

The Criminal Justice Response to Gay Killings: Research Findings†

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Introduction

There has been a recent activist, official and media focus on killings of gay men and the outcome of related criminal trials. However, this form of homicide is not a new type of crime and is more widespread than is generally thought. A survey of murder and manslaughter records for New South Wales since 1980 suggests that at least 74 homicides which could reasonably be termed as 'gay killings' have occurred in this period. A further detailed analysis of court records for the 31 'gay-hate killings' recorded by police since 1986, suggests that the evident motives for this violence include elements of homophobia and violent conceptions of heterosexual masculinity. Homophobic hate is directed towards gay and bisexual men who are selected out for assault by offenders on the simple basis of their group sexual identity. At the same time, conventional notions of male identity often rest behind the felt necessity for a violent response to a real or imagined homosexual pass.

New South Wales police have moved beyond the complacency of earlier times, and in cooperation with gay and lesbian groups they have begun a serious effort to record and monitor these offences. Consequently, this state appears to have a much higher rate of gay killings than other Australian states in which community liaison is in its infancy or still resisted by traditional police ideology. A high proportion of these killings have resulted in the apprehension of offenders and in subsequent criminal trials. Some of these trials have led to the imposition of substantial sentences and clear judicial warnings issued against perpetrators of homophobic violence. But homophobia and masculinism extend well beyond the motives of the characteristically young men who assault and kill gays. They are also reflected in aspects of the past and current criminal justice system response to this form of criminal violence. Valid concerns remain about the outcome of trials in which pleas of provocation and self-defence have been raised by offenders who allege their violence was a necessary or excusable response to a homosexual advance.

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Research outline

Since the late 1980s, there have been claims of a marked increase in violence directed against gay men, lesbians and other sexual minorities in various nations (Herek & Berrill 1992; Mason 1993). In Australia, these claims and heightened concerns were first of all focused on publicising and addressing violence in inner-Sydney and this has since been reproduced in regional parts of New South Wales, and in cities and areas in other states. This development has led some observers into conjecture about the possibility of a sharp increase, or even an epidemic of violence. Because these attacks have only very recently become a focus of police attention or research interest, there can only be speculation about the real level of attacks. It seems likely that the increased concern with this violence is in large part a result of the efforts of activists themselves. Community research, protest rallies and other publicity, have provided the catalyst for making violence and harassment directed at gay men and lesbians into a public issue. This reflects a new level of political influence. Especially in New South Wales, the lesbian and gay community now has an increased and often open representation in party politics and sections of the state bureaucracy.

Gay men and lesbians (particularly in areas like Darlinghurst, Surry Hills and Newtown) in inner-Sydney also have an increased public cultural presence. But many problems arise from efforts to define the different people who now either openly or covertly identify as gay, lesbian, bisexual, homosexual or sexually marginal, as all being part of any unitary community. Questions of identity in this and other research on anti-homosexual violence, are closely tied to the difficult but perhaps necessary effort by researchers to classify a victim's sexual orientation, matters of known or assumed criminal motivation and the criminal justice response to various incidents.

North American research on this area of crime include victim surveys conducted by activist organisations in the 1980s and the pioneering research of Comstock (1991). Early Australian research has been mostly conducted by activists themselves; more recently under the auspices of the New South Wales Police Service, and as the doctoral research of a local academic (Cox 1990; Cox 1994; Baird et al 1994; GLAD 1994; New South Wales Police Service 1995; Mason 1995). Despite the design and sampling problems of most of these studies, the most significant and relevant of their common findings are the comparatively higher rate of victimisation of the gay men and lesbians surveyed as compared with the heterosexual population, and the relative low rates of reporting of offences, which reflects a marked lack of faith in the police and criminal justice system.

In recent years unpublished activist surveys of the murders of homosexual men have been conducted in the United States and Brazil. Internationally, there has been a negligible focus on these homicides by mainstream academic and official researchers. Some major studies of homicide make some mention of such killings (Polk 1994), but others include these under such amorphous categories as crimes of opportunity, gang attacks, victim-precipitated killings, or intra-male violence. This overall neglect is not due to mere oversight, but most probably is tied to the homophobic origins of criminology as a research discipline and its historical incorporation into practices of surveillance and regulation directed against sexual minorities (Tomsen 1997).

