area' that at that point, after Green had 'hit him again and again on top of the bed until he didn't

15 (1997) 191 CLR 334 at 373 per McHugh J.
16 (1997) 191 CLR 334 at 390 per Kirby J.
17 (1997) 191 CLR 334 at 358 per Toohey J.
18 (1997) 191 CLR 334 at 359 per Toohey J.
19 In *R v Murley* (Vic SC, 28 May 1992, Teague J, unreported) the defendant bashed the deceased in the head, rendering him unconscious, left him lying on the floor in order to get a towel to cover the deceased's head whilst he attacked the deceased with a knife, nearly decapitating him. The defendant then proceeded to rob him and set his flat alight. In *R v Dunn* (NSW SC, 21 September 1995, Ireland J, unreported) the defendant repeatedly kicked and punched the deceased, slammed his head into a concrete path and then proceeded to mutilate the body by wrapping a nylon stocking around the deceased's penis. In *R v Turner* (NSW SC, 14 July 1994, Grove J, unreported) the deceased died of head injuries and was stabbed twelve times. Note 4 at 355.
20 (1997) 191 CLR 334 at 391 per Kirby J.
21 (1997) 191 CLR 334 at 360 per McHugh J; 348 per Toohey J.

look like Don' and then 'hit him again and again' that the deceased was either still persisting forcefully in the sexual advance or engaged in a violent struggle as an aggressor? And in what, moreover, did the 'grabbing' and 'touching' of the initial sexual advance consist? Green's response when asked precisely that question is less than illuminating for he clearly describes the touching as 'gentle' and 'slow' rather than forceful and aggressive:

Q. 58 How was he touching you?
A. I suppose it was gently, but I didn't respond.
Q. 59 On what part of the body did he touch you?
A. On my side that's when I pushed him away.
Q. 60 Did he touch you anywhere else after that?
A. Yes, he grabbed me by both arms and pulled me towards him till there was no room between us. Then he moved his hand down to my backside, arse. I pushed it away then he slowly touched my groin area that's when I got aggressive and hit him.[22]

At the trial, Green elaborated on this last phrase — I got aggressive and hit him when he slowly touched my groin area — describing his loss of self-control in some detail:

A. It's just that when I tried to push Don away and that and I started hitting him it's just — I saw the image of my father over my two sisters, Cherie and Michelle, and they were crying and I just lost it.
Q. What do you mean you just lost it?
A. I can't remember stuff after it.
. . .
A. I just lost control
Q. Why did you lose control?
A. Because of those thoughts of me father just going through me mind.
Q. What about your father was going through your mind?
A. About sexually assaulting me sisters and belting me mother.[23]

This final passage seems to suggest that in Green's account of the events, the sexual advance was not violent, nor was it pursued forcefully or aggressively. Rather, the 'provocative' quality of the sexual advance — the aspect of the advance which caused Green to 'just lose it' — seems on this account to lie solely in its 'evocative' capacity.[24]

III. The history of proceedings

At trial, the issue of provocation was raised. The relevant statutory provision was s 23 of the Crimes Act 1900 (NSW) which provided that:

(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 where:
  (a) the act of 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,

22 (1997) 191 CLR 334 at 360 per McHugh J.
23 (1997) 191 CLR 334 at 360–1 per McHugh J.
24 This observation will be of some significance in considering Gummow J's dissenting judgement in the final section of this discussion.

whether that conduct of the deceased occurred immediately before the act or omission causing death or at any previous time.

(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 negative if:

(a) there was not a reasonable proportion between the act or omission causing death and the conduct of the deceased that induced that act or omission;

(b) the act or omission causing death was an act done or omitted with any intent to take life or inflict grievous bodily harm.

On the basis of Green's statements to the effect that he had 'lost control,' that he had 'just snapped' when confronted with a (homo)sexual advance, the issue of provocation was left to the jury, but Green was ultimately convicted of murder. Green appealed against the conviction on a number of grounds, namely that:

(1) the verdict of murder instead of manslaughter was in all the circumstances unsafe and unsatisfactory;

(2) the trial judge had erred in law in determining that the evidence of the Green's special sensitivity to sexual interference and evidence of the family background going to explain that sensitivity — the 'sexual abuse factor'[25] — was not admissible on the issue of whether Green had in fact been provoked as required by s 23(2)(a);