A general pattern of official disinterest has also meant that these killings have only been of minor interest to homicide researchers. In part this seems to be due to the difficulties experienced with official records. Although violent crime has become topical and politicised in the last decade, many aspects of recording and analysis are still very antiquated or in a situation of flux. Among incidents that are officially recorded by police agencies, there is mostly no indication that these are hate crimes. This may sometimes be

apparent from the laborious study of records, but these cases are only found by chance and many records describe ambiguous crime scenarios. Much of the historical underreporting and underrecording and the unknown level of violence against gays and lesbians is a combined consequence of a lack of social power, and substantial levels of complacent or hostile police attitudes.

The ongoing difficulty for researchers studying official records is to consider both the reluctance of victims like gay men and lesbians to report matters of assault and harassment, and also, the shifting and regionally different ways that these are recorded, making interstate comparisons of hate crime especially difficult. Most importantly, homophobic violence and hate crime will appear to undergo dramatic rises in jurisdictions in which these offences are given greater priority. Matters like the allocation of police time and resources, as well as the level of political mobilisation of these victim groups will determine this.

A conventional wisdom among researchers is that records for homicides are the most thorough among all categories of violent crime. But homicide research in Australia, and the official police and coronial records that this is mostly based upon, rarely mention or only hint at the sexuality of an offender or victim as a relevant factor, and the real number of these killings involving homosexuality is unknown in this country. For these reasons, police and a range of concerned parties have only a very rudimentary knowledge of gay-hate killings; including the historical extent of these and the typical and varying characteristics of fatal incidents. As noted above, it is often thought that victimisation rates for homosexuals are generally higher than for heterosexuals. Lesbians report victimisation in different settings than gay men, and in some studies, a higher proportion of harassment than physical attacks (Mason 1995; Gay & Lesbian Rights Lobby 1992). Little is also known about the different rates between different groups of gay men and lesbians such as the variable victimisation that may be associated with social class, age, ethnicity, residence, and other related aspects of lifestyle.

It appears that the very substantial number of gay men who are killed with criminal violence is the dual outcome of negative social constructions of marginal sexual identity and the rigid maintenance of conventional notions of manhood. Accordingly, this project has investigated the relationship between social constructions of masculinity and recent homicides in which victims were selected out by their killers on the basis of their perceived homosexuality. It did this firstly with an examination of press, police and legal reports for those recent attacks which have been prosecuted.

Secondly, this project focused on recent New South Wales trials in which pleas of provocation and self-defence have been made regarding an alleged sexual assault or sexual advance by the deceased. This is a phenomenon similar to the use of the so-called 'homosexual panic defense' in American courts (Bagnall et al 1984; Harvard Law Review 1984), which has been locally renamed as 'homosexual advance defence' (Criminal Law Review 1996). A particular issue which has captured the recent attention of activists is whether or not the official response and depiction of gay male victims in the legal system amounts to some injustice, and whether the sentences meted out to offenders are fair and appropriate. Trial records and reported cases were studied to examine the place of masculinist notions of social honour in leading to this form of retaliatory fatal violence, and the different understandings of male identity and sexuality that arise in courtroom settings. It is hoped that this research has begun to allow further understanding of the motivations of assailants who perpetrate this violence and of the rationale behind criminal justice system reactions.

Data sources and sampling

From 1986 to 1996 the New South Wales Police Gay and Lesbian Liaison Unit has recorded the details of 31 fatal incidents that are regarded as gay-hate killings. These incidents formed the principal sampling frame for this research. Records and transcripts concerning 16 trials for the solved killings were obtained from both the registry of the Supreme Court and the Director of Public Prosecutions. Additionally, Coroner's Court records have been obtained in order to study aspects of unsolved killings. Police records indicate that at least 11 such killings have occurred between 1986 and the present. Finally, a search of press records of homicides between 1980 and 1988 (the year of commencement of full police monitoring) was conducted to obtain a broader historical overview of the scale of this form of crime.

The initial process of sampling faced the difficulties of defining each crime as a 'gay-hate' killing and imputing the motives of homophobia to each offender prior to study. For convenience, the 31 incidents listed by the New South Wales police were accepted as a basis for studying court records. The press search was more widely directed at uncovering probable 'gay killings'. These are homicides in which the sexuality of the victim was judged as having some likely important relation to the fatal incident. This precludes cases where the homosexuality of the deceased appears to be incidental. Domestic homicides between same-sex lovers were also excluded.

Some criminologists note that 'hate crime' is a highly problematic term (Cunneen et al 1997). They are wary of the individualistic and psychologistic notions of crime that seem to be inscribed in it and much related discussion about prevention and punishment. This can lack a systemic perspective regarding the marginalisation of the sexual, racial and ethnic minorities that are subjected to violence and harassment on the basis of their group identity. An analysis of violence against gay men which problematises identity suggests that a continuous representational struggle concerning deviant sexuality and legitimate victimhood is played out within official agencies (police and courts) and official discourses (the heterosexism and masculinism of the law).

Further difficulties beset attempts to define homicides as 'gay killings' and categorise victims as gay. From a constructionist view, gayness is a historically recent label that increasingly describes a similar culture and social outlook among certain homosexual groups, rather than the actual sexual practices of individuals. Many of the victims studied in this research had only marginal or no apparent links to any gay subculture. The subjectivism of the term was acknowledged in this study. However, it is still regarded as worth retaining in description and analysis. This is especially so given the importance of exploring any possible causal link between the increasingly public and ambiguous representation of an urban gay culture and violence that is directed against victims who were viewed by their assailants as unequivocally gay.

The overall number of gay killings that have been recently recorded in New South Wales is far higher than the small numbers monitored by activists in other states. Sexual migration has boosted the gay male population of inner-Sydney which reputedly has the largest gay subculture in Australia (Wotherspoon 1991:221-219). However, these victims comprise a mix of men from city, suburban and other locations. It seems that most of the large gap between rates of gay killings in New South Wales and elsewhere is a reflection of variations in recording practices and the lower level of monitoring in other states where only limited police resources have been dedicated to this task.

Methodology and details of the data

Basic information regarding killings was gathered through a search of press sources. Additionally, an archival search of official Coroner's Court records, and of trial transcripts (cross-examination, police records of interview, dock statements and judgments) obtained from the Supreme Court and Director of Public Prosecutions was conducted. The text of these documents was subject to a content analysis concerned with the themes of male honour and the 'naturalness' of some violence, constructions of male sexuality and different depictions of gay men as either legitimate or illegitimate victims. Such an analysis of courtroom representations and narratives does not mean the uncovering of lies or repressive ideologies but commonsense views of crime scenarios that incorporate categories of understanding violence and sexual identity that can disadvantage crime victims.

As already noted, there are considerable difficulties in attempting to readily classify the sexuality of each of these victims. Regardless of whatever is the best label for the sexuality of a victim, a fatal assault can still be reasonably termed as a gay-hate killing if an offender either rightly or wrongly perceived their victim as gay and this was a substantial part of the motivation for the attack. In a growing number of criminal trials, offenders have made accusations of a homosexual advance or assault by the deceased. In such cases, the death may be classified as a gay-hate killing.

It is possible that some of these victims were neither homosexual in their identity or pattern of desire. They may have been wrongly perceived as such by their assailants, or else this is a convenient rationalisation for a fatal assault which in reality had other motivations. However, it would not be reasonable to suggest that because of such factors gay-hate killings have been improperly classified and their real number is much lower than thought. Many other sorts of pressures exist that can prevent homicides being classified in this way. For example, the sensitivities of the families and friends of victims are a matter of real consideration to police officers investigating these crimes, and there can be personal difficulties in cases where a victim never divulged his sexuality to these parties. Any excessive caution in this regard will reduce the value of the official monitoring of this form of offence.

Although offenders are overwhelmingly male (with 36 males charged as against only four females involved as co-offenders or accomplices), two different general crime scenarios emerge from the official records of these homicides. The first of these can be characterised as an attack in public space on a victim who is homosexual or presumed to be homosexual and who is usually a complete stranger to the assailant(s). Offenders in these incidents are typically young men or teenage boys who are keen to establish a male status among peers and appear to be close to the 'immature' type suggested in one generalised account of the psychology of bashers of homosexual men (Harry 1992). These offenders attack in groups and victims seem to be most vulnerable when attacked at well-known homosexual 'beats'. These locations are selected by offenders because of the expected ready availability of victims. Additionally, offenders may be attracted by the compromised situation of any potential victims who may be seeking out casual sexual contacts. The negative consequences of reporting are a substantial fear to many victims. In two instances men who were attacked at beats died without taking up the opportunity to get medical treatment or police assistance.

Twelve fatal attacks appear to fit this sort of scenario. Some of the most publicly known of these killings which have resulted in criminal trials were the deaths of Richard Johnson, Rattanajurathaporn and John Milicevic. Johnson was lured to a public toilet in a park in inner-city Alexandria where he was kicked to death by eight teenagers after they

had played a social basketball game in 1989. In the same year Rattanajurathaporn, a Thai national, was set upon at South Bondi Headland by three teenagers who bashed him with a claw hammer and apparently threw him from the cliff tops. Milicevic was stabbed three times and killed by three teenagers in a park at Rushcutters Bay in 1993. Other deaths remain unsolved but Coroner's and police records give much reconstructed detail of these incidents. Most disturbingly the frequency of gay-bashing in some locations appears to have complicated police inquiries. Information gathered regarding the killings of two victims reflected a high degree of local public support or indifference to this violence.