(3) the trial judge erred in law in failing to direct the jury that the sexual abuse factor should be considered in determining the issues under s 23(2)(a);

(4) the trial judge had erred in law in suggesting that for the purposes of s 23(2)(b) what was required was a loss of self-control to such an extent that an ordinary person would have resorted to Green's actual response, rather than have been provoked to form an intention to kill or do grievous bodily harm and that that error was not remedied by a later direction to the jury couched in the terms of the provision;

(5) the trial judge had directed the jury as to the meaning of an 'ordinary person' without further directing as to the meaning of 'in the position of the accused;' and

(6) the trial judge erred in determining that evidence of the truth of the alleged sexual assault of Green's sisters by his father was not admissible either on the issues arising under s 23(2)(a) or to show Green's dislike of his father.

In the majority judgment, Priestley JA found that grounds (2) and (3) were made out: the 'sexual abuse factor' was clearly relevant for determining whether Green had in fact been provoked, that is, acted as a result of a loss of self-control induced by conduct of the deceased. These errors were irrelevant, however, as the only realistic chance the Crown would have in negating provocation was to argue, under s 23(2)(b), that notwithstanding that he had in fact been provoked, the deceased's conduct was not such as to cause an ordinary person in the position of the accused to so far lose self-control as to form an intention to kill or do grievous bodily harm. The fifth ground was dismissed on the basis that the direction was adequate and the sixth ground was dismissed on the basis that it was only Green's belief as to his sisters' allegations that was relevant, rather than the truth of those allegations.[26] Priestley JA considered that the fourth ground involved a merely technical error. In weighing up the significance of the errors which he found had taken place, Priestley JA concluded that Green had not been deprived of the chance of a different outcome and that there had been no substantial miscarriage of justice. The first ground of appeal was therefore not made out and it was appropriate to apply the proviso to s6 of

25 (1997) 191 CLR 334 at 342 per Brennan J.

26 Smart J dissented on this point: the truth of the allegations would have given Green's beliefs substance and would have been relevant in assessing the gravity of the provocation.

the Criminal Appeal Act 1912 (NSW)[27] and dismiss the appeal. In Priestley JA's view, on the evidence that the jury had before them, their conclusion was inevitable: an ordinary person in Green's position, notwithstanding that he might have been offended and provoked by Gilles' sexual advances, would not have been induced to lose self-control to the point of forming an intention to kill or inflict grievous bodily harm. Thus, Priestley JA concluded that:

> This is not to say that the behaviour of Mr Gilles up to the point where appellant lost his self-control was not offensive and provocative. It is easy to see that many an ordinary person in the position in which [Green] was when Mr Gilles was making his amorous physical advances would have reacted indignantly, with a physical throwing off of the deceased, and perhaps with blows. I do not think that the ordinary person could have been induced by the deceased's conduct so far to lose self-control as to have formed an intent to kill or inflict grievous bodily harm upon Mr Gilles.[28]

The only decision the jury could have reached on the evidence was that Green had failed to attain the minimum standard of self-control which the law requires of the 'ordinary person.' This conclusion signals that, as a matter of principle, a non-violent homosexual advance, will not support a defence of provocation. Smart J, in dissent, placed a very different interpretation on the events resulting in Gilles' death, re-inscribing them in the homophobic language of revulsion and fear:

> The provocation was of a *very grave kind.* It must have been a *terrifying* experience for the appellant when the deceased persisted. The grabbing and the persistence are critical. Some ordinary men would feel *great revulsion* at the homosexual advances being persisted with in the circumstances and could be induced so far as to lose their self control as to form the intention to and inflict grievous bodily harm. They would regard it as a serious and *gross violation* of their body and their persons. I am not saying that most men would so react or that such a reaction would be reasonable. However, some ordinary men could become enraged and feel that a strong physical re-action was called for. The deceased's actions had to be stopped.[29]

The effect of this analysis is that it also re-inscribes the 'ordinary man' as a (potentially) violent homophobe.[30] The proviso should not have been applied because as a jury, properly instructed and on the evidence before them, might reasonably have reached a conclusion along these lines, there had been a substantial miscarriage of justice.