In the second typical scenario for these crimes, a personal dispute between two men, possibly over sexual activity or an alleged sexual advance, leads to fatal violence between parties who are generally friends or acquaintances. These offences usually occur in private settings. The prosecutions and criminal trials that follow from these killings often lead to the controversial use of pleas of self-defence and provocation. The best known of these cases are the killings of Maurice McCarty who was bashed to death at his residence in Newtown in 1991, the fatal stabbing of Tom Argæt in the offender's flat after a long Friday night drinking session in 1993, and in the same year, the killing of Kevin Marsh, who was stabbed 17 times and struck over the head with a concrete garden gnome which cracked open his skull. The subsequent trials of offenders in these three matters resulted in two full acquittals and a finding of manslaughter only respectively.

Trial patterns and outcomes

There are added difficulties attached to police investigations of gay killings; especially the general reluctance of other gay victims to report assaults and the legacy of a long history of suspicion and animosity between police and homosexuals. But the high clearance rate (two-thirds) for these crimes most probably reflects the seriousness with which New South Wales police now regard these offences, and the advantages in criminal investigation that police have begun to reap from a developed system of gay and lesbian liaison. A high proportion of these killings are regarded as solved by police as offender(s) have been detected and apprehended, with resulting prosecutions in the Supreme Court. Twenty-one of the 31 gay-hate killings have been regarded as solved. One matter was not billed, and four others were still proceeding at the time of commencement of this study. Accordingly, 16 trials have been studied as part of this research (including two different trials for the killers of Rattanajurathaporn).

Criticisms of the criminal courts, the judiciary and various judicial findings in regard to the position of women and racial and ethnic minorities as victims, have increased in Australia in the last decade. Similar doubts have been raised by gay and lesbian activists about the experience of individuals from sexual minorities as crime victims. Great difficulties attach to any attempt at a straightforward assessment of different legal outcomes as being either unfair or just. This is not only because public opinion about the relative social worth of different victims, and the personal merits of different offenders and their actions, is so varied. Researchers who are familiar with the intricate detail of these criminal trials are aware that there are both obvious and subtle differences between cases which are at first glance identical (Dressler 1995). Apparently irrational variations in findings and sentencing can often be better comprehended with a thorough knowledge of the circumstances of the crime and the offender's actions, which far exceeds the level of understanding made available in most media coverage.

The outcome of some New South Wales trials resulting from public gang attacks offered reassurance to gay men and lesbians in the early 1990s that these killings were being

taken seriously by the judiciary and legal system. All three assailants in the *Rattanaju-rathaporn* killing were convicted of murder (with maximum sentences of 19, 20 and 20 years imprisonment). In the *Johnson* case, three of the youths involved were convicted of murder (with maximum sentences of 18, 13 and 18 years imprisonment imposed) and the other five of manslaughter. In the midst of the considerable media attention and controversy surrounding the *Johnson* case, the sentencing judge also voiced a clear warning to any likely perpetrators of homophobic violence. It is interesting to compare these outcomes with the legal response to some earlier crimes. In 1982, a gay man was killed by two brothers in a park next to Nepean Rowing Club, west of Sydney, which was at that time a beat and meeting place for gay men. The offenders travelled home to obtain a shotgun after being outraged by seeing the victim seated in his parked car near the Club. Soon after, they were witnessed by a group of fishermen chasing him along the riverbank as he begged for his life before being shot several times in the back (*Sydney Morning Herald* 1 September 1982). Both offenders were convicted of manslaughter, rather than murder, and sentenced to a maximum of 12 and 10 years imprisonment.

With a growing consciousness of violence against gay men courts recently appear more ready to punish these obvious cases of planned and public homophobic attacks which are closest to the first common scenario of these killings. However, this shift is not so evident in cases fitting the second scenario where offenders allege that fatal violence was necessary to repel, or provoked by, a sexual advance or assault from a victim. Activist misgivings about these cases and their outcomes surround the impossibility of a deceased victim responding to these allegations and the possibility that some of these claims could be merely a convenient explanation for homophobic attacks or planned assaults with robbery (Galbraith 1994; Scahill 1994). Speakers at a 1994 public forum in Sydney, gay and gay-sympathetic politicians and many other commentators, have voiced concern about whether what is called the 'homosexual panic defence' has begun to emerge in Australian criminal trials (Lesbian and Gay Anti-Violence Project, 1995).

The controversial circumstances of trials in the United States in which this criminal defence has been raised have led some to argue that this term creates the misleading impression in courtrooms that many offenders have acted because of a pathological condition, and that in reducing levels of responsibility, it exonerates this form of violence (Comstock 1992; Mison 1992). An internal inquiry conducted in 1994 by the New South Wales Attorney General concluded that this defence has no formal existence in Australian law (New South Wales Attorney General 1994). Nevertheless, further concerns resulted in the establishment of another official inquiry with gay and lesbian community representation in 1995. Although this second inquiry has not yet reported, it is still evident that existing rules regarding pleas of provocation and self-defence are deployed in local courts with a result that is similar to the outcome sought by accused Americans adopting the 'homosexual panic defense'. Australian cases of this sort date back at least to the 1950s (*R v Howe*).

This study has found that these claims regarding self-defence and provocation against a sexual assault have regularly been effective in reducing sentences and appear to be growing in frequency. Offenders have made claims of sexual advances or assaults in 18 of the 21 killings that are regarded as solved by police and in 13 of the 16 trials (comprising 15 killings) studied here. The impact of these allegations against the deceased are reflected in the two full acquittals and six findings of manslaughter in completed trials which have occurred so far. Offenders in five instances who made such allegations were still convicted of murder. But in the majority of instances where these allegations about sexual assault are raised (eight of 13 killings) they have demonstrably served the defence of offenders. Furthermore from the viewpoint of the defence, these claims may still be worth making even if they do not counter a charge of murder but raise factors that are taken into consideration

when sentencing is determined. The lightest sentence for murder imposed on any of the adult offenders who made claims of a sexual assault, was imposed on the killer of Gary Webster in 1992 (*R v Hort*). Trial evidence concerning ongoing and 'degrading' relations between the victim and offender, allowing the deceased to perform oral sex on him in return for money, may have had some link with this.

An interesting further aspect of these type of claims is the possible impact of evidence concerning previous instances of alleged sexual assault which may have occurred many years in the past. In some cases claims are made that the offender has previously been subjected to sexual abuse by the deceased, or the killing of a homosexual victim is explained by reference to previous abuse by some other party. This issue had some relevance in five trials, though the alleged sexual abuse of one offender was never directly mentioned in court. Graham Hort's murder of Gary Webster was regarded as partly due to an alleged rape by a football coach when he was only 14, and his sexual exploitation by the deceased. Long and confused courtroom accounts of the offender's sexuality never considered the possibility that he found real sexual pleasure in his involvements with Webster. Similarly, the 1992 killing of Sidney Hoare (*R v G & B*) was partly explained by an ongoing exchange of sex for money between the principal offender and the victim, and the alleged earlier sexual assault of the offender's brother by an uncle.

Sometimes the assumed causal link between this abuse and the fatal incident becomes much weaker, as when these assaults have allegedly been perpetrated on someone other than the offender. Hoare's killer argued that he was provoked by directly witnessing a sexual advance made upon his younger brother. But sometimes neither the deceased nor the offender were directly involved in the alleged abusive incident. Defence counsel representing the man accused of killing Donald Gillies in 1993 (*R v Green*) suggested that his special sensitivity to an alleged advance was due to his father's previous sexual abuse of his sisters.

Offenders were convicted for murder in two of the five trials in which the issue of sexual abuse was raised in these ways. However, the real impact of these claims may be reflected in the other three cases which resulted in findings of manslaughter with sentences that could be regarded as quite lenient. Peter Simpson's killer received a maximum sentence of eight years imprisonment at the conclusion of the trial in 1987 (*R v Becker*). Sidney Hoare was killed by two brothers who knew well of his homosexuality and apparently visited him at home as friends seeking more of the financial help he had previously given to one of them. Property was stolen from the victim, and the offenders initially lied to the police in an elaborate cover-up concocted by the eldest offender's girlfriend. However, in 1994 the key offender received a maximum sentence of only six years imprisonment.

Gordon Tuckey's killer alleged a sexual advance by his victim and was convicted of manslaughter in 1995 and received a maximum sentence of 11 years jail for a particularly vicious crime (*R v Dunn*). This comprised two assaults that were separated in time by the offender visiting friends and then resolving to return to the scene and resume the attack. The offender alleged that his sister had been raped nearby and also that molesters of children had been seen frequently in the same area as where he met up with his victim.