27 Section 6(1) provides that:

> The court on any appeal under section 5(1) against conviction shall allow the appeal if it is of the opinion that the verdict of the jury should be set aside on the ground that it is unreasonable, or cannot be supported, having regard to all the evidence, or that the judgement of the court of trial should be set aside on the ground of the wrong decision of any question of law, or that on any other ground whatsoever there was a miscarriage of justice, and in any other case shall dismiss the appeal; provided that the court may, notwithstanding that it is of the opinion that the point or points raised by the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.

28 *R v Green*, NSW CA, 8 November 1995 per Priestley J at 26, unreported. This passage is cited several times in *Green v R* (1997) 191 CLR 334 at 345 per Brennan CJ; 358 per Toohey J; 395 per Kirby J. Note 4 at 349.

29 *R v Green*, NSW CA, 8 November 1995 per Smart J at 22–3, unreported.

30 Note 4 at 364. This strikes me as somewhat paradoxical, recalling as it does the origin of the HAD in an earlier phenomenon of US law in the 1980s: the homosexual panic defence (HPD). The defence was used to support a plea of either insanity or diminished capacity be reason of mental defect and therefore functioned to underline the pathological dimension of the defendant's 'acute homosexual panic.' The defence operated narrowly to describe a neurosis or phobia on the part of the defendant in which the homosexual advance resonated with the defendant's repressed or latent homosexuality and thereby triggered a psychotic and violent reaction. Although the HPD has rightly been criticised for the reasons which Howe elaborates, it serves as an ironic reminder that there *is* something almost pathological about Smart J's 'ordinary man.' Note 4 at 340–2.

IV. The High Court's decision

1. The majority — Brennan CJ, and Toohey and McHugh JJ

The point of distinction highlighted by contrasting these two passages is reproduced in the divergence of opinion between the majority opinions (by Brennan CJ and Toohey and McHugh JJ) and the dissenting judgements (of Gummow and Kirby JJ) in the hearing of the appeal from this decision before the High Court. And it was Smart J's view which ultimately prevailed.

Each of the majority judgments took as their point of departure the High Court's recent pronouncements on the law of provocation in *Stingel v R*[31] and *Masciantonio v R*,[32] and emphasized that what is required is:

(1) an assessment of the gravity of the provocative conduct, determined by reference to the particular standpoint of the accused, including age, race, sex, physical features, past history and so on; and
(2) a consideration of the possible effect on the powers of self-control of a truly hypothetical 'ordinary person' of the provocative conduct, so understood and assessed.

Considering the operation of s 23 in the light of these general principles, in the present case, evidence of the 'sexual abuse factor' was clearly relevant to the issue (arising under s 23(2)(a)) of whether Gilles' homosexual advance had in fact induced a loss of self-control on Green's part. The trial judge had clearly erred in excluding it. The Court of Criminal Appeal had also erred, however, in failing to appreciate that in determining the issue arising under s 23(2)(b) — whether an ordinary person in the position of the accused would have been induced by the conduct of the deceased to lose self-control so far as to form an intention to kill or to do grievous bodily harm — what was required was a consideration of the effects on the powers of self-control of an ordinary person of provocation of the *same gravity*, of the *same nature and extent*, as that experienced by the accused. Evidence relating to the 'sexual abuse factor' was therefore relevant to the issues raised by s 23(2)(b). It follows from this that had the jury been able to consider the 'sexual abuse factor' in relation to s 23(2)(a), they might reasonably have taken a different view of the gravity of the provocation to the accused, and might reasonably have considered that the accused had shown the degree of self-control required of an ordinary person 'who has been provoked to the same degree of severity and for the same reasons as the accused'.[33] In this sense, the outcome of their deliberations was not, as Priestley JA determined, inevitable. In Brennan CJ's terms:

> A reasonable jury might have come to the conclusion that an ordinary person, who was provoked to the degree that [Green] was provoked could have formed an intent to kill or inflict grievous bodily harm upon the deceased. It was essentially a jury question, a question the answer to which depended on the jury's evaluation of the degree of outrage which [Green] might have experienced. It was not for the Court to determine questions of that kind, especially when reaction to sexual advances are critical to the evaluation. A [jury] would not be unreasonable because [they] might accept that [Green] found [Gilles'] conduct 'revolting' rather than 'amorous.'[34]

It was therefore not possible to say that there had been no substantial miscarriage of justice. As the Court of Criminal Appeal had erred in applying the proviso so as to dismiss the appeal, the appeal was allowed and a re-trial was ordered.