Although recent public discussion of these trials concerns the effect of straightforward claims of a sexual assault or advance by the victim, these above cases suggest that it is also necessary to consider the complexity of matters where more indirect sexual abuse is alleged. Courts can be expected to be moved by genuine cases where offenders, or someone close to them, have greatly suffered from some previous incident of sexual abuse. However, individuals from sexual minorities could also have reasonable misgivings about

any trial evidence in which they are seemingly made to bear a form of collective responsibility for this abuse and any consequent impact on the judging of an unrelated killing.

There is a real possibility that a genuine claim or fear of a sexual assault from the deceased has triggered the offender's violence in some of these instances of the homosexual advance defence being put before courts. But the distinction between a sexual assault and an advance has to be strongly stressed, regardless that even an unwanted homosexual proposition might compel many heterosexual men to respond with violence. It is strongly emphasised in the draft report of the New South Wales Working Party on the Homosexual Advance Defence that the retaliatory violence must be proportional to the real degree of threat to the offender, and that:

To allow a non-violent advance to amount to sufficient provocation is wrong because it reinforces the notion that fear, revulsion or hostility are valid reactions to homosexual conduct. A murderous reaction toward gay men should not be regarded as ordinary behaviour but as an exceptional characteristic of the accused ... A homosexual advance should therefore be insufficient provocation as a matter of law (Criminal Law Review Division of the New South Wales Attorney General's Department 1996:14)

A further disturbing aspect of this form of defence is that in recent years these claims of a sexual assault by the homosexual victim appear to be more common (being raised in 13 of the 16 trials studied). Also disturbing is the way in which the defence has been successfully argued in a broader range of circumstances. As noted above, in the early 1990s a further momentum towards equal legal treatment for homosexual victims was built on the firm punishment and judicial warnings concerning instances of obvious homophobic attacks in public settings such as the *Johnson* and *Rattanjurathaporn* killings. More difficulties and ambiguity arose in the prosecution of gay killings that fitted the type two scenario, with fatal violence typically arising from a dispute occurring between two men in a private space. The *McKinnon*, *Gnome (R v T)* and *Bonner* trials (of the killers of McCarty, Marsh and Argæt) are the best known examples of these. More recently these pleas and allegations have been deployed in such a way that the different legal response to the trial of cases arising from these two general homicide scenarios appears to have conflated. This trend characterised the trial of the killer of Gordon Tuckey, in which the court accepted that the offender, in the company of another friend, had been sufficiently provoked to retaliatory violence by an alleged proposition and sexual exposure from the deceased as he walked along a public walkway. In the Milicevic killing (*R v A, A & D*) one of the three juvenile offenders who had gone out with a knife to 'roll someone' also alleged a form of sexual advance, insisting that the deceased 'licked his lips like a faggot' and looked as if he 'wanted to kiss me' as his explanation for fatally stabbing the victim in the face and chest and stealing his wallet.

This second case exemplifies one of the more regular difficulties of assessing the fairness of the outcome of the trials of offenders accused of killing gay men. As noted already, the young age of offenders who are in their teens and very early adulthood is a characteristic feature of many of these fatal attacks. As a general rule, courts will reserve higher hopes of rehabilitation and impose lighter sentences on young offenders. Sometimes it will be impossible to distinguish if any apparent lenience is due to this factor or the discriminatory notion that young men need some special protection from an introduction to homosexual activity (such as which rests behind the currently unequal age of consent laws in several states). The real concern that arises from this apparent trend is whether the homosexual advance defence is now also having an extended impact on the outcome of trials which some observers might view as more straightforward cases of opportunistic homicide or group hate killings directed at gay men.

Results of analysis

Although the 31 homicides studied here have all been classified as gay-hate killings by New South Wales police, a mix of apparent motives sit behind these crimes. The hatred that offenders feel towards homosexuals has an obvious connection with some of these. A striking characteristic of these killings is their exceptional brutality. The extreme form of these fatal attacks reflects an apparent contempt for the victim based on a knowledge or judgment of their sexuality. This is especially obvious with attacks where killers have embarked on a plan to hunt down and kill unsuspecting strangers who are, or thought to be, homosexual. Examples of this include the *Johnson* and *Rattanajurathaporn* killings, or the alleged 1994 killing and subsequent dismemberment of Stephen Dempsey by a man armed with a bow and arrows at a beach in Sydney's northern beaches.

Homophobia has a less obvious and more subtle role to play in some of these killings. Robbery appears as a significant factor in these offences. One offender robbed and killed an earlier victim a few months before killing Michael Martin (*R v Richards*), and the alleged killer of Stephen Dempsey has been accused of a second killing with robbery. In both cases the other victims were heterosexuals and anti-gay sentiments had no apparent relation to the crimes. Nevertheless, the sexuality of the deceased may be a relevant factor in their selection as victims for robbery with violence. Homosexuals may be viewed by offenders as 'soft targets' by virtue of their compromised circumstances at many crime scenes, a historical reluctance to report victimisation, and a degree of public disinterest or condoning of these attacks. It is also possible that some offenders opportunistically place themselves in a situation where a homosexual advance will probably happen and in so doing intend to create an excuse for the retaliatory violence and robbery which will follow.

A continuous backdrop to these motives are mainstream constructions of male identity and the deviant positioning of male homosexuality in the codes, practices and discourses that reproduce social understandings of masculinity (Connell 1995). This is reflected in the very high proportion of young male offenders, and a strong evident concern with the establishment of male identity among groups of offenders. Gay-bashing appears to serve a dual purpose of constructing a masculine and heterosexual identity for offenders through a simultaneous involvement with violence and clearly establishing homosexuals as an opposed group of social outsiders.

The protection of a heterosexual male identity also has a powerful relation to many of the type-two killings that generally arise from a personal dispute between two men. A considerable body of crime research suggests that many disputes between males that result in serious injuries and death are prompted by overreactions to trivial or minor affronts that challenge male honour (Archer 1994; Polk 1994). These arise regularly in everyday activities like drinking in hotels, driving, travelling and socialising in public space (Tomsen & Homel 1991; Tomsen 1994). The circumstances of some of the killings studied suggest that the protection of male honour was a critical aspect motivating the offender's actions. Warding off the dishonour that can arise from a homosexual pass is a concern that is distinct from either genuinely fearing or fighting off a sexual assault. In this case, aggression and violence are viewed by many offenders as the most appropriate response to a sexual advance by another male. A striking example of the force of this code of male honour in causing fatal violence is the 'bottom pinch murder' (*Daily Mirror* 30 October 1987:1), a 1987 case where a Sydney man shot a workmate dead for pinching his buttocks and then held police at bay in a subsequent siege (*Sydney Morning Herald* 9 December 1987).

Homophobia and restrictive notions of male identity and behaviour have a relevance well beyond the individual or shared motives of offenders, and may have a significant impact on

the legal response to these killings. No researcher has access to the deliberations of jurors serving on these trials. But in some cases it is evident that commonly held beliefs about homosexuality are consciously projected and focused on by defence counsel. Further gay and lesbian uneasiness surrounds the courtroom depiction of the character and lifestyles of some victims, especially when this runs in tandem with allegations about an unwanted sexual advance. One researcher has already demonstrated the way in which the introduction of detailed evidence regarding the sexual history of the victims in the *McKinnon* and *Gnome* trials meant they were represented as sexually promiscuous or predatory, and by implication, perhaps deserving of their violent fate (George 1995). In cases like the *McKinnon* trial, this sort of evidence was originally gathered by investigating police as part of a serious effort to solve a killing. In so doing police may also unintentionally produce material that may have a prejudicial effect on the outcome of any future trial if it should be entered as evidence. This possibility is very obvious in detailed Coroner's records concerning the sex life of the deceased in one of the unsolved matters.

This courtroom approach could play on the existing homophobia of individual jurors or their ignorance of gay culture and lifestyles. It may also rely on the limited and stereotyped understanding of homosexuality that has been made available through the popular media. This was the case in the *Bonner* trial, which resulted in a full acquittal. Defence counsel repeatedly emphasised the heterosexuality, youth and good looks of the accused, and asked the jury to understand the motivations of the deceased through their own recollections of media accounts of the actions of participants in the Sydney Gay and Lesbian Mardi Gras parade.

This process might also be built upon a negative depiction of the deceased as someone with a sexual interest in younger men, and by implication a paedophile. This approach may have had an impact on the *Gnome* case in which the offender was a juvenile, and it could become an increasingly powerful courtroom tactic in view of the wider effect of the current moral panic about intergenerational male homosexuality in New South Wales. Offenders in a significant number of killings have attempted to rationalise their violence with dubious claims that the deceased or some other person who had been in the same area where the offence occurred were the sexual molesters of children. Gordon Tuckey's killer sought to explain his brutal attack to police with a nebulous reference to the 'rockspiders' he was guarding against. Young men who were interviewed in regard to a killing in 1986, also referred to the child molesters who they believed had previously lurked about near the scene of the crime. In this way, they tried to represent their personal histories of regular gay-bashing as an involvement in some form of community service.