31 (1990) 171 CLR 312.
32 (1995) 183 CLR 58.
33 (1997) 191 CLR 334 at 369 per McHugh J. See also Brennan CJ at 342–4; Toohey J at 354, 357.
34 (1997) 191 CLR 334 at 346. This distinction seems to rather miss the point that here (and presumably in HAD cases generally) the conduct is considered 'revolting' *because* it is 'amorous.'

2. The dissenting judgments — Gummow and Kirby JJ

I suggested at the beginning of this discussion that the fundamental theoretical issue raised by the operation of the HAD in the context of provocation is that it might quite properly be argued that a non-violent homosexual advance should never be considered sufficient to support a defence of provocation. The defence is inherently homophobic:[35] it condones — it re-inscribes as 'justifiable,' as 'ordinary' — a reaction of extreme and excessive violence premised upon feelings of hatred, fear, revulsion and disgust, similarly re-inscribed as 'justifiable' and 'ordinary.' It interprets, discursively and doctrinally, a non-violent homosexual advance as inherently 'provocative' (in both senses of the word) whereas non-violent non-homosexual advances are never so interpreted.

The somewhat unusual factual circumstances of this case — the so-called 'sexual abuse factor' — rather muddies the water, certainly as far as the majority is concerned. Thus, it was possible for McHugh J to argue that 'the fact that this advance was homosexual in nature was only one factor in the case' and not even the most important factor:

> What was more important from [Green's] point of view was that a sexual advance, accompanied with some force, was made by a person whom the accused looked up to and trusted. The sexual, rather than the homosexual, nature of the assault filtered through the memory of what the accused believed his father had done to his sisters, was the trigger that provoked the accused's violent response. Viewed in this light, the conduct of the deceased was directly related to the accused's sensitivity.[36]

Arguing in a similar vein, Brennan CJ suggested that:

> The real sting of provocation could have been found not in the force used by the deceased, but in his attempt to violate the sexual integrity of a man who had trusted him as a friend and father figure . . . and in the evoking of the [Green's] recollection of the abuse of trust on the part of his father.[37]

This interpretation of the 'sexual abuse factor' allows Gilles' advance to be interpreted through the lens of child (sexual) abuse, incest and paedophilia. And so, although perhaps not a literal victim of his father's sexual abuse, Green is a kind of figurative victim, as it were, still subjected to the 'sexual abuse' of a father figure. Such an interpretation is

35 Joshua Dressler puts the contrary proposition that a killing after a non-violent homosexual advance is not always 'the result of intolerance, bigotry or homophobia.' Most heterosexual and homosexual men would become 'justifiably indignant' if subjected to non-consensual sexual conduct. He continues: '[c]ertainly a woman would become outraged if a man touched her breasts, patted her on the buttocks or had a sexual relationship with her while she was asleep. In such circumstances no one would characterize her indignant response an heterophobic or anti-male in nature.' Well, yes and no. The appropriate analogy to test Dressler's hypothesis, it seems to me, would involve an unwanted sexual advance by another woman. Whilst it is unlikely that her indignant reaction would involve extreme, excessive and fatal violence (provocation is a defence overwhelmingly relied upon by men, not women) there seems to me to be no reason why that response might not be described quite properly as homophobic. But, to interrogate Dressler's hypothesis further, it does raise a question as to whether a lesbian woman confronted with an unwanted sexual advance from a man would be able to raise a 'heterosexual advance defence' to excuse a killing. If this were possible, one can readily imagine that this would be described as 'heterophobic or anti-male in nature.' Dressler's premise in suggesting that the HAD is not inherently homophobic, is that 'for some men, the thought or participating in a homosexual act is physically (as distinguished from morally) repulsive. . . . Consequently, a person's distaste for a particular type of sexual act is, in a significant sense a natural reaction of *that* person.' What makes the reaction natural is that sexual orientation is developed before birth or soon after, Dressler argues, and is not freely chosen. Nor is the 'distaste,' 'repulsion,' 'revulsion,' 'outrage,' or 'justifiable indignation' that certain sexual acts elicit freely chosen and it should therefore not be subject to moral criticism. Apart from the fact that this is based on the theoretically dubious premise that 'sexuality' exists beyond the influence of cultural and historical specificities, what this argument glosses over is that the very language in which it is constructed — revulsion, outrage, indignation, repulsion and so on — is not a neutral description of preferences. Rather, this is a lexicon which already expresses moral criticism. 'When "Heterosexual" Men Kill "Homosexual" Men: Reflections on Provocation Law, Sexual Advances, and the "Reasonable Man Standard"' (1995) 85(3) *Journal of Criminal Law and Criminology* 726 at 754–6.