As with allegations of a sexual advance, it is difficult to isolate the direct effect on trial outcomes of these sorts of claims about the sexual identity of the deceased. It is also apparent however, that police must be alert to the possible effect of this factor on any homicide investigation. In one case studied, a gay victim who was described in some police documents as a paedophile and as having a HIV-positive status, was at first wrongly described as having died in an accidental fall at home. This may have reflected his lack of legitimate status as a victim in the eyes of investigating police.

Conventional notions of masculinity are also inscribed into current criminal law regarding homicides in a form which can be hidden and may therefore have an ongoing but unnoticed impact on these trials. Anglo-American case law has outlined a specific range of slights and insults (such as female infidelity) which may be regarded as provoking male violence. Feminist researchers have demonstrated that uses of the provocation plea have followed this masculine model of quick, aggressive and violent responses to personal affronts, but New South Wales statutory amendments have largely left these characteristics

of the plea intact (Allen 1982). In the two trials for gay killings which resulted in acquittals and the six resulting in findings of manslaughter, courts have appeared to accept that the masculinity of the accused or co-accused had been placed under threat by a homosexual advance and this partly excused fatal violence.

Masculine heterosexual identity is generally built around ensuring the sanctity of the body, with rigid limits imposed on the circumstances and socially admitted forms of male physical contact (Connell 1983). At trial, the matter of bodily touching features as a critical element of this provocation. The accused in the *McKinnon* and *Gnome* cases both strongly stressed in court the threat to their masculinity involved in the claspings of their buttocks. In one case, the deceased had broken male codes as regards his own bodily presentation. Gordon Tuckey's public appearance in female clothing was found to have comprised an important element of his killer's provocation to extreme violence.

Conclusion

This research suggests that the real number of gay killings that have occurred in New South Wales since 1980 is much larger than has been previously thought. This is probably also the case elsewhere in Australia but systematic monitoring of this form of homicide has not been attempted in other states and territories. The development of more thorough formal systems of monitoring and the upgrading of recording methods which do not presently track violence against sexual minorities, are essential preconditions to countering this form of crime. Analysis of the crime scenarios in gay-hate killings suggests that although offenders may often regard homosexuals as 'soft targets' for victimisation, homophobia and notions of male identity and behaviour which condone violence also determine the motives behind these offences.

The additional study of 16 trials related to these killings suggests that these factors are also evident in the pattern of representation of events, victims and offenders in the courtroom. Because of the range of different circumstances to each offence and the multiplicity of factors (including the young age of many accused) that may be considered in sentencing, it is often hard to gauge whether this has had an unfair effect on trial outcomes. But recently it appears that this form of representation and allegations of a sexual advance from a deceased gay victim, have been deployed in a widening range of circumstances in criminal trials. These include cases which might be viewed as apparently conscious homophobic killings or unacceptable instances of the protection of male honour with fatal violence.

Homophobia and violent conceptions of masculinity may appear to be cultural phenomena which are widespread and intractable. However, the criminal justice system plays a pivotal role in shaping social opinion about this form of crime. Specific reforms to courtroom procedure in cases of gay killings and anti-gay assaults have been suggested by the New South Wales Working Party on Homosexual Advance Defence. These include directions to jurors regarding the sexuality of victims and the nature of the provocation plea (Criminal Law Review Division of the New South Wales Attorney General's Department 1996). There is considerable merit in these proposals. A continuous sensitising of investigating police, prosecution staff and the judiciary to typical aspects of these homicides and related trials could have an equally important long-term effect in countering this form of violence.

List of cases

R v A, A & D NSWSC 10/2/95; 15/3/95

R v Becker NSWSC 25/9/87

R v Bonner NSWSC 19/5/95

R v D NSWSC 10/7/92

R v Dunn NSWSC 21/9/95

R v G & B NSWSC 30/3/94

R v Green NSWSC 7/6/94

R v Hort NSWSC 18/5/92

R v Howe [1958] SRSA 95

R v M, H, M, & Y NSWSC 15/4/91

R v McKinnon NSWSC 24/11/93

R v Richards NSWSC 15/4/92

R v S & D NSWSC 7/8/92

R v T NSWSC 14/7/94

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