36 (1997) 191 CLR 334 at 370; references omitted.

37 (1997) 191 CLR 334 at 345.

properly criticized on the basis that it functions to assimilate incest and paedophilia into homosexuality:[38] it functions to obscure the fact that a non-violent homosexual advance between adults with a friendship of some years' standing (whatever the precise dynamics of that relationship were) is not the same as, and is not related to, sexual abuse of a child by a parent. This is effectively the point that Gummow J makes in dissenting in the following terms:

> In truth, however, the particular elements said to constitute the position of the accused were his beliefs as to those episodes in his past family history particularly involving the sexual abuse of his sisters but also involving the physical violence inflicted by his father upon his mother and sisters. [Green's] evidence as to the deep impression made upon him by episodes in his family history . . . were insufficiently related to the provocation presented by the conduct of the deceased.[39]

By interpreting Gilles' sexual advance by reference to Green's father's sexual abuse of his sisters, by constructing it almost as a form of adult-child sexual abuse, what all the majority judgements obscure is that this case clearly concerns a non-violent homosexual advance. In this regard, Kirby J's dissent very explicitly addresses what I take to be the central issue which the use of a HAD in this circumstance raises: what meaning, legally, should such an advance be understood to carry?

> If every woman who was the subject of a 'gentle', 'non-aggressive' although persistent sexual advance, in a comparable situation to that described in the evidence in this case could respond with brutal violence . . . on the male importuning her, and then claim provocation after a homicide, the law of provocation would be sorely tested and undesirably extended. A neutral and equal response to the meaning of [s 23] requires the application of the same objective standard to the measure of self-control which the law assumes, and enforces, in an unwanted sexual approach by a man to a man. Such an approach may be 'revolting' to some. Any unwanted sexual advance, heterosexual of homosexual, can be offensive. It may intrude on sexual integrity in an objectionable way. But this Court should not send the message that, in Australia today, such conduct is objectively capable of being found by a jury to be sufficient to provoke the intent to kill or inflict grievous bodily harm. Such a message unacceptably condones serious violence by people who take the law into their own hands.[40]

Reading the majority judgments, however, a very different message is clear: because there is, effectively no distinction to be made between non-violent homosexual advances on the one hand and sexual attacks and sexual abuse on the other, a non-violent homosexual advance will not be treated as analogous to a non-violent heterosexual advance. What is

38 Nathan Hodge argues that this assimilation of peripheral sexualities — that is, sexualities that 'transgress the "heterosexual norm"' — is a consistent feature of HAD cases, arising from the fact that the criminal justice system is unable to distinguish between, for example, homosexuality and transvestism or paedophilia: Note 3 at 31.

39 (1997) 191 CLR 334 at 383–4. Gummow J concludes that Green's belief as to the connection between his past experiences and his immediate circumstances in explaining his violent reaction 'cannot of itself be determinative of the issue which arises under s 23(2)(b)': at 387. Rather, even allowing for an ordinary person to have the beliefs about his father which Green held, the minimum requirement of self-control would still have required that ordinary person not to be provoked to form an intention to kill or do grievous bodily harm when faced with Gilles' sexual advance. As a reasonable jury could not have decided otherwise, there was no miscarriage of justice and the appeal was dismissed.

40 (1997) 191 CLR 334 at 415–16. Kirby also suggested that he found it entirely likely that a jury conviction of murder was inevitable in circumstances. Green was at all times dressed from the waist down. He was awake and aware of what the deceased, who to his knowledge was intoxicated, was doing. He was younger and physically stronger, a fact which is evidenced both by the rapidity with which he suppressed the deceased's advances and by 'the course which his violence took.' Nor was it clear why he did not simply leave, given that he admitted that there was nothing preventing him. However unwanted and offensive the advance may have been, no jury properly instructed could conclude that the deceased's conduct was such as to deprive him of the minimum level of self-control which the law requires.

also clear, to return to the Working Party's recommendation of a jury direction, is that in the absence of judicial insistence on this analogy — an absence which is everywhere present in the majority judgements — jury directions will never be enough to limit the influence of homophobic prejudice in HAD cases.